

**Questions for the Record**  
**Senator Ted Cruz**

**Responses of Michelle T. Friedland**  
**Nominee, United States Circuit Judge for the Ninth Circuit**

**Describe how you would characterize your judicial philosophy, and identify which US Supreme Court Justice’s judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.**

Response: If confirmed, I would not come to the bench with any overriding judicial philosophy. Instead, my approach to every case would be to apply precedent from the Supreme Court and the Ninth Circuit neutrally and carefully to the facts in front of me. I would treat all counsel and all parties with respect, and I would endeavor to ensure that all parties felt they had a fair hearing even if they did not ultimately prevail. Because I would apply all Supreme Court precedent regardless of which Justice authored the opinion for the Court, I do not expect that my decisions would reflect the approach of any single Justice more than others.

**Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?**

Response: If confirmed, I faithfully would apply Supreme Court and Ninth Circuit precedent when interpreting the Constitution. The Supreme Court has emphasized that evidence of “*the public understanding*” of a constitutional provision “in the period after its . . . ratification” is a “critical tool of constitutional interpretation.” *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (emphasis in original).

**If a decision is precedent today while you’re going through the confirmation process, under what circumstance would you overrule that precedent as a judge?**

Response: If confirmed, I always would be bound by Supreme Court precedent. Panels of the Ninth Circuit are also bound by prior decisions of the Ninth Circuit unless those decisions are “clearly irreconcilable” with a subsequent *en banc* or Supreme Court decision. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*). Even when sitting *en banc*, the court should depart from one of its prior decisions only in very limited circumstances, such as when doing so “is necessary to secure or maintain uniformity of the court’s decisions,” Federal Rule of Appellate Procedure 35(a)(1), or when “an opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity,” Ninth Circuit Rule 35-1.

**Explain whether you agree that “State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).**

Response: In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Supreme Court held that the San Antonio Metropolitan Transit Authority was not immune from minimum-wage and overtime requirements of the federal Fair Labor Standards Act. In other cases, the Supreme Court has held unconstitutional federal requirements imposed on States. See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). If confirmed, I faithfully would apply these Supreme Court precedents, just as I would all Supreme Court and Ninth Circuit precedent.

**Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?**

Response: In *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court invalidated federal statutes as exceeding Congress's power under the Commerce Clause. In doing so, the Court emphasized the non-economic nature of the conduct that was regulated by the statutes at issue. See *Morrison*, 529 U.S. at 610-11, 613; *Lopez*, 514 U.S. at 560-61, 566-67. The Supreme Court did not hold, however, that non-economic activity never could be regulated pursuant to Congress's Commerce Clause authority. In his opinion concurring in the judgment in *Gonzalez v. Raich*, 545 U.S. 1 (2005), Justice Scalia stated that "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37 (Scalia, J., concurring in judgment). If confirmed, I faithfully would apply Supreme Court and Ninth Circuit precedent regarding the Commerce Clause, just as I would all Supreme Court and Ninth Circuit precedent.

**What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?**

Response: In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court held that the President's ability to issue an executive order "must stem either from an act of Congress or from the Constitution itself." *Id.* at 585. Justice Jackson's concurring opinion in *Youngstown* provided a "tripartite scheme" that the Supreme Court since has recognized "provides the accepted framework for evaluating executive action in this area." *Medellin v. Texas*, 552 U.S. 491, 524 (2008). If confirmed, I faithfully would apply Supreme Court and Ninth Circuit precedent regarding executive orders and actions, just as I would all Supreme Court and Ninth Circuit precedent.

**When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?**

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court instructed that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty." *Id.* at 720-21 (internal quotation marks and citations omitted). If confirmed, I faithfully would apply Supreme Court and Ninth Circuit precedent regarding fundamental rights, just as I would all Supreme Court and Ninth Circuit precedent.

**When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?**

Response: The Supreme Court has applied strict scrutiny under the Equal Protection Clause to classifications, such as those based on race, that are “so seldom relevant to the achievement of any legitimate state interest” that their use likely reflects discriminatory stereotyping. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). The Supreme Court has applied intermediate scrutiny to classifications, such as those based on gender, that are relevant in some circumstances but “frequently bear[] no relation to ability to perform or contribute to society” so “generally provide[] no sensible ground for differential treatment.” *Id.* at 440-41. If confirmed, I faithfully would apply Supreme Court and Ninth Circuit precedent regarding when heightened scrutiny applies, just as I would all Supreme Court and Ninth Circuit precedent.

**Do you “expect that [15] years from now, the use of racial preferences will no longer be necessary” in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).**

Response: The Supreme Court predicted in *Grutter v. Bollinger*, 539 U.S. 306 (2003), that racial preferences would no longer be necessary in public higher education twenty-five years from the time of that decision. *Id.* at 343. In *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), the Supreme Court further articulated standards for evaluating the constitutionality of the use of race as a factor in public university admissions. Regardless of any expectations I may or may not have, if confirmed, I faithfully would apply *Grutter* and *Fisher*, just as I would all Supreme Court and Ninth Circuit precedent.