

**Senator Grassley
Questions for the Record**

**Salvador Mendoza, Jr.,
Nominee: U.S. District Judge for the Eastern District of Washington**

- 1. You are the judge currently presiding in the *State of Washington v. Arlene's Flowers* case. This case involves a flower shop's denial of services to a same-sex couple for their ceremony. I recognize this case is currently pending.**
 - a. I understand that you have ruled on several pre-trial motions. Please describe the issues presented, your ruling, and the reasons therefore.**

Response: On June 28, 2013, I decided a defense motion for recusal and a defense motion to withdraw an affidavit of prejudice filed against another judge. I denied both motions. I have detailed the issues presented, the rulings and the reasons for the decisions in my response to Senate Judiciary Committee Questionnaire (SJQ) question 14 (d) as follows: The defendants in *State of Washington v. Arlene's Flowers Inc., et al.*, No. 13-2-00871-5, Benton County Superior Court, filed a motion requesting that I recuse myself from the case. They did so after I disclosed that I had previously served (prior to my appointment to Superior Court) as a trustee for Columbia Basin College (CBC), the employer for one of the plaintiffs. As a trustee I did not have any duties to supervise any employees of CBC except the President of the college. That plaintiff had presented data and other scholastic information to the Board of trustees in the past. I did not have a personal friendship with the individual and had not recognized him when I initially reviewed the file. Nonetheless, pursuant to Comment 5 of the Canon of Judicial conduct 2.11, I felt it was important to disclose the information even when I did not feel it was a conflict of interest. I also noted on the record that my wife had purchased flowers on a few occasions from Arlene's Flowers in the past, but I also did not feel that was a conflict of interest. The defendants had already filed two affidavits of prejudice against other judges. I pointed out that under Revised Code of Washington 4.12.050, the parties were only entitled to file one affidavit per case. The defense attorneys then filed a motion attempting to withdraw an affidavit in order to file one against me. I denied the motion because it was not authorized by statute, court rule, or case law. The ruling has not been appealed.

On July 17, 2013, I filed an order addressing three pretrial motions: 1) Plaintiff's motion to strike Defendant's affirmative defenses; 2) Plaintiff's motion to dismiss "Third Party" complaint; and 3) Defense motion to join Attorney General Ferguson under Civil Rule 20. I outline the issues presented, my ruling and the reason for the ruling in my order filed on July 17, 2013. Copy supplied.

On July 24, 2013, I granted in part Defendant's motion to consolidate *Ingersoll, et al. v. Arlene's Flowers, et al.*, 13-2-00953-3 with *State of Washington v. Arlene's Flowers, et al.*, 13-2-00871-5. The motion was granted in part for pretrial discovery and dispositive motions pursuant to Superior Court Civil Rule 42(a) because both actions

presented common questions of law and fact and did not result in prejudice to the parties. I also concluded the decision is consistent with the court's principles on judicial economy. I reserved for later motions the issue of whether the cases should be tried together.

In an order dated October 7, 2013 and amended on December 16, 2013, I denied Defendant's motion for partial summary judgment. The Defendants challenged the Plaintiff's Consumer Protection Act (CPA) claim. I outlined the issues presented, my ruling and the reasons for the ruling in said order. Copy supplied.

- b. Other than those orders already provided, have you issued any other orders since you were nominated? If so, please provide them.**

Response: Yes. I authorized the first amended civil case scheduling order on January 24, 2014. Copy supplied.

- 2. According to press reports you said this about the case, "Believe me, ladies and gentleman, if there was a way ethically that I could not hear this case, I wouldn't." What did you mean by this statement?**

Response: I don't remember the specific context of this statement. I believe I was referencing the fact that I had been a Superior Court judge for less than two months when I was assigned a high profile case. However, I was not going to skirt my ethical responsibility to hear the cases that come before me.

- 3. As a judge, you have only handled state matters and as an attorney, you indicated that the majority of your practice was in federal court.**

- a. Have you handled any trials in federal court?**

Response: Yes. I have handled two federal criminal trials.

- b. Your questionnaire indicates that approximately twenty percent of your legal practice has been in federal court. Please elaborate on the type of legal work this has included (e.g., motions practice, trials, etc...).**

Response: When I was a practicing lawyer in federal court, my legal practice included handling both privately retained and court appointed federal criminal felony cases. Many of the cases I handled involved complex cases with alleged large conspiracies spanning multiple states and countries. I handled cases in federal court in Washington, Montana, Illinois, and Michigan. The work involved all facets of courtroom litigation from initial appearances through trial. The motion practice included case budgeting and management of complex cases, bail motions, suppression hearings, sentencing hearings, and discovery motions.

c. What steps do you plan to take to prepare yourself to handle federal matters, if confirmed?

Response: Since my practice in federal court exclusively involved criminal cases, if confirmed, my focus would be on mastering federal civil cases. Although there are differences between state and federal civil law, my current role as the presiding civil judge in Benton and Franklin counties would likely benefit me if I were to transition to the federal bench. If I am confirmed as a Federal District judge, I will demonstrate the same level of commitment that I give to the cases that I currently preside over as a state Superior Court judge. Additionally, I would note that the Federal Rules of Evidence are the same for both criminal and civil cases. I have substantial familiarity with these based on my previous practice. I am committed to applying my strong work ethic to the areas of law that I am less familiar with.

4. During law school you wrote a comment that criticizes the Supreme Court's decision in *Hernandez v. New York* saying that it was "wrongly decided because it fails to take into account the effects of racism in our justice system, the anti-immigrant hysteria gripping the country, and the practical effect on Latinos."

a. What is your current understanding of the law in this area?

Response: In *Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986), the Supreme Court held that the use of peremptory challenges on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment. The Court established the following three-part test in analyzing these peremptory challenges: 1) the party objecting to the peremptory challenge must establish a prima facie case that the totality of the facts illustrate a racial discriminatory purpose; 2) the non-moving party has the burden of stating a race-neutral reason for the peremptory challenge; and 3) if the non-moving party meets its burden, the burden then shifts again to the moving party to show purposeful discrimination. *Id.* at 96. In *Hernandez v. New York*, 500 U.S. 352, 361 (1991), the Supreme Court concluded that use of peremptory challenges on the basis of fear that a bilingual juror would not follow the official English translation, was a race-neutral reason that did not violate the Equal Protection Clause of the Fourteenth Amendment. *Hernandez* and *Batson* are the binding case precedents in this area.

b. What assurances can you give the Committee that you will faithfully apply Supreme Court precedent in this area, if the matter was to arise before you?

Response: I can assure the Committee that if I am confirmed, I will base my decisions entirely on the facts presented and the binding case precedents of the Supreme Court and the Ninth Circuit. I believe my record as state court judge demonstrates that I fairly and impartially apply the laws to the facts of any given case. Any opinion that I may have had when I was a law student, will have no bearing on the decisions I will make as a U.S. District Court judge if I am fortunate enough to be confirmed.

5. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is the adherence to the rule of law. As a Superior Court judge I have followed this important principle. If I am confirmed, I will continue to do the same.

6. **Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

Response: A judge must be able to treat all the parties appearing before him or her with great respect and dignity. Good temperament from the judge will engender respect for the process and system of justice. I believe I meet this standard.

7. **In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

Response: My personal beliefs on any case precedent will have no bearing on my decision in a case. I am committed to follow both the Supreme Court's and the Ninth Circuit's binding precedents.

8. **Every nominee who comes before this Committee assures me that he or she will follow all applicable precedent and give them full force and effect, regardless of whether he or she personally agrees or disagrees with that precedent. With this in mind, I have several questions regarding your commitment to the precedent established in *United States v. Windsor*. Please take any time you need to familiarize yourself with the case before providing your answers. Please provide separate answers to each subpart.**

- a. **In the penultimate sentence of the Court's opinion, Justice Kennedy wrote, "This opinion and its holding are confined to those lawful marriages."¹**

- i. **Do you understand this statement to be part of the holding in *Windsor*? If not, please explain.**

Response: I do believe that the statement is part of the Court's holding.

- ii. **What is your understanding of the set of marriages to which Justice Kennedy refers when he writes "lawful marriages"?**

Response: In *United States v. Windsor*, Justice Kennedy's reference to "lawful marriages" are those "marriages that are made lawful by the State." 133 S. Ct. 2675, 2695 (2013). Justice Kennedy writes that the definition and regulation of marriage has been traditionally within the authority of the individual states. *Id.*

¹ *United States v. Windsor*, 133 S.Ct. 2675 at 2696.

at 2689-90. He notes that in addition to New York, 11 other states and the District of Columbia have recognized same-sex marriages as lawful marriages. *Id.* at 2689.

iii. Is it your understanding that this holding and precedent is limited only to those circumstances in which states have legalized or permitted same-sex marriage?

Response: The Court's holding only applies to § 3 of DOMA. *Id.* at 2679. This section amends the Dictionary Act in Title 1, §7, of the United States Code to provide a federal definition of "marriage" and "spouse." *Id.* The specific holding of the Court is that as applied to states where same-sex marriage has been legalized, DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Due Process Clause of the Fifth Amendment of the Constitution. *Id.* at 2695.

iv. Are you committed to upholding this precedent?

Response: I am committed to upholding this and all other Supreme Court and Ninth Circuit binding case precedents.

b. Throughout the Majority opinion, Justice Kennedy went to great lengths to recite the history and precedent establishing the authority of the separate States to regulate marriage. For instance, near the beginning, he wrote, "By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States."²

i. Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes. The whole *Windsor* opinion along with all other cited U.S. Supreme Court precedents are binding authority.

ii. Will you commit to give this portion of the Court's opinion full force and effect?

Response: Yes.

c. Justice Kennedy also wrote, "The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens."³

i. Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

² *Id.* 2689-2690.

³ *Id.* 2691.

Response: Yes. The whole *Windsor* opinion along with all other cited U.S. Supreme Court precedents are binding authority.

- ii. **Will you commit to give this portion of the Court’s opinion full force and effect?**

Response: Yes.

- d. **Justice Kennedy wrote, “The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the ‘[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.’”⁴**

- i. **Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.**

Response: Yes. The whole *Windsor* opinion along with all other cited U.S. Supreme Court precedents are binding authority.

- ii. **Will you commit to give this portion of the Court’s opinion full force and effect?**

Response: Yes.

- e. **Justice Kennedy wrote, “The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for ‘when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.’”⁵**

- i. **Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.**

Response: Yes. The whole *Windsor* opinion along with all other cited U.S. Supreme Court precedents are binding authority.

- ii. **Will you commit to give this portion of the Court’s opinion full force and effect?**

Response: Yes.

- 9. **At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

⁴ *Id.* (internal citations omitted).

⁵ *Id.* (internal citations omitted).

Response: If there are no controlling precedents from either the Supreme Court or the Ninth Circuit, then I would be guided by accepted principles of statutory construction. I would first look at the text of the governing statute. If the language is clear, then my inquiry would be over. If it were not clear, I would look for guidance from the Ninth Circuit's and Supreme Court's related cases on the issue. If there were no such cases, I would then turn to other federal appellate court opinions on the subject at issue for persuasive authority.

- 10. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?**

Response: If I am confirmed as a District Court judge, my responsibility would be to follow all case precedents by both the Supreme Court and the Ninth Circuit. Any personal opinion I might have about the decision would play no role in the decision-making process.

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

Response: Statutes enacted by Congress are presumed to be constitutional. Thus, the statute will only be declared unconstitutional if it is clear that Congress has exceeded its authority to enact the statute or when the statute violates a provision of the Constitution.

- 12. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution? Please explain.**

Response: No. District judges should be guided by domestic law as authorized by the Supreme Court precedents. If I am confirmed, I would not be guided by foreign law or take the view of the "world community" in deciding the cases that I handle.

- 13. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?**

Response: As a Superior Court judge, I have been guided by the same principles that I would be guided by as a District Court judge if confirmed: that I would decide cases based upon the facts presented, the statutory text and the case law authority that apply. No other factors will guide my decisions.

- 14. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?**

Response: I can assure the Committee that my personal opinions have no place in deciding any cases that I am asked to preside over. I believe an important hallmark of our system of justice is the ability of our judges to treat all litigants that appear before them equally and

with respect. I am committed to these principles as a Superior Court judge and would be guided by the same if confirmed as a District Court judge.

15. If confirmed, how do you intend to manage your caseload?

Response: My general practice would be to file a case scheduling order at the beginning of each case. At the first scheduled hearing, I would discuss with the litigants any unique or unusual issues that may modify the scheduling order. On large and complex cases, the discussion would be more in depth and particularized to the specific needs of the case. The aim of these discussions would be to both promote efficiencies in the case and meet the needs of the litigants.

16. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Yes. Judges play an important role in ensuring that cases are adjudicated in a timely manner. In my current position as a Superior Court judge for Benton and Franklin Counties, we have developed case management procedures to handle the large caseloads. If confirmed, I would work with the clerk of the court and the other judges in our district to ensure a case management system is in place to expeditiously handle matters in our district.

17. As a judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance.

Response: In deciding cases, I look at the facts presented and the specific issue I am called to decide. I first look to the statutory authority and case precedent, conducting my own independent legal research as needed. The relevant sources may be Washington State statutory authority, case precedent from Washington state appellate courts or the U.S. Supreme Court, the rules of evidence, the criminal or civil rules, or the Washington State or U.S. Constitution.

18. According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: “To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice bias, increase the number of trial lawyers serving on individual Senator’s judicial selection committees”.

- a. Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the subject matter of the communications.**

Response: No.

- b. Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.**

Response: No.

- 19. Please describe with particularity the process by which these questions were answered.**

Response: I received these questions on March 19, 2014 and drafted responses. I then discussed my responses with representatives from the Department of Justice. I then finalized my responses.

- 20. Do these answers reflect your true and personal views?**

Response: Yes.