

**Nomination of David James Porter to the U.S. Court of Appeals for the Third
Circuit Questions for the Record
June 13, 2018**

QUESTIONS FROM SENATOR FEINSTEIN

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

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

From the perspective of a court of appeals judge, all Supreme Court decisions are binding and entitled to *stare decisis* effect. The core holding of *Roe* has been upheld in cases including *Planned Parenthood v. Casey* and *Whole Woman’s Health v. Hellerstedt*. If I am so privileged as to be confirmed, I will fully, faithfully, and fairly apply *Roe*, *Casey*, *Hellerstedt*, and all other Supreme Court precedents.

b. Is it settled law?

Please see my answer to Question 1.a.

2. 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?**

Obergefell is binding precedent of the United States Supreme Court and is controlling for all lower courts. If I am so privileged as to be confirmed, I will fully, faithfully, and fairly *Obergefell* and all other Supreme Court precedents.

3. 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?

Given my practice as a general commercial litigator, I have not had occasion to study the *Heller* decision in detail. Moreover, as a nominee to a lower federal court, I cannot properly provide personal opinions about particular Supreme Court decisions or dissents from those decisions. That is particularly true for matters that could come before me as a judge. *See* Code of Conduct for United States Judges, Canon 3(A)(6). *Heller* is controlling Supreme Court precedent and if I am so privileged as to be confirmed, I will follow it and all other Supreme Court precedents.

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

In *Heller*, the Court stated that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” 554 U.S. 570, 626–27 (2008). The Court “also recognize[d] another important limitation on the right to keep and carry arms” – “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” *Id.* at 627.

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

Please see my answer to Question 3.a.

4. In a 2011 book review, you wrote that “activist, results-oriented unconstitutional decisions...may for prudential reasons continue to command deference, although ideally they would be limited and incrementally eroded by subsequent judicial opinions.” (*Ourselves and Our Posterity: Essays in Constitutional Originalism* (Spring 2011)).

a. Please explain your understanding of what it means to follow precedent.

Lower courts are always bound to follow *all* Supreme Court precedent. Moreover, in the United States Court of Appeals for the Third Circuit, the holding of a panel in a precedential opinion is binding on subsequent panels. En banc consideration is required to overrule a precedential opinion of a previous panel. 3d Cir. I.O.P. 9.1 (2017).

b. How would a decision be eroded if judges follow precedent?

To be clear, the statement quoted above was not intended to reflect my personal views. In my review of *Ourselves and Our Posterity*, I mostly summarized or paraphrased the chapters of each of the contributors to that book. In the quoted passage, I paraphrased an argument made by Jack Wade Nolin in his chapter, “Authority Doctrines and the Proper Judicial Role: Judicial Supremacy, Stare Decisis, and the Concept of Judicial Constitutional Violations,” particularly as set forth at page 80 of *Ourselves and Our Posterity*. The duty of lower courts is always to faithfully follow all binding Supreme Court precedents unless and until the Supreme Court decides to modify or overrule

one of its precedents. I will discharge this duty fully, faithfully, and fairly if I am so privileged to be confirmed.

c. Which Supreme Court decisions do you believe constitute “activist, results-oriented unconstitutional decisions”?

Please see my answer to Question 4.b. The phrase “activist, results-oriented unconstitutional decisions” was my short-hand label for Dean Nolin’s longer description of “the substance of a judicial decision [that] reflects the controversial political views of the judges rather than their reasonably apolitical and expert application of the law.” *Ourselves and Our Posterity*, 79.

As a judicial nominee bound by the Code of Conduct for United States Judges, it would be improper for me to express my personal views on the merits of specific cases. I consider all Supreme Court decisions to be equally binding on lower courts, and if I am so privileged as to be confirmed, I will fully, faithfully, and fairly apply them.

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

It is not appropriate for a lower court to depart from controlling Supreme Court precedent. The Supreme Court has reserved to itself “the prerogative of overruling its own decisions.” *Agostini v. Felton*, 521 U.S. 203, 207 (1997). If the Supreme Court has not overruled one of its own decisions, the rules of our hierarchical federal court system dictate that “once the [Supreme] Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.” *Rivers v. Roadway Express*, 511 U.S. 298, 312 (1994)

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

Circuit court judges must always apply controlling Supreme Court precedent, even if that precedent “appears to rest on reasons rejected in some other line of [Supreme Court] decisions.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997). In cases presenting potentially conflicting lines of reasoning, it may be appropriate for a circuit judge to discuss the continued strength of a particular precedent in light of other decisions. But even if a circuit judge raises such questions, it remains his or her duty to faithfully apply all controlling Supreme Court precedent.

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

In the Third Circuit, it is not appropriate for one circuit panel to overturn prior circuit precedent. 3d Cir. I.O.P. 9.1 (2017). As a general matter, Third Circuit panels follow all panel precedents absent en banc reconsideration. *U.S. v. Stimler*, 864 F.3d 253, 263 (3d Cir. 2017). Moreover, en banc reconsideration occurs only on “rare

occasions” in the Third Circuit. *Jeld-Wen, Inc. v. Van Brunt*, 607 F.3d 114, 117 (3d Cir. 2010). The court has described this as an “exacting standard” and generally will not decline to follow panel precedent unless it “no longer has *any* vitality” or is “patently inconsistent” with subsequent legal developments. *Id.* (emphasis in original). If I am so privileged as to be confirmed, I will faithfully follow the Third Circuit’s rules and policies with respect to panel precedents.

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

As a lower court nominee, it would not be appropriate for me to opine as to when it is appropriate for the Supreme Court to overturn its own precedent. As noted above, the Court has reserved this prerogative to itself. *Agostini v. Felton*, 521 U.S. 203, 207 (1997). *See also Pearson v. Callahan*, 555 U.S. 223, 233–36 (2009); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

5. In the same 2011 book review, you also wrote that “for prudential and other reasons relating to the doctrine of *stare decisis*, it may be preferable in some instances to suffer the continued viability of an unconstitutional decision. Yet such decisions do not necessarily mellow with age; rather, they may continue to deform constitutional jurisprudence.” (*Ourselves and Our Posterity: Essays in Constitutional Originalism* (Spring 2011))

Which Supreme Court decisions do you believe “deform constitutional jurisprudence”?

Please see my answer to Question 4.b. In the quoted passage, I was not offering my opinion but describing the argument Christopher Wolfe laid out in his chapter, “The Supreme Court and Changing Social Mores,” particularly as set forth at pages 153–74 of *Ourselves and Our Posterity*. As a nominee bound by the Code of Conduct for United States Judges, it would be improper for me to express my personal views on specific cases. I consider all Supreme Court decisions to be equally binding on lower courts, and if I am so privileged as to be confirmed I will fully, faithfully, and fairly apply them.

6. In the same 2011 article, you wrote that in *Planned Parenthood v. Casey*, the Supreme Court “adduced an expansive conception of constitutional liberty to gird up *Roe*’s shaky theoretical foundation.” You also wrote that as a result of *Roe*, the Supreme Court had “taken ownership of abortion policy.” (*Ourselves and Our Posterity: Essays in Constitutional Originalism* (Spring 2011)) Senator Blumenthal asked you about your claims on *Roe* at your nominations hearing, and I have several follow-up questions.

a. What is “shaky” about the theoretical foundation of *Roe*?

Please see my answer to Question 4.b. In the quoted passage, I not setting forth my personal views, but I was paraphrasing the argument made by Edward Whelan in his chapter, “Original Meaning and Responsible Citizenship,” particularly as set forth at page 15 of *Ourselves and Our Posterity*. As I explained at my hearing in response to Senator Blumenthal’s question on this point, I was referring to Mr. Whelan’s views

that engaged in the scholarly debate over the strength of the *Roe* Court’s *ratio decidendi*.

As a nominee bound by the Code of Conduct for United States Judges, it would be improper for me to join that debate by expressing my personal views on specific cases. If I am so privileged as to be confirmed, I will fully, faithfully, and fairly follow *Roe*, *Casey*, *Hellerstedt*, and all other Supreme Court precedents governing this field.

b. Why did you refer to “abortion policy”? Is it your position that the Constitution does not in fact protect a woman’s right to choose?

Please see my answer to Question 4.b. In the quoted passage, I was not offering my opinion but paraphrasing the argument made by Hadley Arkes in his chapter, “Confirmation to the Court in Times Turned Mean: A Strategy for the Hearings,” particularly as set forth at pages 131–32 of *Ourselves and Our Posterity*.

The Supreme Court has held, and repeatedly reaffirmed, that the United States Constitution protects a woman’s right to an abortion. If I am so privileged as to be confirmed, I will fully, faithfully, and fairly follow *Roe*, *Casey*, *Hellerstedt*, and all other Supreme Court precedents governing this field.

7. In a 2011 book review, you wrote that as a result of “judicial activism,” a “broad range of substantive policy issues [has been transferred] from elected officials to courts [and] has spawned new constituencies who jealously guard the judicial victories that they could not achieve through the democratic process. To these constituencies, the appointment of judges who are committed to the principles of originalism and judicial restraint are a threat to the creation of public policy-by-litigation.” (*Ourselves and Our Posterity: Essays in Constitutional Originalism* (Spring 2011)).

a. Please explain why outcomes based on originalism are not policy-based.

Please see my answer to Question 4.b. In the quoted passage, I was not offering my opinion but paraphrasing an argument offered by Edward Whelan in his chapter “Original Meaning and Responsible Citizenship,” particularly as set forth at pages 17–21 of *Ourselves and Our Posterity*. As a judicial nominee, it would be improper for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts.

b. What is “public policy-by-litigation”? Please provide examples of cases which meet your definition of “public policy-by-litigation.”

Please see my answer to Question 7.a.

c. How does “the appointment of judges who are committed to the principles of originalism and judicial restraint” threaten “the creation of public policy-by-litigation”?

Please see my answer to Question 7.a.

8. In April 2012, you wrote an article attacking the constitutionality of the Affordable Care Act. You concluded that the Affordable Care Act was not validly enacted under to the Commerce Clause, and you wrote that the federal government’s argument in support of the Affordable Care Act is “a metaphysical abstraction” that threatens “to break the Framers’ structural design that for 225 years has preserved individual liberty and served as a check on unlimited federal power.” (*A Whirlwind Tour of the Supreme Court’s Commerce Clause Jurisprudence* (Apr. 2, 2012)) At your hearing before the Senate Judiciary Committee, I asked you to explain what you meant by this statement. You responded that the government’s “assertion that people are all insurable risks” was a “metaphysical abstraction, whereas the Commerce Clause is designed to regulate activity affecting interstate commerce.”

a. Does health care affect interstate commerce?

As a general proposition, many aspects of the health care industry plainly affect interstate commerce. Beyond that observation, as a nominee bound by the Code of Conduct for United States Judges, it would be improper for me to express my personal views on contested political issues or on matters that could arise in the litigation context. Should I be so privileged as to be confirmed, in such cases I would faithfully follow all controlling Supreme Court and Third Circuit precedent.

b. Do you continue to believe that the Affordable Care Act is both a threat to “individual liberty” and an invalid enactment under the Commerce Clause?

In *A Whirlwind Tour of the Supreme Court’s Commerce Clause Jurisprudence*, I did not assert that the Affordable Care Act was or is a threat to individual liberty. Beyond that clarification, as a nominee bound by the Code of Conduct for United States Judges, it would be improper for me to express my personal views on this subject, both because of its political nature and because such issues could arise in the course of litigation. The Supreme Court has addressed the constitutionality of the Affordable Care Act in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). If I am so privileged as to be confirmed, I would fully and faithfully follow *NFIB v. Sebelius* and all of its other binding precedents in this area.

9. In the same 2012 article in which you criticized the Affordable Care Act, you discussed the Supreme Court’s decision in *United States v. Lopez* (1995), which struck down the Gun-Free School Zones Act as exceeding Congress’ authority under the Commerce Clause. You wrote that the *Lopez* decision is a “reminder that... Congress’ Commerce power still has outer limits.” (*A Whirlwind Tour of the Supreme Court’s Commerce Clause Jurisprudence* (Apr. 2, 2012))

Does Congress have authority to regulate guns?

In *District of Columbia v. Heller*, the Supreme Court stated that “nothing in our opinion

should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” 554 U.S. 570, 626–27 (2008). The Court “also recognize[d] another important limitation on the right to keep and carry arms” – “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” *Id.* at 627. If I am so fortunate to be confirmed, I shall fully, faithfully, and fairly apply this and all Supreme Court to the issue of gun regulation.

10. In 1990, as a law school student, you published an article focused on corporate law and the balance between state law and federal law governing corporations. In this article, you argued that judges who balanced state law against federal corporate regulations were engaging in “policy-making” from the bench. You wrote that the “problem” is “whether there can be any principled drawing of state-federal boundaries, or whether ‘federalism’ is an inherently plastic idea, to be molded according to the desires of judges and prostituted into the service of judicial policy-making.” (*The Business Roundtable v. Securities and Exchange Commission: The Interpretive Principle of Corporate Federalism and Federal Securities Law*, 13 GEO. MASON U.L. REV. 413 (1990))

Please explain what you meant by the phrase “prostituted into the service of judicial policy-making.”

In this article, which I authored twenty-eight years ago while in law school, I attempted to engage with another commentator’s assertion that the court’s decision in *The Business Roundtable v. Securities and Exchange Commission*, 905 F.2d 406 (D.C. Cir. 1990) was based upon policy considerations rather than the text of the governing statute. The quoted passage set forth a rhetorical question, asking whether federalism in the corporate law context could serve as legitimate governing principle or merely a pretext for improper judicial policy-making.

11. According to your Senate Judiciary Questionnaire, you co-founded the Pennsylvania Judicial Network in 2009, along with former Pennsylvania Senator Rick Santorum, the Republican Party of Pennsylvania, and other conservative organizations. The press release announcing the formation of the Pennsylvania Judicial Network bears your signature. However, at your hearing before the Senate Judiciary Committee, you testified that you were not involved in the creation of the Pennsylvania Judicial Network, and that you did not become aware that your signature was included on the press release until 2014.

- a. **In your testimony before the Senate Judiciary Committee, you said that you participated in a phone call with the Judicial Crisis Network in 2009 regarding the Pennsylvania Judicial Network. Please identify the person(s) with whom you spoke on this call and the nature of your discussions.**

I do not know who called me in 2009 about the proposed Pennsylvania Judicial Network.

- b. **In your testimony before the Senate Judiciary Committee, you said that the**

Judicial Crisis Network asked you to participate in a follow-up call, but that you did not ultimately join that follow-up call. What was your understanding of the purpose of that follow-up call?

My understanding from the initial call was that the purpose of the follow-up call was to discuss the nature and activity of the to-be-formed Pennsylvania Judicial Network. As I explained in my hearing testimony, I did not participate in any later calls.

c. How did you learn that your name appeared on the press release announcing the Pennsylvania Judicial Network?

I became aware of this matter in April 2014 after reading an article in the *Pittsburgh Post-Gazette*.

d. If you had no role in the formation of the Pennsylvania Judicial Network, why did you not take steps to have your name removed from the organization's materials or to distance yourself from the organization?

When I became aware of the matter in 2014, I looked for information about the Pennsylvania Judicial Network. It appeared that the organization was defunct (to the extent that it was ever active), and thus I did not pursue the matter further.

12. In 2006, you represented Pennsylvania State University (Penn State) in a lawsuit initiated by a former member of the women's basketball team who alleged she was expelled from the team because of her race, gender, and sexual orientation. The plaintiff, an African-American student, alleged that the head coach of the Penn State women's basketball team targeted and harassed players whom the coach perceived to be lesbian. According to the plaintiff's complaint, the coach told the plaintiff that she was not feminine enough, repeatedly instructed her to change her clothing, appearance and demeanor, and repeatedly questioned her about her sexual orientation. Ultimately, the plaintiff was dismissed from the team, causing her to file suit. (First Amended Complaint, *Harris v. Portland*, 2005 WL 4154198 (M.D. Pa. May 30, 2005))

In a brief you filed on Penn State's behalf, you characterized the plaintiff's discrimination claim as a tactic to "expand existing law and create new social policy." Your brief also urged the court not to elevate sexual orientation to a suspect class and turned to Justice Scalia's dissent in *Romer v. Evans* as support, writing that "Congress has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws." (*Harris v. Portland*, Defendant's Motion to Dismiss, 2006 WL 1214416 (M.D. Pa. 2006))

a. Please describe your role in the preparation of Pennsylvania State University's briefing in this case.

My firm represented Ms. Portland but not Pennsylvania State University in this case. I was the third most senior lawyer (on a team of four lawyers) in this case, and participated in preparing pleadings, motions, and briefs.

b. Did you participate in the preparation of, supervise attorneys, or give approval for the arguments made in the briefs or at oral argument?

As stated above, I was a relatively junior member of the team defending Ms. Porter. I participated in the preparation of a brief filed in support of Ms. Portland's motion to dismiss. I do not believe the motion to dismiss was orally argued.

c. Do you believe that protecting students from discrimination based on sexual orientation constitutes the creation of "new social policy"?

Please see my answer to Questions 12.a and 12.b. As a nominee bound by the Code of Conduct for United States Judges, it would be improper for me to express my personal views on political issues or on matters that could arise in the litigation context. Should I be so privileged as to be confirmed, and if presented with such a case, I would faithfully follow all controlling Supreme Court and Third Circuit precedent.

13. In 2006, you served as Senator Rick Santorum's attorney in a dispute regarding Senator Santorum's residency. (Andrew Conte, "Santorum's Lawyer Rebuffs Challenge to Residence," Pittsburgh Tribune Review, (May 26, 2006))

a. Have you represented Senator Santorum in any other matters, legal or otherwise? If so, please identify and describe each matter in which you have represented Senator Santorum.

In addition to the residency dispute referenced above, I represented Senator Santorum, together with Governor Ed Rendell and Senator Arlen Specter, in a 2005 challenge to the Department of Defense's proposed deactivation of the 111th Fighter Wing of the Pennsylvania Air National Guard based at the Naval Air Station Joint Base in Willow Grove, Pennsylvania. That matter is described in Question 17 of my Senate Questionnaire for Judicial Nominees. These matters were the only cases in which I represented Senator Santorum.

b. Other than the Pennsylvania Judicial Network, have you worked with Senator Santorum on any special projects or advocacy issues? If so, please identify and describe each project you have worked on with Senator Santorum.

No.

14. Beginning in 2015, you represented a company called Senior Operations in a lawsuit filed by plaintiff mobile home owners in El Cajon, California. Plaintiffs claimed that the manufacturing facility owned by Senior Operations contaminated the groundwater in their community and caused damage to their property. Plaintiffs alleged that Senior Operations was liable for the property damage because it failed to prevent the manufacturing facility from continuing to pollute the groundwater.

a. Please describe your role in the preparation of Senior Operations' briefing in

this case.

These cases are currently in active litigation. As a judicial nominee, I am prohibited from commenting on a case pending in any court, pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges.

- b. Did you participate in the preparation of, supervise attorneys, or give approval for the arguments made in the briefs or at oral argument?**

Please see my answer to Question 14.a.

- c. After assuming ownership of the facility, did Senior Operations take steps to prevent the manufacturing facility from polluting the groundwater or to fix or remedy any prior pollution?**

Please see my answer to Question 14.a.

- d. What happened to the community in El Cajon, California as a result of the groundwater contamination caused by the manufacturing facility owned by Senior Operations?**

Please see my answer to Question 14.a.

15. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), 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?**

I do not recall ever being asked about my views on administrative law.

- 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”?**

Given my practice as a commercial litigator, I have not had occasion to study administrative law in detail. Moreover, as a nominee to a lower federal court, I cannot properly provide personal opinions about areas of the law. That is particularly true for matters that could come before me as a judge. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If I am so privileged as to be confirmed, I will approach any administrative law case in the same manner that I would approach all other cases -- without any predilections and looking to all applicable Supreme Court and Third Circuit precedents for controlling guidance.

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

No.

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

I reviewed the questions when they were transmitted to me. I conducted research as necessary to refresh my recollection as to certain cases or writings referenced in some of the questions. I drafted answers to each question and then sent draft answers to members of the Office of Legal Policy, requesting their feedback. I then finalized my answers and submitted them to the Office of Legal Policy for transmittal to the Senate Judiciary Committee. My answers to each question are my own.

Senator Dick Durbin
Written Questions for David Porter
June 13, 2018

For questions with subparts, please answer each subpart separately.

1. In 2011 you wrote a review of a book entitled “Ourselves and Our Posterity: Essays in Constitutional Originalism” in the Grove City College Journal of Law and Public Policy. In this book review, you commented on *stare decisis* in ways that appear to reflect your own thinking rather than the writings of the book’s authors.

For example, you write the following:

As faint-hearted originalists acknowledge, for prudential and other reasons relating to the doctrine of *stare decisis*, it may be preferable in some instances to suffer the continued viability of an unconstitutional decision. Yet such decisions do not necessarily mellow with age; rather, they may continue to deform constitutional jurisprudence and, as Christopher Wolfe argues, transform attitudes and behavior.

- a. **Please explain what you meant in this passage.**

To be clear, the statement quoted above was not intended to reflect my personal views. In my review of *Ourselves and Our Posterity*, I mostly summarized or paraphrased the chapters of each of the contributors to that book. In the quoted passage, I paraphrased an argument made by Christopher Wolfe in his chapter, “The Supreme Court and Changing Social Mores,” particularly as set forth at pages 153–74 of *Ourselves and Our Posterity*. As a lower court nominee, I do not consider some Supreme Court decisions to be better or worse than others; they are all equally binding on lower courts. If I am so privileged as to be confirmed, I will fully, faithfully, and fairly apply all controlling precedents of the Supreme Court and Third Circuit.

- b. **What is the standard you would apply for when judges should, as you say, “suffer the continued viability of an unconstitutional decision”?**

Please see my answer to Question 1.a.

- c. **Please cite one or more examples of an unconstitutional decision such as you described in this passage.**

Please see my answer to Question 1.a. As a judicial nominee bound by the Code of Conduct for United States Judges, it would be improper for me to express my personal views on specific cases. As such, all Supreme Court decisions are equally binding on lower courts, and if I am so privileged as to be confirmed I will fully, faithfully, and fairly apply them.

2. You also say in this book review that:

The transfer of a broad range of substantive policy issues from elected officials to courts has spawned new constituencies who jealously guard the judicial victories that they could not achieve through the democratic process. To these constituencies, the appointment of judges who are committed to the principles of originalism and judicial restraint are a threat to the creation of policy-by-litigation.

Please explain what you meant by this passage.

Please see my answer to Senator Feinstein's Questions 7.a, 7.b, and 7.c

3. You say in your questionnaire that in 2009 you were a member of the Pennsylvania Judicial Network. This organization was formed as a branch of the Judicial Crisis Network, a group that is infamous for its right-wing dark money advertising campaigns against Merrick Garland and other Obama nominees and for President Trump's nominees.

The main purpose of the Pennsylvania Judicial Network apparently was to oppose the nomination of Sonia Sotomayor to the United States Supreme Court. A press release announcing the group's formation said "Judge Sotomayor is an example of the kind of judicial elitism that places judges above the law and the Constitution. That's not the way the Framers designed our system."

Carrie Severino, the policy director of the Judicial Crisis Network, confirmed in an April 20 article in the *National Review* that "Porter was part of a network of conservatives that organized in opposition to the confirmation of Judge Sonia Sotomayor to the Supreme Court."

- a. **Why did you join an organization that described then-Judge Sotomayor as an example of "judicial elitism"?**

Please see my answers to Senator Feinstein's Questions 11.a, 11.b, 11.c, and 11.d.

- b. **What in your view does it mean to be an example of "judicial elitism"?**

Please see my answers to Senator Feinstein's Questions 11.a, 11.b, 11.c, and 11.d. I have never used the phrase "judicial elitism" and do not know what it means.

- c. The Pennsylvania Judicial Network also said on its website that the organization would work "to ensure that the confirmation process for all judicial nominees is fair and that every nominee sent to the full Senate receives an up or down vote." **Do you believe that Judge Merrick Garland should have received an up-or-down vote in the Senate for his Supreme Court nomination?**

Please see my answers to Senator Feinstein’s Questions 11.a, 11.b, 11.c, and 11.d. As a nominee bound by the Code of Conduct for United States Judges, it would be improper for me to express my personal views on a contested political issue, such as Judge Garland’s Supreme Court nomination.

4. On March 25, 2012 you wrote an op-ed entitled “Is the health care law constitutional? No, strike it down.” In this op-ed you urged the Supreme Court to invalidate the Affordable Care Act in the then-pending case *NFIB v. Sebelius*. You described the individual mandate in the law as “an unprecedented assertion of federal control that violates the framers’ constitutional design.” The Supreme Court upheld the mandate in that case.

- a. **Why did you make this claim?**

This op-ed consisted primarily of my analysis of the constitutionality of the Affordable Care Act’s individual mandate under the Supreme Court’s then-existing Commerce Clause jurisprudence. The Supreme Court thereafter upheld the individual mandate as a valid exercise of Congress’s taxing power. Should I be so privileged as to be confirmed, I would faithfully follow the Supreme Court’s decision in *NFIB v. Sebelius* and all of its other binding precedents.

- b. **Since you have already publicly stated your legal analysis about the constitutionality of the Affordable Care Act, would you commit, if confirmed, to recuse yourself from any case that might come before you about the constitutionality of that law?**

I have not studied the specific recusal circumstance presented by this question, but in every case, including one involving the Affordable Care Act, I would carefully consider 28 U.S.C. § 455, the Code of Conduct for United States Judges, and all other laws, rules, advisory opinions, and practices governing recusal decisions.

5. In 1988, the Supreme Court held by a 7 to 1 vote in the case *Morrison v. Olson* that Congress is allowed under the Appointments Clause to limit the removal of an independent counsel to cases in which a principal officer finds good cause. Recently a number of Republican members of this Committee argued, in a debate over a bill to protect the special counsel’s Russia investigation, that we should act as if we are bound by Justice Scalia’s dissent in *Morrison v. Olson*.

- a. **Should we act as if Justice Scalia’s dissent is binding?**

The holding of *Morrison v. Olson* is set forth in the Court’s majority opinion, and not in Justice Scalia’s dissenting opinion.

- b. **What weight of authority should lower court judges give to Justice Scalia’s dissent in *Morrison v. Olson*?**

Morrison v. Olson is binding Supreme Court precedent. Justice Scalia's dissent in that case, like all concurrences and dissents, has no weight of authority, but only persuasive value.

6.

- a. **Do you believe that judges should be “originalist” and adhere to the original public meaning of constitutional provisions when applying those provisions today?**

In the first instance, lower court judges should apply any controlling Supreme Court precedent or binding circuit precedent in interpreting constitutional provisions. In the rare case where neither the Supreme Court nor the Third Circuit has addressed the meaning of a particular provision, I would look to binding precedent governing the interpretive tools to be used in the analysis. Using the interpretive tools provided by the precedent, I would discern the original public meaning of the text. I would also study the reasoning and logic of factually or analytically similar Supreme Court or Third Circuit decisions and the opinions of other federal or state courts, and seek to harmonize my decision with the existing body of law.

- b. **If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause today?** The Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution provides that:

...no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or title, of any kind whatever, from any King, Prince, or foreign State.

This issue is a subject of current litigation, and thus I am forbidden by Canon 3(a)(6) of the Code of Conduct of United States Judges to opine on it.

7. You say in your questionnaire that you have been a member of the Federalist Society since 1989.

- a. **Why did you join the Federalist Society?**

I joined the Federalist Society because, like other organizations in which I have also been a member (such as the American Law Institute and the American Inns of Court), it provides interesting, timely, useful, and high-quality programming for lawyers. Moreover, I am interested in legal history and the sources from which our court-fashioned doctrines developed, and the Federalist Society often provides interesting and thought-provoking lectures and debates relating to these areas.

- b. **Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said “[w]e’re going to have great judges, conservative, all picked by the Federalist Society.” In a press conference on

January 11, 2017, he said his list of Supreme Court candidates came “highly recommended by the Federalist Society.”

This question asks for my opinion on a political matter upon which I cannot ethically opine pursuant to Canon 5 of the Code of Conduct for United States Judges.

- c. **Please list each year that you have attended the Federalist Society’s annual convention.**

To the best of my recollection, I attended the Federalist Society’s annual convention in 1996, 1999, 2000, 2001, 2002, 2003, 2005, 2006, 2007, 2012, 2016, and 2017.

- d. On November 17, 2017, Attorney General Sessions spoke before the Federalist Society’s convention. At the beginning of his speech, Attorney General Sessions attempted to joke with the crowd about his meetings with Russians. Video of the speech shows that the crowd laughed and applauded at these comments. (See <https://www.reuters.com/video/2017/11/17/sessions-makes-russia-joke-at-speech?videoId=373001899>) **Did you attend this speech, and if so, did you laugh or applaud when Attorney General Sessions attempted to joke about meeting with Russians?**

I attended Attorney General Sessions’ speech. I do not recall whether I laughed at his attempted joke. I do not believe that I applauded.

8.

- a. **Is waterboarding torture?**

As a commercial litigator, I have not had the occasion to study this issue. It is my general understanding that waterboarding constitutes torture where it is intentionally used “to inflict severe physical or mental pain or suffering” upon a detainee. 18 U.S.C. § 2340(1).

- b. **Is waterboarding cruel, inhuman and degrading treatment?**

As a commercial litigator, I have not had the occasion to study this issue. It is my general understanding that recent legislation established no person in the custody or control of the United States may be subject to interrogation methods not authorized in the Army Field Manual, and that waterboarding is not so authorized.

- c. **Is waterboarding illegal under U.S. law?**

Please see my answers to Questions 8.a. and 8.b.

9. **Was President Trump factually accurate in his claim that 3 to 5 million people voted illegally in the 2016 election?**

This question calls for an answer on a political dispute, and accordingly I am precluded from commenting pursuant to Canon 5 of the Code of Conduct for United States Judges.

10. Do you think the American people are well served when judicial nominees decline to answer simple factual questions?

Judicial nominees should answer questions truthfully and to the maximum extent permitted by the Code of Conduct for United States Judges and any applicable privilege rules. I have endeavored to do that in my oral testimony and in my answers to written questions.

11. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

The Judicial Crisis Network has also spent money on advertisements supporting a number President Trump's nominees.

- a. Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.**

This question calls for my personal views on a political issue, and therefore I must refrain from commenting pursuant to Canon 5 of the Code of Conduct for United States Judges.

- b. If you learn of any such donations, will you commit to call for the undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

If I am so privileged as to be confirmed, I will carefully consider 28 U.S.C. § 455, the Code of Conduct for United States Judges, and all other laws, rules, advisory opinions, and practices governing recusal decisions.

- c. Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

Please see my answers to Question 11.a and 11.b.

12.

- a. Do you interpret the Constitution to authorize a president to pardon himself?**

I have not studied this question.

- b. What answer does an originalist view of the Constitution provide to this question?**

I have not studied this question.

**Nomination of David James
Porter United States Court of
Appeals For the Third Circuit
Questions for the
Record Submitted
June 13, 2018**

**QUESTIONS FROM SENATOR
WHITEHOUSE**

1. 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?

Justice Cardozo famously said that “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.” *Berky v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (1926). Although I generally agree with Justice Cardozo’s dictum about metaphors in law, I thought that Justice Roberts’ example was apt. I understand it to represent the principle that a judge’s role is to neutrally interpret and apply rules made by others and to ensure a fair adjudicative process for all parties, without respect to persons.

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

Judges should refrain from allowing the consequences of a ruling to play a role in the decision-making process, if by “consequences” one means the judge’s preferred outcome in a case, or whether the judge thinks the result is fair or rational according to his or her personal standards. There are, however, circumstances where it is appropriate for a judge to consider consequences. For example, in deciding whether to grant a preliminary injunction before a case proceeds to final resolution, the trial court must consider, among other things, whether the requested injunction will prevent irreparable harm and whether the injunction is in the public interest. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). And a judge necessarily considers the practical consequences of a decision if it appears that the ruling would yield an obviously absurd result. *See U.S. v. Wilson*, 503 U.S. 329, 334 (1992) (absurd results are to be avoided).

2. 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?

Empathy, or the ability to adopt another’s perspective and to feel compassion for others, is a natural and generally praiseworthy skill or trait. There are occasions when judges are required to consider litigants’ backgrounds and characteristics, such as when imposing criminal sentences. 18 U.S.C. § 3553(a)(1) (sentencing court must consider,

among other things, the “history and circumstances of the defendant”). Except where required, though, judges should strive to subordinate empathy and other emotions, and to decide cases “without respect to persons” and only according to “the Constitution and laws of the United States.” 28 U.S.C. § 453. Such neutrality and independence flows directly from the judge’s oath and duty to exercise “judgment” rather than “will.” THE FEDERALIST No. 78 (Alexander Hamilton).

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

Please see my answer to Question 2.a. The judge’s decision in a case or controversy must be dictated by the applicable law and not influenced by his or her personal life experience. But with that stipulation, I can imagine circumstances where a judge’s accumulated professional experience and knowledge may appropriately enter the decisionmaking process. For example, the judge may draw upon such experience when articulating the holding in a case in such a way as to cohere and not clash with existing legal doctrine. Or an appellate judge may draw upon such experience in order to exhibit sensitivity to trial courts in their lawful exercise of discretion over trial and docket management. A judge’s personal life experience may sometimes be useful in the context of a multi-member court where collegiality is necessary to achieve and maintain consensus as tentative agreements reached in conference are translated into a written opinion.

3. 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.

4. What assurance can you provide this committee and the American people that you would, as a federal judge, equally uphold the interests of the “little guy,” specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

If I am so privileged as to be confirmed, I will take very seriously my oath to “administer justice without respect to persons,” to “do equal right to the poor and to the rich,” and to “faithfully and impartially discharge and perform all the duties ... under the Constitution and laws of the United States.” 28 U.S.C. § 453. Over nearly 25 years in legal practice, I have represented plaintiffs and defendants, wealthy and very poor (pro bono), individuals, for profit and not-for-profit corporations, public companies, small businesses, sole proprietorships and partnerships, small colleges, large universities, small and large charitable organizations, state actors and government components. I well understand that for every litigant, becoming involved in the litigation process is a very big deal and often stressful and bewildering. I commit to uphold the rights of all litigants and to administer justice without regard to the parties’ status, wealth, posture as plaintiff or defendant, race, sexual orientation, political affiliation, or any other variable other than how the governing law bears upon the particular case or controversy.

5. Prior to law school, you served as a research assistant at the Institute on Religion and Democracy, which opposes “abortion rights, homosexual rights, big government, extreme

environmentalism, pacifism, and anti-Americanism.” Additionally, you are a contributor to the Center for Vision and Values, which advocates against the rights of LGBT individuals. Do you agree with the substantive positions of the Institute on Religion and Democracy and the Center for Vision and Values on the rights of LGBT individuals? What steps would you take to treat all litigants before you—regardless of sexual orientation—without prejudice?

It has been thirty years since I worked as a research assistant at the Institute on Religion and Democracy, and I have had virtually no contact, if any, with the Institute since I started law school in 1989. My involvement with the Center of Vision and Values consists of two blog posts – one surveying the Supreme Court’s Commerce Clause jurisprudence and the other a brief remembrance of William F. Buckley, Jr. on the occasion of his death. My limited involvement with these organizations does not represent an endorsement of any of their positions, past or present. As a nominee bound by the Code of Conduct for United States Judges, it would be improper for me to express my personal views on political positions taken by these organizations, or on matters that could arise in the litigation context.

If I am so privileged as to be confirmed, I will uphold the rights of all litigants and administer justice without regard to the parties’ status, wealth, posture as plaintiff or defendant, race, sexual orientation, political affiliation, or any other variable other than how the governing law bears upon the particular case or controversy.

6. While defending The Pennsylvania State University in a lawsuit alleging the targeting and harassment of lesbians by Penn State women’s basketball team, you filed a brief arguing that “Congress has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws.” Do you still believe this to be true? If confirmed, how will you ensure that all litigants before you—regardless of race, gender, or sexual orientation—feel that they are treated equally?

Please see my answer to Senator Feinstein’s Questions 12.a, 12.b, and 12.c. Moreover, I recognize the significant difference between the role of an advocate and the role of a judge, and commit to being a fair and neutral arbiter of all disputes that come before me. If I am so privileged as to be confirmed, I will uphold the rights of all litigants and administer justice without regard to the parties’ status, wealth, posture as plaintiff or defendant, race, sexual orientation, political affiliation, or any other variable other than how the governing law bears upon the particular case or controversy.

7. In discussing a lawsuit under the Clean Water Act, you noted that environmental regulation “erodes freedom and undermines independence.” Do you still hold this view? If you do, how would you ensure that environmental agencies and advocates believe that they are getting a fair shake before you? If not, what changed your mind? What do you believe is the importance of environmental regulation?

The quoted statement was made in the course of litigation and legislative reform efforts, involving a client who challenged certain regulations affecting wetland areas on his property. I recognize the significant difference between the role of an advocate and the role of a judge, and commit to being a fair and neutral arbiter of all disputes that come before me. As a judicial nominee bound by the Code of Conduct for United States Judges, it would be improper for me to express my personal views because doing so would mistakenly suggest

that I might decide a case based on something other than the relevant law and facts. Moreover, these questions implicate legal issues that may arise in litigation, and thus I am prohibited from commenting based upon Canon 3(A)(6) of the Code of Conduct for United States Judges.

8. In reviewing Rick Santorum's book, *It Takes a Family*, you wrote that the book was "a thoughtful articulation of conservative vision and public policy." Summarizing Mr. Santorum's argument, you wrote "[Santorum] argues . . . a prosperous society 'depends on healthy mom-and-dad families.'" Do you agree with Mr. Santorum's statement? If so, how would that view influence how you judge matters that come before you if confirmed?

As a judicial nominee bound by the Code of Conduct for United States Judges, it would be improper for me to express my personal views about the positions taken by Senator Santorum in his book because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts.

9. In celebrating the nomination of John Ashcroft as Attorney General, you wrote that he "is pro-life, pro-death penalty, anti-gun control, prefers judges who exercise restraint and strictly construe the Constitution, and disfavors quota-based affirmative action plans." Do you see yourself as a judge who "exercise[s] restraint and strictly construe[s] the Constitution."?

In the quoted passage from this article, I sought to emphasize that Senator Ashcroft's political and legal views meshed with those of President George W. Bush, and that it was appropriate for a President to appoint an Attorney General whose views coincided with his or her own. I was not setting forth my own political or judicial philosophy. As I explained in response to Senator Klobuchar's questioning at my June 6, 2018 hearing, if I am so privileged as to be confirmed, I would not attempt to "strictly" construe the Constitution because I do not think that is appropriate. Rather, I would strive to *fairly* and *reasonably* construe any constitutional or statutory provisions presented for the court's interpretation and application, consistent with the relevant precedent of the United States Supreme Court and the Third Circuit.

10. You are listed as a founding member of the Pennsylvania Judicial Network. However, in your confirmation hearing you noted that "I really didn't have any involvement with that project," beyond a ten to fifteen second phone call.

- a. Who was this phone call with?

Please see my answer to Senator Feinstein's Question 11.a.

- b. Have you spoken with the other founding members or the leadership of the Pennsylvania Judicial Network since that initial phone call?

No.

- c. Are you aware of any efforts by either the Pennsylvania Judicial Network or the Judicial Crisis Network to support your nomination?

I am aware of an article titled *Liberal Groups' Lame Attempts to Demonize a*

Respected Third Circuit Nominee, published on April 20, 2018 by Carrie Severino, Chief Counsel and Policy Director to the Judicial Crisis Network. The article is available at: <https://www.nationalreview.com/bench-memos/david-porter-third-circuit-nominee-liberal-groups-demonize/>

- d. Do you believe that it is incorrect for you to be listed as a “founding member”? If so, what steps have you taken to address this misrepresentation?

Yes. Please see my answer to Senator Feinstein’s Questions 11.a, 11.b, 11.c, and 11.d.

11. During your confirmation hearing, when asked about whether you believe in racial discrimination, you called it a “settled issue,” and noted that “I don’t view that as a contested public policy question anymore.” However, when asked about *Brown v. Board of Education* and school desegregation, you noted that the judicial cannon of ethics prohibits you from responding. Do you believe that school segregation is a “contested public policy question”? If no, do you believe *Brown v. Board of Education* was correctly decided?

On May 17, 2018 -- the sixty-fourth anniversary of the Supreme Court’s landmark decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) -- an action was commenced in New Jersey alleging that segregative state laws, policies and practices have violated and are violating students’ constitutional rights and *Brown*’s anti-segregation principle. See *Latino Action Network, et al. v. The State of New Jersey, et al.*, MER-L-001076-18 (Law Div.). As the application of *Brown* continues to be a subject of active litigation, I am prohibited from commenting, pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges.

**Nomination of David James Porter, to be United States Circuit Judge for the
Third Circuit
Questions for the Record
Submitted June 13, 2018**

QUESTIONS FROM SENATOR COONS

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

The Supreme Court has identified and employed many factors to guide this analysis. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Loving v. Virginia*, 388 U.S. 1 (1967); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). If fortunate enough to be confirmed, I would review the parties’ briefs, analyze the relevant Supreme Court and Third Circuit precedents, discuss the issue with my colleagues, and apply the appropriate legal standards to the facts of record.

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

Yes. Please see my answer to Question 1.

- b. Would you consider whether the right is deeply rooted in this nation’s history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation’s history and tradition?

Please see my answer to Question 1. The Supreme Court has focused this inquiry on historical practice under the common law, practice in the American colonies, the history of state statutes and judicial decisions, and long-established traditions. *See Glucksberg*, 521 U.S. at 710-16.

- c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of another court of appeals?

Please see my answer to Question 1. I would begin any analysis by looking to Supreme Court and Third Circuit precedent. In some occasions, I would consult precedent from other circuits, for its persuasive value.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?

Yes.

- e. Would you consider whether the right is central to “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S.

558, 574 (2003) (quoting *Casey*).

Yes. I would fully, fairly, and faithfully apply all Supreme Court precedent, including *Casey* and *Lawrence*.

- f. What other factors would you consider?

Please see my answer to Question 1.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

The Supreme Court has repeatedly held that the Equal Protection Clause requires heightened scrutiny for gender-based classifications as well as for race-based classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 170 (1976).

- a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

Please see my answer to Question 2. If so privileged as to be confirmed as a lower court judge, I would be duty-bound to fully, faithfully, and fairly apply Supreme Court precedent in this area.

- b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

Please see my answer to Question 2. I do not have any information as to why this protection was recognized in 1996.

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

The Fourteenth Amendment requires same-sex couples to be afforded the right to marry "on the same terms accorded to couples of the opposite sex." *Obergefell*, 135 S. Ct. at 2607.

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

The Supreme Court has not yet addressed this issue, and it currently is the subject of active litigation in the lower courts. As a judicial nominee, I thus am prohibited from commenting. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges.

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

The Supreme Court recognized such a constitutional right to privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

The Supreme Court recognized such a constitutional right to privacy in *Roe v. Wade*, 410 U.S. 113 (1973) and reaffirmed *Roe's* central principle in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). If so privileged as to be confirmed, I would fully, faithfully, and fairly apply these precedents.

- b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The Supreme Court recognized such a constitutional right in *Lawrence v. Texas*, 539 U.S. 558 (2003). If so privileged as to be confirmed, I would fully, faithfully, and fairly apply *Lawrence* and any other applicable Supreme Court or Third Circuit precedents.

- c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Not applicable. Please see my answers to Questions 3, 3.a and 3.b.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “[h]igher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

- a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

The Supreme Court at times has considered changing understandings of society. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Riley v. California*, 134 S. Ct. 2473 (2014); *United States v. Virginia*, 518 U.S. 515 (1996). I would consider such evidence when appropriate in light of Supreme Court and Third Circuit precedent.

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

Scientific and social science evidence is often adduced, typically through expert witnesses, in a party's attempt to prove an element of its case. There is a significant body of law and commentary relating to the admissibility and weight of such evidence. *See, e.g., Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); Reference Manual on Scientific Evidence (Federal Judicial Center, 3d ed. 2011). If I am so privileged as to be confirmed, I would follow all laws enacted by Congress and precedents of the Supreme Court and Third Circuit concerning the role of such evidence in judicial analysis.

5. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.

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

I have not had occasion to study the question whether *Brown* is consistent with the original public meaning of the Fourteenth Amendment. I am aware that respected some commentators who have studied the issue closely have concluded that *Brown* is consistent with originalism. *See, e.g.,* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995). While this is an interesting academic question, should I be confirmed as a lower court judge I would simply apply *Brown* in any applicable case.

- b. How do you respond to the criticism of originalism that terms like "the freedom of speech," "equal protection," and "due process of law" are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited June 13, 2018).

Although this is an interesting academic point, if I am so privileged as to be confirmed, my analysis of these terms would follow the decisions of the Supreme Court and Third Circuit precedents in interpreting them.

- c. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

From the perspective of a lower court judge, the original public meaning of a constitutional provision would be dispositive if the Supreme Court or, in my case, the

Third Circuit, has said that it is dispositive. I would faithfully and fairly apply all binding Supreme Court and Third Circuit precedent, regardless of the methodology employed.

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

Please see my answer to Question 5.c.

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

If I am so privileged as to be confirmed, I would in the first instance apply all binding precedent of the Supreme Court and Third Circuit. If Supreme Court and Third Circuit precedent does not address the particular case, then I would also consider persuasive opinions of other circuit courts, scholarly commentary, and of course the text and context of the relevant constitutional provision together with historical sources bearing upon the original public meaning of the provision.

6. At your nomination hearing, you testified that your only contact with the Pennsylvania Judicial Network was a phone call that lasted approximately 15 seconds, and you "never participated in [a] second call nor had any subsequent involvement with that project."

- a. Why did you list the Pennsylvania Judicial Network as a legal organization of which you have been a member on page 4 of your Senate Judiciary Questionnaire?

Please see my answers to Senator Feinstein's Question 11 and Senator Whitehouse's Question 10. I listed membership in this organization in an abundance of caution, given press reports from 2014 stating that I had previously been listed as a member.

- b. Does the Pennsylvania Judicial Network or its affiliated organization, the Judicial Crisis Network, support your nomination?

I do not know whether the Pennsylvania Judicial Network currently exists, much less whether it supports my nomination if it does. I do not know whether the Judicial Crisis Network supports my nomination. I am aware that Carrie Severino, chief counsel and policy director for the Judicial Crisis Network, authored a post on *National Review Online* in support of my nomination, as explained in my answer to Senator Whitehouse's Question 10.c.

7. Carrie Severino, chief counsel and policy director for the Judicial Crisis Network, reportedly told the *National Review* that you were a part of a network of conservatives that organized the opposition to the confirmation of Justice Sotomayor. Have you ever communicated with Ms. Severino or any other staff member at the Judicial Crisis Network about opposition to the nomination of Justice Sotomayor?

No.

8. The Pennsylvania Judicial Network has asserted that you are one of its founders. You

testified during your nomination hearing, “I’m aware that my name appears on a letter that was on a website. I learned about that in 2014. But I didn’t agree to or authorize having my name added to that letter.”

Please see my answers to Senator Feinstein’s Question 11 and Senator Whitehouse’s Question 10.

- a. How did you learn about the Pennsylvania Judicial Network’s use of your name?
 - b. Have you ever voiced opposition to your name being associated with the Pennsylvania Judicial Network?
 - c. Did you contact anyone to inquire why your name was added to the Pennsylvania Judicial Network letter?
 - d. Did you ever ask that your name be removed from the Pennsylvania Judicial Network’s materials?
 - e. Did you ever put out a statement expressing disagreement with your name being associated with the Pennsylvania Judicial Network or with any of the Pennsylvania Judicial Network’s positions?
 - f. Did you take any other efforts to disassociate yourself from the Pennsylvania Judicial Network, the Judicial Crisis Network, or the opposition to Justice Sotomayor?
9. You are a trustee of Grove City College, which the Princeton Review ranked as among the least LGBT-friendly colleges in the United States. Grove City College previously sued the federal government for linking federal financial aid with adherence to anti-discrimination rules. Currently, Grove City students cannot access federal financial aid because of the school’s decision not to comply with Title IX. At your nomination hearing, you testified that Grove City College has “parallel systems” to Title IX in place.

- a. How do these “parallel systems” protect students from discrimination in the absence of the application of federal anti-discrimination laws like Title IX?

As a student, parent of students, and trustee, it has been my experience and observation that Grove City College does not and has never discriminated against students; it is a safe, welcoming, caring community for all students, faculty and employees. I am not familiar with all of Grove City’s day-to-day operations, but it is my understanding that the college protects students from discrimination by employing reporting, investigative, and disciplinary procedures that are functionally very similar to those employed by colleges and universities that receive federal financial assistance.

- b. If these systems are comparable, why does Grove City College refuse federal financial aid to avoid compliance with Title IX?

It is my understanding that Grove City College has taken a consistent position since its founding in 1876 not to accept federal financial assistance as a matter of principle, *i.e.*,

that financial independence is intrinsically good for philosophical reasons, and instrumentally good for financial and business reasons. The decision to refuse federal funding thus predates Title IX, and was not a decision taken to avoid compliance with that regime.

- c. Have you participated in any decision by Grove City College not to comply with federal anti-discrimination laws and/or to refuse access to federal funding?

Please see my answer to Question 9.b. I do not recall any proposal that would have changed or modified Grove City's long-standing position on financial independence during my time on the board of trustees.

- d. Have you ever expressed disagreement with Grove City College's decision not to comply with federal anti-discrimination laws and/or to refuse access to federal funding?

Please see my answer to Question 9.c.

10. In a 2007 book review, you praised then-Senator Rick Santorum's book, "It Takes a Family," which asserts that a "prosperous society" depends on "healthy mom-and-dad families." Do you agree that a prosperous society also includes and depends on healthy families with loving single parents and LGBT parents?

Please see my answer to Senator Whitehouse's Question 8.

11. In a 2011 book review, you described *Planned Parenthood v. Casey* as having "an expansive conception of constitutional liberty," and you referred to the author's argument that "activist, results-oriented unconstitutional decisions are not entitled to respect as binding precedent."

- a. What did you mean when you referred to an "expansive conception of constitutional liberty"?

Please see my answer to Senator Feinstein's Question 4.c. *Planned Parenthood v. Casey* is a binding Supreme Court decision, and if confirmed I will fully, faithfully, and fairly apply it without hesitation.

- b. Is *Planned Parenthood v. Casey* or *Lawrence v. Texas* – both of which are referenced in the article – an "activist, results-oriented decision"?

Please see my answer to Senator Feinstein's Question 4.c. *Planned Parenthood v. Casey* and *Lawrence v. Texas* are binding Supreme Court precedents, and if confirmed I will fully, faithfully, and fairly apply them without hesitation.

12. In the same 2011 book review, you asserted that *Roe v. Wade* rests on a "shaky theoretical foundation."

- a. What do you mean by "shaky theoretical foundation"?
- b. At your hearing, you testified that there was a "debate in the scholarship about *Roe*'s theoretical foundation." Please describe your understanding of this debate.

Please see my answers to Senator Feinstein's Question 6.a.

Senator Mazie K. Hirono
Questions for the Record for David Porter

1. You filed a brief in support of a motion to dismiss in a discrimination case brought by a basketball player against her coach at Penn State based partly on a “no lesbian policy.” In the brief, you accused the plaintiff of initiating the litigation in order to “create new social policy” in order to “elevate perceived sexual orientation to a fundamental substantive due process right and/or add it to the limited ranks of suspect classes that receive heightened protection under the Equal Protection Clause.”

Do you continue to believe that the litigant in the case was pursuing a “new social policy?”

Please see my answers to Senator Feinstein’s Questions 12a., 12.b., and 12.c.

2. When asked about this brief by Senator Klobuchar during your Senate Judiciary Committee hearing, and whether you would be able to apply the law establishing heightened protection for sexual orientation, you responded by stating that you would have no problem doing that if the courts come down that way or if Congress decides to expand protected classes.

In your view, is there any Supreme Court precedent that has “come out that way?”

I have not had the opportunity to fully study Supreme Court precedent in this area, and thus have not developed a view of the current state of the Supreme Court’s jurisprudence. I am aware that this issue is currently being litigated in district and circuit courts nationwide, and I thus must refrain from any additional comments. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges.

3. You are listed as a founding member of the Pennsylvania Judicial Network in 2009, a partner group of the Judicial Crisis Network that was formed to oppose the nomination of Sonia Sotomayor to the U.S. Supreme Court. During your hearing you stated that you did not have any involvement in that project other than a 15-second phone call and that you did not authorize having your name listed on an opposition letter. Carrie Severino, chief counsel and policy director of the Judicial Crisis Network, was quoted in an article published in National Review Online stating that you were a part of a network of conservatives that organized the opposition to the confirmation of Justice Sotomayor.

a. Have you ever spoken to Ms. Severino about ways in which to organize opposition in Pennsylvania to the nomination of Justice Sotomayor?

No.

b. Have you engaged in any activity with the Pennsylvania Judicial Network beyond your initial 15-second phone call?

No.

c. Is the Pennsylvania Judicial Network working to support your nomination?

Please see my answers to Senator Feinstein’s Question 11 and Senator Whitehouse’s Question 10.c. I have had no interaction with the Pennsylvania Judicial Network since the brief 2009 phone call, and I am unaware if the organization currently exists, or is defunct.

3. You are a member of the Board of Trustees at Grove City College and you are listed as a “contributor” to the college’s Center for Vision and Values. The college has been ranked the least friendly school for LGBT students and the Center for Vision and Values has published numerous articles that are critical of LGBT students.

- a. During your time with the Center for Vision and Values did you ever edit, review, or approve any study, commentary, or article before or during publication? If so, please explain and provide a link to the piece.**

Please see my answer to Senator Whitehouse’s Question 5. My involvement with the Center of Vision and Values consists of the submission of two posts – one surveying the Supreme Court’s Commerce Clause jurisprudence and the other a brief remembrance of William F. Buckley, Jr. on the occasion of his death.

- b. The Center for Vision and Values advocates conservative positions on a wide range of issues. Based on your time on the board of directors, would you be able to reach conclusions and issue opinions as a judge that run contrary to the beliefs advocated by the Center for Vision and Values?**

Please see my answer to Question 3.a. and to Senator Whitehouse’s Question 5. To be clear, I have never served on the board of directors or had any role -- leadership, editorial, volunteer, or otherwise -- with the Center for Vision and Values. If I am so privileged as to be confirmed, I will fully, faithfully, and fairly apply the law to the case before me, consistent with Supreme Court and Third Circuit precedent.

4. You wrote a book review praising Rick Santorum’s 2005 book *It Takes a Family*, which argues that a prosperous family depends on “mom-and-dad” families

Do you believe that families including same-sex couples are equal to “mom-and-dad” families?

Please see my answer to Senator Whitehouse’s Question 8.

5. You argued against the constitutionality of the Affordable Care Act in a piece titled, “Is the health care law constitutional? No, strike it down.”

As a circuit court judge, will you follow precedents such as *NFIB v. Sebelius* when considering possible litigation regarding the ACA?

Yes. If I am so privileged as to be confirmed, I will faithfully follow *NFIB v. Sebelius* and any other Supreme Court or Third Circuit precedent regarding the Affordable Care Act.

Nomination of David James Porter
United States Circuit Court for the Third Circuit
Questions for the Record
Submitted June 13, 2018

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute 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.¹ Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.² 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.³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁴

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

As I understand the concept of implicit bias, it is possible that all people have implicit biases of some kind. I also believe that racism in various forms – both explicit and implicit – continues to exist in this country. It is therefore essential that judges, who are duty-bound to administer the law fairly, equally, and without regard to persons, are on the look-out for all forms of racism or bias in their views and in the litigation of cases before them.

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

Yes, the percentage of persons of color in custody in our nation's prisons exceeds the percentage of such persons in the national population.

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.

Yes. I have read at least the following articles, judicial opinions, or other publications/presentations that directly or indirectly concern implicit racial bias:

¹ JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), available at <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>.

² *Id.*

³ ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), available at <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

⁴ *Id.* at 8.

Hon. Katharine S. Hayden, Hon. Mark W. Bennett, Paulette Brown, Esquire, Hon. Bernice B. Donald, Rachel Godsil, *Implicit Bias in Jury Selection and in Other Aspects of the Criminal Justice System*, Panel Discussion at the Third Circuit Judicial Conference, April 19, 2017.

Hon. Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, Yale L. J. Forum, January 31, 2017.

Hon. Mark S. Cady, *A Justice System's Response to Implicit Bias*, presentation to the Iowa Defense Counsel Association Annual Convention (2017).

Jesse Singal, *Psychology's Racism-Measuring Tool Isn't Up to the Job*, The Cut, January 11, 2017.

Tom Bartlett, *Can We Really Measure Implicit Bias? Maybe Not*, Chronicle of Higher Education, January 5, 2017.

Jeff Guo, *Researchers have discovered a new and surprising racial bias in the criminal justice system*, Wash. Post, Feb. 24, 2016.

Nasgol Ghandnoosh, *Racial Disparities in Sentencing: Three Sources and Three Solutions*, ACSblog, February 17, 2015.

Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing* (Coase-Sandor Institute for Law & Economics Working Paper No. 661, 2013).

Pamela M. Casey, Roger K. Warren, Fred L. Cheesman, and Jennifer K. Elek, *Addressing Implicit Bias in the Courts*, 49 Court Review 64 (2012).

McCleskey v. Kemp, 481 U.S. 279 (1987).

U.S. v. Maximo Mateo-Medina, 845 F.3d 546 (3d Cir. 2017).

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.⁵ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.⁶

⁵ THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), available at http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

⁶ *Id.*

- a. Do you believe there is a direct link between increases of 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 these statistics regarding the relationship between incarceration rates and crime rates, and I have not developed any opinions on this issue.

- b. Do you believe there is a direct link between decreases of 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 answer to Question 2.a.

3. 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.

4. Since *Shelby County, Alabama v. Holder*, states across the country have adopted restrictive voting laws that make it harder, not easier for people to vote. From strict voter ID laws to the elimination of early voting, these laws almost always have a disproportionate impact on poor minority communities. These laws are often passed under the guise of widespread voter fraud. However, study after study has demonstrated that widespread voter fraud is a myth. In fact, an American is more likely to be struck by lightning than to impersonate someone voter at the polls.⁷ One study that examined over one billion ballots cast between 2000 and 2014, found only 31 credible instances of voter fraud.⁸ Despite this, President Trump, citing no information, alleged that widespread voter fraud occurred in the 2016 presidential election. At one point he even claimed—again without evidence—that millions of people voted illegally in the 2016 election.

- a. As a general matter, do you think there is widespread voter fraud? If so, what studies are you referring to support that conclusion?

I have not studied the national incidence of voter fraud and do not have any well-developed opinions or understanding on this issue. Moreover, this question bears on a political question and issues litigated in courts throughout the country. Accordingly, I cannot ethically opine on these matter. See Canon 3(A)(6) & Canon 5 of the Code of Conduct for United States Judges.

⁷ JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD, BRENNAN CENTER FOR JUSTICE 6 (2007), available at <http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf>.

⁸ Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, THE WASHINGTON POST, Aug. 6, 2014, available at https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.4da3c22d7dca.

- b. Do you agree with President Trump that there was widespread voter fraud in the 2016 presidential election?

Please see my answer to Question 4.a.

- c. Do you believe that restrictive voter ID laws suppress the vote in poor and minority communities?

Please see my answer to Question 4.a.

5. The color of a criminal defendant plays a significant role in capital punishment cases. For instance, people of color have accounted for 43 percent of total executions since 1976 and 55 percent of those currently awaiting the death penalty.⁹

- a. Do those statistics alarm you?

It would be improper for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts. Should I be so fortunate as to be confirmed, I will follow Supreme Court and Third Circuit precedent on capital cases, or cases bearing on the death penalty, fairly and without regard to person or race.

- b. Do you believe it is cruel and unusual to disproportionately apply the death penalty on people of color in compared to whites? Why not?

It would not be appropriate for me to express any views on this question because a similar issue might come before me as a district judge, should I be fortunate enough to be confirmed. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”). Before determining whether or how the Eighth Amendment’s prohibition on cruel and unusual punishments applies to this question, I would want the benefit of a developed factual record, the parties’ briefs and amicus briefs, thorough review of all relevant Supreme Court and Third Circuit precedent, oral argument, and consultation with my colleagues.

- c. The color of the victim also plays an important role in determining whether the death penalty applies in a particular case. White victims account for about half of all murder victims, but 80 percent of all death penalty cases involve white victims. If you were a judge, and those statistics were playing out in your courtroom, what would you do?

⁹ The American Civil Liberties Association, Race and the Death Penalty, <https://www.aclu.org/other/race-and-death-penalty> (Last visited June 13, 2018).

Please see my answer to Question 5.b. If I am so privileged as to be confirmed, I will carefully scrutinize the facts and proceedings in each death penalty case for errors or bias, consistent with Supreme Court and Third Circuit precedent.