Senator Chuck Grassley
Questions for the Record

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Nominee, United States Court of Appeals for the Ninth Circuit

1. **At your hearing, Senator Tillis asked you about some comments you made as a law student to the *Harvard Women's Law Journal* about the role of a judge and your judicial philosophy. For example, you said:**

> **"'[M]inority judges' still need to maintain the disguise of 'objectivity' or else face challenges to their decisions . . . Yes, [a minority judge] is going to identify with [a minority party's] experiences, but she can't 'admit' this. We've got to get more clever and say, look, we're just as neutral as any sixty-year-old white man."**

You responded that you "completely disagree with" that statement today.

   a. **At what point in time did you stop agreeing with the perspective expressed in this comment?**

      Response: I stopped agreeing with this perspective during law school. Working on cases and shadowing attorneys during my summer externships after my 1L and 2L years made me realize that judges presiding over cases must be objective and must be fair and impartial to all parties in all cases.

   b. **How did you come to change your view? What sources—for example, authors, jurists, or written texts—persuaded you to change your view?**

      Response: Experience working on cases made me realize that as a lawyer and a citizen I want and need judges presiding over cases to be objective and to be fair and impartial to all parties.

   c. **What sources—for example, authors, jurists, or written texts—inform your view of the judicial role today?**

      Response: United States Supreme Court and Ninth Circuit precedent that sets forth what judges can and cannot consider in rulings, as well as the Code of Conduct for United States Judges, inform my view of the judicial role today.

2. **At Harvard, you were a member of the Coalition for Civil Rights—a student advocacy organization that filed a lawsuit challenging the University's hiring practices. Plaintiffs asserted claims under a Massachusetts statute prohibiting "employers from engaging in discriminatory employment practices against certain protected classes." *Harvard Law Sch. Coal. for Civil Rights v. President and Fellows of Harvard College*, 595 N.E.2d 316, 318 (Mass. 1992). The case was dismissed for lack of standing because "the plaintiffs**

[were] not within the employer-employee relationship and ha[d] not alleged substantial injury within the area of concern of the statute." ***Id.***

a. Did you participate in that lawsuit as a plaintiff?

Response: Yes.

b. In your judgment at the time, did the plaintiffs in that case have standing to sue the University? Why or why not?

Response: Yes, at the time I believed the plaintiffs had standing to sue based on my consultation with more senior law students who had consulted an attorney.

c. Why did you decide to participate in that lawsuit as a plaintiff?

Response: I decided to participate in the fall semester of my first year of law school because I cared deeply about the issue of faculty diversity at the time.

3. During your Judiciary Committee hearing, you were asked about the circumstances under which you would examine legislative history and congressional intent. Please expand on the answers you provided.

a. Do you believe legislative history to be useful? Why or why not?

Response: As the United States Supreme Court has repeatedly stated, "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). "If the statutory language is unambiguous and 'the statutory scheme is coherent and consistent,'" then "the inquiry ceases." *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016). However, if the text is ambiguous or the statutory scheme is not coherent or consistent, then United States Supreme Court and Ninth Circuit precedent permit the consideration of legislative history. However, such history should be viewed with caution. The United States Supreme Court has stated that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil*, 545 U.S. at 568.

b. What do you understand the phrase "congressional intent" to mean?

Response: Congressional intent refers to the "doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *SEC v. Joiner*, 320 U.S. 344, 350–351 (1943); *see also Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 642 (1990) ("[T]he intent of Congress as revealed in the history and purposes of the statutory scheme.").

c. Do you believe that legislative history reflects "congressional intent"?

Response: The United States Supreme Court has held that legislative history may "shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil*, 545 U.S. at 568. However, the United States Supreme Court has cautioned that legislative history may give "unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Id*.

4. What three canons of construction have you found most useful in your time as a judge?

Response: The United States Supreme Court has held that "canons are not mandatory rules. They are guides that 'need not be conclusive.'" *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Nonetheless, the following three canons have been most useful in my time as a judge. First, the whole-text canon provides that text must be construed as a whole. The United States Supreme Court has stated that: "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Second, the ordinary-meaning canon provides that words are to be understood in their ordinary meaning unless the context indicates otherwise. The United States Supreme Court has stated that where words have not "acquired any special meaning in trade or commerce, they must receive their ordinary meaning." *Nix v. Hedden*, 149 U.S. 304, 306 (1893). Finally, the surplusage canon provides that every word must be given effect. The United States Supreme Court has stated, "These words cannot be meaningless, else they would not have been used." *United States v. Butler*, 297 U.S. 1, 65 (1936).

5. At your hearing, Senator Flake mentioned the Orr Ditch Decree doctrine, under which federal courts apply both substantive and procedural aspects of Nevada state water law in certain cases. Do you have any opinion on why it might make sense in some cases for federal courts to apply state procedural law?

Response: The Ninth Circuit has set forth several factors that courts should consider in deciding whether to apply state procedural law. *United States v. Orr Water Ditch Co.*, 914 F.2d 1302, 1309 (9th Cir. 1990); *United States v. Orr Water Ditch Co.*, 391 F.3d 1077, 1081 (9th Cir. 2004). These factors include: the plain language of the governing documents, the dominance of state law issues, case law interpreting similar governing documents, the state's expertise in adjudicating the underlying disputes, and whether there is a conflict between state and federal procedural laws. *Id.*

6. As a judge on an appellate panel, under what circumstances would you see fit to author a dissenting or concurring opinion? Why would you author such opinions?

Response: If confirmed, I would consider issuing dissenting or concurring opinions where the majority opinion incorrectly applied the precedent of the United States Supreme Court, the Ninth Circuit, or a court of last resort such as a state supreme court; did not follow an

intervening decision of the United States Supreme Court or a court of last resort that is clearly irreconcilable with prior Ninth Circuit precedent; applied the wrong legal standard; or failed to give necessary guidance to the lower courts and the legal community.

7. You may be aware that the judges on the Ninth Circuit Court of Appeals actively engage in the process of rehearing cases *en banc* and frequently issue dissents from denial of *en banc* rehearing. In your view, what is the purpose of such dissents? As a judge on the Ninth Circuit, when would you issue such a dissent?

Response: If confirmed, I would consider issuing dissents from denial of en banc rehearing if the majority opinion incorrectly applied the precedent of the United States Supreme Court, the Ninth Circuit or a court of last resort such as a state supreme court or did not follow an intervening decision of the United States Supreme Court or a court of last resort that is clearly irreconcilable with prior Ninth Circuit precedent.

8. Under what circumstances, if any, do you believe an appellate court should overturn circuit precedent? What factors would you consider in reaching this decision?

Response: The Ninth Circuit has stated that, "Ordinarily, panels cannot overrule circuit precedent; that power is reserved to the circuit court sitting en banc." *United States v. Plouffe*, 445 F.3d 1126, 1127 (9th Cir. 2006). However, the Ninth Circuit has established an exception to this rule when a court of last resort, such as the United States Supreme Court or a state supreme court, issues an intervening decision that is "clearly irreconcilable" with prior Ninth Circuit precedent. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). The procedure for en banc review is set forth in Federal Rule of Appellate Procedure 35 and corresponding Ninth Circuit Rules 35-1 through 35-4.

9. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: The United States Supreme Court has recognized that judging the constitutionality of a statute is "the gravest and most delicate duty" that federal courts are called upon to perform. *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 204 (2009). Moreover, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr.*, 485 U.S. 568, 575 (1988). However, where Congress has exceeded its constitutional authority or a statute violates the Constitution, then a court should declare the statute unconstitutional.

10. Please describe with particularity the process by which these questions were answered.

Response: I received these questions from the Justice Department and drafted my responses. I discussed the responses with representatives of the Justice Department before finalizing them.

11. Do these answers reflect your true and personal views?

Response: Yes.