

**Nomination of Barbara Bailey Jongbloed to the United States District Court for the
District of Connecticut
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 an inferior 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. It is the role of the district court judge to faithfully apply precedent of the Supreme Court. In a rare instance where respectfully identifying an issue for Supreme Court review might be beneficial, the district court might note such an observation.

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 Circuit Court where the district court sits, but not by decisions of the other district courts. The Supreme Court has stated, "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709, n.7 (2011), citing 18 J. Moore et al., Moore's Federal Practice § 134.02[1] [d], p. 134–26 (3d ed.2011). Under the principle of the rule of law, however, a district court judge should render similar decisions when faced with similar facts unless there is a valid basis for not doing so. If the Second Circuit or the Supreme Court reverses a district court's decision, the district court must faithfully apply that precedent when ruling in a subsequent case involving the same issue.

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

Only the Supreme Court has authority to determine whether to overturn its own precedents applying the factors identified in, for example, *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019), *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009) and *Agostini v. Felton*, 521 U.S. 203, 235-36 (1997). As a sitting state court judge and a district court nominee, it would be inappropriate for me to express any personal view about when the Supreme Court should make such a determination. If

confirmed to the district court, I would faithfully apply all Supreme Court and Second Circuit precedent.

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 decisions of the Supreme Court, including *Roe v. Wade*, are binding precedent for lower court judges. If confirmed, I will fully and faithfully apply it and all other binding Supreme Court and Second Circuit precedent.

b. Is it settled law?

Yes. *Roe v. Wade* is binding Supreme Court precedent. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Second 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. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Second 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?

As a sitting state court judge and a district court nominee, it would not be appropriate for me to express a personal view on a particular Supreme Court opinion. If confirmed, I would faithfully apply the Supreme Court's decision in *Heller* and all other Supreme Court and Second Circuit decisions.

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

In *Heller*, the Supreme Court stated that "the right secured by the Second Amendment is not unlimited," and 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." 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?

As a sitting state court judge and a district court nominee, it would not be appropriate for me to express any personal views on *Heller* and prior case law. If confirmed, I would faithfully apply the Supreme Court's decision in *Heller* and all other Supreme Court and Second Circuit precedent.

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*, the Supreme Court stated that "First Amendment protection extends to corporations." 558 U.S. 310, 342 (2010). If confirmed, I would faithfully apply Supreme Court and Second Circuit precedent regarding the constitutional rights guaranteed by the First Amendment. As a sitting state court judge and a district court nominee, it would not be appropriate for me to offer any personal views. See Code of Conduct for United States Judges, Canon 3(A)(6).

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

As a sitting state court judge and a district court nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation. See Code of Conduct for United States Judges, Canon 3(A)(6).

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

In *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 719 (2014), the Supreme Court held that non-profit corporations and for-profit closely held corporations are protected by the Religious Freedom Restoration Act. Because the Supreme Court did not address the question of the applicability of the Free Exercise Clause of the First Amendment to corporations, as a sitting state court judge and a district court nominee, it would not be appropriate for me to comment on that issue. *See* Code of Conduct for United States Judges, Canon 3(A)(6). *See also* Canons 2 and 5, Code of Conduct for United States Judges.

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

As a sitting state court judge and a district court nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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 sitting state court judge and a district court nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

As a sitting state court judge and a district court nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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"?

If confirmed, I would faithfully apply Supreme Court and Second Circuit precedent regarding administrative law. As a sitting state court judge and a judicial nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

As a sitting state court judge and a judicial nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

It is appropriate to consider legislative history in construing a statute when Supreme Court or Second Circuit precedent directs that such an analysis is appropriate. *See, e.g., Matal v. Tam*, 127 S. Ct. 1744, 1756 (2017).

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 the questions on November 6, 2019, reviewed them, prepared draft responses, and requested feedback from attorneys at the Office of Legal Policy at the Department of Justice. I made additional edits as I deemed appropriate, and authorized the submission of these responses to the Senate Judiciary Committee as my responses.

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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?

Yes.

- 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 state court judge and a judicial nominee, it would not be appropriate for me to express a view on political issues. *See* Code of Conduct for United States Judges, Canon 5.

- 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?

As a sitting state court judge and a judicial nominee, it would not be appropriate for me to express a view on political issues regarding the judicial selection process. *See* Code of Conduct for United States Judges, Canon 5.

- 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?

As a sitting state court judge and a judicial nominee, it would not be appropriate for me to express a view on political issues. *See* Code of Conduct for United States Judges, Canon 5.

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?

I agree that, like an umpire, a judge must rule fairly and impartially without fear or favor and without regard to any personal views or preferences.

- 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 governing Supreme Court or Second Circuit precedent, or applicable statutory provisions, instruct a district judge in limited circumstances to consider consequences of a particular ruling in the decision-making process, a district judge should fully and faithfully apply that law in rendering a decision.

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?

Rule 56 requires a court to grant summary judgment if there is no “genuine dispute as to any material fact.” The Supreme Court held in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), that whether there is a “genuine dispute” depends on whether “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” This “reasonable jury” standard is objective, not subjective. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 61 (1993). If confirmed, I will fully and faithfully apply Supreme Court and Second Circuit precedent regarding when summary judgment is proper under Federal Rule of Civil Procedure 56.

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 is required to “administer justice without respect to persons.” 28 U.S.C. § 453. Although decisions must be governed exclusively by the law and the facts, there is a role

for empathy in the decision-making process including being aware of the need to be respectful to litigants and to treat everyone fairly and with dignity. For example, a judge can be empathetic in exercising her discretion in setting court dates and schedules so as to avoid unduly burdening parties, counsel, witnesses, victims, or jurors. Empathy, does not, however, 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?

Although judges' personal life experiences may assist them in performing their duties in some areas, judges should always strive to fully understand the factual and legal issues that arise in any case and fulfill their duty to "administer justice without respect to persons." 28 U.S.C. § 453.

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

No.

6. The Seventh Amendment ensures the right to a jury "in suits at common law."

- a. What role does the jury play in our constitutional system?

The jury plays a fundamental role in our constitutional system, both in criminal and civil cases. A jury is required to apply the law, as given by the court, to the facts as it finds them, based on evidence presented during the trial. The Seventh Amendment ensures that right in civil cases as a constitutional matter.

- 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 sitting state court judge and a district court nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6). I will fully and faithfully apply Supreme Court and Second Circuit precedent on these issues.

- 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?

The Supreme Court has addressed the question of deference to congressional fact-finding in a number of opinions including, but not limited to, *Kimel v. Florida Board of Regents*, 528 U.S. 62, 81 (2000), *City of Boerne v. Flores*, 521 U.S. 507 (1997) and *United States*

v. Lopez, 514 U.S. 549 (1995). If confirmed, I would consider the arguments and authorities cited by the parties and fully and faithfully apply Supreme Court and Second Circuit precedents.

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.

If confirmed, I would consider and comply with all my ethical obligations under the Code of Judicial Conduct, as well as any applicable law. Before attending any educational seminar, I would consider all of the circumstances regarding the seminar, on a case-by-case basis, the Code of Judicial Conduct and any applicable advisory opinions; and consult with ethics experts at the Administrative Office of the United States Courts.

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 Barbara Jongbloed
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. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

a. Do you agree that training on implicit bias is important for judges to have?

Yes. I agree that that training is important to help judges understand and fulfill their obligation to decide every case free from any bias, explicit or implicit, and “without respect to persons” as required by the oath of office. 28 U.S.C. § 453.

b. Have you ever taken such training?

Yes. The Connecticut Judicial Branch has regularly included implicit bias training at our annual Judges Institute and at other times as part of various judicial branch training programs.

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

If confirmed, I look forward to taking advantage of available training opportunities recommended for federal judges in consultation with the Administrative Office of the United States Courts.

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QUESTIONS FROM SENATOR BOOKER

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

To the extent that binding precedent requires a specific interpretive method, I would apply that precedent. *See, e.g., Crawford v. Washington*, 541 U.S. 36 (2004).

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

To the extent that binding precedent requires a specific interpretive method, I would apply that precedent. *See, e.g., Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

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

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

The Supreme Court has held that it is appropriate to consider legislative history when the text of a statute is ambiguous. *See, e.g., Matal v. Tam*, 127 S. Ct. 1744, 1756 (2017). The Second Circuit has also held that if the plain text of a statute "alone fails to resolve the question, we test the competing interpretations against both the statutory structure . . . and the legislative history" of the statutory provision in question. *Marblegate Asset Mgmt. v. Education Mgmt. Finance Corp.*, 846 F.3d 1, 6 (2d Cir. 2017). If confirmed, I would fulfill my obligation to faithfully apply these and other precedents of the Supreme Court and Second Circuit.

- 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 3(a).

4. 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.¹ 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.²

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

As a sitting state court judge and a judicial nominee, it would not be appropriate for me to comment on political issues. *See* Code of Conduct for United States Judges, Canon 5.

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

Please see my response to Question 4(a).

¹ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

² *Id.*

- 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 4(a).

5. 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.³ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.⁴ 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.⁵ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁶

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

I understand that studies have concluded there is implicit racial bias in our criminal justice system. As a sitting state court judge and a district court nominee, however, it would not be appropriate for me to offer any personal views. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

I understand that studies have concluded this. As a sitting state court judge and a district court nominee, however, it would not be appropriate for me to offer any personal views. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

- 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 had training on implicit bias through the Connecticut Judicial Branch. I have also served on our Criminal Jury Instruction Committee, which recently added a recommended pattern instruction for jurors on implicit bias. I have reviewed, among others, the following:

A. Wistrich & J. Rachlinski, "Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It," in *Enhancing Justice: Reducing Bias* (S. Redfield ed., 2017), pp. 87-130;

C. Lee, "Awareness as a First Step Toward Overcoming Implicit Bias," in *Enhancing Justice: Reducing Bias* (S. Redfield ed., 2017), pp. 289-302;

American Bar Association, "Achieving an Impartial Jury (AIJ) Toolbox" (2015), available at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf;

J. Elek & P. Hannaford-Agor, "First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision-Making," 49 Court Review 190 (2013); and

J. Kang & M. Bennett, "Implicit Bias in the Courtroom," 59 UCLA L. Rev. 1124 (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.⁷ Why do you think that is the case?

As a sitting state court judge and a judicial nominee, it would not be appropriate for me to comment on matters that could be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

- 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.⁸ Why do you think that is the case?

Please see my response to Question 5(d).

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

Every judge is required, by oath, to administer justice "without respect to persons." 28 U.S.C. § 453. Every judge must treat all people before her with equality, dignity and respect and ensure that personal views, sympathies, or biases do not enter into the judge's decisions.

6. 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.⁹ In the 10 states that saw

³ 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>.

⁴ *Id.*

⁵ 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>.

⁶ *Id.*

⁷ 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.

⁸ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

⁹ 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>.

the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁰

- 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.

As a sitting state court judge and a judicial nominee, it would not be appropriate for me to comment on matters that could be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

- 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.

As a sitting state court judge and a judicial nominee, it would not be appropriate for me to comment on matters that could be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

7. 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.

8. 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.

9. Do you believe that *Brown v. Board of Education*¹¹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes, *Brown v. Board of Education* was correctly decided. This landmark case holds a unique place in the history of American jurisprudence in that it corrected a historic wrong by overruling *Plessy v. Ferguson* and holding that the separate-but-equal doctrine violated the Equal Protection Clause of the Fourteenth Amendment.

10. Do you believe that *Plessy v. Ferguson*¹² was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. Please see my answer to Question 9.

11. 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.

12. 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.”¹³ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

As a sitting state court judge and a judicial nominee, it would not be appropriate for me to comment on political matters. *See* Code of Conduct for United States Judges, Canon 5.

13. 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.”¹⁴ 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, 693 (2001), the Supreme Court held that the Due Process Clause applies to all aliens present within the United States, regardless of whether their presence is lawful. If confirmed, I would faithfully apply *Zadvydas* and all other Supreme Court precedents.

¹⁰ *Id.*

¹¹ 347 U.S. 483 (1954).

¹² 163 U.S. 537 (1896).

¹³ 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>.

¹⁴ 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**

Barbara Bailey Jongbloed, to the U.S. District for the District of Connecticut

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?**

I will look to 18 U.S.C. § 3553 and the factors Congress has outlined for the court to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of [§ 3553(a)].” I will follow federal statutes and Supreme Court and Second Circuit precedent on sentencing, consult the Sentencing Guidelines and perform the required guideline calculation, study the presentence report, consider the arguments of the parties, including sentencing memoranda and any letters submitted, hear from any victims, or review victim impact statements, and review proper evidence, statements, and any allocution before me on sentencing.

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

Please see response to Question 1(a) above.

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

Please see response to Question 1(a) above.

- 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?**

If confirmed, I will apply the sentencing laws enacted by Congress, including mandatory minimum sentences, regardless of my personal views. As a sitting state court judge and a judicial nominee, I do not think it would be appropriate for me to provide any personal views on

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

mandatory minimum sentences under Canons 1, 2, 3, and 5 of the Code of Conduct for United States Judges.

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

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

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

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

- 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?**

As a sitting state court judge and a district court nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

As a sitting state court judge and a district court nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

As a sitting state court judge and a district court nominee, it would not be appropriate for me to express a view on issues that are likely

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>

to be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

- 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.

- 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.**

I am aware that the United States Sentencing Commission publishes annual data regarding sentencing statistics including demographic information. As a sitting state court judge and a district court nominee, it would not be appropriate for me to offer any personal views on that information. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

- 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?**

Yes.