Nomination of Jonathan Kobes to the U.S. Court of Appeals for the Eighth Circuit
Questions for the Record
August 29, 2018

QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper application of precedent by judges.

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

   Never. United States Supreme Court decision are binding on all lower courts and it is the Court's prerogative alone to overrule its own precedent. If I am confirmed I will faithfully apply all Supreme Court and Eighth Circuit precedent.

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

   A circuit court should always apply Supreme Court precedent that directly controls, 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 some cases, it might be right for a circuit judge to flag an issue – either related to Supreme Court precedent that may no longer be viable or to the difficulty that lower courts experience applying Supreme Court precedent. The Supreme Court has observed that this lower court practice might "facilitate[ ]" its review of the issue. *Eberhart v. U.S.*, 546 U.S. 12, 19-20 (2005). However, if Supreme Court precedent controls a judge should faithfully apply that precedent.

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

   In the Eighth Circuit one panel should not overturn another panel's decision. *See, e.g. U.S. v. Reynolds*, 116 F.3d 328, 329 (8th Cir. 1997). The en banc court may overturn a prior decision, but those instances are generally limited to intra-circuit splits or proceedings that involve questions of "exceptional importance." *See* Fed. R. App. P. 35(b).

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

   The Supreme Court has highlighted the factors that it considers in determining whether to overturn one of its own precedents. *See, e.g. Pearson v. Callahan*, 555 U.S. 223, 233-36 (2009); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). As a nominee for a lower court, it would be inappropriate for me to otherwise opine on when the Supreme Court should overturn one of its own decisions.

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

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

    Roe is binding authority and, as this question notes, has been upheld on multiple occasions. I would apply it faithfully, as I would all Supreme Court decisions, whether they are considered "super-precedent" or not.

    b. Is it settled law?

    Please see my answer to questions 2(a).

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

    Obergefell is binding authority and I would faithfully apply it, along with all other Supreme Court precedent.

4. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

    a. Do you agree with Justice Stevens? Why or why not?

    It would be inappropriate for me to comment on my personal opinions of Justice Stevens's dissent in *Heller* – or on my personal views of the majority opinion. I would faithfully apply *Heller*.

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

    Heller specifically noted that the rights secured by the Second Amendment are not "unlimited" and that the Court's opinion was not calling into question certain

"longstanding prohibitions" on firearm possession. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). The lower courts are currently working through issues related to this question, so it would be inappropriate for me to answer further. *See* Canon 3A(6), Code of Conduct for United States Judges; Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.")

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

See my answer to question 4(a).

5. You have spent most of your time as a practicing attorney doing regulatory work for corporations. In addition, you have spent the past four years in a non-practicing role, working for Senator Rounds. In light of that, please answer the following:

a. How many times have you appeared in a federal appellate court on behalf of a client (excluding to file an amicus brief)? Of those appearances, in how many were you the lead counsel on behalf of a client?

I appeared as counsel in the following Eighth Circuit cases:

United States v. R.J.S. (03-2855) – (lead counsel but did not argue)

United States v. Warren Red Cloud (04-1239) – (lead counsel, argued); *Red Cloud* was consolidated for argument with the following cases: *United States v. Cornell White Face* (03-4043); *United States v. George C. Hawk Wing* (03-4059); *United States v. Gene Alan Rossman* (04-1030); and *United States v. Joseph Evans* (04-1527)

United States v. Dale Joseph Martin (04-2711) – (lead counsel but did not argue)

United States v. Timothy Calhoun (05-1238) – (sole counsel, *Anders* case)

Planned Parenthood, et al. v. Alpha Center, et al. (06-3142) – (local counsel)

b. How many times have you personally argued a case in a federal appellate court on behalf of a client?

On one occasion – *U.S. v Warren Red Cloud*, which was consolidated with several other cases) (see answer to question 5(a)).

c. Please identify each state and federal appellate case you have been involved in on behalf of a client and state your role in each case.

See answer to question 5(a). In addition, to the best of my recollection:

Cellco Partnership d/b/a/, Verizon Wireless v. Nelson, 2006 SD 71 (counsel, drafted portion of briefs, did not argue)

I also provided legal and regulatory support for an application filed by Growth Energy and 54 ethanol manufacturers for a waiver under section 211(f) of the Clean Air Act for ethanol-gasoline blends of up to 15% by volume of ethanol — commonly known as E15. The EPA partially granted Growth Energy's waiver application.

After the EPA partially granted Growth Energy's waiver application, I was lead in-house counsel for Growth Energy in *Grocery Manufacturers Association, et al. v. EPA*, a challenge by the petroleum, small engine, and food industries to the partial waiver. Growth Energy intervened in support of the EPA and challenged the petitioners' standing under Article III. Ultimately, a divided panel of the District of Columbia Circuit adopted Growth Energy's arguments and dismissed the petitions for review. *See* 693 F.3d 169 (D.C. Cir. 2012).

I served as primary in-house counsel in the early stages of *Rocky Mountain Farmer's Union, et al. v. Corey*, 730 F.3d 1070 (9th Cir. 2015), a challenge by the ethanol industry and agricultural groups to California's Low Carbon Fuel Standard. The district court ruled in favor of the ethanol industry on Dormant Commerce Clause grounds. The Ninth Circuit affirmed in part and reversed and remanded in part. Another lawyer at POET managed the merits briefing at the district court level and the appeal; I oversaw the initial pleadings and the early strategy decisions. I also assisted with a suit filed by POET in California state court challenging the state's approval of the Low Carbon Fuel Standard regulations. As in the *Rocky Mountain Farmer's Union*, I retained the outside counsel and oversaw the initial pleadings and the early strategic decisions. Another POET attorney handled the subsequent litigation. The history of this case can be located at *POET, LLC et al. v. State Air Resources Board et al.*, 12 Cal. App. 5th 52 (2017).

6. In 2005, while you were an associate at Murphy, Goldammer, and Prendergast, you represented Alpha Center and the Black Hills Crisis Pregnancy Center as interveners in *Planned Parenthood Minnesota v. Rounds*, a challenge brought by Planned Parenthood to a South Dakota informed consent law. Among other requirements, the challenged statute "require[d] the physician [performing the abortion] to inform the pregnant woman 'that the abortion will terminate the life of a whole, separate, unique living human being'" and "'that the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota.'" (*Planned Parenthood Minnesota v. Rounds*, 650 F. Supp. 2d 972 (D.S.D. 2009))

   Your brief in the Eighth Circuit argued that the district court had erred in striking down provisions of the informed consent statute. You specifically argued that "the harm to [the] rights, interests and health of pregnant women in South Dakota far outweighs any perceived harm to the abortion doctors at Planned Parenthood." Your brief continued: "With the injunction [against the informed consent law] in place, the women who go to the Planned

Parenthood facility in Sioux Falls receive no real information that helps them reach an informed decision about whether to give up their rights, and information necessary to protect their interests and health. As a direct consequence, and as a result of the injunction entered by the District Court, women are losing their fundamental right to their relationship with their children, their unborn children die, and the women are placed at risk for severe psychological harm. It is difficult to imagine a greater harm to befall these women than the loss of their fundamental rights, the death of their children and the detriment to their health." (Reply Brief on Appeal of Intervenors Alpha Center, Black Hills Crisis Pregnancy Center, et al., *Planned Parenthood Minnesota v. Rounds*, 530 F.3d 724 (8th Cir. 2008), 2005 WL 3657919)

a. How did you come to represent Alpha Center and Black Hills Crisis Pregnancy Center in this case?

Either the firm was already representing these clients when I joined as the only litigation associate or, possibly, the clients contacted a senior partner at the firm soon after I joined. I do not recall the specifics – but I was not the initial attorney contacted at the firm. The senior partner at the firm then asked me to assist him as local counsel and I agreed.

b. At the time you began your representation of Alpha Center and Black Hills Crisis Pregnancy Center, were you aware of their missions and the services that they provided to pregnant women?

In general terms, yes; although the senior partner had the client relationship.

c. How did the injunction against South Dakota's informed consent statute harm the "rights, interests and health of pregnant women in South Dakota"? Please specifically address how the statute impacted each of these — pregnant women's rights, their interest, and their health.

The arguments presented on behalf of the intervenors are set forth in Brief on Appeal of Intervenors Alpha Center, Black Hills Crisis Pregnancy Center, et al., *Planned Parenthood Minnesota v. Rounds*, 530 F.3d 724 (8th Cir. 2008), 2005 WL 4902900, as well as in the declarations and arguments submitted in the district court.

d. On what basis did you conclude that the injunction placed women "at risk for severe psychological harm"?

As local counsel, I did not draft any of the substantive provisions of the brief cited in this question. More to the point, I did not reach this conclusion. I was advocating on behalf of my clients, who took this position in litigation. The evidence cited in support of the intervenors in this case is summarized in the Brief on Appeal of Intervenors Alpha Center, Black Hills Crisis Pregnancy Center, et al., *Planned Parenthood Minnesota v. Rounds*, 530 F.3d 724 (8th Cir. 2008), 2005 WL 4902900.

e. On what basis did you conclude that "women are losing their fundamental right to their relationship with their children"?

See my answer to question 6(d).

f. On what basis did you conclude that absent the informed consent statute, "women who go to the Planned Parenthood facility in Sioux Falls receive no real information that helps them reach an informed decision about whether to give up their rights, and information necessary to protect their interests and health"?

See my answer to question 6(d).

g. On what basis did you conclude that absent the informed consent statute, "women are placed at risk for severe psychological harm"?

See my answer to question 6(d).

7. According to your Senate Judiciary Questionnaire, your legislative portfolio in Senator Rounds' office "includes law enforcement, judicial nominations, civil rights, and immigration." (Kobes SJQ at p. 13)

a. In addition to the items you listed in your Questionnaire, does your legislative portfolio currently include — or has your legislative portfolio ever included — issues relating to the following:

i. Women's reproductive rights?

Not specifically, but I am asked to provide legal and policy analysis for a variety of issues. To the best of my recollection, I have not provided legal or policy analysis to Senator Rounds on issues related to women's reproductive rights.

ii. LGBT rights, including marriage equality?

Not specifically, but I am asked to provide legal and policy analysis for a variety of issues. I have provided legal and policy analysis to Senator Rounds on issues related to LGBT rights and marriage equality.

iii. The Second Amendment and/or gun control policy generally?

Yes, for a period of time I had primary responsibility for advising Senator Rounds regarding the Second Amendment.

iv. Religious liberty?

Not specifically, but I am asked to provide legal and policy analysis for a variety of issues. I have provided legal and policy analysis to Senator Rounds on issues related to religious liberty.

8. As you noted in your Senate Judiciary Questionnaire — and as you discussed at your nominations hearing — you gave an interview in June 2017 to a Dutch newspaper, *Reformatorisch Dagblad*, in which you covered a number of topics, including immigration, President Obama, and the Federal Judiciary. You also provided to the Committee a "complete audio recording of the interview." These questions are based on that audio recording.

   a. In discussing immigration, you said: "So I think immigration is a huge issue and I think it's not necessarily just Republican and Democrat. But largely an anti-establishment, anti-Washington, anti-political power. Cause you know in some of those areas immigrants are taking jobs from low paid Democrats. In many cases, minority races are competing with immigrants for labor, and they tend to be Democrats. And then you've got the Republicans who ideologically oppose some of the immigration because it waters down the culture, it changes the culture, things like that."

      i. Whose "culture" were you referencing?

      I was referring to those who do not want current American culture changed by immigration.

      ii. In what ways does immigration "water[ ] down the culture"?

      As I indicated during my confirmation hearing on August 22, I do not believe that immigration "waters down the culture." I consider such arguments to be the sort of opposition to immigration that I referred to using such terms as "unfair" and "fear."

      iii. On what basis did you conclude that "immigrants are taking jobs from low paid Democrats"? Please cite specific evidence for this claim.

      I was offering political commentary on the role that immigration as a political issue played in the 2016 Presidential election. There is research indicating that low-skilled immigrants negatively impact the wages of certain American workers. To the best of my knowledge there is no overall agreement on this issue, but it is certainly the case that many in the political and academic worlds contend that immigration can lower wages for certain groups of workers already in the United States.

   b. You also said with respect to immigration in South Dakota: "And we have a Hispanic community here in Sioux Falls and we also have a growing African

community. And there are social issues associated with it. So some of it is unfair fear, but some of it is just legitimate."

i. What are the "social issues associated" with Sioux Falls' growing "Hispanic . . . [and] African community"?

I was referring to a variety of issues related to the arrival of immigrant communities, including but not limited to: obtaining employment, access to a variety of social services, access to healthcare, access to educational and childcare opportunities, and access to financial services. In addition, local police, law enforcement, and city and state government work hard to establish trust relationships with newly arrived residents. Local religious and non-profit agencies are also actively involved in supporting newly arrived communities. Language and cultural differences can be a challenges in all of these areas.

ii. How is some of the "fear" associated with the growth of those communities "legitimate"?

None of the fear is legitimate. I intended to convey that the "social issues" that accompany litigation are legitimate areas of concern – issues related to education, employment, social services, and the like. Those challenges must be met by communities of all sizes and appeared to me to be fair issues for public debate. I was highlighting the difference between these legitimate issues for discussion against what I considered to be unfair "fear."

c. In the same interview, you expressed the opinion that the nation's courts — and in particular the Supreme Court — had become overly politicized and dominated by "elites." You said: "And I think the other issue a lot of people here, the Federal Court systems, have a lot of distrust of federal courts generally, and the fact that many of the decisions are decided by nine, generally nine, justices, who are not democratically elected and who are all, I think at the moment, east or west coast elites. So I think the Supreme Court is a huge issue for people living in the Midwest, conservatives, traditionalists, Republicans."

i. How does the fact that a Federal judge or Justice is appointed, rather than elected, impact the legitimacy of an opinion issued by that judge or Justice?

I do not believe it does – I was not expressing my personal beliefs. Article III specifically contemplates the appointment of Justices of the Supreme Court and inferior federal judges.

ii. Why does the geographic origin of the Justices on the Supreme Court matter?

I do not believe it does – I was not expressing my personal beliefs but rather attempting to explain what others have argued. *See, e.g.*, Glenn Reynolds, *'Front Row Kids' and values have taken over our courts*, USA Today, Oct. 23, 2017, available at https://www.usatoday.com/story/opinion/2017/10/23/front-row-kids-and-values-dominate-supreme-court-judiciary-glenn-reynolds-column/788630001/

d. You also said: "There's a sense on the right that obviously the courts have become political. And you know I think that there's some real merit in that. That they're not deciding the law, they're making policy."

i. On what basis have you reached the conclusion that the courts "have become political"?

I have not reached that conclusion. I was offering political commentary on the fact that large sectors of the electorate believe that courts, particularly the Supreme Court, are driven by politics. My observation that there was "merit in that" was inartful and imprecise. I was trying to communicate that I did not want to discount the views of large sections of voters – on both sides of the political spectrum – and to describe a uniquely American dynamic to a foreign national who had a limited understanding of American politics and the American judiciary.

ii. Please cite specific examples where the courts "have become political."

See my answer to question 9(d)(i).

iii. On what basis have you reached the conclusion that courts are "not deciding the law" but instead "making policy"?

See my answer to question 9(d)(i).

iv. Please cite specific examples wherein the courts are "not deciding the law" but instead "making policy."

See my answer to question 9(d)(i).

9. According to your Senate Questionnaire, you were a member of the Federalist Society from 1999 to 2004. The Federalist Society's "About Us" webpage, states that, "[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." The same page states that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In

working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

a. Please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools.

I am not aware of the Federalist Society's understanding of the quote referenced in this question, nor have I spent any considerable time involved with law schools since my graduation from Harvard Law School in 2000.

b. As a member of the Federalist Society, explain how exactly the organization seeks to "reorder priorities within the legal system."

I have not been a member of the Federalist Society since 2004. I do not know how the Federalist Society seeks to reorder priorities in the legal system, if at all. I have never had a discussion with any member or employee of the Federalist Society about this statement.

c. As a member of the Federalist Society, explain what "traditional values" you understand the organization places a premium on.

I have not been a member of the Federalist Society since 2004. I am not aware of what the Federalist Society means by the term "traditional values." I have never had a discussion with any member or employee of the Federalist Society about this statement.

10. 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?

To the best of my recollection, no one has asked me for 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"?

While I have handled regulatory litigation, I have not expressed any general views on "administrative law." Without more specificity I am unable to further answer this question. In any event, if confirmed, I would address any administrative law issue not by applying whatever views I might hold on the particular issue; instead, I would faithfully apply the precedent of the Supreme Court and the Eighth Circuit.

11. When is it appropriate for judges to consider legislative history in construing a statute?

The Supreme Court has held that it is appropriate to consult legislative history only when the meaning text of a statute is ambiguous. *See, e.g. Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017). As I indicated during my confirmation hearing, it is often difficult to determine legislative intent or history. However, I would apply Supreme Court precedent.

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

No. I would consider acquiescence to any such request as entirely inappropriate, unethical, and a violation of my oath of office, should I be confirmed.

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

The Office of Legal Policy, Department of Justice forwarded these questions to me via email. I reviewed the questions, reviewed my SJQ, and did additional research in order to respond to the questions. I then drafted the responses, submitted draft answers to OLP for feedback, and finalized my answers. I then submitted the final answers to OLP for submission to the Committee. Each answer is my own.

Nomination of
Jonathan A. Kobes, to be United States Circuit Judge for the Eighth Circuit

Submitted August 29, 2018

QUESTIONS FROM SENATOR WHITEHOUSE

All judicial nominees listed above are directed to answer each of the following questions:

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?

    I think the Chief Justice's metaphor is helpful to understand the role of a judge. A judge should not make political decisions, but should exercise legal judgment within the context of a case and controversy. Admittedly, judging – like umpiring a game – involves some "judgment calls," pitches that are on the edge of the strike zone. But a judge, like an umpire, should always strive to be consistent and impartial and to make the best call possible given the rules of the game (the law). Judges should always ignore the noise of the crowd.

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

    Judges should always be aware of the practical consequences of any decision. Judicial rulings, like legislation, ultimately affect people. Judges should never forget that. However, the fundamental role of a judge is to make a decision based on the facts in the record and the law.

2. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy.

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

    A judge should have empathy for all litigants and participants in the judicial system. Empathy may play a particularly important role for district court judges at sentencing, for example, or when a court handles a case filed by a pro se litigant. Judges must be committed, however, to treating all parties fairly. And ultimately, a judge's responsibility is to do equal justice under the law – for everyone.

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

    All judges – like all people – take their background and personal experience with them to work. Judges should be particularly aware of their personal views, however, and any "blind spots" in their perspective – so that their personal opinions never dictate the outcome of a case. A judge should apply the law impartially.

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 confirmed I will swear an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich." I will honor that oath if confirmed.

   Over the course of my career, I have also had the privilege of representing the "little guy." For example, I represented thousands of Midwestern corn farms in regulatory proceedings and litigation related to the ethanol industry. As an Assistant United States Attorney, I advocated on behalf of victims of violent crime on the Pine Ridge Indian Reservation. While in private practice, I handled multiple cases for small business owners and a case pro bono for a South Dakota prisoner.

   As a lawyer I am committed to equal justice before the law – no matter what the financial background of the litigant who might enter my courtroom. I would have the same commitment if I am confirmed as a judge.

5. Do you believe that discrimination (in voting access, housing, employment, etc.) against minorities—including racial, religious, and LGBT minorities—exists today? If so, what role would its existence play in your job as a federal judge?

   Yes, it seems to me beyond dispute that discrimination exists today.

   I would decide every case – including those involving allegations of discrimination – based on the evidence in the record and the controlling law.

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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 established these factors in cases such as *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). I would apply the Supreme Court's precedent – along with precedent from the Eighth Circuit – to the facts of each individual case to determine if a particular right is fundamental.

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

      Yes, guided by Supreme Court precedent. *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742 (2010).

   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?

      Yes – as guided by Supreme Court precedent on the issue. *See, e.g. Washington v. Glucksberg*, 521 U.S. 702 (1997).

   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?

      Yes. I would be bound by Supreme Court and Eighth Circuit precedent. I would consider precedent from other circuits as potentially persuasive authority.

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

      Yes and 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. Both *Casey* and *Lawrence* are controlling authority.

   f. What other factors would you consider?

Any other factors relevant under Supreme Court or Eighth Circuit precedent.

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 applied heightened scrutiny under the 14th Amendment to cases involving both race, *see, e.g. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and gender, *see, e.g. Craig v. Boren*, 429 U.S. 190 (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?

      The Supreme Court has consistently held that the 14th Amendment requires heightened scrutiny for gender-based classifications. This is settled and binding precedent notwithstanding any arguments about the subjective intent of the drafters of the 14th Amendment.

   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?

      I do not know why the litigation leading up to the decision in *Virginia* was not filed until the 1990s nor do I know why the Supreme Court had not previously addressed the issue. In any case, *U.S. v. Virginia* is controlling authority.

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

      The Supreme Court has recognized this principle in certain contexts. *See, e.g. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), *Lawrence v. Texas*, 539 U.S. 558 (2003). For example, in *Obergefell* the Court held that Fourteenth Amendment prohibits states from "bar[ring] same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." 135 S. Ct. at 2607. Whether the Fourteenth Amendment prohibits discrimination based on sexual orientation in other contexts is an unsettled question. I therefore cannot express an opinion on the issue. *See* Canon 3A(6), Code of Conduct for United States Judges; Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.")

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

      I do not believe that the Supreme Court has addressed this issue. Because this issue might come before me if I am confirmed, it would be inappropriate for me to answer

this question.

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

   Yes. The Supreme Court recognized this right 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?

      Yes. The Supreme Court recognized this right in *Roe. v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

   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?

      Yes. The Supreme Court recognized this right in *Lawrence v. Texas*, 539 U.S. 558 (2003).

   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.

      Please see my answers to the previous subparts of this question.

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 for judges to consider evidence that sheds light on our changing understanding of society?

      The Supreme Court has considered this sort of evidence in a variety of contexts – including *Obergefell* and *Virginia*. If I am confirmed and a party raises arguments related to the changing understanding of society, I would consider those arguments in light of the relevant Supreme Court and Eighth

Circuit precedent.

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

The Federal Rules of Evidence and Supreme Court precedent clearly anticipate the admission of such evidence when it is relevant and based on a reliable methodology. *See, e.g.* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

5. 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.

a. 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?

Although I am aware of some scholarly commentary on the issue, I have not studied the question of whether *Brown* is consistent with the original meaning of the Fourteenth Amendment. In any case, *Brown* is binding authority and I would faithfully apply it.

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 August 29, 2018).

I am not familiar with the article referenced in this question – although I am generally familiar with academic discussions regarding difficulties in determining original public meaning in a variety of contexts, particularly when attempting to apply original public meaning to modern factual circumstances. There is substantial Supreme Court precedent on the First, Fifth, and Fourteenth Amendments, however, and I would be bound by those holdings – whether based on an analysis of original public meaning or not.

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?

In some cases the Supreme Court has based its holding on an analysis of original public meaning. *See, e.g. District of Columbia et al. v. Heller*, 554 U.S. 570 (2008). In other cases, it has not. *See, e.g. Brown v. Board of Education*, 347 U.S. 483

(1954). If confirmed as an inferior court judge, I will be obligated to faithfully apply the holdings of the Supreme Court in all applicable cases and to follow the essential reasoning of the Court – whatever that might be. *See, e.g. Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996).

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?

I would begin with the text of the provision in question and any controlling or relevant Supreme Court or Eighth Circuit precedent. If those sources did not resolve the issue, I would consider other persuasive judicial authority, scholarly research, and historical sources.

6. In a 2017 interview you gave to the Dutch newspaper *Reformatorisch Dagblad*, when discussing LGBT rights and religion you noted that conservative ideas on the family have been challenged by recent Supreme Court decisions. There, you stated "traditional conservative ideas on the family have gone out."

a. To what "traditional conservative ideas on the family" were you referring? Is it your contention that these ideas are not shared by anyone but conservatives?

As a judicial nominee, it would be inappropriate for me to offer my current opinion on political matters. In the interview in question, which I gave prior to my nomination, I was referring to political opposition to same-sex marriage. I did not contend that only conservatives opposed same-sex marriage. Rather, I was specifically asked to offer political commentary on a group of conservative, religious voters in the context of the 2016 presidential election. It was my view at the time that most of those voters opposed same-sex marriage.

b. What do you consider non-traditional ideas on the family? Is it your contention that no conservatives share these ideas?

As a judicial nominee, it would be inappropriate for me to offer my current opinions on political matters. In the interview in question, I was not offering my own views on non-traditional ideas of the family, but rather those of a subset of conservative, religious voters. At the time, it was my opinion that this group of voters would not consider same-sex marriage to be "traditional." I also stated, however, in the context of same-sex marriage, that there were people of faith "on the other side of the issue," too – *i.e.*, the many religious people who support same-sex marriage. I did not address non-religious conservatives because that was not the topic of the interview, but it was not my view that all conservatives oppose same-sex marriage.

c. When would it be appropriate for a circuit court judge to consider traditional conservative ideas about the family when faced with a case concerning gay or lesbian couples?

It would be inappropriate for a circuit court judge to consider "traditional conservative ideas about the family" when determining any case, including those concerning gay or lesbian couples. Any case should be decided impartially, without regard to political issues, based on Supreme Court and circuit precedent. If I am confirmed I would do just that.

7. In that same 2017 interview you gave to *Reformatorisch Dagblad*, you suggested that federal courts are overly politicized and dominated by "elites." You went on to say, "I think the Supreme Court is a huge issue for people living in the Midwest, conservatives, traditionalists, Republicans." Finally, you stated, "there's a lack of trust, lack of respect, for the court system on these big policy issues — the federal courts."

a. If you become confirmed, how will you go about assuring litigants that they can trust our federal courts?

If I am confirmed, I will faithfully uphold my judicial oath to administer justice without respect to persons and to do equal right to the poor and to the rich, and I will faithfully and impartially discharge my duties.

b. How will you ensure potential litigants that you will follow and apply binding precedent from courts that you have called political, dominated by costal elites, and lack respect?

It was not my intent in the 2017 interview to offer my personal opinions on the federal judiciary. I was describing what I viewed as the perspectives of a particular subset of the electorate.

If I am confirmed, my obligation will be to follow the precedent of the United States Supreme Court without regard for my personal views on any topic and without regard for the political perspectives of any particular group.

Senator Mazie K. Hirono
Questions for the Record for Jonathan A. Kobes

1. You lack the experience that typically qualifies a nominee for confirmation as a federal circuit court judge.

   Please identify what experience you have that qualifies you to serve in a lifetime position as a federal circuit court judge.

   Over the past approximately 18 years I have had the privilege of serving in a broad range of legal positions that qualify me to serve on the Eighth Circuit.

   In addition to clerking for the judge I am nominated to replace, I have served as a litigation attorney at the CIA – handling cases involving the possible disclosure of classified information. I have also served as an Assistant United States Attorney and tried jury cases to verdict, appearing in federal court multiple times a week. I have interviewed victims of violent crime on the Pine Ridge Indian Reservation and I have indicted multiple defendants on drug conspiracy charges. I have also briefed cases in the Eighth Circuit and presented oral argument in one case.

   In addition to my experience in federal district court, I have experience in South Dakota state court – handling both civil and criminal matters. I have taken and defended depositions and argued various motions. I represented a variety of clients – large corporations, small businesses, religious organizations, individuals, and pro bono clients – in a variety of different cases.

   My in-house practice has also afforded me an opportunity to work on issues that are unusual for a small legal market. In addition to managing a variety of commercial and employment litigation, I was lead regulatory and litigation in-house counsel representing the interests of thousands of farmers in the Midwest. I led rule-making initiatives with the EPA and guided litigation in the D.C. Circuit and in California federal district court. I conducted internal investigations and advised boards of directors and company employees on a variety of issues – including compliance with EPA and USDA regulations, FEC regulations, foreign regulations related to the production and importation of agricultural products, foreign corrupt practices, and US export regulations. I have been on the ground overseas with business development teams ensuring real-time compliance with the law and I am accustomed to making difficult, time-sensitive legal decisions in a variety of settings.

   Finally, for the last almost four years I have had the privilege of serving as lead counsel for U.S. Senator M. Michael Rounds. In addition to drafting and reviewing legislation, I have handled ethics and political compliance for the Senator and been assigned primary responsibility for several legislative portfolios. More importantly, though, I have earned the Senator's trust and am frequently called upon to advise the Senator on a variety of high profile policy and legal issues.

In sum, my experience is atypical. I have served in all three branches of government and I have significant and diverse real-world legal experience: as a prosecutor, a private-practice attorney, an in-house counsel, and an advisor to a United States Senator. In my view, the breadth of my legal experience over the last 18 years uniquely qualifies me for a position on the Eighth Circuit.

2. After clerking on the Eighth Circuit, you spent one year in the Central Intelligence Agency's Attorney Honors Program. The Attorney Honors Program is generally a multi-year program for attorneys seeking a career at the CIA. You only stayed one year.

   What led you to leave the Attorney Honors Program—and the CIA more broadly— after only one year?

   To the best of my recollection, when I accepted a position as a CIA Honors Attorney the position was a two-year-term, non-career position. When I entered on duty with CIA the Agency had converted the role of Honors Attorney to a career-track position.

   I departed the CIA because my first daughter was born in December, 2002, and my wife and I determined that it was not financially feasible to remain in the Washington, D.C. area. The Department of Justice was hiring post-September 11, and I accepted a position with the United States Attorney's Office for the District of South Dakota.

3. During your interview with Reformatorisch Dagblad, you complained that "judges have become highly political, especially the appellate and Supreme Court." Your own political experience fair outweighs your litigation experience.

   Please explain why confirming you as a federal circuit court judge wouldn't be just another example of the politicization of the judiciary.

   I have served as Deputy Chief of Staff, Counsel, and General Counsel for Senator M. Michael Rounds for just under four years. In contrast, I have worked in litigation-related positions for approximately nine years. Specifically, I have served in the litigation division of the CIA for approximately one year, as a criminal division assistant United States Attorney for approximately two years, as a private practice litigation attorney for approximately three-and-one-half years, and as in-house counsel at POET, LLC with significant responsibility for regulatory and commercial litigation, for approximately three-and-one-half years. I have served as Deputy Chief of Staff, Counsel, and General Counsel for Senator M. Michael Rounds for less than 4 years.

   I have had the privilege of serving in all three branches of the federal government, so I am perhaps more aware than most of the differences between the roles of an Article III judge and an attorney serving in the Executive or Legislative branches. In my view, confirming judges with a variety of professional backgrounds – including a variety of government service – is a good thing. All judges – no matter their background – must set aside any political allegiances when they take the bench. If confirmed to the Eighth Circuit, I will do so as well.

4. When a Senator asks judicial nominees about their personal views on a topic, their involvement in certain organizations, or their decisions to advocate for certain points of view, they often say that those parts of their records do not matter and that as judges they will simply "follow the law." But, cases are not always decided by the direct application of legal precedent. At some point, as one nominee told us, "judging kicks in."

a. Do you acknowledge that there will be times on the bench that a judge does bring personal experiences and views to bear on their decisions?

Every judge brings his or her background and experiences to the bench. However, decisions should be rendered on the law, precedent and legal judgment, not on a judge's personal views.

b. If not, what do you view as the work of judging? If it were as easy as "following the law," why would we need judges at all?

We need judges because someone has to apply the law to the particular facts of a dispute and determine the legally correct outcome. When doing so, judges should approach every case – including the more difficult cases – with a sense of humility, impartiality, and open-mindedness. Judges should constantly challenge their first instincts on a case and try to be aware of their own "blind spots." Also judges need to apply precedent fairly and consistently, no matter what their personal views might be.

Nomination of Jonathan A. Kobes
United States Circuit Court for the Eighth Circuit
Questions for the Record
Submitted August 29, 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?

    I have not studied the concept of implicit bias, but based on my understanding of the term and my everyday experience, yes. Bias is evident in all parts of society; unfortunately the criminal justice system is not immune.

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

    Yes.

    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.

    I have not.

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

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[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.
[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.

saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.[6]

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 the relevant statistics so as to form an educated opinion 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. 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.[7]

a. Do those statistics alarm you?

Yes.

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?

The Supreme Court has directly addressed this issue in *McCleskey v. Kemp*, 481 U.S. 279 (1987). If confirmed I will be bound to faithfully apply *McCleskey*.

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?

Please see my answer to question 4(b).

[6] *Id.*
[7] The American Civil Liberties Association, Race and the Death Penalty, https://www.aclu.org/other/race-and-death-penalty (Last visited June 13, 2018).

Questions for the Record from Senator Kamala D. Harris
Submitted August 29, 2018
For the Nomination of

Jonathan Allen Kobes, to the U.S. Court of Appeals for the Eighth Circuit

1. In June 2017, you made the following statements in an interview to W.B. Kranendonk of the Dutch newspaper *Reformatorisch Dagblad*:

   "You know I think some of it is just fear of the unknown. I think some of it is. I think some of it is there are winners and losers when immigrants move in . . . . That little [town] you were just in, Sioux Center was largely protestant, was largely white, was mostly Dutch, very conservative, and then you have an influx of 15-20% largely Hispanic, some African, largely Roman Catholic and not Northern European at all. So you know it causes the, uh you know, it does."

   a. You mention that there are "winners and losers when immigrants move in." Please explain how some people become "winners" and others become "losers" as a result of immigration.

   As a judicial nominee, it would be inappropriate for me to offer my current opinion on political matters. With respect to the interview in question, which I provided prior to my nomination, I was asked to provide general political commentary. Within that context, it seemed to me at the time that the immigrants themselves are generally "winners," as is the community as a whole, the economy as a whole, and, in particular, owners of certain industries that require labor that cannot be supplied by the current population. In South Dakota, for example, the tourism industry and the dairy industry, among others, are in need of additional workers.

   There is also research, however, indicating that immigrants negatively impact the wages of some American workers. To the best of my knowledge there is no overall agreement on this issue, but it is certainly the case that many in the political and academic worlds contend that immigration can lower wages for certain groups of workers already in the United States.

   b. Please explain what—in your view—happens when a "largely protestant," "largely white," "mostly Dutch," and "mostly conservative" population is met with a population "influx" that is "15-20% largely Hispanic, some African, largely Roman Catholic and not European."

   As a judicial nominee, it would be inappropriate for me to offer my current opinion on political matters. With respect to the interview in question, which I provided prior to my nomination, I was asked to provide general political commentary. Within that context, I was suggesting that communities, including my hometown, face a variety of changes and challenges associated with

immigration. These include providing social and religious services, educational opportunities, employment opportunities, and many others. It seemed to me beyond dispute that immigration changes a community.

With respect to my hometown, it was my view that the community was stronger, more vibrant, more diverse, and more successful in 2017 than it was in the 1980s when I was growing up. So with respect to that community, good things have happened.

2. In the same interview, you said: "[Y]ou've got the Republicans who ideologically oppose some of the immigration because it waters down the culture, it changes the culture, things like that . . . . We have a Hispanic community here in Sioux Falls and we also have a growing African community. And there are social issues associated with that. So some of it is unfair fear, but some of it is just legitimate."

   At the hearing, you attempted to clarify these comments by stating that "legitimate social issues" include hospital staff in Sioux Falls having to speak over 95 languages and an "influx of children who don't speak English . . . many of whom have no parents at home during the day because they're working full time at the local packing plant."

   a. Can you provide evidence for the example you gave about hospital staff having to speak over 95 languages?

   The example that I provided was based on a personal conversation that I had with a former executive of a Sioux Falls-based hospital system.

   b. Can you provide evidence for the example you gave about children who do not speak English and do not have parents at home during the day because their parents work full time at the local packing plant?

   It is a well-known fact that a packing plant in Sioux Falls employs significant numbers of recent immigrants. I have personal knowledge of this as well, because many of these employees seek constituent service assistance in the Sioux Falls office of Senator M. Michael Rounds, which has been my duty station for the last approximately 2 years. Working in the packing industry is hard work and requires long hours.

   As to the challenges Sioux Falls faces related to unsupervised children, please see a local newspaper article published shortly before my hearing, Shelly Conlon and Rebekah Tuchscherer, *Thousands of South Dakota children unsupervised due to lack of funding*, Argus Leader (Sioux Falls), Aug. 15, 2018, available at https://www.argusleader.com/story/news/education/2018/08/15/south-dakota-funding-unsupervised-parenting-laws-sioux-falls/878529002/.

c. Why is the need to educate new students who do not speak English a "legitimate issue"?

Schools districts, including those in South Dakota, have an obligation to educate all children – including recent arrivals to the United States who do not speak English. This presents certain challenges for local schools, including increasing ESL programs and teaching children who are not fluent in English. It seemed obvious to me that those challenges are "legitimate issues" for educators and the community as a whole. To the best of my knowledge the Sioux Falls School district, for example, is doing a good job in this area.

3. During the Obama Administration, our country made great strides in its recognition of LGBTQ equality. In 2015, the Supreme Court ruled in *Obergefell v. Hodges* that the Fourteenth Amendment guarantees to same-sex couples the fundamental right to marry.[1] The next year, the Obama Administration published guidance stating that Title IX protects the right of transgender students to use restrooms and locker rooms that match their gender identities.[2] These landmark civil rights events brought our country closer to its guiding principle of "equal justice under law."

   In June 2017, you made the following statement about those events:

   "[F]or example our gay marriage is brand new in this country. Last summer, was it last summer, or the summer before? I can't remember. So one to two years. That's a huge shock to people on the conservative side. Um sort of transgendered issues in public schools was a huge issue under President Obama that struck a lot of people here in this part of the country as very difficult."

   a. What was "very difficult" about allowing transgender students to express their gender identities?

   It was well known that the Obama Administration's Title IX guidance generated significant political opposition. While working for Senator Rounds I directly observed examples of this opposition from South Dakota constituents. I was commenting on that opposition.

   b. Do you agree that transgender students face discrimination because of who they are?

   Yes.

[1] 135 S. Ct. 2584, 2604-05 (2015).
[2] "Dear Colleague Letter on Transgender Students" (May 13, 2016), https://www.justice.gov/opa/file/850986/download; *see also* "White House Sends Schools Guidance On Transgender Access To Bathrooms," NPR (May 13, 2016), https://www.npr.org/sections/thetwo-way/2016/05/13/477896804/obama-administration-to-offer-schools-guidance-on-transgender-bathrooms.

4. In the same interview, you said: "And you know you do find a difference in the religious participation levels in the cities as opposed to the smaller towns. So I think people in this area would argue that the country is losing some of that commitment. I think that's probably fair. Now that's not uniform I don't think. There are certainly Christians on the other side of the issue too, but certainly traditional conservative ideas on the family have gone out, I mean President Obama opposed gay marriage when he was elected in 2008. And in 8 years, 6, 7, 8 years later, the White House was in rainbow colors. So that's a huge change in a very short period of time."

   a. Do you believe that judges may consider their personal religious views when evaluating cases before the court?

   No. Judges should set their personal views – including religious views – aside and decide cases based on the law and relevant precedent.

   b. Should government actions targeting LGBTQ individuals be subject to heightened scrutiny?

   The Supreme Court has found that the Fourteenth Amendment's due process and equal protection clauses apply to same-sex relationships in certain contexts. *See, e.g. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), *Lawrence v. Texas*, 539 U.S. 558 (2003). For example, in *Obergefell* the Court held that Fourteenth Amendment prohibits states from "bar[ring] same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." 135 S. Ct. at 2607. Whether the Fourteenth Amendment prohibits discrimination based on sexual orientation in other contexts is an unsettled question. I therefore cannot express an opinion on the issue. *See* Canon 3A(6), Code of Conduct for United States Judges; Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.")

   I am not aware that the Supreme Court has addressed the applicability of the Fourteenth Amendment to transgender people. Because this issue might come before me if I am confirmed, it would be inappropriate for me to answer this question.

5. According to your Questionnaire, you joined the Board of Bethany Christian Services in the spring of 2012.

   In March 2018, Philadelphia's Department of Health Services ("DHS") discovered that Bethany Christian Services and another foster care agency had policies that denied publicly funded services to same-sex couples. DHS stopped working with both organizations, noting that their policies regarding LGBTQ families violated the non-

discrimination clause included in the contracts they entered into with DHS. The other foster care agency sued, and a federal judge ruled against the agency in July 2018.[3]

a. Were you aware that Bethany Christian Services discriminated against LGBTQ couples who sought to adopt children?

I served on the Board of Directors for Bethany Christian Services in Sioux Falls in 2012, approximately three years prior to *Obergefell*. To the best of my knowledge, in 2012 Bethany in Eastern South Dakota did not receive any public funding. However, I was aware that Bethany did not place children with same-sex couples in 2012.

b. Do you agree with the practice of denying or restricting adoptions to LGBTQ couples on religious grounds?

This issue is currently the subject of litigation. I therefore cannot express an opinion or answer the question. *See* Canon 3A(6), Code of Conduct for United States Judges; *cf.* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.")

c. Did you provide advice about or advocate for this practice during your Board service?

No.

d. Did you assist in drafting any Bethany policies related to the denial or restriction of adoptions to LGBTQ couples?

No.

6. Bethany has also recently used its foster care operations to place children who were separated at the U.S. border because of the Trump Administration's "zero tolerance" policy. This year, Bethany disclosed that it made $200 a day per child caring for immigrant minors separated at the border from their parents. While Bethany has criticized Attorney General Jeff Sessions and the "zero tolerance" policy, the agency has taken at least 50 displaced migrant children, most of whom arrived after the zero-tolerance policy took effect this spring.[4]

a. Do you agree with Bethany's role and involvement in family separation at the Southwestern border?

[3] "Religious Adoption Agency Can't Exclude Gay Parents, Judge Rules," NBC News (July 19, 2018), https://www.nbcnews.com/feature/nbc-out/religious-adoption-agency-can-t-exclude-gay-parents-judge-rules-n892796.

[4] "Grand Rapids Agency: We don't profit off immigrant kids in separation crisis," Detroit Free Press (July 17, 2018), https://www.freep.com/story/news/local/michigan/2018/07/17/bethany-christian-services-immigrant-children/792865002/.

I am unaware of the specifics of the policy referenced in this question so I am unable to offer an opinion. In addition, I believe that the "zero tolerance" policy is currently subject to litigation. I therefore cannot express an opinion on the merits of that policy. *See* Canon 3A(6), Code of Conduct for United States Judges; Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.")

b. Have you provided advice to Bethany about this practice, either formally or informally?

No.