

**Nomination of Philip Morgan Halpern to the United States District Court for the
Southern District of New York
Questions for the Record
Submitted November 6, 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 a lower court to depart from Supreme Court precedent.

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

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

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

District courts are bound by precedents of the Supreme Court and the Second Circuit but not by decisions of other district courts. As such, and because no two cases are the same, I am unable to identify a situation where a district court is creating its own precedent such that it may be overturned. See, *Camreta v. Greene*, 563 U.S. 692, 709, N.7 (2011).

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

Only the Supreme Court may overrule one of its own prior opinions. As a district court nominee, it would not be appropriate for me to offer my views on when the Supreme Court may exercise its prerogative. See, *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 484 (1989).

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

Precedent, Thomas West, p. 802 (2016))

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

All Supreme Court precedent, including *Roe v. Wade*, is binding precedent on all lower courts and must be faithfully applied. Should I be so fortunate as to be confirmed, I will fully and faithfully apply *Roe v. Wade*.

b. Is it settled law?

Yes.

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. Should I be so fortunate as to be confirmed, I will fully and faithfully apply *Obergefell v. Hodges*.

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?

As a judicial nominee under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A), I do not believe it appropriate for me to comment on the merits of Justice Stevens’ Opinion. Should I be so fortunate as to be confirmed, I will fully and faithfully apply all Supreme Court precedent including *District of Columbia v. Heller*.

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

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

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

Should I be so fortunate as to be confirmed, I will fully and faithfully apply all Supreme Court precedent including District of Columbia v. Heller. As a judicial nominee, I do not believe it is appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further.

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 v. FEC, 558 U.S. 310, 342 (2010), the Supreme Court stated that "First Amendment protection extends to corporations." Should I be so fortunate as to be confirmed, I will fully and faithfully follow Citizens United FEC and Second Circuit precedent on the subject. As a judicial nominee, I do not believe it is appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further.

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

See my response to Question 5c.

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

In Burwell v. Hobby Lobby Stores Inc., the Supreme Court held that a "person" under the Religious Freedom Restoration Act included corporations. 573 U.S. 682, 707-08 (2014). Should I be so fortunate as to be confirmed I will fully and faithfully follow Hobby Lobby and Second Circuit precedent concerning the subject. As a judicial nominee, I do not believe it is appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further on issues of pending or impending litigation.

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

As a judicial nominee, I do not believe it is appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment on a matter concerning the Equal Protection Clause and free exercise of religion as this is a matter pending in the Second Circuit. See, New Hope Family Services Inc. v. Poole, 378 F. Supp. 3d 194 (N.D.N.Y), on appeal to Second Circuit June 10, 2019.

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

As a judicial nominee, I do not believe it is appropriate under with the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment on legal hypotheticals that could come before the federal courts.

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

Please see my response to Question 7.

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

No.

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

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

No.

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

No.

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

Should I be so fortunate as to be confirmed, I will fully and faithfully apply all Supreme Court precedent and Second Circuit precedent concerning the administrative law and the Administrative Procedure Act including Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984).

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

I have not studied this issue and am not an expert on climate change. In addition, it is my understanding that there is currently pending or impending litigation which involves theories based on the allegation of injuries caused by climate change. I therefore do not believe it appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further. Should I be so fortunate as to be confirmed, I will fully and faithfully apply Supreme Court precedent and Second Circuit precedent to any case involving climate change.

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

The Supreme Court has held that it is appropriate for judges to consider legislative history in limited certain circumstances such as where a statute is ambiguous. See, Exxon Mobil Corp. v. Allapattah Services Inc., 545 U.S. 546, 568 (2005). Should I be so fortunate as to be confirmed, I will fully and faithfully apply Supreme Court precedent and Second Circuit precedent on the use of legislative history.

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

No.

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

I received these questions on Wednesday, November 6, 2019, at 7:47 p.m. I carefully read the questions beginning on November 7, 2019, at 7:00 a.m. I conducted some research and drafted responses. I then forwarded my draft responses to the Office of Legal Policy at the Department of Justice on November 8, 2019, for review. I considered the comments made by the Office of Legal Policy and finalized my answers thereafter.

**Written Questions for Philip Morgan Halpern
Submitted by Senator Patrick Leahy
Wednesday, November 6, 2019**

1. In an interview held at Pace University School of Law in 2011, you made a claim about your ability to know if someone is telling you the truth. You stated: “I look at you and I have an instinct about whether you are telling me the truth. And I don’t know whether it’s the way you conduct yourself or how you sit or the way you answer my questions or the eye contact we have or the plausibility of what you are saying. But I can tell you for sure if you are trying to blow smoke my way, I have an instinct about it I think. And frankly I rely on it, so I’ve built up a confidence level.”

(a) If you are confirmed to serve as a federal judge, do you commit to relying on the facts and law over and above your so-called “instinct” that you described in this 2011 interview?

Yes.

2. 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?’”

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?

The Supreme Court has instructed that in interpreting statutory text, it is proper to consider the words of a provision within the broader context of a statute as a whole. See, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000). If I am fortunate enough to be confirmed, I will fully and faithfully apply Supreme Court and Second Circuit precedent concerning the methods for interpreting statutes.

3. 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 Constitution provides for an independent Federal Judiciary through life tenure and salary protections so that a judge will not be affected by public criticism and allows a judge to follow and apply the

Constitution and the law applicable to their cases and controversies without repercussion. As a judicial nominee, I do not believe it is appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further on a subject of current political debate or an abstract scenario which is or may be the subject or pending or impending litigation.

- (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 3 (a).

4. 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?**

The Supreme Court can review decisions by the President including during times of war, other armed conflicts or for national defense. Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

5. Many are concerned that the White House's denouncement of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

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

Our Constitution creates three co-equal branches of government and a separation of powers doctrine is essential. As such, each branch should respect the powers conferred to the other branches. Under with the Code of Conduct for United States Judges (applicable to nominees), Canon 3(A)(6), it would be inappropriate for a judge to comment on an issue that could arise as a pending or impending litigation ("a judge should not make public comment on the merits of a matter pending or impending in any court.")

6. 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 and assigns power over war and foreign affairs to the President and Congress. If I am fortunate enough to be confirmed, I will fully and faithfully apply the laws including the Constitution, any relevant statute and all Supreme Court and Second Circuit precedent should a challenge to the legislative or executive party come before me.

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

The Supreme Court has stated that courts can review decisions by the President during times of war or other armed conflict. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). If I am fortunate to be confirmed, I will fully and faithfully apply the Supreme Court and Second Circuit precedent as well as any other statutory authority in this area.

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

The Supreme Court has addressed the Executive Branch’s expertise in national security and has created a framework for assessing whether Executive actions are authorized. See, *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006). If I am fortunate to be confirmed, I will fully and faithfully apply the Supreme Court and Second Circuit precedent in this area.

8. 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 in United States v. Virginia, 518 U.S. 515, 531 (1996) held that the equal protection clause of the Fourteenth Amendment applies to laws that make distinctions on the basis of gender and that the government must demonstrate an “exceedingly persuasive justification for such gender based determinations.” If I am fortunate to be confirmed, I will fully and faithfully apply the Supreme Court and Second Circuit precedent in this area.

9. Do you agree with Justice Scalia’s characterization of the Voting Rights Act as a “perpetuation of racial entitlement?”

If I am fortunate to be confirmed, I will fully and faithfully apply the Supreme Court and Second Circuit precedent interpreting the Voting Rights Act.

10. 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 states: “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, Emoluments, Office, Title of any kind whatsoever, from any King, Prince or foreign State.”

11. 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 the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

As a general matter, appellate courts review the factual findings made by the district court. Established standards of review govern an appellate court’s review of factual findings made in the district court. If I am fortunate to be confirmed, I will fully and faithfully apply the Supreme Court and Second Circuit precedent including Shelby County v. Holder. As a judicial nominee, I do not believe it is appropriate under the Code of

Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further on a question which is or may be the subject of pending or impending litigation.

12. 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 these amendments specifically provides that Congress has the power to enforce them “by appropriate legislation.” U.S. Constitution Article XIII, Section 2; U.S. Constitution Article XIV, Section 5; and U.S. Constitution Article XV, Section 2.

13. 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?

The Supreme Court established a fundamental right to personal autonomy in Lawrence v. Texas, 539 U.S. 558 (2003). If I am fortunate enough to be confirmed, I will fully and faithfully apply Supreme Court and Second Circuit precedent including in Lawrence v. Texas on the subject.

14. 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?

As a district court nominee, I would be bound to fully and faithfully apply Supreme Court and Second Circuit precedent. The Supreme Court has held that *stare decisis* is of fundamental importance to the rule of law. See, Welsh v. Texas Department of Highway and Public Transportation, 483 U.S. 468, 494 (1987). The Supreme Court has also held that it is not appropriate for lower courts to depart from Supreme Court precedent. See, Agostini v. Felton, 521 U.S. 203, 237 (1997).

15. 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.

If I am fortunate to be confirmed, I will consult 28 U.S.C. § 455 and the Code of Conduct for the United States Judges in considering a recusal. Certainly, I anticipate that any matters in which my son or my sister appears in my courtroom would require me to recuse myself. Additionally, I will recuse myself from any matters before me in which I have ever participated in the litigation. Initially, and for a period of time, I also anticipate recusing myself from any case involving my current law firm.

16. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. 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?

Generally, courts play a central role in protecting Constitutional rights through the impartial application of the law. In this regard, and if confirmed, I will apply all Supreme Court and Second Circuit precedent considering and applying footnote 4 of United States v. Carolene Products to protect “discrete and insular minorities.” As a judicial nominee, I do not believe it is appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A),

3(A)(6) and 5(A) to comment further on questions which are or may be the subject of pending or impending litigation.

17. 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 and politically motivated hiring and firing at the Justice Department during the Bush administration. 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 Trump administration's conflicts of interest and the events discussed in the Mueller report we make sure that we exercise our own power properly.

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

Yes.

- 18. Do you believe there are any discernible limits on a president's pardon power? For example, President Trump claims he has an "absolute right" to pardon himself. Do you agree?**

The Constitution states that the President "shall have the Power to Grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment." U.S. Constitution Article II, Section 2. If I am fortunate to be confirmed and a matter were to come before me, I will research the subject and fully and faithfully apply all applicable Supreme Court and Second Circuit precedent regarding the Presidential powers. As a judicial nominee, I do not believe it is appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further on questions which are or may be the subject of pending or impending litigation.

- 19. 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 scope of Congressional power under the Commerce Clause and Fourteenth Amendment has been developed extensively in the Supreme Court case law. See, Wickard v. Filburn, 317 U.S. 111 (1941); City of Boerne v. Flores, 521 U.S. 507 (1997). If I am fortunate to be confirmed, I will fully and faithfully apply Supreme Court and Second Circuit precedent concerning the scope of Congressional powers including those addressing the Commerce Clause and in Section 5 of the Fourteenth Amendment.

20. 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? Does that weight shift when additional constitutional issues are presented, as in the Establishment Clause claims of *Trump v. Hawaii*? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?**

The decision in *Trump v. Hawaii* is binding Supreme Court precedent that I will fully and faithfully apply along with other Supreme Court and Second Circuit precedent concerning the weight of factual finding made by the President on immigration and Constitutional issues. As a judicial nominee, I do not believe it is appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further on hypotheticals examining the analysis by the United States Supreme Court as inappropriate comments on a matter which is or may be the subject of pending or impending litigation.

- 21. 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.**

The Supreme Court has held that "[u]necessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion imposed an undue burden on the right." See, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). If I am fortunate to be confirmed I will fully and faithfully apply all Supreme Court and Second Circuit precedent including *Planned Parenthood v. Casey* and *Whole Woman's Health v. Hellerstedt*. As a judicial nominee, I do not believe it is appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further on specific examples which are or may be the subject of pending or impending litigation.

- 22. Federal courts have used the doctrine of qualified immunity in increasingly broad ways, shielding police officers in particular whenever possible. In order to even get into court, a victim of police violence or other official abuse must show that an officer knowingly violated a clearly established constitutional right as specifically applied to the facts and that no reasonable officer would have acted that way. 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 similar cases.**

- (a) Do you think that the qualified immunity doctrine should be reined in? Has the “qualified” aspect of this doctrine ceased to have any practical meaning? Should there be rights without remedies?**

The Supreme Court has developed a doctrine of qualified immunity over time. See, Harlow v. Fitzgerald, 457 U.S. 800 (1982); Pearson v. Callahan, 555 U.S. 223 (2009) and San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015). If I am fortunate to be confirmed I will fully and faithfully apply all Supreme Court and Second Circuit precedent concerning the doctrine of qualified immunity. As a judicial nominee, I do not believe it is appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further on specific questions which may or may be the subject of pending or impending litigation.

23. 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 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?**

In *Carpenter v. United States*, the Supreme Court acknowledged that “[a]s technology 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.’” 138 S. Ct. 2206, 2214 (2018). Congress has also enacted the Electronic Communications Privacy Act which imposes statutory restrictions above and beyond those required by the Fourth Amendment. See, 18 U.S.C. § 2518. If I am fortunate to be confirmed I will fully and faithfully apply all Supreme Court and Second Circuit precedent on the Fourth Amendment’s protections as well as enforce the restrictions contained in the Electronic Communications Privacy Act. As a judicial nominee, I do not believe it is appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further on specific questions which may or may be the subject of pending or impending litigation.

24. 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 the Executive Branch bypassed the congressional approval generally needed for appropriations. As a member of the Appropriations Committee, I take seriously Congress's constitutional duty to decide how the government spends money.

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

I have not had the opportunity to study this issue in depth, but should I be fortunate to be confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedent regarding Presidential power in this respect. As a judicial nominee, I do not believe it is appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further on specific questions which may or may be the subject of pending or impending litigation.

25. During Justice Kavanaugh's confirmation hearing, he used partisan language to align himself with Senate Republicans. For instance, he accused Senate Democrats of exacting "revenge on behalf of the Clintons" and warned that "what goes around comes around." The judiciary often considers questions that have a profound impact on different political groups. The Framers sought to address the potential danger of politically-minded judges making these decisions by including constitutional protections such as judicial appointments and life terms for Article III judges.

(a) Do you agree that the Constitution contemplates an independent judiciary? Can you discuss the importance of judges being free from political influence?

The Constitution provides for independent judiciary, specifically Article III insulates judges from political influence by life tenure and salary protection. These protections enable judges to make decisions free from public criticism or political pressure. Canon 1 of the Code of Conduct for United States Judges states that "[a]n independent and honorable judiciary is indispensable to justice in our society." Should I be fortunate to be confirmed, I will uphold Canon 1 and my judicial oath to faithfully and impartially decide cases "without respect to persons and to do equal right to the poor and rich" under the laws of our nation.

**Nomination of Philip M. Halpern
to the United States District Court for the Southern District of New York
Questions for the Record
Submitted November 6, 2019**

QUESTIONS FROM SENATOR WHITEHOUSE

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

- a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

I have not previously read or reviewed the material. As requested, I have done so.

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

I have no personal knowledge of anonymous or opaque spending related to judicial nominations. As a judicial nominee, I do not believe it is appropriate under with the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further on policy matters or political questions that are the subject of legislative consideration by Congress. If I am fortunate enough to be confirmed, I will faithfully decide all cases and controversies fairly and impartially and uphold the integrity and independence of the judiciary.

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

I have not studied this issue and am not familiar with the facts and circumstances related to Mr. Leo’s statement. Further and to the extent this issue relates to the process of nominating and confirming the judges, I do not believe it is appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further.

- 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.

- 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?

If I am fortunate as to be confirmed, I will administer justice fairly and impartially to all parties and faithfully follow all Supreme Court and Second Circuit precedent with respect to cases and controversies before me. As a judicial nominee, I do not believe it is appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further.

- 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?

Yes. This metaphor is appropriate as both an umpire and a judge are impartial arbiters, required to make decision on the facts presented, without a stake in the outcome; and each is there to insure all players and parties follow the rules.

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

To the extent that the Supreme Court and Second Circuit precedent direct a judge to consider practical consequences, a district court judge should fully and faithfully apply that law. If I am fortunate enough to be confirmed, I will fully and faithfully apply Supreme Court and Second Circuit precedent concerning practical consequences.

- 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 Anderson v. Liberty Lobby Inc., 477 U.S. 242, 249-51 (1986), the Supreme Court held that “the ‘genuine issue’ summary judgment standard is ‘very close’ to the ‘reasonable jury’ directed verdict standard” and that “the inquiry on under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether is so one sided that one party must prevail as a matter of law.” This precedent calls for the district court to apply an objective standard.

- 4. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “to recognize what it’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African-American or gay or disabled or old.”
 - a. What role, if any, should empathy play in a judge’s decision-making process?

A judge should treat each party before him with dignity and respect, fairly and impartially. A judge should not allow empathy to supersede a judge’s obligation to follow the law. Ultimately, a judge’s decision must be based on the applicable law and

relevant facts and not personal feelings. If I am fortunate enough to be confirmed, I will uphold my oath of office and “administer justice without respect to persons and to do equal right to the poor and to the rich” and to decide cases “faithfully and impartially” under the laws of our nation. See, 28 USC § 453.

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

Personal life experience should not play any role in a judge’s decision-making process. The decision-making process requires the judge to apply the law to the facts presented. A judge’s personal life experience, including knowledge, education and training, can aid a judge’s ability to be respectful and treat people with dignity; to have an open mind concerning arguments; and to communicate effectively with parties, counsel and jurors.

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

No.

6. The Seventh Amendment ensures the right to a jury “in suits at common law.”
a. What role does the jury play in our constitutional system?

The role of the jury is an important and historic one in our system of jurisprudence. It reflects a Constitutional commitment to having members of the community serve as fact finders in our judicial system.

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

As a judicial nominee, I do not believe it is appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further on a question which is or may be the subject or pending or impending litigation. If I am fortunate as to be confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedent on this subject.

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

If I am fortunate enough to be confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedent concerning what deference Congressional fact finding is afforded on legislation expanding or limiting individual rights including City of Boerne v. Flores, 521 U.S. 507 (1977).

8. Earlier this year, the Federal Judiciary’s Committee on the Codes of Conduct 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.
 - ii. Determining whether the seminar is supported by private or otherwise anonymous sources.
 - iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.
 - iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.
 - 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.

I will abide by the Code of Conduct for United States Judges and I will consider Advisory Opinion #116 along with any subsequent Advisory Opinions relating to the participation in any such educational seminar.

- 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 8 b.

**Questions for Philip M. Halpern
From Senator Mazie K. Hirono**

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

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

No.

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

No.

2. In an interview at Pace University School of Law in 2011, you claimed you could confidently tell when someone was lying or telling the truth. You stated, "I can tell you for sure if you are trying to blow smoke my way, I have an instinct about it I think. And frankly I rely on it, so I've built up a confidence level."

a. In your view, what factors should judges consider in making credibility determinations? Is instinct one of them?

The factors a judge should consider in making credibility determinations of a witness include, but are not limited to, the following: consistency of statements with prior testimony; ability of the witness to state answers with conviction; the strength of the points made on cross examination of the witness; prior inconsistent statements of the witness; demeanor and presence in the courtroom; and corroboration of testimony or impeachment of testimony. The reference I made at Pace University School of Law in 2011 related to the use of instinct in evaluating truthfulness as an advocate, which is an entirely different skill than making credibility determinations as a judge.

b. One of the challenges of relying on instincts is that they may be affected by underlying implicit biases. Would you agree that training on implicit bias is important for judges to have?

Yes.

c. Have you ever taken such training?

No.

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

As an attorney admitted to practice in New York, and beginning in 2020, I am required pursuant to 22 N.Y.C.R.R. § 1500.22 to take continuing legal education on this subject.

3. You reported that you have been a member of the Westchester Country Club from 1984 to the present. You were even on its Board of Governors from 2004 to 2013. A New York Times article from 2001 noted that “[o]f the club's 975 members, only three are black, each admitted shortly after golf's governing bodies threatened to pull tournaments from country clubs that did not strive for integrated memberships.”

- a. When you joined the Westchester Country Club in 1984, did it have a policy or practice of not admitting non-white members?**

No.

- b. When you joined the Westchester Country Club, how many non-white members were there?**

I do not know and do not have access to that information.

- c. When was the first African-American member admitted into the country club?**

I do not know and do not have access to that information.

- d. When you were on the Club's Board of Governors, how many minority members were admitted to the club?**

I do not know and do not have access to that information.

- e. What steps have you specifically taken to increase the diversity of the country club's membership?**

As a member, I have supported our diversity in membership, by welcoming new members of diverse backgrounds and religion, and encouraging people I know of diverse backgrounds and religion to join the club.

- f. How many minority members are currently in the country club?**

I do not know and do not have access to that information.

4. As a lawyer for the Empire State Restaurant and Tavern Association, whose members include Philip Morris, you challenged smoking bans in Westchester and Nassau Counties in the 1990s. You argued that the laws prohibiting smoking in restaurants should be struck down because county officials failed to consider the loss of the businesses' property rights as part of its environmental review.

- a. Is it your view that the financial impact on businesses should be considered in an environmental impact assessment of a regulation?**

The position of my client in that case was that the Environmental Conservation law of the State of New York, specifically Environmental Conservation Law §§ 8-0103, 7., 8-0109, 1. and case law interpreting those statutes like New York City Coalition v. Vallone, 94 N.E.2d 672, 763 N.Y.S. 2d 530, 535 (2003), require that economic/financial impact on businesses be considered in an environmental impact assessment of a regulation.

- b. At the time you challenged the smoking bans, the president of the Westchester County Board of Health noted that “tobacco kills more Americans each year than alcohol, cocaine, crack, heroin, car accidents, homicide, suicide, fires, and AIDS combined.” Were you aware of this information at that time?**

No.

Nomination of Philip M. Halpern
United States District Court for the Southern District of New York
Questions for the Record
Submitted November 6, 2019

QUESTIONS FROM SENATOR BOOKER

1. In 1999, in connection with your representation of Summit Residential, LLC, you filed a preliminary injunction to silence protestors who opposed your client's proposed project to build townhouses. You said, "My client is happy to have them picket, but let's tell the truth."¹ The protestors complained that the lawsuit was a Strategic Lawsuit Against Public Participation, which is prohibited under state law.²

- a. What was the basis of the lawsuit you filed?

My law firm commenced an action against Friends of Wickers Creek Archeological Site for a preliminary and permanent injunction, interference with prospective business advantage, libel and slander predicated on the defendants' activities including, but not limited to, picketing and protesting with signs that stated, "The Landing: Desecrated Gravesites" and "Beware 'Landing' on TOXIC landfill." The statements and writings made by the defendants were demonstrably false and were intended to block my firm's client from selling already-built condominium units at the site. The trial Judge refused to dismiss the complaint, determined that the causes of action had a substantial basis in fact and law, was not a SLAAP suit, and permitted discovery to go forward.

- b. Why did you believe that the protestors' speech was not protected by the First Amendment in this instance?

My client's position was that the speech was demonstrably false and intended to interfere with the client's business of selling condominium units.

2. You once represented Home Depot in a lawsuit against the City of Rye, New York. In that case, Home Depot sought \$50 million in damages for the denial of roadwork permits and argued that the denial of the permits constituted a civil rights violation under §1983.³ The suit named each city council member as a defendant and the Mayor of Rye said that the lawsuit was designed to intimidate the city.⁴ What is/was your response to the Mayor of Rye's criticism of the lawsuit?

The lawsuit commenced by Home Depot against the City of Rye was not intended to intimidate anyone. Rather, the sole and exclusive purpose was to obtain the money damages that were caused by the City of Rye and the individual Council members' refusal to sign a road-widening permit that, in effect, blocked the store from being completed and opened for business for a period in excess of two years. The conduct by the City and Council members was alleged to be egregious. The initial decision by the lower Court granted Summary Judgment on liability in favor of Home Depot and against the City and

Council members. That decision was subsequently reversed by the Appellate Division and that reversal was affirmed by the New York State Court of Appeals.

3. You were involved in a series of lawsuits that challenged smoking bans in Westchester and Nassau Counties.⁵ You argued that the law should be invalidated because “county officials didn’t consider the ban’s negative impact on the environment.”⁶ Why did you believe the smoking ban was detrimental to the environment and what studies did you rely on in making this argument?

The argument attributed to me in the question was not one I made. The reporter, in summarizing what he believed to be the issue, stated: “A group representing the hospitality and cigarette industries argued yesterday that a law prohibiting smoking in Westchester restaurants should be thrown out because County officials didn’t consider the ban’s negative impact on the environment.” The argument that I made on behalf of my client had nothing to do with that, but rather was governed by New York’s Environmental Conservation Law § 8-0103, 7. and 8-0109, 1. My client’s position in that case was that the economic impact of precluding smoking in restaurants was a variable that the environmental statute required the Board of Health to consider before it passed the smoking ban regulation.

4. In 1992, you wrote an article in *The Labor Lawyer* where you defended employers’ rights in counterclaims in employment discrimination disputes.⁷ At one point you criticized existing

¹ Daphne Stein, *State Supreme Court Denies Summit’s Request to Gag FOWCAS*, THE RIVERTOWNS ENTERPRISE (Dec. 24, 1999) (SJQ Attachments 12(e) at pp. 5302).

² Loren Brody, *Project dispute sparks First Amendment Debate*, WESTCHESTER COUNTY BUSINESS JOURNAL (Jan. 10, 2000) (SJQ Attachments 12(e) at pp. 5298).

³ John Caher, *Developers Lose Civil Rights Tool in Land Cases*, NEW YORK LAW JOURNAL (May 14, 2004) (SJQ Attachment 12(e) at pp. 5271).

⁴ *Id.*

⁵ David McKay Wilson, *Smoking ban faces challenge in court*, THE REPORTER DISPATCH (May 30, 1996) (SJQ Attachments 12(d) at pp. 5318).

⁶ *Id.*

⁷ Philip M. Halpern, *Age Discrimination in Employment: Releases Protect Employers Too!*, THE LABOR LAWYER, (1992) (SJQ Attachments 12(a) at pp. 74).

law for failing to recognize that “employers have rights too!”⁸ Why do you believe existing law favors employees over employers?

That article did not state that existing law favors employees over employers. The article concerned the right of an employer, after a severance agreement was entered into and paid, to assert a counterclaim against an employee for a return of the consideration paid when that employee sued the employer. In 1992, the law was unsettled and the point of the article was to point out that when employers and employees sign a severance agreement, each has rights to enforce the terms thereof should litigation thereafter ensue.

5. In your Senate Judiciary Committee Questionnaire, you said, “To the best of my knowledge, none of the organizations listed above currently discriminates or formerly discriminated on the basis of race, sex, religion or national origin, either through formal membership requirements of the practical implementation of membership policies.”⁹ Yet, in your Questionnaire, you stated that you are a member of Westchester Country Club.¹⁰ *The New York Times* wrote about the club stating, “The county’s largest club with about 1,450 members, Westchester Country Club in Harrison, once a white, Protestant bastion, today has many Catholic members as well as some who are Jewish, according to Julia A. Dunn, the admissions secretary. When asked if there were any black members, she said: ‘We are not a discriminatory club, and that’s all I will say in response to that.’”¹¹ Additionally, as of 2001, Westchester County Club only had three black members out of its 975 total members.¹² And, each of the three black members were only admitted after four major golf organizations issued a warning to country clubs that did not aim to have diverse membership.

- a. You have been a member of Westchester Club since 1984 and even served on its Board of Governors from 2004 to 2013.¹³ Why did you fail to acknowledge the club’s discriminatory history in your questionnaire?

To the best of my knowledge, I do not believe Westchester County Club has a discriminatory history. I have never been aware of Westchester Country Club having a policy or practice of discriminating on the basis of race, sex, religion, or national origin. As a member of the Board of Governors, I have supported our diversity in membership fully, by welcoming new members of diverse backgrounds and religion, and encouraging people I know of diverse backgrounds and religion to join the Club.

- b. You were a member of Westchester County Club before it admitted its first black members. Did you ever notice that the club lacked diversity?

Please see my response to Question 5a.

- c. While serving on the Board of Governors, what, if anything, did you do to promote diversity among the club’s membership?

Please see my response to Question 5a.

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

The terms “originalist” and “textualist” have contested meanings. I do believe that the original public meaning of Constitutional and statutory texts must be considered when applying the law. I am aware that the Supreme Court has indicated that looking to the original public meaning in terms of the Constitution is relevant. However, as a District Court Judge, my primary obligation will be to apply binding precedent. It is rare for a lower Court to consider Constitutional text which has no applicable Supreme Court precedent. The Supreme Court has also stated that statutory interpretation begins with the text and where the text is clear, that is the end of the inquiry. If I am fortunate enough to be confirmed, I will faithfully apply all Supreme Court and Second Circuit precedent concerning the appropriate rules of Constitutional and statutory interpretation.

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

Please see my response to Question 6.

8. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is

⁸ *Id.* at SJQ Attachment 12(a) pp. 95.

⁹ SJQ at pp. 8.

¹⁰ *Id.*

¹¹ Donna Greene, *Signs of Change at Some Country Clubs*, N.Y. TIMES (Aug. 17, 1986) <https://www.nytimes.com/1986/08/17/nyregion/signs-of-change-at-some-country-clubs.html?searchResultPosition=13>.

¹² Corey Kilgannon, *For Caddies, a View of the Racial Divide*, N.Y. TIMES (June 17, 2001) <https://www.nytimes.com/2001/06/17/nyregion/for-caddies-a-view-of-the-racial-divide.html?searchResultPosition=6>

¹³ SJQ at pp. 8.

that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

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

The Supreme Court has repeatedly stated that consideration of legislative history may be appropriate when the text of a statute is ambiguous. If I am fortunate enough to be confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedent concerning statutory interpretation and the use of legislative history.

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

Please see my response to Question 8a.

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.¹⁴ 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.¹⁵

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

I have not had any occasion to study this issue in depth. I believe that there is currently pending or impending litigation involving these issues and I do not believe that it would be appropriate under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A) to comment further.

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

Please see my response to Question 9a.

- 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 9a.

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.¹⁶ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹⁷ 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.¹⁸ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹⁹

¹⁴ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

¹⁵ *Id.*

¹⁶ 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>.

¹⁷ *Id.*

¹⁸ 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>.

¹⁹ *Id.*

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

I believe that implicit racial bias exists in our society at large, including our criminal justice system.

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

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.

Prior to my nomination, I have not studied the issue of implicit racial bias in our criminal justice system.

- 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.²⁰ Why do you think that is the case?

I have not studied this issue and am not familiar with the report.

- 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.²¹ Why do you think that is the case?

I have not studied this issue and am not familiar with this study.

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

A federal District Judge should treat all people appearing before him with equality, dignity, respect and consider the case with vigilance to insure that implicit racial bias does not impact the complex criminal case before him.

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.²² In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.²³

- 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 or reached any conclusion about this statistical relationship between incarceration and crime rates.

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

I have not studied or reached any conclusion about this statistical relationship between incarceration and crime rates.

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 a case before you who is transgender to be referred to in accordance with that person's gender identity?

Yes.

²⁰ 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.

²¹ Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

²² 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>.

²³ *Id.*

14. Do you believe that *Brown v. Board of Education*²⁴ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

15. Do you believe that *Plessy v. Ferguson*²⁵ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No.

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.”²⁶ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

Consistent with Canon 5 of the Code of Judicial Conduct, it would not be appropriate for me to comment on political statements made by President Trump.

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.”²⁷ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has stated that “. . . the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). If I am fortunate enough to be confirmed, I would faithfully apply this binding precedent of the Supreme Court as well as any binding precedent of the Second Circuit on this subject.

²⁴ 347 U.S. 483 (1954).

²⁵ 163 U.S. 537 (1896).

²⁶ 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>.

²⁷ 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 November 6, 2019
For the Nomination of

Philip M. Halpern, to the U.S. District Court for the Southern District of New York

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

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

If I were confirmed as a District Court Judge, I would fairly and faithfully follow the requirements of all applicable statutes, law and rules, Sentencing Guidelines, each as construed by the U.S. Supreme Court and the Second Circuit Court of Appeals to determine a proper sentence. I would thoroughly review the pre-sentence report filed, consider all applicable sentencing range guidelines and whether an upward or downward modification is appropriate. I would also review all filings by the parties including any motions, memoranda or letters, the victim's statements and argument of counsel and consider all other relevant material including the recommendations of the probation department. After considering all of the above, I would evaluate the facts and circumstances in light of all of the factors set forth in 18 U.S.C. §3553(a) in an effort to insure that every sentence imposed would be ". . . sufficient, but not greater than necessary . . ." to comport with the purposes of sentences set forth in 18 U.S.C. §3553(a)(2) as well as to meet the goal of avoiding sentencing disparities set forth in 18 U.S.C. §3553(a)(6).

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

In addition to the steps outlined in response to Question 1a, I would avail myself of all sentencing data for comparative convictions and reach out to my colleagues within the Southern District of New York to discuss issues of sentencing. I would also consult the Bench Book for U.S. District Court Judges provided by the Federal Judicial Center.

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

I would consider U.S. Supreme Court and Second Circuit precedent as well as the Sentencing Guidelines themselves. While not binding on District Court Judges, U.S. v. Booker, 543 U.S. 220, 246 (2005), Part K of Section 5 of the Sentencing Guidelines lists the specific circumstances under which a trial judge may depart from the advisory guideline range. Additionally, 18 U.S.C. § 3553(a) authorizes a variance from the Sentencing Guideline range when appropriate. If confirmed as a District Court Judge, I would consider all such authorities and

factors as well as the arguments of the parties before considering whether a departure from the Guidelines was appropriate.

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

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

I have never reviewed the topic of mandatory minimum sentences and their impact on deterring certain types of crime; and am unfamiliar with Judge Reeves' comments. The enactment of any statute associated with any sentencing policy is clearly for Congress to determine and as a District Court nominee I should, under the Code of Conduct for United States Judges (applicable to nominees), withhold any comment on such possible policy and/or legislation. I will faithfully apply and follow all applicable laws relating to sentencing as well as the binding precedent of the U.S. Supreme Court and Second Circuit Court of Appeals.

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

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

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

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

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

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

If I were confirmed and confronted with an injustice, I would take such measures as I believe consistent with governing law and ethical considerations which would include but not be

¹ <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>

² See, e.g., "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

limited to describing the injustice in my opinion.

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

Charging policies are determined by the Executive Branch. Judges must not encroach on that authority. If I concluded that the law compelled imposition of an unjust and disproportionate sentence because of the charging policy, then, consistent with the Judicial Canons of Ethics, I would consider raising the issue or commenting on it as part of the sentencing process or in a written Decision. Additionally, I would consider reaching out to the U.S. Attorney if consistent with the applicable ethical rules and applicable law.

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

The clemency power is reserved for the President of the United States and the Executive Branch. If confirmed as a District Court Judge, I would be bound to respect the separation of powers under our Constitution.

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

Yes, to the extent consistent with applicable law.

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

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

Yes.

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

It is my understanding that there are statistical reports showing racial disparities in our criminal justice system, including, rates of stop-and frisk, access to counsel and incarceration rates. I have not sufficiently studied the problem to cite other specific issues. However, if so fortunate as to be confirmed, I will ensure that everyone is treated equally and fairly in my courtroom.

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

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

Yes.

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

If confirmed, I will give serious consideration to qualified minorities and women for all positions that I have occasion to fill.