Questions for the Record for Judge Neil Gorsuch
Senator Richard Blumenthal
March 24, 2017

1. During his hearing, Chief Justice Roberts said, "I believe that the liberty protected by the Due Process Clause is not limited to freedom from physical restraint, that it includes certain other protections, including the right to privacy."

    a. **Do you, like Chief Justice Roberts, believe that the liberty protected by the Due Process Clause includes the right to privacy?**

RESPONSE: As I testified, I agree that the Supreme Court has long recognized that the liberty prong of the Due Process Clause protects privacy interests in a variety of ways.

    b. **When I asked whether you agreed with Chief Justice Roberts' stated agreement with the result in *Brown v. Board of Education*, you said, "There is no daylight here." Is there any "daylight" between your views and his stated belief that the liberty protected by the Due Process Clause includes the right to privacy?**

RESPONSE: I am unaware of daylight between my discussion of the Supreme Court's precedents and the Chief Justice's.

2. In your book, *The Future of Assisted Suicide and Euthanasia*, you wrote that "one might ask: . . . How does substantive due process differ from outright judicial choice, or what is sometimes derisively labeled 'legislating from the bench'? . . . [D]oes . . . holding that the clause is also the repository of other substantive rights not expressly enumerated in the text of the Constitution or its amendments . . . stretch the clause beyond recognition?"
    a. **How would you answer these questions**?

RESPONSE: I did not attempt to answer these questions in my book; they were outside the scope of that project, which took existing legal doctrines as given.

3. During your hearing, you told me that you had "gone as far as I can go ethically, with the canons that restrict me, about speaking on cases. I cannot talk about specific cases, and I cannot get involved in politics."
    a. **Were you acting consistently with your ethical obligations when you told me *Brown v. Board of Education* "corrected one of the most deeply erroneous interpretations of law in Supreme Court history," that it was "a correct application of the law of precedent," and that there was no "daylight" between you and Chief Justice Roberts' stated agreement with the holding?**

RESPONSE: Respectfully, I believe this captures only some of my testimony, and I believe my testimony was consistent with my ethical obligations.

b. **If so, when I discussed cases other than *Brown* with you, why would you not say whether you agreed with any other case or thought any other case was correct?**

RESPONSE: As we discussed, my personal views are not relevant to my job as a judge. Expressing personal views would risk sending a mistaken signal to litigants that I would decide their cases on related matters on a basis other than the law and facts. It would also risk impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

c. **Was Chief Justice Roberts acting consistently with his ethical obligations when he said at his hearing that he agreed with the results in *Brown* and in *Griswold v. Connecticut*?**

RESPONSE: Respectfully, as I explained, I speak only for myself. I do not think it proper for me to attempt to characterize or comment on another judge's testimony. I do not and have not suggested that anyone has acted unethically.

4. During your hearing, you said that *Brown v. Board of Education* "was a seminal decision that got the original understanding of the Fourteenth Amendment right."

a. **Is *Brown* an originalist opinion?**

RESPONSE: As I testified, *Brown* corrected a deeply erroneous decision and vindicated a dissent by the first Justice Harlan that correctly identified the original meaning of the Equal Protection Clause.

b. **Did the decision in *Loving v. Virginia* get the original understanding of the Fourteenth Amendment right?**

RESPONSE: As I testified, *Loving* involves the Supreme Court's application of the principle recognized in *Brown* that all persons are created equal, and it is entitled to all of the respect due a precedent of the Supreme Court.

c. **Did the decision in *United States v. Virginia* get the original understanding of the Fourteenth Amendment right?**

RESPONSE: As I testified, *United States v. Virginia* involved the Supreme Court's application of the principle that all persons are created equal, and it is entitled to all of the respect due a precedent of the Supreme Court.

d. **Did the decision in *Romer v. Evans* get the original understanding of the Fourteenth Amendment right?**

RESPONSE: *Romer v. Evans* involved the Supreme Court's application of Fourteenth Amendment principles, and it is entitled to all of the respect due a precedent of the Supreme Court.

e. **Did the decision in *District of Columbia v. Heller* get the original understanding of the Second Amendment right?**

RESPONSE: As I testified, *Heller* involved the Supreme Court's interpretation of the Second Amendment to confer an individual right to keep and bear arms. It is entitled to all of the respect due a precedent of the Supreme Court.

5. During your hearing, you said that *Brown v. Board of Education* was "a correct application of the law of precedent."

a. **What did you mean by that?**

RESPONSE: As I explained, precedent is an important part of the rule of law in this country. Precedent has both intrinsic value, representing our collective history as a people, and instrumental value, enhancing the determinacy of the law. In the *Law of Judicial Precedent*, together with judges from around the country appointed by Presidents of both parties, we discussed a mainstream view on the application of judicial precedent. As outlined in that book, judges consider a number of factors in analyzing precedent, such as the age, reliance interests, and the workability of the precedent, among other things. *Brown* applied the law of precedent to correct one of the darkest stains in our constitutional history—*Plessy v. Ferguson*. The Equal Protection Clause promises equal protection of the laws to all persons. As Justice John Marshall Harlan recognized in his dissent in *Plessy*, the words of the Clause do not mean allowing separation to advance one particular race. They mean equal.

b. **Was the decision in *Griswold v. Connecticut* a correct application of the law of precedent?**

RESPONSE: As I testified, *Griswold v. Connecticut* guarantees married couples the use of contraceptives in the privacy of their own home. It is more than 50 years old, with obvious reliance interests and has been repeatedly reaffirmed—factors relevant to the weight of a precedent. As I testified, "I do not see a realistic possibility that a State would pass a law attempting to undo that."

c. **Was the decision in *Planned Parenthood v. Casey* a correct application of the law of precedent?**

RESPONSE: As we discussed, *Planned Parenthood v. Casey* reaffirmed the right to abortion as recognized in *Roe*. *Casey* is 25 years old, with obvious reliance interests, and has been reaffirmed—factors relevant to the weight of precedent.

d. **Like *Brown*, *Lawrence v. Texas* overturned a previous decision of the Supreme Court. Was the decision in *Lawrence* a correct application of the law of precedent?**

RESPONSE: As we discussed, *Lawrence v. Texas* is nearly 14 years old, with obvious reliance interests, and has been reaffirmed—factors relevant to the weight of precedent.

e. **During your hearing, you described *Plessy v. Ferguson* as "one of the most deeply erroneous interpretations of law in Supreme Court history." Was the decision in *Bowers v. Hardwick* a deeply erroneous interpretation of law?**

RESPONSE: As we discussed, in *Lawrence v. Texas*, the Supreme Court held that *Bowers* was incorrect when it was decided.

6. During your hearing, you said that *Eisenstadt v. Baird* "was an application of settled equal protection principles."
    a. **Was *Romer v. Evans* an application of settled equal protection principles?**
    b. **Was *Planned Parenthood v. Casey* an application of settled due process principles?**
    c. **Was *Lawrence v. Texas* an application of settled due process principles?**

RESPONSE: In *Romer v. Evans*, the Court held that a Colorado law violated the Fourteenth Amendment. In *Planned Parenthood v. Casey*, the Court stated that constitutional protection of the woman's decision to terminate a pregnancy derives from the Due Process Clause of the Fourteenth Amendment. And in *Lawrence v. Texas*, the Court rested on the liberty prong of the Due Process Clause. These decisions are entitled to all the respect due precedents of the Supreme Court.

7. During your hearing, you were willing to discuss how some of the factors involved in looking at precedent applied to prior cases. For example, you told me that when it comes to *Griswold v. Connecticut*, "the reliance interest surrounding it are obvious and many and great."
    a. **Are there obvious and many and great reliance interests surrounding *Loving v. Virginia*?**
    b. **Are there obvious and many and great reliance interests surrounding *Roe v. Wade* and *Planned Parenthood v. Casey*?**
    c. **Are there obvious and many and great reliance interests surrounding *Lawrence v. Texas*?**
    d. **Are there obvious and many and great reliance interests surrounding *Obergefell v. Hodges*?**
    e. **If your answer to part (a), (b), (c), or (d) of this question is anything other than "yes," why is that answer different from what you were willing to say of *Griswold*?**

RESPONSE: I agree that there are reliance interests implicated by each of those precedents.

8. In 1996, you were a named counsel on an *amicus* brief to the Supreme Court in *Washington v. Glucksberg*. The brief indicated that the Court should consider the "problems of legitimacy and line-drawing inherent in the Court's abortion rulings." I understand that you were writing a brief on behalf of a client and am not attributing the language to your personal beliefs, but I would like to know what you meant to convey with that argument.

a. **What did you mean by "problems of legitimacy . . . inherent in the Court's abortion rulings"?**
b. **What did you mean by "problems of . . . line-drawing inherent in the Court's abortion rulings"?**

RESPONSE: This sentence fragment is taken from a detailed and long brief prepared in my role as an advocate for a client, the American Hospital Association. That brief in full conveys the views of my client only.

9. You joined an opinion in *Allstate Sweeping LLC v. Black*, 706 F.3d 1261, 1268 (10th Cir. 2013) holding that a corporation could not assert a hostile work environment claim under Section 1981 and the Equal Protection Clause because it could not show that it had the subjective feeling of being "offended." The opinion included the following language: "[I]t is not clear to us that an artificial entity could ever prevail on a hostile-work-environment claim. . . . Being offended presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience."
    a. **How is it possible for an artificial entity to express a sincere religious belief, as you held in *Hobby Lobby v. Sebelius*, but not have the feeling or thought of being offended?**

RESPONSE*: Allstate* involved a hostile-work-environment claim brought under 42 U.S.C. § 1981 and the Equal Protection Clause, whereas *Hobby Lobby* involved a claim under the Religious Freedom Restoration Act (RFRA). A hostile-work-environment claim requires proof that the "plaintiff was *offended*." A claim under RFRA has no such element. Rather, RFRA requires that "a person" be engaged in the "exercise of religion." The Dictionary Act, which courts must look to when a term is otherwise undefined, defines a "person" to include corporations. In *Hobby Lobby*, the government conceded and the Supreme Court ultimately held that the corporate form alone does not prevent such exercise. For example, many churches and religious groups are organized as corporations.

10. In your concurrence in *Hobby Lobby v. Sebelius*, you led with the statement, "All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others."
    a. **If an adoption agency seeks a RFRA objection from a statute that requires such agencies to be willing to place children with same-sex couples, does that implicate the "problem of complicity"?**

    b. **If a restaurant owner refuses to serve a same-sex couple because of a belief that homosexuality is sinful, does that implicate the "problem of complicity"?**

RESPONSE: Respectfully, these questions implicate matters that are live with dispute. As we discussed, I cannot express a view about a case or controversy that I might have to decide. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

11. In *Hobby Lobby v. Sebelius*, the opinion you joined held that the Affordable Care Act's birth control mandate was not the "least restrictive means" of accomplishing the government objective at issue because the government was able to provide the same accommodation to for-profit companies as it provided to religious employers.
    a. **What is your understanding of the state of the law regarding whether the "least restrictive means" the government must use needs to be practically possible or politically feasible? Could Congress's theoretical ability to pass a new law, or to appropriate new funds, to serve a government interest qualify even if there was no indication that Congress had moved to do so?**

RESPONSE: The Religious Freedom Restoration Act (RFRA) requires the government to identify the least restrictive means of furthering a compelling governmental interest before it may substantially burden the exercise of a sincerely held religious belief. The Supreme Court in *Hobby Lobby* explained that "[t]he least restrictive means standard is exceptionally demanding," and proceeded to explain the state of the law on that standard. *See* 134 S. Ct. 2780-83.

    b. **Please explain your understanding, for purposes of the Religious Freedom Restoration Act, of what constitutes a "compelling" government interest to act, as opposed to when a government interest is merely "legitimate" or "important."**

RESPONSE: RFRA codified the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). As the Supreme Court has explained, that test requires the Court to look "beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

12. During your hearing, when asked about your 2005 *National Review* article "Liberals'N'Lawsuits," you told Senator Coons that you were making two points in writing the article: first, that "one of the beauties of our courts is that they can vindicate civil rights for minorities," but second, that "there are some comparative disadvantages to resolving policy matters for courts." In the article, you refer to "gay marriage" as an item on a liberal "social agenda."

    a. **Did the Supreme Court's decision in *Obergefell v. Hodges* concern the vindication of a civil rights matter or did it concern the resolution of a policy matter?**

RESPONSE: In *Obergefell v. Hodges*, the Supreme Court held that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." 135 S. Ct. 2584, 2604 (2015). *Obergefell* is a precedent of the Supreme Court entitled to all the weight due such a precedent.

13. In your 2005 *National Review* article "Liberals'N'Lawsuits," you wrote, "Finally, in the

greatest of ironies, as Republicans win presidential and Senate elections and thus gain increasing control over the judicial appointment and confirmation process, the level of sympathy liberals pushing constitutional litigation can expect in the courts may wither over time, leaving the Left truly out in the cold." That seems at odds with your repeated statements during your hearing that judges are nonpolitical.

a. **Why would Republican control of the presidency and the Senate lead to the appointment and confirmation of judges who are unsympathetic to "liberals pushing constitutional litigation"?**

RESPONSE: In my 2005 National Review Online column, written before I became a judge, I offered an assessment as a commentator of a Washington Post column written by David von Drehle, a self-described liberal commentator. As I explained in my column, Mr. von Drehle argued that democratic institutions are often best suited for deciding important social issues. Through debate and compromise, legislators are able to make good policy decisions that are most likely to build strong and enduring consensus. At the same time, I also argued that courts are very important places for the vindication of individual and civil rights. This is because courts are the place where unpopular voices get heard the same as popular voices. They are also where the best arguments prevail, without compromise, regardless of whether those arguments are politically popular.

During my time on the bench, I have found my colleagues on the Tenth Circuit to be collegial and committed to the rule of law. I do not view my colleagues as Republican judges or Democratic judges, but as judges. My record as a judge is consistent with this: according to my clerks, 97 percent of the 2,700 cases I have decided were decided unanimously, and I have been in the majority 99 percent of the time. In those rare instances when I have dissented, my clerks inform me I am about as likely to dissent from judges appointed by a Republican as from judges appointed by a Democrat. And according to the Congressional Research Service, my opinions have attracted the fewest dissents of any Tenth Circuit judge it studied. That is my record as a judge based on ten years on the bench.

14. You said at your hearing that an *en banc* hearing is "an extraordinary thing. We probably hear between zero and three *en bancs* a year over the course of my time." You also said that "about one of every five *en bancs*, about 20 percent of *en bancs* in our court are *sua sponte*. It is not unusual." Assuming that your descriptions are roughly accurate, the Tenth Circuit has heard a maximum of approximately 30 cases *en banc* during your tenure, with approximately six of them being *sua sponte*.
    a. **Why did you find the error you claimed was made by the panel opinion in *Planned Parenthood Association of Utah v. Herbert* rose to the level of exceptionalism shown by the six *sua sponte en banc* cases – six out of tens of thousands of cases – the Tenth Circuit has heard over the past decade?**

RESPONSE: As we discussed, the key issue presented by that case was an issue that cuts to the heart of an appellate court's role, namely, the standard of review it must apply when a trial court's factual findings are challenged on appeal. Normally, an appellate court must affirm a trial court's factual findings unless the trial court committed clear error—a demanding standard. In my view—a view shared by the three other judges who voted for rehearing en banc in that

case and one who did not—the panel decision deviated from that rule. It seems important to me that we abide our standards of review and do not pick and choose the areas of law to start abandoning those standards.

15. You joined an opinion in *Druley v. Patton*, 601 Fed. Appx. 632, 635 (10th Cir. 2015) that included the statement "To date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims." You stated at your hearing that you wrote a separate concurrence in *Gutierrez-Brizuela v. Lynch* because you saw "an equal protection concern." You also stated at your hearing that you write separate concurrences "when I see a problem [to] raise my hand and tell my bosses I see an issue here."
    a. **Did you consider writing a concurrence in *Druley v. Patton* to raise as "an equal protection concern" or "an issue" that Tenth Circuit precedent had not recognized transgender individuals as belonging to a suspect class for Equal Protection purposes? If not, why not? If you considered and decided not to, why did you make that decision?**

RESPONSE: During my time as a judge, I have decided over 2,700 cases and do not recall every instance in which I considered writing separately or the reasons for not doing so.

    b. **Did you call for a *sua sponte* rehearing *en banc* to determine whether the Tenth Circuit should recognize transgender individuals as belonging to a suspect class for Equal Protection purposes? If not, what made this case a less appropriate subject for rehearing than *Planned Parenthood Association of Utah v. Herbert*?**

RESPONSE: Respectfully, I am not at liberty to discuss the internal deliberations of my court.

16. During your hearing, I asked you whether you had spoken with representatives of the Heritage Foundation about various topics. You said, "To my knowledge, Senator, from the time of the election to the time of my nomination, I have not spoken to anyone that I know of from Heritage." As you know, you were included on President Trump's list of potential Supreme Court nominees—reportedly assembled with the assistance of the Heritage Foundation—long before last year's election.
    a. **Did you have any communications with representatives or employees — including employees on paid or unpaid leave — of the Heritage Foundation or the Federalist Society in 2016 or 2017?**

    b. **If so, what did you discuss with such representatives or employees?**

    c. **Did you discuss *Roe v. Wade*, abortion, reproductive rights, or the right to privacy with such representatives or employees? Please describe the nature and content of the conversation on any of these topics.**

    d. **Were any of the individuals who helped you prepare for your confirmation hearings employees—including employees on paid or unpaid leave—of the Heritage Foundation? Were any employees of the Heritage Foundation in the**

last year?

e. **Were any of the individuals who helped you prepare for your confirmation hearings employees—including employees on paid or unpaid leave—of the Federalist Society? Were any employees of the Federalist Society in the last year?**

RESPONSE: I have responded to many questions about my experiences in the nomination and confirmation process, both in the Senate Judiciary Committee Questionnaire and at the hearing. Various people have provided me advice, including Senators, Administration and transition personnel, former law clerks, and friends and family. Some of them are affiliated with the Federalist Society and some are affiliated with the American Constitution Society, societies that provide, among other things, valuable forums for civil discussion and debate on legal questions. As I explained at the hearing, I have made no commitments to anyone on matters that might come before me as a judge.

17. During your hearing, Senator Feinstein referenced a document that was turned over to the Committee as part of your confirmation process. The exchange appears on page 25-26 of the hearing transcript. The document mentioned by Senator Feinstein was a set of talking points prepared for Attorney General Alberto Gonzales on the subject of torture. The document was discussed in a *Washington Post* article from March 15, 2017. You indicated you had not seen the document.
    a. **How many people helped to prepare you for your confirmation hearings?**

RESPONSE: Please see the response to Question 16.

b. **Did any of those people indicate in any way that you might be asked about the Gonzales talking points subsequently referenced by Senator Feinstein?**

RESPONSE: I understand that the Department of Justice produced or allowed access to over 178,000 pages of documents from my tenure as the Principal Deputy Associate Attorney General in 2005 and 2006. During my testimony, Senator Feinstein asked me a question regarding a specific document. As I stated during the hearing, I generally do not feel comfortable commenting on documents that are not in front of me, especially documents from over a decade ago. Senator Feinstein graciously agreed to provide me the document to allow me the opportunity to review it before questioning me about it later in the hearing. Upon review, I recognized the particular document as one put before me in preparation for my testimony. Various senators then proceeded to ask me questions about the document which I addressed at that time.

c. **Did anybody indicate that you might be asked about torture-related materials you worked on during your time in the George W. Bush Administration?**

RESPONSE: Respectfully, it is unclear what materials this question references. In preparation for my testimony before the Judiciary Committee, I was briefed on various topics from my time as Principal Deputy Associate Attorney General in 2005 and 2006, including my

work on the Detainee Treatment Act.

18. During your hearing, Senators Feinstein and Durbin referenced email you sent during your time in the Bush Administration in which you discussed reasons to have President Bush issue a signing statement when signing the Detainee Treatment Act. These emails were the focus of—and were linked to in—a March 15 *New York Times* article. They were also mentioned in the Times and other publications over the following few days. In fact, a *Times* headline from March 19, 2017 article bore the headline, "Emails Hint at Court Pick's View of Presidential Power." You indicated at your hearing that you were not familiar with these emails.

    a. **Did anybody involved in preparing your for your confirmation hearings indicate that you might be asked about this email?**

RESPONSE: Please see response to Question 17(b).