Nomination of R. Shireen Matthews to the United States District Court
for the Southern District of California
Questions for the Record
Submitted June 24, 2020

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 not appropriate for lower courts to depart from Supreme Court precedent. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

   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?

   A lower court must always fully and faithfully follow Supreme Court precedent. The U.S. Court of Appeals for the Ninth Circuit instructs that "[j]udges of the inferior courts may voice their criticisms, but follow [precedent] they must." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). If confirmed, I would faithfully follow Supreme Court and Ninth Circuit precedent.

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

   District court rulings do not create binding precedent. *Camreta v. Greene*, 563 U.S. 692, 709 n. 7 (2011). In reconsidering any prior ruling, a district court must apply Federal Rules of Civil Procedure 59(e) and 60.

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

   The principles of stare decisis and precedent are important to consistency, predictability, and the rule of law. The Supreme Court has stated, "it is this Court's prerogative alone to overrule one of its own precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). District courts must faithfully apply any changes to precedents made by the Supreme Court.

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"?

I have not studied the writings referenced in Question 4 and the Supreme Court has not described any of its opinions as "superprecedent," but I do acknowledge that *Roe v. Wade* is binding Supreme Court precedent. If confirmed, I will faithfully apply all Supreme Court precedent, including *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.

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?

The Supreme Court's decision in *Heller* is binding precedent. If confirmed, I would faithfully apply all Supreme Court precedent, including *District of Columbia v. Heller*, 554 U.S. 570 (2008). Under the Canons of Judicial Conduct, it would be inappropriate for me to offer my personal views on the merits of Supreme Court decisions. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

In *District of Columbia v. Heller*, the Supreme Court stated, "[l]ike most rights, the right secured by the Second Amendment is not unlimited. . ." The Court also stated, "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). Because there are cases pending, and additional follow-on cases relating to the application of the Second Amendment and the *Heller* decision could be filed in the future, it would not be appropriate for me to elaborate further on the decision. *See* Code of Judicial Conduct for United States Judges, Canon 3(A)(6).

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

Please see my response to Question 4(a).

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?

The Supreme Court's decision in *Citizens United* is binding precedent. If confirmed, I would faithfully apply all Supreme Court precedent, including *Citizens United*. Under the Canons of Judicial Conduct, it would be inappropriate for me to offer my personal views on the merits of Supreme Court decisions. *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?

Please see my response to Question 5(a).

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

In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that a closely held corporation is a "person" under the Religious Freedom Restoration Act, interpreting the statute before it. 573 U.S. 682, 707-708 (2014). If confirmed, I will fully and faithfully follow the holding in *Hobby Lobby* and all other binding precedent related to the freedom of religion that corporations may have. Because issues of religious freedom under the First Amendment related to corporations may be litigated in federal court, it would be inappropriate for me to comment further pursuant to Canon 3(A)(6) of the 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?

The rights to free exercise of religion and equal protection of the laws are guaranteed by the Constitution. In the event I am called upon to rule on a case where the above referenced issue is raised, I would consider all binding authority in analyzing the facts of the case in order to make my decision. Pursuant to the Code of Conduct for United States Judges, Canon 3(A)(6), I believe as a nominee it would be inappropriate for me to comment further.

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?

   If called upon to rule on a case involving this issue, I would consider all binding authority, including *Loving v. Virginia*, 388 U.S. 1 (1967), which held, "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12. Pursuant to the Code of Conduct for United States Judges, Canon 3(A)(6), I believe as a nominee it would be inappropriate for me to comment further.

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 responses to Questions 6 and 7 above.

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"?

During my time as a federal prosecutor and as a civil litigator in a private law firm, I have not had occasion to handle cases involving issues of administrative law. If confirmed, I would faithfully apply Supreme Court precedent regarding administrative law, including *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

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

As a judicial nominee I am governed by the Code of Conduct for United States Judges. It would be inappropriate to discuss my personal views on climate change because those issues could come before the federal courts. *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?

The Supreme Court has held that courts may consider legislative history in construing a statute when the text of the statute is ambiguous, and that resort to legislative history is unnecessary when the statute is unambiguous. *Milner v. Dep't. of Navy*, 562 U.S. 562, 574 (2011); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). If confirmed, I would faithfully apply Supreme Court precedent concerning statutory interpretation and 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 the questions via email on June 24, 2020. From June 24-26, 2020, I reviewed the questions, conducted research, and drafted answers. I then submitted my answers to attorneys at the U.S. Department of Justice, Office of Legal Policy. After receiving feedback, I incorporated edits I deemed appropriate. I then authorized the submission of my answers to the Senate Judiciary Committee. All responses to the questions posed to me are my own.

Nomination of R. Shireen Matthews
to the United States District Court for the
Southern District of California
Questions for the Record
Submitted June 29, 2020

QUESTIONS FROM SENATOR WHITEHOUSE

1. If you have not already done so, please read a copy of the draft Advisory Opinion 117, circulated by the Codes of Conduct Committee of the Judicial Conference of the United States. A draft of the opinion is available here: https://fixthecourt.com/wp-content/uploads/2020/02/Guide-Vol02B-Ch02-AdvOp117.pdf. If the Committee formally adopts its draft Advisory Opinion as written, will you comply with it?

   Yes.

2. 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.

      Cannon 1 of the Code of Conduct for United States Judges instructs judges to "uphold the integrity and independence of the judiciary." If confirmed, I will follow binding precedent, and do my part to uphold both the rule of law in our society and the integrity and independence of the federal judiciary. Under the Canons of Judicial Conduct, it would be inappropriate for me to offer my personal views on matters that might be litigated in the federal courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

   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?

Canon 5 of the Code of Conduct for United States Judges warns judges to refrain from pursuing political activities. Further, Canon 2 instructs judges to avoid even the appearance of impropriety and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. If confirmed, I would follow these and the remaining Canons of Judicial Conduct, without inserting my personal views into the decision making process.

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?

Pursuant to the Code of Conduct for United States Judges, it would be inappropriate for a nominee like me to comment on political matters. *See* Code of Conduct for United States Judges, Canon 5.

3. 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 with the sentiment behind Chief Justice Roberts' baseball analogy, as well as his testimony committing to approaching each case with an open mind, without an agenda or platform. If confirmed, I am mindful that my role will change from advocate to decision-maker. I commit to decide each case by applying precedent to the specific facts before me, without regard to any personal beliefs or policy preference.

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 governing precedent or statutes instruct a judge to consider the practical consequences of a particular ruling in deciding "cases and controversies," then the judge should fully and faithfully apply that law in rendering a decision.

4. 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?

   When granting summary judgment, the court must find there is "no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Supreme Court has held that the summary judgment standard must be construed "with due regard … for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury," as well as "for the rights of persons opposing such claims and defenses …" *Celotex Corp. v. Catrett*, 477 US 317, 327 (1986). As a result, a judge is not to "weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial … Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions …" *Anderson v. Liberty Lobby, Inc.*, 477 US at 249-255.

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

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

      A judge must follow the law, without passion or prejudice for any party, regardless of any personal viewpoints. That said, it is important for judges to remain active and engaged in their communities. Doing so serves as a tangible reminder of how the law can have profound consequences for litigants and the public.

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

      As a minority woman and the daughter of immigrants, I am proud of my background and personal experiences. A judge, however, should not allow personal viewpoints or preferences to play a role in deciding cases. The role of a judge is to faithfully apply the laws and applicable precedent to the "cases and controversies" that come before the court.

6. 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.

7. When, if ever, is it appropriate for a district judge to publish an opinion that includes dicta challenging the correctness of a binding precedent?

   A judge must always follow Supreme Court precedent. The U.S. Court of Appeals for the Ninth Circuit instructs that "[j]udges of the inferior courts may voice their criticisms, but follow [precedent] they must." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). If confirmed, I would faithfully follow Supreme Court and Ninth Circuit precedent.

8. When, if ever, is it appropriate for a district judge to publish an opinion that includes a proclamation of the judge's personal policy preferences or political beliefs?

   Never.

9. 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?

      Jurors perform a vital role in our justice system. While a judge determines the law to be applied in a case, the jury decides the facts. If confirmed, I will faithfully apply Seventh Amendment precedent and be mindful of the jury's constitutional and historic importance.

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

      Because issues relating to pre-dispute arbitration clauses are and may be litigated in federal court, it would be inappropriate for me to comment pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges.

   c. Should an individual's Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

      Because issues relating to the Federal Arbitration Act are and may be litigated in federal court, it would be inappropriate for me to comment pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges.

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

    When interpreting any legislation, judges should look first to the ordinary meaning of the statutory text. If the meaning of the statute is unambiguous, the analysis ends there. If, however, the meaning of the statute cannot be ascertained by its text, a judge should use the canons of construction to ascertain the legislature's intent, including by looking to the broader statutory context. Reviewing legislative history—including Congressional fact-finding—may be appropriate in certain cases, but the role of

legislative history should be limited because such fact-finding is often not adopted by the full legislative body.

11. The Federal Judiciary's Committee on the Codes of Conduct recently issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.

    a. Have you read Advisory Opinion #116?

        Yes.

    b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

        i. Determining whether the seminar or conference specifically targets judges or judicial employees.

            Yes.

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

            Yes.

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

            Yes.

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

            Yes.

        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.

            Yes.

    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?

Canon 2 of the Code of Conduct for United States Judges discusses the importance of avoiding even the appearance of impropriety and promoting public confidence in the integrity and impartiality of the judiciary. If confirmed, I will adhere to the standards in the Code of Conduct, including Canon 2, and will carefully consider each of the factors listed in Advisory Opinion #116 when deciding whether to participate in any educational program sponsored by an organization other than the Federal Judicial Center or the Administrative Office of the Courts.

12. In your view, what is the evidentiary significance of Congress's failure to enact a proposed amendment to a previously enacted statute for how you would interpret the previously enacted statute? In general, what significance do you attach to evidence of Congress's failure to enact any piece of proposed legislation?

The Supreme Court has held that "[i]n statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). If "that examination yields a clear answer, judges must stop." *Id.* If the inquiry must continue, and legislative history, such as Congress's failure to enact a proposed amendment is considered, a judge must "never allow it to be used to 'muddy' the meaning of 'clear statutory language.'" *Id.* If confirmed, I would faithfully follow Supreme Court precedent concerning statutory interpretation.

Questions for the Record for R. Shireen Matthews
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.

   b. Have you ever taken such training?

   Yes.

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

   Yes, to the extent such training is offered to federal judges through the Administrative Office of the Courts or another officially sanctioned educational program.

Nomination of R. Shireen Matthews
United States District Court for the Southern District of California
Questions for the Record
Submitted June 24, 2020

QUESTIONS FROM SENATOR BOOKER

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

   I understand originalism to refer to a method of constitutional and statutory interpretation that focuses on the original public meaning of the text at the time of adoption. Although I prefer not to categorize myself using any particular label, the Supreme Court has provided guidance for how lower courts should approach questions relating to the meaning of a particular statute or constitutional provision. A district court judge has a clear obligation to follow precedent established by the U.S. Supreme Court and, absent that, the circuit court in which the judge sits. If confirmed, I would study the relevant constitutional or statutory text and all relevant precedent, and faithfully follow the rules of stare decisis when applying the law to the facts of the particular case before me.

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

   I understand textualism to be a method of statutory interpretation whereby a court looks to the plain meaning of the text of a statute. The Supreme Court has held that "[i]n statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). If "that examination yields a clear answer, judges must stop." *Id.* If confirmed, I would faithfully follow Supreme Court precedent concerning statutory interpretation.

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 courts may consider legislative history in construing a statute when the text of the statute is ambiguous, and that resort to legislative history is unnecessary when the statute is unambiguous. *Milner v. Dep't. of Navy*, 562 U.S. 562, 574 (2011); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). If confirmed, I would faithfully apply Supreme Court 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 answer to Question 3(a).

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

Yes. I understand judicial restraint to mean that an appellate judge will adhere to the limited nature of the judicial role, deciding cases by applying the law and facts to the parties before the court, and refrain from reaching unnecessary issues or imposing the judge's own viewpoints.

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[1] Was that decision guided by the principle of judicial restraint?

The Supreme Court's decision in *Heller* is binding precedent. If confirmed, I would faithfully apply all Supreme Court precedent, including *Heller*. Under the Canons of Judicial Conduct, it would be inappropriate for me to offer my personal views on the merits of Supreme Court decisions. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[2] Was that decision guided by the principle of judicial restraint?

The Supreme Court's decision in *Citizens United* is binding precedent. If confirmed, I would faithfully apply all Supreme Court precedent, including *Citizens United*. Under the Canons of Judicial Conduct, it would be inappropriate for me to offer my personal views on the merits of Supreme Court decisions. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[3] Was that decision guided by the principle of judicial restraint?

The Supreme Court's decision in *Shelby County* is binding precedent. If confirmed, I would faithfully apply all Supreme Court precedent, including *Shelby County*. Under the Canons of Judicial Conduct, it would be inappropriate for me to offer my personal views on the merits of Supreme Court decisions. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

5. 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

[1] 554 U.S. 570 (2008).
[2] 558 U.S. 310 (2010).
[3] 570 U.S. 529 (2013).

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.[4] 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.[5]

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

As a federal judicial nominee, I am governed by the Code of Conduct for United States Judges. Under Canon (3)(A)(6), "[a] judge should not make public comment on the merits of a matter pending or impending in any court," because such comments may cause the public to question the judge's impartiality. Because cases involving alleged voter fraud are and could be litigated in federal court, it would be inappropriate for me to comment in a manner that would indicate a predetermined decision on a disputed matter.

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

Under Canon (3)(A)(6), "[a] judge should not make public comment on the merits of a matter pending or impending in any court," because such comments may cause the public to question the judge's impartiality. Because cases involving voter ID laws are and could be litigated in federal court, it would be inappropriate for me to comment in a manner that would indicate a predetermined decision on a disputed matter.

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 5(b).

6. 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.[6] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[7] 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.[8] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than

[4] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org /analysis/debunking-voter-fraud-myth.
[5] *Id.*
[6] 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.
[7] Id.
[8] 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.

10 to 1.[9]

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

Yes.

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

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

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

As a federal prosecutor, I reviewed certain publications by the U.S. Sentencing Commission about demographic differences in federal sentencing practices, including:

1. *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report's Multivariate Regression Analysis*, United States Sentencing Commission (March 2010).

2. *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*, United States Sentencing Commission (December 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.[10] Why do you think that is the case?

As a judicial nominee, it would not be appropriate for me to comment on matters that could be the subject of litigation in any court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). As a general matter, however, avoiding unwarranted sentencing disparities between similarly situated defendants is mandated by 18 U.S.C. § 3553(a). If confirmed, I will faithfully apply the seven factors from Section 3553(a)—including Congress's mandate to avoid unwarranted sentencing disparities—to fashion sentences that are sufficient, but not greater than necessary to comply with purposes of the statute.

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.[11] Why do you think that is the case?

[9] Id.
[10] 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.
[11] Sonja B. Starr & M. Marit Rehavi, Racial Disparity in Federal Criminal Sentences, 122 J. POL. ECON. 1320, 1323

Please see my response to Question 6(d).

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

The judiciary's role in any case is to apply the law fairly to each and every person who comes into a courtroom, "without fear or favor." *See* Code of Conduct for United States Judges, Canon 1 (commentary). If confirmed, my judicial philosophy in criminal cases will be guided by three principles: (1) I will strive not to prejudge a case until all of the issues are fully presented; (2) I will uphold the rule of law by considering only the relevant aggravating and mitigating factors that apply to that particular defendant in that particular case; and (3) I will strive to treat criminal defendants the same way I would want to be treated—with dignity, courtesy, and respect.

7. 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.[12] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[13]

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

I have not studied this issue and am not able to offer an informed view on it.

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

Please see my response to Question 7(a).

8. 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.

9. 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.

(2014)

[12] 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.

[13] Id.

10. Do you believe that *Brown v. Board of Education*[14] 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 a monumental decision in that it addressed the long-standing injustice of racial segregation originally sanctioned in *Plessy v. Ferguson*. While judicial nominees are governed by the Code of Judicial Conduct for United States Judges and should not comment on the correctness of Supreme Court precedent, I agree with the numerous other nominees who have made an exception for this case because of its unique place in American jurisprudence.

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

    No. *Plessy v. Ferguson* was expressly overturned by the Supreme Court in *Brown v Board of Education*. Please also see my answer to Question 10.

12. 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.

13. 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."[16] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

    The Code of Conduct for United States Judges precludes me, in my role as a judicial nominee, from commenting on the statements of political leaders. *See* Code of Conduct for United States Judges, Canon 5. The standards for recusal and disqualification are governed by 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and binding precedent. They do not refer to the judge's race or ethnicity as a basis for recusal.

14. 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."[17] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

    The Supreme Court has held that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful,

[14] 347 U.S. 483 (1954).
[15] 163 U.S. 537 (1896).
[16] 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.
[17] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). If confirmed, I would faithfully apply all Supreme Court precedent.

Questions for the Record from Senator Kamala D. Harris
Submitted June 24, 2020
For the Nomination of:

R. Shireen Matthews, to be United States District Judge for the Southern District of California

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?**

    With respect to the sentencing process, 18 U.S.C. § 3553(a) sets forth seven factors that a sentencing court must consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the four primary purposes of sentencing (i.e., promoting respect for the law and providing just punishment for the offense, deterring criminal conduct, protecting the public, and providing needed training, care, or treatment); (3) the kinds of sentences available; (4) the sentencing range established through application of the sentencing guidelines and the types of sentences available under the guidelines; (5) any relevant policy statements promulgated by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

    Before sentencing a defendant, I would carefully consider the record before me, including the U.S. Probation Office's presentence report, the trial record or plea agreement, any sentencing agreement between the parties, the parties' sentencing memoranda and supporting materials, including victim impact statements, if applicable, and letters offered in support of the defendant. After reviewing the record, I would consider the objectives and factors set forth in Section 3553(a).

    During the sentencing hearing, I would provide the defendant and, if applicable, victim(s), an opportunity to address the court, and would consider their statements and the arguments of counsel. In deciding what sentence to impose, whether within the applicable range, or whether as a departure or as a variance (or both), I would rely on Section 3553, the U.S. Sentencing Commission Guidelines ("Sentencing Guidelines"), and relevant Supreme Court and Ninth Circuit precedent.

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

Avoiding unwarranted sentencing disparities between similarly situated defendants is mandated by 18 U.S.C. § 3553(a). In addition to the process described in my answer to Question 1(a), I would consult available sentencing data on convictions for comparable offenses to reduce sentencing disparities.

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

Chapter 5 of the U.S. Sentencing Guidelines lists a series of circumstances that may justify upward or downward departures. Any departure would turn on the facts of the particular case and the applicable law.

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 not studied the impact of mandatory minimum sentences on the crime rate. As a nominee, it would not be appropriate for me to comment on Congress's decisions regarding mandatory minimum sentences pursuant to the Code of Judicial Conduct for Federal Judges Canons 2(A), 3(A)(6), and 5(C).

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] 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.

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

   If confirmed, I would make a record regarding the sentence imposed, the precedents that guided my decision—including any statutory constraints—and the rationale behind the sentence.

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

   It is within the discretion of the Executive Branch to make charging decisions.

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

   A decision relating to a grant of clemency rests with the Executive Branch. However, the record relating to the sentence imposed—including discussion of any statutory constraints—would be available to the Executive Branch and the public.

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, I would take into account alternatives to incarceration consistent with 18 U.S.C. § 3553 and the U.S. Sentencing Guidelines.

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, judges play a critical role in ensuring the fairness of our justice system. *See* Code of Conduct for United States Judges, Canon 1 (noting that a judge's conduct impacts public confidence in the integrity and independence of the judiciary).

   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.**

      Yes. For example, the U.S. Sentencing Commission has reported on racial disparities in federal sentencing. *See Demographic Differences in Sentencing: An Update to the 2012 Booker Report* (2017).

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.

Senator Josh Hawley
Questions for the Record

R. Shireen Matthews
Nominee, U.S. District Court for the Southern District of California

1. **In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court set out the precedent of judicial deference that federal courts must afford to administrative actions.**

   a. **Please explain your understanding of the Supreme Court's holding in *Chevron.***

      In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court held that when Congress, in drafting a statute, explicitly leaves "a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. 837, 843-44 (1984). The Court also held that Congress's delegation of authority may be implicit rather than explicit. *Id.*

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

      Under the rules of statutory construction, a judge should begin by looking to the ordinary meaning of the statutory text. If the meaning of the statute cannot be ascertained by its text, a judge should use the canons of construction to ascertain the legislature's intent, including by looking at the broader statutory context. After using the tools of statutory construction, if the statutory provision's meaning is apparent, the provision is not ambiguous. If, however, two or more competing meanings remain, then the statutory provision is ambiguous.

   c. **In your view, is it relevant to the *Chevron* analysis whether the agency that took the regulatory action in question recognized that the statute is ambiguous?**

      An agency's view that a statute is ambiguous may be relevant, though it is not necessarily determinative. Although a court may consider the agency's reasoning at step 2 of the *Chevron* analysis, it is the court's constitutional duty to say what the law is. If I were confirmed, I would be bound to apply, and would faithfully apply, Supreme Court precedent, including *Chevron* and *Auer v. Robbins*, 519 U.S. 452 (1997).

2. **What is your view of the scope of the First Amendment's right to free exercise of religion?**

   a. **Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?**

      The First Amendment bars Congress from "prohibiting the free exercise" of religion, and the Fourteenth Amendment incorporates and applies that prohibition to state governments. The Supreme Court has held that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

   b. **What standard would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?**

      Regulations that impede or prohibit exercise of religious freedom or other recognized fundamental rights must be justified by a compelling government interest and must survive strict judicial scrutiny. As the Court held in *Church of the Lukumi Babalu Aye*, "a law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." 508 U.S. at 532.

   c. **Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?**

      Absent a ruling from the Supreme Court or other binding precedent, it would not be appropriate for a federal court to evaluate the acceptability, logic, or consistency of a litigant's religious belief. *See Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 715 (1981). Instead, the "narrow function" of a court in this context is to determine whether the line drawn reflects "an honest conviction" by the litigant seeking protection under the Free Exercise clause. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

   d. **Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?**

      The Religious Freedom and Restoration Act continues to apply to actions taken by the federal government, and may be implicated when employers and educational institutions act on their sincerely held religious beliefs. *See e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). If confirmed, I

will faithfully follow the Supreme Court's precedents, including *Hobby Lobby*.

3. **What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller?***

   In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment establishes an individual right to possess firearms, without connection to service in a militia, for traditionally lawful purposes, such as self-defense within the home. The Court struck down a District of Columbia prohibition on handgun possession in the home and a requirement that any lawful firearms in the home be either disassembled or rendered inoperable by a trigger lock. The Court also stated that the right to bear arms is not unlimited, affirming prohibitions on possession of firearms by felons or those with mental illness, as well as restrictions on carrying firearms in schools or government buildings.

4. **Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?**

   I am aware that a few district court judges have recently granted nationwide injunctions in certain cases throughout the country. Because cases involving requests for injunctive relief are and could be litigated in federal court, it would be inappropriate for me to comment in a manner that would indicate a predetermined decision on a disputed matter. *See* Code of Conduct of United States Judges, Canon 3(A)(6). However, if confirmed I would carefully consider Rule 65 of the Federal Rules of Civil Procedure and fully and faithfully follow all binding precedent in deciding any request for injunctive relief.

5. **Please state whether you agree or disagree with the following statement and explain why: "Absent binding precedent, judges should interpret statutes based on the meaning of the statutory text, which is that which an ordinary speaker of English would have understood the words to mean, in their context, at the time they were enacted."**

   I agree that when interpreting a statute, a judge should begin by looking to the ordinary meaning of the statutory text. *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). If the meaning of the statute is unambiguous, the analysis ends there. *Id.* If, however, the meaning of the statute cannot be ascertained by its text, a judge should use the canons of construction to ascertain the legislature's intent, including by looking to the broader statutory context. When there is binding precedent, that precedent controls the outcome in the district court. If confirmed, I will faithfully follow Supreme Court and Ninth Circuit precedent regarding statutory interpretation.

6. **Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes Jr. wrote that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."**

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

I have not studied Herbert Spencer's book, *Social Statics*, and am not able to comment on it. Based on other language from Justice Holmes' dissent—particularly his statement that the Constitution was "not intended to embody a particular economic theory" — I believe Justice Holmes was arguing that the Court should not substitute its own policy preferences for those of elected officials. *Lochner v. New York*, 198 U.S. 45, 75 (1905).

b. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

The Supreme Court's holding in *Lochner v. New York* has been widely criticized and partially overruled by subsequent cases. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage legislation for women and children, and rejecting freedom of contract arguments); *Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421 (1952) (overruling *Lochner* in part); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (same). Further, Justice Stevens wrote in 2011 that "there is virtually universal agreement among judges and scholars that [*Lochner*] was incorrectly decided." John Paul Stevens, *Five Chiefs: A Supreme Court Memoir* (2011). If confronted with an issue like the one raised in *Lochner*, I would review the Supreme Court's substantive due process jurisprudence and follow all binding precedent.