Questions for the Record for Senator Patrick Leahy, Senate Judiciary Committee, Hearing on the Nomination of The Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States March 24, 2017

1. During your hearing, I asked you whether the First Amendment prohibits the President from imposing a blanket religious litmus test for entry into this country. I was disappointed that you refused to answer this basic constitutional question. You instead stated that this relatively straight-forward tenet of constitutional law "is currently being litigated actively" and you did not want to discuss further. In my view, this question is no different than whether the Constitution permits a police officer to compel a warrantless search of one's home without an investigative justification. The question may be litigated at some point, but I suspect you would not hesitate to answer the question now.

   I also asked Jameel Jaffer, who appeared as an outside witness in connection with your nomination, whether the First Amendment permits a religious litmus test for entry into this country. He responded with an unequivocal: "Of course not." Mr. Jaffer then stated that the "bigger concern" is that you refused to answer this question. I agree.

   Does the Constitution allow the President to impose a religious litmus test for entry into the United States?

RESPONSE: As we discussed, it would not be proper for a nominee to express views that touch on or could be perceived as touching on claims made in pending or impending litigation. *See, e.g.*, *Washington v. Trump* (9th Cir. 2017). Respectfully, and as we discussed, I believe this question does that. To comment further 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.

2. During your hearing, I asked you whether there was any circumstance in which the President could violate a statute passed by Congress to authorize torture or warrantless surveillance of Americans. You declined to answer my question. You stated: "[W]e have courts to decide these cases for a reason, to resolve these disputes."[1] I am troubled that you declined to express any opinion about whether the President has the power to violate laws passed by Congress.

   a. Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[2] In a time of war, do you believe that the

[1] Gorsuch Hearing Transcript Day 3, March 22, 2017, at 48-49.
[2] *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution?

RESPONSE: As we discussed, no person and no institution is above the law, and Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952), provides an instructive tripartite framework for evaluating presidential power. In the first category, when "the President acts pursuant to an express or implied authorization of Congress," his "authority is at its maximum." *Id.* at 636. With congressional authorization, the President's actions enjoy "the strongest of presumptions and the widest latitude of judicial interpretation" attach. *Id.* at 637. In the second category, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers." *Id.* Finally, in the third category, the President acts contrary to the express or implied will of Congress. It is here that the President's "power is at its lowest ebb." *Id.* at 637–38.

b. In response to my question, you said: "I would approach it as a judge through the lens of the *Youngstown* analysis." To be clear, if confirmed, would you follow the framework outlined in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*[3] when deciding cases regarding the scope of the presidential power in wartime?

RESPONSE: As we discussed, Justice Jackson's *Youngstown* concurrence sets forth a widely accepted framework instructive in evaluating the scope of presidential power.

3. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers."[4] Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?

RESPONSE: I agree that *Hamdan v. Rumsfeld* recognized limitations on the power of the President. It is a precedent of the Supreme Court entitled to all the weight due such a precedent.

4. In *Hamdan v. Rumsfeld*, the Supreme Court also made clear that the Geneva Conventions applies to all enemy combatants detained by the United States. Do you agree that Common Article III of the Geneva Conventions applies to those fighting on behalf of non-state actors in any armed conflict?

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[3] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[4] *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.").

RESPONSE: I agree that *Hamdan v. Rumsfeld* recognized limitations on the power of the President. It is a precedent of the Supreme Court entitled to all the weight due such a precedent.

5. Many are concerned that the White House's denouncement of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first Muslim ban, there were reports of Federal officials refusing to comply with court orders.

    a. If a President refuses to comply with a court order, how should the courts respond?

    b. Is a President who refuses to comply with a court order a threat to our constitutional system of checks and balances?

RESPONSE: As we discussed at the hearing, one test of the rule of law is whether the government can lose in its own courts and accept the judgment of those courts. The refusal of the other two branches to comply with a court order implicates the Constitution's scheme of separate and diffuse power and authorities. It also implicates the independence of the judiciary. I expect the coordinate branches of government to respect the independent judiciary, and I have not hesitated and will not hesitate to rule accordingly as a judge and defend the independent judiciary.

6. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.[5] Do you agree with that view? Does the Constitution permit discrimination against women?

RESPONSE: In *Mississippi Univ. for Women v. Hogan* (1982) and *J.E.B. v. Alabama ex rel. T.B.* (1994), the Supreme Court held that state practices discriminating on the basis of sex are subject to a heightened level of scrutiny under the Equal Protection Clause. This scrutiny is often referred to as "intermediate scrutiny." In *United States v. Virginia (VMI)* (1996), the Court emphasized that heightened scrutiny requires an "exceedingly persuasive justification" for sex-based classification.

7. Was Justice Scalia right when he said that the 2003 decision striking down a ban on consensual sex between men was part of the "homosexual agenda," which he said was trying to "eliminat[e] the moral opprobrium that has traditionally attached to homosexual conduct"?[6]

RESPONSE: Respectfully, the holding of the majority in *Lawrence v. Texas* is the controlling precedent of the United States Supreme Court, not the dissent.

8. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he

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[5] http://www.huffingtonpost.com/2011/01/03/scalia-women-discrimination-constitution_n_803813.html

[6] *Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, J., dissenting).

wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home." Do you believe the Constitution protects that personal autonomy as a fundamental right?

RESPONSE: As we discussed, the Constitution protects a variety of rights touching on such matters. As I said at the hearing, "[p]rivacy is in a variety of places in the Constitution. The first and most obvious place, back to the Bill of Rights, is the Fourth Amendment, the right to be free from unreasonable searches and seizures in your homes, papers, and effects." Privacy is also protected in the Third Amendment and in the First Amendment, whose protections for "the right to free expression" and "the freedom of religious belief and expression" both "require[] a place of privacy." With regard to the Fourteenth Amendment, the Supreme Court "has held that the liberty prong of the Due Process Clause protects privacy in a variety of ways having to do with child rearing and family decisions, going back to *Meyer* [*v. Nebraska*], which involved parents who wished to have the freedom to teach their children German at a time it was unpopular in this country, and *Pierce* [*v. Society of Sisters*], the right of parents to send their children to a parochial school if they wish."

9. You are a proponent of the view that the Constitution should be interpreted based on the original public meaning of its text. When faced with a case where precedent points clearly toward one outcome, but your understanding of the Constitution's original public meaning points in the opposite direction, which side wins?

RESPONSE: As we discussed, precedent is the anchor of the law. In the *Law of Judicial Precedent*, judges from around the country appointed by Presidents of both parties and I offered a mainstream account about the law of judicial precedent. As outlined in that book and as we discussed at the hearing, judges consider a number of factors in analyzing precedent such as the age, reliance interests, and workability of the precedent. In assessing any case, a good judge starts with a presumption in favor of precedent.

10. Since I have been voting on Supreme Court nominations, I can think of only three nominees who were originalists in the same way you have been described: Justice Scalia, Judge Bork, and Justice Thomas.

    a. How do you compare your approach to interpreting the Constitution to those jurists?

    b. In what ways does your judicial philosophy differ from theirs?

RESPONSE: I am hesitant to suggest that originalism is associated with only certain judges or factions. As I stated at the hearing, labels are sometimes used to dismiss or ignore underlying ideas or to mistakenly suggest certain views belong to a particular ideology or party. Indeed, as Justice Elena Kagan has explained, in a real sense, "we are all originalists." Respectfully, at the hearing I attempted to convey fully how I approach the task of judging, including through the examination of the law, precedent, and the respectful exercise of the judicial process. I also respectfully refer you to Question 25(a) of Senator Feinstein's questions for the record.

11. Many originalists like Justices Scalia and Thomas, and Judge Bork, have been critical of decisions like *Roe* and *Griswold* that recognized and relied on the right to privacy. They have argued that it was not explicitly in the Constitution, and so it is not on a par with specifically enumerated rights such as freedom of speech or trial by jury. But as Justice Breyer told this Committee, the Ninth Amendment "says do not use that fact of the first eight to [conclude] that there are no others."[7]

    a. Does the Ninth Amendment mean that the Constitution protects unenumerated rights, including the right to privacy?

RESPONSE: As we discussed during the hearing, *Roe* and *Griswold* are precedents of the United States Supreme Court entitled to all the weight due such precedents. Please also see the response to Question 8 with respect to privacy and our discussions at the hearing on those particular precedents, and please also see the response to Question 5(b) of Senator Blumenthal's questions for the record.

    b. When is it appropriate for the Court to recognize unenumerated rights?

RESPONSE: In a number of opinions over many years, including many opinions we discussed at length at the hearing, the Supreme Court has recognized a number of unenumerated rights. These opinions are precedents of the Supreme Court entitled to all the weight due to such precedents. See for example the response to Question 8 above. To the extent your question implicates issues that may come before me as a judge in the future, it would not be proper for me to offer further opinions. 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.

12. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress's findings in reaching its decision. As Justice Ginsburg's dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was "extraordinary" and the Court erred "egregiously by overriding Congress' decision."[8] When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

RESPONSE: Respectfully, *Shelby County v. Holder* is a precedent of the Supreme Court entitled to all the weight due such a precedent, and it would not be proper for me as a sitting judge to critique its reasoning in these proceedings. As we discussed, to do so would risk

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[7] Nomination of Stephen G. Breyer, United States Senate Committee on the Judiciary, Hearing Transcript, at 268.

[8] *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2652 (2013) (Ginsburg, J., dissenting).

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.

13. When I asked you about *Citizens United* and concerns about corruption, you said, "I think there is lots of room for legislation in this area that the Court has left. The Court indicated that if, you know, proof of corruption can be demonstrated, that a different result may be obtained on expenditure limits." You then added, "And I think there is ample room for this body to legislate, even in light of *Citizens United*, whether it has to do with contribution limits, whether it has to with expenditure limits, or whether it has to do with disclosure requirements." However, *Citizens United* states that "we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." In the Bullock case in 2012, the same five justices who decided Citizens United overturned a Montana Supreme Court ruling, and refused even to consider a record showing that "independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana."

    a. What "room for legislation" were you referring to?

    b. What types of expenditure limits would be consistent with *Citizens United*? Or did you misstate the holding of *Citizens United*?

RESPONSE: As we discussed at the hearing, the Supreme Court has long recognized Congress's authority to legislate regarding campaign contributions, expenditures, and disclosures, subject to the constraints of the First Amendment. For example, in *Buckley v. Valeo*, the Court held that "contribution and expenditure limitations both implicate fundamental First Amendment interests," and that such restrictions therefore must pass heightened scrutiny. 424 U.S. 1, 23 (1976). At the same time, the Court recognized that one governmental interest sufficient to justify restrictions on contributions and expenditures is the government's interest in combatting *quid pro quo* corruption, or the appearance of such corruption. In *Buckley*, the Court upheld certain contribution limitations enacted by Congress as furthering the compelling interest in combatting corruption. Meanwhile, the Court concluded that certain limitations on independent expenditures by individuals did not sufficiently advance the compelling interest to justify the heavy restriction on speech. *Citizens United* expanded on this point, holding that certain "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." 558 U.S. 310, 314 (2010). Although the Court in *Citizens United* found that the Government had not shown a compelling interest in the regulation of certain independent expenditures, the Court has not expressly foreclosed any regulation of political expenditures that might implicate the Government's interest in preventing *quid pro quo* corruption, or the appearance thereof. The Supreme Court also has recognized Congress's authority to enact disclosure requirements relating to the political process. In *Buckley*, the Court identified three governmental interests that can be served by disclosure provisions: (i) equipping the electorate with information as to where political campaign contributions come from and how they are spent; (ii) deterring actual corruption and avoiding the appearance of corruption by exposing large contributions and expenditures to publicity; and (iii) gathering data to detect violations of the contribution limitations. 424 U.S. at 66-68. The Court noted that "disclosure

requirements – certainly in most applications – appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68. The Court upheld certain disclosure and disclaimer requirements in *Citizens United*. 558 U.S. at 319.

14. The Supreme Court is a separate and co-equal branch of government, but that does not mean it is not subject to important Congressional oversight. For example, Congress appropriates the Court's budget and requires that justices file financial disclosure reports annually. But justices are not required to adhere to the same ethics rules as Members of Congress and the President's cabinet, this includes adhering to travel and stock ownership disclosures. This raises legitimate questions about whether Justices are recusing themselves from cases where they may have outside interests.

    a. Is it a problem in your view that justices are not held to the same disclosure requirements as Members of Congress?

RESPONSE: As discussed at the hearing, should I be fortunate enough to be confirmed, I commit to maintaining my impartiality to the best of my abilities and to recuse myself when the law suggests I should. As I stated in my Senate Judiciary Committee Questionnaire, if confirmed, I would seek to follow the letter and spirit of the Code of Conduct for United States Judges (even though it is not binding upon Justices of the Supreme Court), the Ethics Reform Act of 1989, 28 U.S.C. § 455, the Ethics in Government Act of 1978, and other relevant guidelines. Among other things, I would recuse myself from any cases in which I participated as a judge on the U.S. Court of Appeals for the Tenth Circuit and other cases that might give rise to an actual or apparent conflict of interest.

    b. Does Congress have the authority to fix it?

RESPONSE: Respectfully, whether Congress has the authority to act in this fashion is a question that may arise in future cases and controversies, and it would not be proper for me to comment further. 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.

15. Justice Kennedy wrote in *Planned Parenthood v. Casey* that "At the heart of liberty is the right to define one's own concept of existence."[9] You have suggested that the personal autonomy rights protected by the Constitution include only those rooted in "history and custom." In cases that struck down laws discriminating against LGBT Americans, including the 2015 case upholding marriage equality, Justice Kennedy argued that while "history and custom guide" the inquiry into what fundamental rights or personal autonomy are protected, they "do not set its outer boundaries."[10] If majorities of the Supreme Court had endorsed your more limited view of

[9] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).
[10] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

fundamental rights, as expressed in your book, rather than Justice Kennedy's view, would laws discriminating against LGBT Americans still be on the books?

RESPONSE: The Supreme Court has recognized in *Obergefell v. Hodges* the right to same-sex marriage. *Obergefell* is a precedent of the Supreme Court, and it is entitled to all the weight due such a precedent. Respectfully, when I referenced "history and custom" in my book, *The Future of Assisted Suicide and Euthanasia,* I did not suggest that it is the only test the Court has employed in due process cases.

16. In her concurring opinion in *United States v. Jones*, Justice Sotomayor questioned the continued applicability of the third-party doctrine with respect to Americans' electronic data. She stated that this doctrine of Fourth Amendment jurisprudence is "ill-suited to the digital age" when "people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." Justice Sotomayor argued that Americans' digital information "can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy."[11]

    a. Do you agree with Justice Sotomayor's statement?

    b. Do you believe that the third-party doctrine is a logical way to assess Fourth Amendment protections for Americans' digital information?

RESPONSE: As we discussed during my testimony before the Committee, I believe that recent Supreme Court cases, including *United States v. Jones* and *Kyllo v. United States*, demonstrate how the Fourth Amendment's historical protections can apply against technological advancements that obviously were not envisioned at the time of the Amendment's adoption. These cases show how the Court can thoughtfully use historical principles in applying the law to current realities, and I refer you to our extensive discussions at the hearing about them. To the extent your question implicates issues that may come before me as a judge, it would not be proper for me to comment further. 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.

17. In connection with your nomination to the U.S. Court of Appeals for the Tenth Circuit in 2006, you were asked a series of questions related to medical aid in dying. Following your nomination, you published a book entitled, *The Future of Assisted Suicide and Euthanasia*, in which you concluded that "the Court's decisions seem to assure that the debate over assisted suicide and euthanasia is not yet over – and may have only begun."[12]

    The contents of your book raise questions, especially considering precedent that

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11 *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring).

12 https://www.washingtonpost.com/news/morning-mix/wp/2017/02/01/neil-gorsuch-wrote-the-book-on-assisted-suicide-heres-what-he-said/?utm_term=.266f9647bee0

includes the Supreme Court's unanimous decision in *Washington v. Glucksberg* that deferred to States on this issue. The Court has stated, "Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."[13] To date, at least six states, including Vermont, have authorized medical aid in dying, and many more have continued to consider questions related to this issue.

a. Do you agree with the Supreme Court's decisions in *Washington v. Glucksberg* and *Gonzales v. Oregon*[14]?

b. Do you believe that questions related to medical aid in dying should be left to each State?

RESPONSE: As we discussed at the hearing, *Washington v. Glucksberg*'s holding permitted the debate over assisted suicide to continue in the States. That decision and *Gonzales v. Oregon* are precedents of the Supreme Court entitled to all the weight that such precedents are due. As I said at the hearing, a judge's personal views play no proper role in the discharge of the duties of a judge, for every litigant is entitled to a judgment based on the law and facts.

18. In *Allstate Sweeping v. Black*, you joined a unanimous decision rejecting a company's hostile work environment claim. That decision stated, "Being *offended* presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience."[15] Yet in *Hobby Lobby* you joined a decision holding that large, for- profit corporations could have religious views, and that those religious views could limit health insurance access for employees.[16]

a. How do reconcile your divergent views in those cases?

b. Given that the contraception mandate is a law of general applicability, why should a woman's access to contraception be dependent not on the duly enacted law, but instead on her boss's views?

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

[13] *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).
[14] *Gonzales v. Oregon*, 546 U.S. 243 (2006).

[15] *Allstate Sweeping v. Black*, 706 F.3d 1261, 1268 (10th Cir. 2013) (emphasis in original).
[16] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152 (10th Cir. 2013).

held that the corporate form alone does not prevent such exercise. For example, many churches and religious groups are organized as corporations.

19. In 2010, you wrote a unanimous panel decision in *United States v. Pop*e, in which the defendant challenged the federal statute making it a felony for those convicted of misdemeanor domestic violence to own a gun.[17] You upheld a dismissal of the case on procedural grounds, yet you made it abundantly clear in your opinion that you considered it an open question whether the government can legally prevent those who commit domestic violence from owning guns. Last year, in *Voisine v. United States*, the Supreme Court held that even those guilty of reckless domestic violence can be barred from gun ownership.[18] Do you recognize *Voisine* as settled law? Or do you think it is still an open question whether domestic violence offenders can own guns?

RESPONSE: *Voisine v. United States* is a precedent of the Supreme Court, entitled to all the weight due such a precedent.

20. In 2013, Congress passed the Leahy-Crapo Violence Against Women Reauthorization Act. Consistent with a 1978 Supreme Court decision, we granted jurisdiction to Native American tribal courts to try domestic and sexual offenses that occur on tribal land. That now means non-Indian abusers are no longer able to slip between jurisdictional cracks with impunity. They will be held accountable where they commit the offense. And we crafted the law to ensure that such defendants will have the same due process rights they have under the Constitution. In *United States v. Lara*, the Court held that that "the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute non-member Indians." In light of the Supreme Court's decision in *Lara*, do you believe that it is unconstitutional for tribal courts to have jurisdiction over non-Indians even where Congress authorizes such jurisdiction?

RESPONSE: Respectfully, this question appears to reference an active case or controversy likely to come before the Supreme Court. Accordingly, it would be improper for me to offer a further opinion. 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.

21. **On behalf of Senator Ron Wyden:**

In your 2006 book *The Future of Assisted Suicide and Euthanasia*, you argue that the Supreme Court's decision in *Gonzales v. Oregon* did not settle whether

[17] *United States v. Pope*, 613 F.3d 1255 (10th Cir. 2010).
[18] *Voisine v. United States*, 136 S. Ct. 2272, 2277 (2016).

Oregon's Death with Dignity law violates the Constitution's equal protection guarantee.

Our Constitution guarantees the people fundamental rights, the full scope of which, as Justice Harlan once wrote, "cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." This exact concept is written into the Bill of Rights itself. The Ninth Amendment says: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Those fundamental rights guaranteed by the Constitution were never intended to be limited to the specific terms of the first eight amendments to the Bill of Rights. The existence of additional fundamental rights not enumerated in the first eight amendments to the Constitution have also been re-affirmed by the Supreme Court.

a. Is it your view that our Constitution grants individuals the right to make decisions about their own lives and families without interference from the state?

RESPONSE: The Constitution expressly protects a variety of rights touching on such matters. As I said at the hearing, "[p]rivacy is in a variety of places in the Constitution. The first and most obvious place, back to the Bill of Rights, is the Fourth Amendment, the right to be free from unreasonable searches and seizures in your homes, papers, and effects." Privacy is also protected in the Third Amendment and in the First Amendment, whose protections for "the right to free expression" and "the freedom of religious belief and expression" both "require[] a place of privacy." With regard to the Fourteenth Amendment, the Supreme Court "has held that the liberty prong of the Due Process Clause protects privacy in a variety of ways having to do with child rearing and family decisions, going back to *Meyer* [*v. Nebraska*], which involved parents who wished to have the freedom to teach their children German at a time it was unpopular in this country, and *Pierce* [*v. Society of Sisters*], the right of parents to send their children to a parochial school if they wish."

b. Your record over the last ten years suggests that your personal beliefs often bleed into your legal analysis. Your decisions suggest that you are not able to act independently of the conservative causes that you support. If a case were to come before you, would you be able to consider it without bias?

RESPONSE: Respectfully, I cannot agree with your characterization. My record shows that, 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 cases where I have dissented, my clerks report that I was about as likely to dissent from a judge appointed by a Republican as I was to dissent from a judge appointed as a Democrat. According to the Congressional Research Service, I understand that 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.

c. As you stated in your book, do you believe that Oregon's law fails to provide equal protection because it is not reasonable to rest legal distinctions between

the terminally ill and the healthy on professional medical judgments about quality of life and life expectancy?

If so, please elaborate on why you currently believe these judgments cannot form the basis of a reasonable legal distinction between the terminally ill and the healthy. If not, please explain how your views have evolved since 2006.

RESPONSE: Respectfully, the views expressed in the book speak for themselves and are more developed and detailed. As I explained at the hearing, too, the views in the book were offered as a commentator and before I became a judge. My decisions as a judge are based only on the facts and law of each case as it is presented, not my personal views.