

**Nomination of Judge Neil M. Gorsuch to be Associate
Justice of the United States Supreme Court
Questions for the Record
Submitted March 24, 2017**

QUESTIONS FROM SENATOR COONS

1. Several recent Supreme Court cases have made reference to the opinions of foreign courts or foreign practices to affirm conclusions that were otherwise supported by the record as well as relevant U.S. case law and practices in cases addressing capital punishment under the Eighth Amendment and privacy of same-sex intimacy under the Fourteenth Amendment. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002). Is it your contention that foreign court decisions and foreign practices of democratic countries that follow the rule of law cannot be considered and cited in opinions interpreting the Constitution?

RESPONSE: As we discussed at the hearing, it is not categorically improper to cite international law in judicial opinions and there are circumstances when it is necessary and proper to do so. At the hearing we discussed some but by no means all examples, such as when a judge may need to interpret a contract with a choice-of-law provision that may adopt a foreign law or when a treaty, by its terms, requires a judge to look at international law.

2. From documents obtained during your tenure at the Department of Justice, it appears that you were directly involved in work leading to the enactment of the Detainee Treatment Act of 2005 on behalf of the administration, as well as in discussions about whether President Bush should append a signing statement to the bill and what the statement should say.
 - a. If a case concerning this act and/or President Bush’s signing statement came before the Supreme Court, would you recuse yourself from hearing the case?
 - b. What standard or standards would you consult when making this determination?

RESPONSE: As I stated in my Senate Judiciary Committee Questionnaire, if confirmed, I would seek to follow the letter and spirit of the Code of Conduct for United States Judges (even though it is not binding upon Justices of the Supreme Court), the Ethics Reform Act of 1989, 28 U.S.C. § 455, the Ethics in Government Act of 1978, and other relevant guidelines. Among other things, I would recuse myself from any cases in which I participated as a judge on the U.S. Court of Appeals for the Tenth Circuit and other cases that might give rise to an actual or apparent conflict of interest. I would apply the same standards in determining whether I should recuse from any case, including a case concerning the Detainee Treatment Act or President Bush’s signing statement accompanying the Act.

3. In one document released to the Senate Judiciary Committee, you wrote by hand “Yes” next to a typed question asking, “Have the aggressive interrogation techniques used by the Admin yielded any valuable intelligence? Have they ever stopped a terrorist incident? Examples?”
 - a. When you wrote this note, what did you understand to constitute “aggressive interrogation techniques”?

- b. During your tenure at the Department of Justice, what actions, if any, did you take to defend the use of “aggressive interrogation techniques”?
- c. Do you believe that “aggressive interrogation techniques” work to yield valuable intelligence?
- d. Is it legal for U.S. officials to torture individuals?
- e. Is it legal for the President to authorize the use of torture based on a claim of national security?
- f. Would the President’s authorization of the use of torture be within the scope of judicial review?

RESPONSE: I do not currently recall the specific context of the document you reference in your question. As I said at the hearing, my recollection of events from approximately 12 years ago is that the handwritten answer on the document reflected the position that clients had represented to lawyers at the Department of Justice. As we discussed at the hearing, torture, as well as cruel, inhuman, and degrading treatment, is expressly prohibited by law, and no person is above the law.

- 4. All federal judges – except Supreme Court justices – are required to comply with the Code of Conduct for United States Judges. This code ensures that judges avoid the appearance of impropriety, refrain from political activity, and make financial disclosures. In your hearing you said, “I have no problem living under the rules I’ve lived under. I’m quite comfortable with them. And I’ve had no problem reporting every year to the best of my abilities everything I can. So I can tell you that. It doesn’t bother me what I’ve had to do. I consider it part of the price of service and it’s a reasonable and fair one.”
 - a. If confirmed, will you support the establishment of a code of conduct for Supreme Court justices?
 - b. In the absence of a binding code of conduct for Supreme Court justices, will you commit to continue adhering to the Code of Conduct for United States Judges applicable to federal judges on district courts and circuit courts?
 - c. Will you commit to filing the same financial and travel disclosures that you currently file, should you be confirmed to the Supreme Court?

RESPONSE: As I said at the hearing in response to Senator Klobuchar, if confirmed I would commit to give a careful consideration to the practice of the Supreme Court on these questions, and I would want to hear what my colleagues have to say. In addition, as I stated in my Senate Judiciary Committee Questionnaire, if confirmed I would seek to follow the letter and spirit of the Code of Conduct for United States Judges (even though it is not binding upon Justices of the Supreme Court), the Ethics Reform Act of 1989, 28 U.S.C. § 455, the Ethics in Government Act of 1978, and other relevant guidelines. Among other things, I would recuse myself from any cases in which I participated as a judge on the U.S. Court of Appeals for the Tenth Circuit and other cases that might give rise to an actual or apparent conflict of interest.

- 5. Pro bono representation of litigants plays a vital role in providing access to justice. The American Bar Association suggests that each lawyer render at least 50 hours of pro bono legal services per year. You have written about the importance of access to justice, effective representation of capital defendants, and the challenges that many parties face in obtaining affordable representation. Please describe every pro bono matter you worked

on during your time in private practice.

RESPONSE: While in private practice, my colleagues and I took on various matters for clients that could not afford the firm's normal hourly rate. In these cases, the firm's fees were modified, were made subject to contingency arrangements, or were waived to allow the client to obtain legal representation. As a judge, I have sought to advance these same interests, including my work on the rules committees, and on our circuit's efforts to enhance representation for death row inmates. Please see also the response to Question 20 of Senator Hirono's questions for the record.

6. Prior to the commencement of your nomination hearing, the Committee received two letters from former students that concern me. In these letters, the students describe their recollection of one session of your Spring 2016 legal ethics class. These letters assert that, following a lively class discussion about work-family balance and the difficulties of law school debt for students of all genders, you asked students about their personal knowledge of women using maternity benefits provided by a law firm and then leaving the law firm shortly thereafter. These letters assert that you told the class that law firms and other companies should ask female interviewees about pregnancy plans in order to protect the employer from financial loss, and that it is legal for companies to do so. Title VII protects against discrimination on the basis of pregnancy, childbirth, and sex, and asking a candidate for employment about her plans to become pregnant or have a family can be used as evidence in a discrimination case.
 - a. Please recount everything you recall concerning the conversation you had with your Spring 2016 legal ethics class on April 19, 2016.

RESPONSE: I respectfully refer you to my discussion with Senator Durbin at the hearing on this subject.

- b. Do you think it is ever acceptable for a professor or a judge to suggest that employers should ask about family planning in a job interview?

RESPONSE: I have not done so and respectfully refer you to my discussion with Senator Durbin at the hearing on this subject.

7. You have used descriptions of substantive due process that include "very much uncharted," "more than a little 'open ended,'" "murky," and something with a "paradoxical name." Given the complexity of this area of law, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?
 - a. Would you consider whether the right is expressly enumerated in the Constitution?
 - 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?
 - 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?
 - d. Would you consider whether a similar right has previously been recognized by

Supreme Court or circuit precedent?

- 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*).
- f. What other factors would you consider?

RESPONSE: As discussed at the hearing, some of the descriptions of the doctrine you cite at the outset of your question come from Supreme Court cases. See, e.g., *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended”); *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Respectfully, the questions posed here may come before me as a judge. Accordingly, I can promise no more than that I will endeavor to follow the law as faithfully as I am able. To offer more would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

8. The U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) has exclusive jurisdiction over appeals from civil actions involving claims “arising under . . . any Act of Congress relating to patents.” 28 U.S.C. § 1295(a)(1). Decisions of the Federal Circuit are reviewable by the Supreme Court. Because you have been at the Court of Appeals for the Tenth Circuit, your docket was unlikely to include cases relating to patent law issues, but if you are confirmed to the Supreme Court, such cases will now have the potential to appear before you. What specific patent law experience (such as in private practice, other governmental service, or as an inventor/entrepreneur) would you bring to bear when considering these cases?

RESPONSE: During my service as Principal Deputy Associate Attorney General at the Department of Justice, I had a supervisory role over litigating components that were involved in various kinds of intellectual property litigation. As a judge, I have participated in intellectual property cases, though of course not patent cases which, as you note, proceed to another circuit.

9. The Federal Circuit was created by the Federal Courts Improvement Act of 1982, Pub. L. 97-164. “Congress conferred exclusive jurisdiction of all patent appeals on the Court of Appeals for the Federal Circuit, in order to ‘provide nationwide uniformity in patent law.’” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (quoting H.R. REP. NO. 97-312, p. 20 (1981)).
 - a. In light of this intent behind creating an intermediate appellate court that has nationwide subject matter jurisdiction over patent law, what, if any, deference or consideration should the Federal Circuit receive for doctrinal developments in this area of law?
 - b. Does your answer change depending on whether the patent law issue in question is based on an interpretation of any part of Title 35 of the U.S. Code or if it is, instead, based upon a common law patent doctrine?
 - c. Resolving circuit splits is often viewed as one of the Supreme Court’s core responsibilities in order to ensure uniform rules nationwide so that case outcomes are not simply the result of where a case is filed. Because the Federal Circuit is

the only intermediate appellate court to hear patent cases, however, there is no possibility of a circuit split on these issues. What other factors would you look to in order to determine whether to grant a writ of certiorari in patent law cases?

RESPONSE: Pursuant to Rule 10 of the Supreme Court Rules, a writ of *certiorari* is granted for “compelling reasons.” Some factors that might indicate whether further review is warranted of a decision of the Federal Circuit include tension with Supreme Court decisions, the presence of intra-circuit conflicts, and the importance of the case.

10. During your nomination hearing, you spoke frequently about the “reliance interest” that must be considered (among other factors) when the Supreme Court decides whether it should overturn precedent. Do you agree that this same type of interest has particular relevance when considering whether to make substantial changes to patent law (even if no precedent is directly overturned), given that significant research and development investments are often predicted on the certainty of a federal patent grant?

RESPONSE: As we discussed at the hearing extensively, when evaluating precedent a judge must analyze multiple factors, and reliance often may be an important one. On this score, I also respectfully refer you to the book I coauthored, the *Law of Judicial Precedent*.

11. During your nomination hearing, we had an exchange about your concurrence in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013). I raised my concern that your characterization of the role of “complicity” in the context of determining whether a person is entitled to object to a facially neutral law under the Religious Freedom Restoration Act (“RFRA”) could be expanded to allow the religious views of a few to impact the liberty interests of many, since it allows for religious objections based on the actions and choices of others. Following up on our exchange, please answer the following questions:

a. Does the characterization of “complicity” in this question comport with what you meant when you used that term in your *Hobby Lobby* concurrence?

RESPONSE: Respectfully, I used that term when describing the claimant’s assertion of a sincerely held religious belief, a statutorily prescribed consideration under the Religious Freedom Restoration Act (RFRA). As we discussed at the hearing, the same concept was discussed in *Thomas v. Review Bd. Of the Indiana Employment Security Division*, 450 U.S. 707 (1981), where a Jehovah’s Witness sincerely believed that directly participating in the production of armaments made him complicit in their use in a way that violated his sincerely held religious belief. Of course, whether a law substantially burdens a sincerely held religious belief is only the first part of the RFRA analysis. There is also a second part: If a law substantially burdens such a belief, the government may show that the denial of an accommodation is the least restrictive means of furthering a compelling government interest.

b. Can any level of support that an individual finds to be objectionable constitute complicity?

RESPONSE: Respectfully, whether a particular individual can show a substantial burden on a sincerely held religious belief under the Religious Freedom Restoration Act depends on the particular facts of each case.

- c. Can a court ever inquire into how remote this support is to determine whether a RFRA claim based on “complicity” exists, even if the claim is based on a sincerely held religious belief that the legally mandated conduct requires “complicity . . . in the wrongdoing of others”?

RESPONSE: Please see the response to Question 11(b).

12. You wrote that judges should “strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be” You told Sen. Feinstein that it does not matter that “some of the drafters of the Fourteenth Amendment were racists, because they were, or sexist, because they were. The law they drafted promises equal protection of the laws to all persons. . . . And equal protection of laws does not mean separate in advancing one particular race or gender. It means equal.”
 - a. 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. 489, 490-93. 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?

RESPONSE: As I have stated during my testimony, *Brown v. Board of Education* overturned the deeply erroneous decision of *Plessy v. Ferguson*. It took many years—almost 60 years—for the Supreme Court to recognize that Justice Harlan in his dissent in *Plessy* got the original meaning of the Equal Protection Clause right the first time. It is one of the great stains on the Supreme Court’s history that it took so long to get to the *Brown* decision.

- b. How do you respond to the criticism of your approach 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-pages/democratic-constitutionalism> (last visited Mar. 24, 2017).

RESPONSE: Respectfully, I am not familiar with this article.

- c. How does your approach to judicial interpretation lead you to conclude that “equal” applies to equality across race *and* gender, even though the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction?

RESPONSE: As I discussed with Senator Feinstein at the hearing, the Fourteenth Amendment as drafted promises equal protection of the laws to all persons. The original meaning of those words, as captured by Justice Harlan in his dissent in *Plessy v. Ferguson*, is that equal protection of laws means just that—equal.

- d. If the Fourteenth Amendment has always required equal treatment of men and women, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515, that states were required to provide the same educational opportunities to men and women?

RESPONSE: Whatever the reason, as I stated above the Fourteenth Amendment means equal protection of the law for all persons.

- e. Does the Fourteenth Amendment require that states treat gay and lesbian couples equally to heterosexual couples? Why or why not?

RESPONSE: In *Lawrence v. Texas* and *Obergefell v. Hodges*, the Supreme Court held that gay and lesbian couples have a constitutionally protected right to engage in consensual sexual relations and to marry.

- f. Does the Fourteenth Amendment require that states treat transgender people equally? Why or why not?

RESPONSE: This question appears to reference pending or impending cases likely to come before the Supreme Court, and accordingly it would not be proper for me to comment further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

13. Chief Justice Warren wrote that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This approach explicitly calls on the Court to not limit its Eighth Amendment analysis to the meaning of “cruel and unusual punishments” when the Amendment was ratified in 1791, a time when firing squads and hanging were prevalent methods of execution. Under this evolving standard, the Court has prohibited practices once thought to be constitutional, such as the execution of minors and the execution of individuals with intellectual disabilities.

- a. Under your judicial approach described above, what is meant by the Eighth Amendment’s prohibition against “cruel and unusual punishments”?
- b. Does the phrase “cruel and unusual punishments” have the same meaning from the Eighth Amendment’s ratification in 1791 until now, or has our understanding changed?
- c. Do scientific advancements in our understanding of psychology, pain, and death alter what constitutes “cruel and unusual punishments”?

RESPONSE: The Supreme Court has issued several opinions discussing the Eighth Amendment and how it should be interpreted. Recently in *Miller v. Alabama*, 132 S. Ct. 2455

(2012), the Court has reaffirmed the view that the Eighth Amendment's prohibition of cruel and unusual punishment “guarantees individuals the right not to be subjected to excessive sanctions.” *Id.* at 2463 (citation and quotation marks omitted). That right, the Supreme Court has instructed, “flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense.” *Id.* The Supreme Court also has stated that it views the concept of proportionality according to “the evolving standards of decency that mark the progress of a maturing society.” *Id.* (citing *Estelle v. Gamble*, 429 U.S. 97 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (plurality opinion))).

14. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “Higher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), 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 about the purported negative impact of such marriages on children.
 - a. When is it appropriate to consider evidence that sheds light about our changing understanding of society?
 - b. What is the role of sociology, scientific evidence, and data in the Supreme Court’s analysis?

RESPONSE: Whether and what sociology, scientific evidence, and data a court should consider are questions that are often contested in litigation. I am unaware of a global answer to these questions. A judge can only take each case on its facts and in light of applicable law.

15. In *Prost v. Anderson*, 636 F.3d 579 (10th Cir. 2011), you authored a majority opinion holding that federal prisoners whose convictions have been undermined by a later Supreme Court decision construing the statute under which they were convicted may not invoke the “savings clause” of 28 U.S.C. § 2255(e) unless there are exceptional circumstances like the abolition of their sentencing court. Does your decision create a situation in which an actually innocent person could be in prison without any claim to habeas relief?

RESPONSE: In *Prost v. Anderson*, the Tenth Circuit sought to apply faithfully Congress’s directions in 28 U.S.C. § 2255.

16. In *Williams v. Jones*, 571 F.3d 1086, 1094 (10th Cir. 2009), you dissented from a majority opinion holding that a defendant who had ineffective assistance of counsel was entitled to a more meaningful remedy than the one provided under state law. You wrote, “The Sixth Amendment right to effective assistance of counsel is an instrumental right designed to ensure a fair trial. By his own admission, [the defendant] received just such a trial, at the end of which he was convicted of first degree murder by a jury of his peers. We have no authority to disturb this outcome.” *Id.* You said the defendant

“would have us follow him through the looking glass, to a world where a fair trial is called ‘prejudice’; where the results of a fair trial are void because of a lost opportunity rather than an infringed legal entitlement; and where a lawyer’s incompetence transforms the executive plea bargain prerogative into a judicially enforceable entitlement. I do not believe the Sixth Amendment permits us to accompany him there.” 571 F.3d at 1110. If your dissent had been the majority opinion, would it be the case that any defendant receiving inadequate assistance of counsel on a plea agreement who subsequently has a “fair” trial would not have a remedy for the ineffective assistance of counsel claim?

RESPONSE: In *Williams v. Jones*, I suggested that a defendant cannot demonstrate prejudice from a claim of ineffective assistance of counsel in the pretrial plea bargaining process if he is later convicted after a trial he concedes was fair. The Supreme Court in *Lafler v. Cooper* and *Missouri v. Frye* later addressed this question, and these decisions are the controlling precedent.

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

1. During his hearing, Chief Justice Roberts said, “I believe that the liberty protected by the Due Process Clause is not limited to freedom from physical restraint, that it includes certain other protections, including the right to privacy.”
 - a. **Do you, like Chief Justice Roberts, believe that the liberty protected by the Due Process Clause includes the right to privacy?**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13. In your 2005 *National Review* article “Liberals’N’Lawsuits,” you wrote, “Finally, in the

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

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

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

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

14. You said at your hearing that an *en banc* hearing is “an extraordinary thing. We probably hear between zero and three *en bancs* a year over the course of my time.” You also said that “about one of every five *en bancs*, about 20 percent of *en bancs* in our court are *sua sponte*. It is not unusual.” Assuming that your descriptions are roughly accurate, the Tenth Circuit has heard a maximum of approximately 30 cases *en banc* during your tenure, with approximately six of them being *sua sponte*.

- a. **Why did you find the error you claimed was made by the panel opinion in *Planned Parenthood Association of Utah v. Herbert* rose to the level of exceptionalism shown by the six *sua sponte en banc* cases – six out of tens of thousands of cases – the Tenth Circuit has heard over the past decade?**

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

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

15. You joined an opinion in *Druley v. Patton*, 601 Fed. Appx. 632, 635 (10th Cir. 2015) that included the statement “To date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims.” You stated at your hearing that you wrote a separate concurrence in *Gutierrez-Brizuela v. Lynch* because you saw “an equal protection concern.” You also stated at your hearing that you write separate concurrences “when I see a problem [to] raise my hand and tell my bosses I see an issue here.”

- a. **Did you consider writing a concurrence in *Druley v. Patton* to raise as “an equal protection concern” or “an issue” that Tenth Circuit precedent had not recognized transgender individuals as belonging to a suspect class for Equal Protection purposes? If not, why not? If you considered and decided not to, why did you make that decision?**

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

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

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

16. During your hearing, I asked you whether you had spoken with representatives of the Heritage Foundation about various topics. You said, “To my knowledge, Senator, from the time of the election to the time of my nomination, I have not spoken to anyone that I know of from Heritage.” As you know, you were included on President Trump’s list of potential Supreme Court nominees—reportedly assembled with the assistance of the Heritage Foundation—long before last year’s election.

- a. **Did you have any communications with representatives or employees — including employees on paid or unpaid leave — of the Heritage Foundation or the Federalist Society in 2016 or 2017?**
- b. **If so, what did you discuss with such representatives or employees?**
- c. **Did you discuss *Roe v. Wade*, abortion, reproductive rights, or the right to privacy with such representatives or employees? Please describe the nature and content of the conversation on any of these topics.**
- d. **Were any of the individuals who helped you prepare for your confirmation hearings employees—including employees on paid or unpaid leave—of the Heritage Foundation? Were any employees of the Heritage Foundation in the**

last year?

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

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

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

- a. **How many people helped to prepare you for your confirmation hearings?**

RESPONSE: Please see the response to Question 16.

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

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

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

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

work on the Detainee Treatment Act.

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

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

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

**Nomination of Judge Neil M. Gorsuch to be
Associate Justice of the United States Supreme Court
Questions for the Record
Submitted March 24, 2017**

QUESTIONS FROM SENATOR DURBIN

1. When you recommended that the signing statement for the Detainee Treatment Act state that the Act is “best read as essentially codifying existing interrogation policies,” did you know what these existing interrogation policies were?
2. Prior to making the recommendation referenced in question #1, had you read any of the following memos by the Office of Legal Counsel?

Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005)

Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees (May 10, 2005)

Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005)

RESPONSE: The December 29, 2005 email chain discussed proposed versions of a signing statement to accompany the Detainee Treatment Act. As we discussed at the hearing, these events took place many years ago and my recollection “is that there were individuals in maybe the Vice President’s office who wanted a more aggressive signing statement . . . and that there were others, including at the State Department, who wanted a gentler signing statement.” To my recollection, as I said at the hearing, “I was in the latter camp [along with] John Bellinger, among others.” I did so in my role as a lawyer helping with civil litigation brought by individuals detained as enemy combatants and defended by the Department of Justice. The email chain indicates that the Legal Adviser for the State Department favored a gentler and more expansive statement for various reasons, including public and foreign relations. The email chain also indicates that the National Security Council expressed the view that the Detainee Treatment Act codified existing policies. In that light and as a lawyer advising a client, the email chain indicates that I suggested a signing statement could (1) speak about the Detainee Treatment Act positively to the public and to foreign nations as the State Department suggested, (2) highlight aspects of the legislation helpful to litigators in the Civil Division of the Department of Justice, and (3) make transparent the client’s position that the Act codified

existing policies. I do not recall what I knew about specific interrogation policies or memos at the time.

3. Prior to making the recommendation referenced in question #1, were you read into or briefed on the CIA's rendition, detention or interrogation program?

RESPONSE: I had various national security clearances during my service at the Department of Justice, including related to detainee matters in aid of my work on litigation brought by individuals detained as enemy combatants, but I do not recall which specific programs or when I was read into them.

Nomination of Neil M. Gorsuch to be Associate Justice of the Supreme Court
Questions for the Record
Submitted March 24, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. At your hearing, you acknowledged you worked on the Graham amendment to the Detainee Treatment Act, which sought to eliminate habeas corpus for Guantanamo detainees.

You also acknowledged that in December 2005, after the Detainee Treatment Act was passed, there were different factions in the Administration advocating different versions of the signing statement. In an email you sent to Steven Bradbury and others you said a signing statement:

“...along the lines proposed below would help inoculate against the potential of having the Administration criticized sometime in the future for not making sufficient changes in interrogation policy in light of the McCain portion of the amendment; this statement clearly, and in a formal way that would be hard to dispute later, puts down a marker to the effect that the view that McCain is best read as essentially codifying existing interrogation practices.”

This was in December 2005, just nine months after an Office of Legal Counsel memo signed by Steven Bradbury had concluded that waterboarding, stress positions, sleep deprivation, and other techniques were not prohibited by the standard applied under Article 16 of the Convention Against Torture.

I read your email as saying if the Administration issued a signing statement along these lines then the passage of the McCain amendment would not require much of a change in interrogation policy than what the Department of Justice had already decided was allowable.

- a. **What did your email mean? What did you mean when you said that a signing statement would “inoculate against” being criticized in the future for “not making sufficient changes in interrogation policy”?**

RESPONSE: The December 29, 2005 email chain discussed proposed versions of a signing statement to accompany the Detainee Treatment Act. As we discussed at the hearing, these events took place many years ago and my recollection “is that there were individuals in maybe the Vice President’s office who wanted a more aggressive signing statement ... and that there were others, including at the State Department, who wanted a gentler signing statement.” To my recollection, as I said at the hearing, “I was in the latter camp [along with] John Bellinger, among others.” I did so in my role as a lawyer helping with civil litigation brought by individuals detained as enemy combatants and defended by the Department of Justice. The email chain indicates that the Legal Adviser for the State Department favored a gentler and more expansive statement for various reasons, including public and foreign relations. The email chain also indicates that the National Security Council expressed the view that the Detainee Treatment Act codified existing policies. In that light and as a lawyer advising a client, the email chain indicates that I suggested a signing statement could (1) speak about the Detainee Treatment Act positively to the public and to

foreign nations as the State Department suggested, (2) highlight aspects of the legislation helpful to litigators in the Civil Division of the Department of Justice, and (3) make transparent the client's position that the Act codified existing policies.

2. On the first day of questioning, you told Senator Graham that the Detainee Treatment Act prohibits waterboarding. But an email you wrote when you were part of the Bush Administration Justice Department seems to say the opposite—you said that the law should be read as “essentially codifying interrogation practices,” which at the time included waterboarding, stress positions, sleep deprivation, and other techniques that had been approved in the Bradbury OLC memo from 2005.

a. What did you mean by “codifying existing interrogation policies”?

RESPONSE: Please see the response to Question 1.

b. When did you come to the view that the Detainee Treatment Act bars waterboarding, and why in the Bush Administration did you have a different view?

RESPONSE: I do not currently recall when precisely I came to that view. By its express terms, the Detainee Treatment Act prohibits cruel, inhuman, and degrading treatment. Please see also the response to Question 1.

3. Do you understand and agree that your former role at the Justice Department—and the positions you advocated for while at the Justice Department on behalf of the government—can and should have no bearing on the way you decide cases as a judge?

RESPONSE: I understand and agree that my former role at the Department of Justice has not had and will not have any bearing on the way I decide cases as a judge.

4. Do you agree with seminal Supreme Court decisions and precedents in cases that you were involved with or associated with, in which the Court ruled against the Bush Administration? Such cases include *Rasul v. Bush*, *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*. If confirmed, will you agree to follow these precedents?

RESPONSE: *Rasul v. Bush*, *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush* are precedents of the Supreme Court due all the weight of such precedents. As Alexander Hamilton said in Federalist Paper No. 78: “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents.”

5. Do you believe that the courts play an important role in reviewing and deciding whether an individual's rights have been violated by the government, even and especially when the government is acting in the name of protecting national security? Should courts ever review the basis of the political branches' claim of national security—or are those claims subject to the exclusive determination of the executive and/or Congress? If so, in what situations and on what basis?

RESPONSE: The Constitution protects liberty by dividing the federal government’s powers and authority into three co-equal branches. As I explained at my hearing, in our constitutional system, the judiciary provides an important, independent forum “for vindicating the rights of unpopular voices, minority voices, the least amongst us.” This is true even when the political branches are acting in the name of national security. As I acknowledged at my hearing, “Presidents make all sorts of arguments about inherent authority [regarding national security]. . . . Presidents of both parties have made arguments, for instance, about the War Powers Act, both parties. And the Congress has taken a different position on that matter, for example, with both parties. And the fact is we have courts to decide these cases for a reason, to resolve these disputes. And I would approach it as a judge through the lens of the *Youngstown* analysis.” Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), sets forth a widely accepted tripartite framework for evaluating presidential power. In the first category, as I stated at the hearing, the “President [is] acting with the concurrence of Congress” and this is “when the President is acting at his greatest strength because there are shared responsibilities in our Constitution.” Next, “when the Congress and the President are in disagreement,” this is “the other end of the spectrum” and the President is acting “at the lowest ebb of his authority.” Finally, “when Congress is silent, that is the gray area in between.”

6. Do you believe that any government actions are “unreviewable” by the courts (assuming the court has jurisdiction and the parties have standing)? If so, to what extent?

RESPONSE: As I said during my hearing, no one is above the law. The role of an independent judiciary is to consider cases and controversies based upon the law and the facts.

7. Do you believe that humane treatment of individuals held in U.S. custody—that is, freedom from torture or cruel, inhuman, or degrading treatment—is required by international law, federal statute, and our Constitution?

RESPONSE: As we discussed at my hearing, the Convention Against Torture and implementing legislation ban torture. The Detainee Treatment Act bans cruel, inhuman, and degrading treatment. The Eighth Amendment prohibits cruel and unusual punishment.

8. Do you believe that Congress has the authority to regulate and constrain the executive branch, including on issues related to national security? For example, do you agree that Congress can constitutionally require that the executive branch treat detainees humanely, and prohibit torture and cruel treatment? Are there any areas in which you believe that Congress is constitutionally *prohibited* from legislating to constrain the executive branch? If so, what specific areas, and to what extent?

RESPONSE: Please see the response Question 5.

9. The Detainee Treatment Act contained both Senator McCain’s amendment that prohibited cruel, inhuman, and degrading treatment, and Senator Graham’s amendment that eliminated the jurisdiction of the federal courts to hear claims brought by detainees at Guantanamo.

When the bill was about to be voted on, you forwarded press articles explaining what having these two provisions together meant. One article quoted a law professor who said

the Graham provision would not only bar habeas petitions against the legality of *detention*, but also claims “against conditions of confinement”—such as torture. In these emails, you said this was the “Administration’s victory” and “the Administration’s upside.”

- a. **Why did you see it as a victory that those who might have been tortured or who were detained unlawfully could not exercise their rights to have their habeas claims before a federal court?**

RESPONSE: As a lawyer in the Department of Justice, I worked with the Department of Defense and with Congress and others in a bipartisan effort to establish a system of rules to govern litigation brought by individuals detained as enemy combatants at Guantanamo Bay, bearing in mind the *Youngstown* formulation discussed above. Among other things, and as Senator Graham spoke about at the hearing, a process was put in place to permit detainees to challenge their status as enemy combatants in Combatant Status Review Tribunals as well as in the United States Court of Appeals for the D.C. Circuit. Some in the Administration regarded these legislative provisions as intrusions on the President’s powers. In contrast, and with others, I welcomed these developments as consistent with *Youngstown*. That is what I recall I meant by “the Administration’s upside.”

10. The President’s signing statement on the Detainee Treatment Act said the Graham amendment limiting court review would apply to pending cases, not just future cases. You advocated issuing a signing statement making that point—that the Graham amendment should knock out cases by people challenging “*many different aspects of their detention and that are now pending.*”

- a. **Is that true? Yes or no.**
- b. **Is it true that you worked on the effort to use the Graham amendment to get the Supreme Court to dismiss the Hamdan v. Rumsfeld case?**
- c. **Isn’t it also true that the Supreme Court, in Hamdan v. Rumsfeld, rejected the position you advocated and held that the Graham amendment did not apply to pending cases?**

RESPONSE: The Civil Division and Office of the Solicitor General of the Department of Justice advanced the position that the Detainee Treatment Act would apply to cases pending on the date of its enactment. As a lawyer for the Department, I supported that position. Ultimately, that position did not prevail in the Supreme Court, with five Justices disagreeing with the Government’s position and three Justices agreeing (Chief Justice Roberts took no part in the consideration or decision of the case).

11. The Supreme Court in *Hamdan* (2006) rejected the Administration’s position that the Graham amendment barred review of Hamdan’s case. An e-mail shows you discussed the decision with reporters, and the next day you were drafting legislation to reverse the Court’s ruling.

The legislation apparently drafted by you and a lawyer from the Office of Legal Counsel

barred judicial review of pending cases, including cases challenging conditions of confinement—such as torture. (Section 7 of draft) It also would have authorized indefinite military detention of Americans and others as enemy combatants, even if they were arrested in the United States. (Section 3 of draft)

- a. **Is that true? And is it also true that, after the Military Commissions Act of 2006 barred pending habeas petitions by Guantanamo detainees, the Supreme Court found that the law was unconstitutional?** (Boumediene v. Bush, 2008)

RESPONSE: My involvement in responding to *Hamdan* was limited. *Hamdan* was decided on June 29, 2006, approximately three weeks before I was confirmed as a judge. The Military Commissions Act was signed on October 17, 2006, months after I left the Department of Justice. Your question references an early draft of the Act that I reviewed but do not recall drafting. As I read it today, that draft would not have barred judicial review but would have sought to channel cases through the judicial-review mechanism of the Detainee Treatment Act. It is true that the Supreme Court some years later in *Boumediene v. Bush* (2008) held that certain aspects of the Act did not satisfy the Suspension Clause.

12. When President Bush signed the Detainee Treatment Act, he issued a statement that basically said he would only construe the law consistent with his powers as Commander in Chief. According to press reports, Administration officials confirmed “*the President intended to reserve the right to use harsher methods in special situations involving national security.*” In other words, the signing statement reflected the President’s belief that he had the power to not comply with the law he had just signed. (Charlie Savage, *Boston Globe*, Jan. 4, 2006)

According to emails, you were involved in preparing that signing statement and you advocated for the issuance of the signing statement. They even show you saying to the top State Department lawyer that Harriet Miers, the White House Counsel, “*needs to hear from us, otherwise this may wind up going the other way.*”

- a. **Why did you argue so strongly for the issuance of this statement, even going so far as to push the President’s Counsel to do it?**

RESPONSE: Please see the response to Question 1.

13. One of the documents provided to the Committee by the Justice Department contains a series of questions—and we tell from the subject matter that the document was created approximately around November 22, 2005 (because it discusses the indictment of Jose Padilla that occurred on that date). The talking points ask whether “aggressive interrogation techniques employed by the Admin yielded any valuable intelligence?” In the margin next to this question, you hand-wrote one word: “**Yes.**”

- a. **Please describe the information upon which you relied to make the assessment that “aggressive interrogation techniques employed by the Admin yielded any valuable intelligence.”**

b. Did you ever question whether they were lawful?

c. Do you believe that torture yields useful intelligence?

RESPONSE: As we discussed at the hearing, clients of the Department of Justice had represented that certain interrogation techniques had yielded valuable intelligence. I have never considered or been asked to consider whether torture yields useful intelligence because, among other things, torture is expressly prohibited by federal statute.

14. As a presidential candidate, President Trump said he wanted to bring back waterboarding and a “hell of a lot worse.” (The Hill, February 6, 2016)

a. Does the President have the authority to issue such an order?

b. Would such an order be lawful?

RESPONSE: No one is above the law—including the President. To the extent your question implicates issues that may arise in future cases that may come before me as a judge, it would not be proper for me to comment further. As a general matter, however, I would reemphasize that Justice Jackson’s concurrence in *Youngstown* teaches that executive power is at its “lowest ebb” when undertaken in violation of a congressional statute. Please see the response to Question 5.

15. During the February 6, 2006 hearing with Attorney General Gonzales, senators from both parties raised serious concerns about his argument that the president had “inherent authority” that could not be limited by laws passed by Congress—the very argument that you had included in your draft testimony.

Senator Graham observed at the hearing that this “inherent authority” argument could “wipe out” Congress’ power and be used to justify torture. This was the same logic that John Yoo used in the torture memos—that the President’s Article II powers enable him to override the laws passed by Congress.

a. Do you believe the President has the inherent authority to order waterboarding, as President Trump has promised, even though it is forbidden by law?

RESPONSE: Please see the response to Question 14.

16. On May 30, 2005, Mr. Bradbury signed a memo for the Office of Legal Counsel concluding that waterboarding, stress positions, sleep deprivation, and other techniques were not prohibited by the substantive constitutional standard applicable to the United States under Article 16 of the Convention Against Torture—which also is the standard set forth in the McCain amendment. You came to work at the Department of Justice in June 2005.

a. Were you aware of this memo while you were at the Department of Justice?

RESPONSE: I do not recall what I knew at the time about this then-classified memorandum.

17. You served in the George W. Bush Administration as the Principal Associate Deputy Attorney General. During this time, you defended Bush Administration positions that the President had the authority to engage in warrantless electronic eavesdropping.

a. Does this reflect your own views that a President has the authority to do this?

RESPONSE: Positions that I took while at the Department of Justice, as an advocate for the interests of the Executive Branch, do not necessarily reflect my personal views or decisions that I have made or may make as a judge.

b. What was your view at the time of the so-called torture memos written by John Yoo and Jay Bybee that the President had the authority to redefine torture and allow it, despite the prohibition in federal law and treaties?

RESPONSE: I had no occasion to pass upon the memos referenced in your question, which had been withdrawn before I joined the Department of Justice.

18. At your hearing, Senator Lee asked you if you had ever “held any public office in a policymaking arena outside the Federal judiciary.” You responded that you had served on your children’s school board, but “that is as close to policy as I care to get.”

Yet during your time at the Justice Department, you were a senior political appointee, the chief deputy to the third-ranking position in the department.

Your Senate questionnaire, which you filled out, says you “*assisted in the development and implementation of a wide variety of initiatives and policies.*”

In fact, I sent you a letter asking about the policies and initiatives you had worked on. I received a response from the Justice Department that said that based on searches they did, they found that you worked on a series of policies and initiatives.

a. In your high-level political appointment, didn’t you work on policy matters, as you stated in your questionnaire?

b. In your experience, isn’t it typical for people at the leadership levels of the Justice Department where you served to be involved in policy decisions?

RESPONSE: According to searches conducted by the Department of Justice (see March 8, 2017 letter from the Department), I assisted in the development and implementation of certain Departmental legal policies or initiatives while I was at the Department. Involvement in legal policy initiatives within the Department does not mean policymaking as a politician or legislator, which I understood Senator Lee to be asking about at the hearing.

c. You worked on legislation while you were at the Department of Justice, right? Can you name the bills or types of legislation you worked on, beyond the Detainee Treatment Act and the Military Commissions Act?

RESPONSE: It is possible I worked on other legislation but, given the passage of time, I cannot currently recall other legislation.

19. On the campaign trail, then-candidate Trump stated that based on the justices he would appoint to the Supreme Court, *Roe* would be overturned “automatically” and “go back to the states.” He also said women should be punished for having an abortion, before walking back the statement.

- a. **If *Roe* were overturned by the Supreme Court, could states decide whether to legalize abortion? Yes or no.**
- b. **Without *Roe*, in states that make access to abortion illegal, could a state pass a criminal law with penalties for a woman who has an abortion? Yes or no.**

RESPONSE: As we discussed at the hearing, *Roe v. Wade*, decided in 1973, is a precedent of the United States Supreme Court entitled to all the respect due such a precedent under the law of precedent. As a nominee, it would not be proper to speculate about hypothetical contingent events, particularly involving a controlling precedent of the Supreme Court.

20. When asked by Senator Blumenthal whether you agreed with the result in *Brown v. Board of Education*, you testified that *Brown* “was a seminal decision that got the original understanding of the Fourteenth Amendment right.”

- a. **Is *Roe v. Wade* also “a seminal decision that got the original understanding of the Fourteenth Amendment right”? Yes or no.**

RESPONSE: *Roe v. Wade* is a precedent of the Supreme Court that, as I said at the hearing, “has been reaffirmed many times,” and is entitled to all the respect due such precedent. In *Roe*, the Court grounded a right to abortion in its understanding of “the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action.” 410 U.S. 113, 153 (1973).

21. When Chairman Grassley asked you whether you agreed with the decision in *Bush v. Gore*, 531 U.S. 98 (2000), you testified: “as a judge, it’s a precedent of the United States Supreme Court, and it deserves the same respect as other precedents of the United States Supreme Court when you’re coming to it as a judge.”

But in *Bush v. Gore*, the Court wrote that the Court’s “consideration [wa]s limited to the present circumstances.” *Id.* at 109.

- a. **In light of the Court’s instruction that its consideration in *Bush v. Gore* was “limited to the present circumstances,” do you believe that the Court’s decision in that case deserves the same respect as precedent of the Court that *Roe v. Wade* does?**

RESPONSE: As discussed at the hearing, there are a number of “factors a good judge looks at when deciding any challenge to a precedent,” including, among other things, “how long it has

been around,” “whether it has been reaffirmed,” “the quality of the initial decision,” and “workability.”

22. In 2015, you joined a dissent in the Little Sisters case where you argued in favor of the religious beliefs of an organization over the rights of an individual. *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315 (10th Cir. 2015) (Hartz, J., dissenting from the denial of rehearing en banc). The dissent you joined argued that requiring the groups to fill out a simple form violated their religious rights, but the opinion took no account of the harm that the groups’ beliefs would impose on their female employees. In fact, the dissent makes no mention of them at all.

a. How was your approach in this case consistent with the Supreme Court’s majority opinion in *Hobby Lobby* that “courts must take adequate account of the burdens” that a religious accommodation imposes on individuals who do not benefit from the accommodation and do not share the religious belief?

RESPONSE: Respectfully, the two decisions are consistent. The Religious Freedom Restoration Act prohibits the federal government from substantially burdening a sincerely held religious belief unless its regulation is narrowly tailored to achieve a compelling government interest. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court noted, “[i]t is certainly true that in applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.’ That consideration will often inform the analysis of the Government’s compelling interest and the availability of a less restrictive means of advancing that interest,” 134 S. Ct. 2751, 2781 n. 37 (2014) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). The dissent from denial of rehearing en banc in *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315 (10th Cir. 2015), had no occasion to address the Government’s compelling interest and the availability of a less restrictive means to advance that interest. The dissent addressed whether the Little Sisters’ sincerely held religious beliefs had been substantially burdened, and concluded that the panel erred in not finding a substantial burden. *Id.* at 1318. The dissent would have remanded the case to the panel to analyze the remaining issues under RFRA of the existence of a compelling interest and the availability of a less restrictive means of advancing that interest. *Id.* Part of that analysis on remand could have included an analysis of the burdens that a religious accommodation would impose on individuals who do not benefit from the accommodation and do not share the religious belief.

23. Last June, California passed a law permitting assisted suicide for terminally ill patients, called the End of Life Options Act. It allows mentally competent adults to make their own decisions about their end of life.

In your writings on the subject, you suggested that one reason to ban the practice of assisted suicide was a risk of abuse. But the California law has a number of safeguards to prevent such abuse: (1) only mentally competent adults who have only six months or less to live are eligible; (2) patients must request aid three times—twice orally, and once in writing in the presence of two witnesses (3) patients must consult with two different physicians; and (4) a final attestation form is required.

a. Even with all these safeguards that California has put in place, do you still

believe that the assisted-suicide laws are subject to abuse?

RESPONSE: As we discussed at the hearing, my prior writings were offered as a commentator not in my role as a judge. Many of the issues raised here implicate issues that may come before me as a judge, and my decisions as a judge are based on the facts and law of each case, not my personal views. It would not be proper for me to comment further on how I might rule in a particular case. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

24. One of the documents we received from the Department of Justice stood out to me as it related to this issue. In an email you wrote to Solicitor General Paul Clement, you expressed a hope that you could “*include an epilogue discussing the Court’s ruling and, hopefully, remarking on the brilliant and winning performance of the SG!*” in the book you were writing on assisted-suicide.

During the hearing, in response to a question from Senator Coons about this document, you said, “When you represent the Government, you want the Government to win.”

But this email is not a general expression of support for the Administration. It is you saying that you hoped to include a discussion of the Government winning the case in your book and to highlight how well the Solicitor General did in arguing the case.

If the Justice Department had won that case, it would have meant that the federal drug laws would prohibit dispensing or prescribing a controlled substance to assist in suicide—it would, in effect, have outlawed this nationwide and wiped out state laws.

a. So my question to you is simple: before *Gonzales v. Oregon* was decided, was it your personal hope that the Bush Justice Department’s position would prevail in that case?

RESPONSE: As I discussed at the hearing, I was an advocate for the government at the time, and as an advocate representing the Department of Justice it was my hope that the government prevail in its case.

25. Like Justice Scalia, you are a self-professed originalist. (*See, e.g.*, “[The Constitution] isn’t some inkblot on which litigants may project their hopes and dreams...but a carefully drafted text judges are charged with applying according to its original public meaning.” *Cordova v. City of Albuquerque*, 816 F.3d 645 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment) (underlining added)).

I am interested in whether you think your approach to originalism is the same or different from Justice Scalia’s. For example, Justice Scalia repeatedly said that there was no protection of privacy rights under the Constitution outside the Fourth Amendment context.

a. Is your theory of originalism the same as Justice Scalia’s in this regard?

RESPONSE: As I said at the hearing, “I’m happy to be called [an originalist]. I do worry about the use of labels in our civic discussion . . . sometimes [leads to] ignor[ing] the underlying ideas. As if originalism belonged to a party, it doesn’t. As if it belonged to an ideological wing, it doesn’t.” As I further said at the hearing: “I am with Justice Kagan on this. I think it is what we all want to know. I do not know a judge who would not want to know what the original understanding is of a particular term in the Constitution or a statute. That is information [that] would be valuable to any judge and considered by a judge.” I also respectfully refer you to the response to Question 10 of Senator Leahy’s questions for the record.

- b. The Court, as part of protecting privacy, has safeguarded the right to marry, the right to procreate, the right to custody of one’s children, the right to keep the family together, the right to control the upbringing of one’s children, the right to purchase and use contraceptives, the right to abortion, the right to engage in private consensual homosexual activity, and the right to refuse medical treatment. Under your theory of originalism, which of these rights are protected?**

RESPONSE: As we discussed at the hearing, a good judge should always give appropriate respect to precedent. As Alexander Hamilton said in Federalist Paper No. 78: “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents.” To the extent that the Court has ruled in these areas, those cases are precedent of the Supreme Court entitled to all the respect such precedent is due.

26. In the case Compass Environmental Inc. v. Occupational Safety and Health Review Commission, 663 F.3d 1164 (10th Cir. 2011), the issue involved a fine imposed by the Department of Labor on an employer for failing to train an employee who died after being electrocuted on the job. The worker—who had started working later than the rest of the crew, and did not receive the same safety training that the rest of the workers did—was killed when a piece of equipment came too close to a high-voltage overhead power line.

The majority opinion, which was joined by another Tenth Circuit appointee of President George W. Bush, upheld the Department of Labor’s fine against the employer, because it found that the employer had violated the law by failing to train this worker in light of the fact the worksite included hazardous high-voltage power lines, that the employer recognized this hazard as it applied specifically to worker, and that that it had trained most of its employees on that hazard but not the worker who died.

You wrote that the fine should be overturned because the Secretary of Labor hadn’t produced any evidence that a reasonably prudent employer would have anticipated this hazard or trained the worker about the hazards posed by high-voltage overhead lines.

- a. There was evidence that (1) high-voltage power lines are very dangerous, (2) the employer had identified this power line as a hazard at this worksite, and (3) the employer had decided it should train employees on this hazard but had not trained this particular person because he didn’t start working until later. Why didn’t you believe this was enough evidence to support the contention that a**

reasonably prudent employer should have trained this worker—and could be held responsible for not doing so?

RESPONSE: My opinion in *Compass Environmental v. Occupational Safety and Health Review Commission* was based on the legal principle that the government cannot penalize anyone without some proof of wrongdoing. The Secretary of Labor had the burden of proving that “reasonably prudent employers in the industry would have anticipated the sort of electrical hazard that [the worker] encountered in this case and provided him with more training about it.” 663 F.3d 1164, 1170 (10th Cir. 2011) (Gorsuch, J., dissenting). As I explained, I discerned no record evidence suggesting that a reasonable employer would have done more to anticipate or train for the accident than Compass did. As I explained, agencies “cannot penalize private persons and companies without *some* evidence the law has been violated.” *Id.* My opinion in this respect endorsed the reasoning of an Administrative Law Judge.

27. Outside groups including Heritage Foundation and Federalist Society played an unprecedented role in the Supreme Court nomination process—President Trump stated that “we’re going to have great judges, conservative, all picked by the Federalist Society.” (Donald Trump, Breitbart News Interview, June 13, 2016).

In September, when your name was added to President Trump’s second shortlist, he specifically thanked both the Heritage Foundation and the Federalist Society. *The Wall Street Journal* wrote an article discussing Leonard Leo’s role in selecting conservative Supreme Court nominees and specifically stated that “the week after the election... Mr. Leo was summoned to Trump Tower” to discuss “winnowing” the list. (Wall Street Journal, “Trump’s Supreme Court Whisperer,” Feb. 3, 2017)

a. When did you first meet Leonard Leo?

RESPONSE: I do not exactly recall when I first met Leonard Leo, but it was many years ago.

28. I understand you sat on a panel with Mr. Leo entitled, “The Life and Legacy of Supreme Court Justice Antonin Scalia” on September 3, 2016. Your name was put on President Trump’s second short list on September 23, 2016.

a. Did you discuss the Supreme Court vacancy with Mr. Leo when you interacted with him on September 3 or at any time before your name was put on the list?

RESPONSE: On September 3, 2016, I moderated a long scheduled panel on the legacy of Associate Justice Antonin Scalia during the Tenth Circuit Judicial Conference with Justice Elena Kagan, Professor William Kelley, and Leonard Leo. During the course of the Conference, I had conversations with Justice Kagan, Professor Kelley, and Mr. Leo about many topics, including Justice Scalia’s jurisprudence and current events.

b. Why do you think the Federalist Society and the Heritage Foundation recommended you for inclusion on Mr. Trump’s list?

RESPONSE: I cannot speak for the Federalist Society or the Heritage Foundation.

29. On the first day of questioning, Senator Blumenthal asked you about officials from the Heritage Foundation who discussed the Supreme Court with you. In response to his question you said: *“To my knowledge, Senator, from the time of the election to the time of my nomination, I have not spoken to anyone that I know of from Heritage.”*

- a. Did you speak to anyone from the Heritage Foundation prior to the 2016 election about the Supreme Court? How many conversations with people from Heritage did you have? When did they take place?**

RESPONSE: Prior to the 2016 election, to my knowledge, I did not have substantive conversations with someone whom I know to be employed by the Heritage Foundation about my potential nomination to the Supreme Court.

- b. Did you speak to anyone from the Federalist Society before or after the election? If so, what topics and issues did you discuss?**
- c. Have individuals from the Federalist Society and the Heritage Foundation been involved in your preparation for this nomination hearing? If so, please detail their involvement.**

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

30. During your hearing, Senator Blumenthal asked you about your interview with the President, and you said there was a mention of *Roe v. Wade*. He then asked about your interview with Steve Bannon, White House Chief of Staff Reince Priebus, and other advisors. He asked if they asked you about *Roe* and you said no.

- a. Did they ask you about any case? If so, what cases did they ask you about?**
- b. Did they ask about your judicial philosophy? If so, what did you say?**

RESPONSE: To my recollection, they asked me about my qualifications, my family and personal history, my record as a lawyer and a judge at the Tenth Circuit, and my approach to judging, as this Committee has. As I explained at the hearing, I have made no commitments to anyone on matters that might come before me as a judge.

31. Your questionnaire states that, on January 5, 2017, you interviewed with members of the

transition team—specifically including Steve Bannon and Reince Priebus, who is now the President’s Chief of Staff.

- a. **What did Steve Bannon specifically ask you? What else did he say to you?**
- b. **What did Reince Priebus specifically ask you? What else did he say to you?**
- c. **What else did you discuss?**

RESPONSE: I respectfully refer you to my testimony at the hearing on this subject and to Question 30.

32. Then you were interviewed by the President-elect.

- a. **What did the President specifically ask you? What else did he say to you?**

RESPONSE: I respectfully refer you to my testimony at the hearing on this subject and to Question 30.

33. During your hearing, you were asked about the outside groups that are reportedly spending \$10 million in support of your confirmation. You indicated that you had no idea what individuals may be contributing to that effort. When Senator Whitehouse asked if it was a problem that the American people did not know who was funding this extraordinary campaign on your behalf—or even whether you were concerned about that fact—you declined to answer.

- a. **Please list any person, institution, corporation, or other entity that you believe to have made any contributions to this campaign.**
- b. **Have you made any attempts to learn the identity of any individuals or organizations that have made contributions to this campaign? If so, what have you learned? If you have not made any such attempts, why not?**
- c. **Will you publicly call on the Judicial Crisis Network and any other organization working in support of your nomination to disclose their donors?**
- d. **You implied during the hearing that you are “uncomfortable” with the massive amounts of money being spent on the campaign to support your nomination. Will you publicly call on the Judicial Crisis Network and other organizations working in support of your nomination to cease this big-money campaign?**

RESPONSE: Respectfully, these questions are better directed to others. Over the last several weeks, I have focused on meetings with nearly 80 Senators, answering the Senate Judiciary Committee Questionnaire, completing the FBI process, interviewing with the ABA, preparing for the hearing, and answering questions for the record.

34. Please identify all individuals who assisted in your preparation for testifying before

the Judiciary Committee.

RESPONSE: In preparation for my hearing, various people have provided me advice, including Senators, Administration and transition personnel, former law clerks, and friends and family. Please see the response to Question 30.

35. Please identify all organizations that have assisted in your preparation for testifying before the Judiciary Committee.

RESPONSE: Please see the response Question 34.

36. Please identify all communications you have had with any individuals from the Judicial Crisis Network in within the past year. If you are aware of people who had communications with any individual from the Judicial Crisis Network regarding your nomination or potential nomination, please identify such people, the nature of the communications, and when they occurred.

RESPONSE: No one in this process has identified themselves to me as from the Judicial Crisis Network. Please see the response to Question 33.

37. You were previously a member of the Republican National Lawyers Association, and you chaired their Judicial Confirmation Task Force from 2001-2002.

a. What did your role as chair involve?

b. You must have been successful in that role—the Senate Republican Conference gave you an Award for Distinguished Service based on your work. What did you do to warrant that award?

RESPONSE: My role and the award you mention are described in the letter sent by the Department of Justice dated March 8, 2017.

38. While testifying during your hearing, you have at times lamented the current judicial confirmation process. You told Senator Whitehouse, in fact, “There is a lot about the confirmation process today that I regret.” And Senator Lee said on Monday that “[T]he acrimony, the duplicity, the ruthlessness of today’s politics are still quite unfamiliar to you. I hope that they will remain unfamiliar to you.”

In 2001, President Bush had just been elected. Republicans in the Senate had blocked over 60 of President Clinton’s judicial nominees at the time and fights over the judiciary were already quite partisan.

a. You are obviously aware of the fact that judicial nominations can be quite contentious—you helped a partisan political organization confirm judges. What is different today than it was in 2001-2002?

RESPONSE: I have not sought to study what is different today from 2001-2002 regarding the judicial confirmation process, but I respectfully refer you to an article I wrote in 2002, *Justice White and Judicial Excellence*, UPI (May 3, 2002).

39. You have said repeatedly during your hearing that you can't comment on precedent because it would "tip your hand" to future litigants.

Yet on several occasions you have gone out of your way in separate opinions to call for precedent to be overturned.

One example is the *Gutierrez-Brizuela* case, where you wrote the unanimous majority ruling for the immigrant on due process grounds, but then wrote an opinion concurring with yourself to call for the *Chevron* doctrine to be reconsidered.

- a. How does answering our questions about precedent "tip your hand" any more than writing a separate, unnecessary opinion questioning a precedent that has been relied on thousands of times does?**

RESPONSE: As a circuit judge, I am responsible for applying the precedent of the Tenth Circuit and the Supreme Court to cases and controversies before me, which required the result the panel reached in *Gutierrez-Brizuela v. Lynch*. But, as I said at the hearing, circuit judges are also in a position to "identify[] issues" for the Supreme Court "when [they] see a problem" in a case or controversy. This is exactly what I did in my concurrence in *Gutierrez-Brizuela*. As I said at the hearing and explained in that opinion, an undocumented immigrant in that case was placed in a "whipsaw" "by a change in law effected by an administrative agency," which had "overrul[ed] a judicial precedent" and effectively added four years to the time Mr. Gutierrez had to wait outside the United States. As a circuit judge, it was appropriate for me to identify the problems that I saw underlying the result that we were required to reach. Raising an issue in this capacity is fundamentally different than offering my views on specific Supreme Court precedents in the context of a hearing where there is no case or controversy to resolve. Publicly discussing preferred or disfavored precedents in the context of a confirmation hearing undermines the independence of the judiciary and the separation of powers and carries with it a risk of suggesting to future litigants that I am not approaching their respective cases with an open mind or that I have prejudged their cases in order to secure confirmation.

40. During your tenure at the Justice Department, or after, did you ever learn that Justice Department leadership was considering the termination of specific U.S. Attorneys? If so, what did you learn and when?

RESPONSE: In the Department of Justice, U.S. Attorneys report to the Deputy Attorney General and are not hired or terminated by the Associate Attorney General, to whom I reported. Further, I was not employed by the Department at the time of the removal of seven U.S. Attorneys in December 2006 and do not recall involvement in the termination of these individuals.

41. The Department of Justice's Office of the Inspector General report "An Investigation in the Removal of Nine U.S. Attorneys in 2006" makes clear that while the actual firing of seven U.S. Attorneys occurred on occurred on December 7, 2006—after you had left the

Department of Justice—the report also found that “the process to remove the U.S. Attorneys originated shortly after President Bush’s re-election in 2004,” and that substantial groundwork was laid during the time period that you served at the Department.

- a. Did you ever communicate with Kyle Sampson or anyone else in Department leadership about the U.S. Attorney firings that occurred in 2006 and 2007? If so, what did you discuss and when? Did you have any such communications following your confirmation to the Tenth Circuit?**

RESPONSE: Please see the response to Question 40.

42. Did you ever communicate with Monica Goodling about politicization hiring at the Justice Department? If so, what did you discuss?

RESPONSE: I do not recall discussions about inappropriate political hiring for career positions with Ms. Goodling.

43. Did you ever communicate about consideration of political background or belief in the hiring process for career positions? Did you have any such discussions following your confirmation to the Tenth Circuit?

RESPONSE: I did not make inappropriate political hiring recommendations for career positions at the Department of Justice.

44. Did you ever participate in any decision to overrule the recommendation of a career attorney in the Civil Rights Division? If so, please identify each occasion where you participated in any such decision.

RESPONSE: At the Department of Justice, career attorneys in the Civil Rights Division report to the Assistant Attorney General of that Division, a presidentially appointed and Senate confirmed position. In turn, the Assistant Attorney General reports to the Associate Attorney General, also a presidentially appointed and Senate confirmed position. I also reported to the Associate Attorney General. It has been more than a decade since I worked at the Department, but I do not recall instances in which the Associate Attorney General overruled the Assistant Attorney General for Civil Rights during my time at the Department.

45. Did you ever communicate regarding hiring practices in the Civil Rights Division with Bradley Schlozman or anybody else? If so, what did you discuss and when, and with whom.

RESPONSE: I do not recall discussions about inappropriate political hiring for career positions in the Civil Rights Division with Mr. Schlozman or others during my time at the Department. In the course of preparing for the hearing, I have been shown an email that I sent, within days before the end of my tenure at the Department, alerting others to a newspaper article discussing hiring in the Civil Rights Division.

46. Did anyone ever communicate to you any concern about Bradley Schlozman's conduct in the Civil Rights Division? If so, who communicated them to you, and what were the concerns that were communicated? Did you ever discuss the concerns with anyone else, either before or after you left DOJ? What actions did you take to respond to any concerns you heard?

RESPONSE: Please see the response to Questions 43 and 45.

47. Please identify all individuals who assisted in your preparation for testifying before the Judiciary Committee.

RESPONSE: Please see the response to Question 34.

48. Please identify all organizations that have assisted in your preparation for testifying before the Judiciary Committee.

RESPONSE: Please see the response to Question 34.

49. Please identify all communications you have had with any individuals from the Judicial Crisis Network in within the past year. If you are aware of people who had communications with any individual from the Judicial Crisis Network regarding your nomination or potential nomination, please identify such people, the nature of the communications, and when they occurred.

RESPONSE: No one in this process has identified themselves to me as from the Judicial Crisis Network. Please see the response to Question 33.

Hearing before the Senate Committee on the Judiciary
The Nomination of Neil M. Gorsuch to be an Associate Justice of the Supreme Court
Questions for the Record Submitted by Senator Al Franken

Questions for Judge Gorsuch:

Question 1: I'd like to discuss the use of class action waivers, which are often included in forced arbitration clauses. When companies pair forced arbitration clauses with class action bans, they close the courtroom doors to individuals with small claims and shield themselves from liability.

Between 2010 and 2014, the New York Times found that only 505 consumers went to arbitration over a dispute of \$2,500 or less. Verizon, for example, which has more than 125 million subscribers, faced only 65 consumer arbitrations in those five years. Time Warner Cable, which – at the time – had 15 million customers, faced just seven.

It's not that there were so few arbitrations because customers were suddenly satisfied with their telecom providers. Rather, there are so few arbitrations because consumers probably realized that they would spend far more money pursuing an individual claim in arbitration than they could ever hope to recover – and that's only if they beat the odds and actually ended up winning.

In fact, I'd suggest that there is perhaps no industry that Americans are more dissatisfied with than their internet, TV, and cell phone providers. And that's not without reason. Here are two quick examples. Last month, the New York Attorney General filed a lawsuit against Charter and its subsidiary Time Warner Cable, claiming that the company quote “conducted a deliberate scheme to defraud and mislead New Yorkers by promising internet service that they knew they could not deliver” end quote. And last year, after it received 1,000 customer complaints, the FCC fined Comcast the largest penalty in agency history for charging its customers for services and equipment that they didn't ask for.

- Judge Gorsuch, is asking hundreds, or thousands, or millions of consumers who have all been impacted by the same illegal practice to each go it alone against a powerful corporation in arbitration really a viable alternative to class actions – especially when they have little to no hope of recovering enough to justify the costs of bringing the claim?

RESPONSE: As we discussed during the hearing, in passing the Federal Arbitration Act in 1925 Congress “expressed a preference that people should arbitrate their disputes. [Congress] made a judgment, [a] policy judgment, in favor of arbitration because it is quicker, cheaper, easier for people.” And “[i]f Congress thinks that the courts are not applying the Federal Arbitration Act as it wishes or if it wishes to revise or eliminate the Federal Arbitration Act,” it may of course do so.

- During the hearing, you openly discussed the expenses associated with litigation in the context of the article you wrote. Isn't one way to address the expenses through class actions? And haven't forced arbitration clauses that include class action bans eroded one critical method for individuals to achieve access to affordable justice?

RESPONSE: As we discussed during the hearing, and as I have recognized in my writings, access to affordable justice in this country is a serious problem. During the hearing, I mentioned findings suggesting that approximately 80 percent of the members of the American College of Trial Lawyers report that pretrial delays and costs keep injured parties from bringing valid claims to court and about 70 percent of members say that cases are settled on the basis of litigation costs rather than the merits. Class actions can serve a valuable function in protecting consumers and investors. Please see also the response to Question 20 of Senator Hirono’s questions for the record.

Question 2: Judge Gorsuch, as an antitrust professor, I imagine you have an interesting perspective on the effect of the Supreme Court’s decision in *Italian Colors*. This is the case of a group of small business owners – led by Italian Colors, a restaurant in Oakland, California – that sued American Express, alleging the company violated antitrust law when it charged excessive processing fees for its credit cards. Typically, vendors that accept American Express charge cards also must accept American Express credit cards. And because American Express has monopoly power with respect to charge cards, vendors have little choice but to accept those cards and, with them, American Express’ credit cards. So Italian Colors alleged that American Express used this monopoly power to force small businesses into accepting American Express products they otherwise would not have.

It turns out that in addition to requiring that vendors accept its credit cards, American Express also required vendors to accept an arbitration agreement as part of doing business with them. This agreement not only prohibited vendors from taking any disputes to court but also preventing them from forming a class.

Nobody involved in this case disputed the fact that the cost of pursuing Italian Colors’ individual claim far exceeded its possible recovery. So it was up to the Supreme Court to decide whether the arbitration clause preventing Italian Colors from forming a class was enforceable under the Federal Arbitration Act, given that enforcing it would effectively prevent Italian Colors – and the rest of the small businesses – from vindicating their rights under the nation’s antitrust laws. The Court ultimately sided with American Express and essentially held that the Federal Arbitration Act, which favors enforcement of arbitration agreements, trumps the goals of all other federal statutes, including the antitrust laws.

- Judge Gorsuch, setting aside whether the Court made the right call in *Italian Colors*, how – in your view – has this decision impacted private antitrust enforcement?
- Or, put another way, do you agree that there is value in private antitrust enforcement – that it serves complementary role to federal and state efforts aimed at combatting anticompetitive conduct? And do you think the *Italian Colors* decision has made it harder for individuals – and for small businesses – to challenge monopolistic conduct under the nation’s antitrust laws?

RESPONSE: In *American Express v. Italian Colors* (2013), the Supreme Court held that, under the terms of the Federal Arbitration Act, courts cannot invalidate a contractual waiver of class arbitration solely because the plaintiff's cost of individually arbitrating a federal statutory claim is greater than the plaintiff's potential recovery. As I noted during the hearing, Supreme Court precedents interpreting acts of Congress invariably have effects. It is for Congress to assess the nature of the effects of any particular judicial decision and to legislate if it deems appropriate.

Question 3: I have serious concerns about AT&T's proposed acquisition of Time Warner and how it could impact Americans' access to information. When the same company owns the programming and controls the pipes that bring us that programming, we have a problem – especially, I believe, when the programming in question is the news.

In this case, a combined AT&T-Time Warner would have both the ability and incentive to favor its own news network, CNN, over competing news networks – say Fox News, for example. And as a result, AT&T could control where its 25 million subscribers get their information and could ultimately restrict its viewers' access to alternative viewpoints.

We've seen this happen before. Soon after it purchased NBCUniversal, Comcast placed MSNBC and CNBC – its newly acquired channels – in favorable locations on the Comcast channel lineup while relegating competing networks – like Bloomberg News – to an undesirable location. It took two years – and a protracted battle at the FCC – for Comcast to finally end its anticompetitive treatment. And we may never know exactly how Bloomberg's viewership was impacted in the meantime.

I'm interested in the ways that the Supreme Court can impact Americans' access to information. 70 years ago, in *United States v. Associated Press*, the Supreme Court found that the First Amendment supported aggressive antitrust enforcement. Justice Black wrote, "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary." He then continued, "Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."

- Would you agree that one of the purposes of the First Amendment is to ensure that the government doesn't make decisions that silence citizens or restrict Americans' access to diverse viewpoints?

RESPONSE: Without expressing any views on the proposed acquisition, I agree that one of the purposes of the First Amendment, as interpreted by the Supreme Court, is to ensure free speech and access to diverse viewpoints.

- Would you agree that antitrust law should protect against mergers or other anticompetitive conduct that results in depriving citizens' access to news and the free expression of information?

RESPONSE: I agree that the antitrust laws serve to protect against mergers and other conduct with anticompetitive effects.

Question 4: In January, after AT&T and Time Warner confirmed that they would be structuring their proposed acquisition to circumvent FCC review, 12 of my colleagues and I asked the companies to send us the public interest statement that they would have been required to send to the FCC – a document that essentially demonstrates why they believe the deal promotes competition and benefits consumers.

While I'm glad they responded to me, their response does little to address my concerns and essentially asks American consumers to trust that the combined company won't engage in anticompetitive behavior, raise prices, violate the principles of net neutrality, or decrease access to diverse voices. The letter also suggested that the deal raises no competitive concerns because it is vertical in nature – meaning the companies don't currently compete head-to-head – and that the government rarely seeks to block vertical mergers. Top execs from AT&T and Time Warner wrote, “[the government] typically permits such mergers to proceed, imposes conditions to address any competitive risks, and narrowly tailors those conditions to avoid undermining the mergers' consumer benefits. Yet this merger presents no such risks at all.”

We've seen the risks before, and we've seen just how successful these merger conditions have been the past. In the years since the Comcast-NBCUniversal deal was completed, the combined company has faced complaint after complaint for engaging in anticompetitive behavior and not complying with conditions that the FCC and DOJ imposed on the transaction.

- Judge Gorsuch, can vertical mergers violate antitrust law? Do you subscribe to the view that all or almost all vertical integration is efficient?

RESPONSE: There is limited case law regarding vertical mergers, but the Supreme Court has recognized that vertical mergers can violate antitrust law under certain circumstances in, for example, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), and *Ford Motor Co. v. United States*, 405 U.S. 562 (1972). To the extent your questions ask me to take a position that would implicate issues that may come before me as a judge, I respectfully cannot comment further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

- Do you agree that one company controlling both the programming and the pipes creates incentives for that company to engage in anticompetitive behavior? And if you'd rather not discuss the pending deal, you can reference Comcast-NBCUniversal – a deal that was completed six years ago.

RESPONSE: Your question implicates issues that remain in dispute and that may come before me as a judge, and therefore I respectfully cannot comment beyond what I have offered above.

Question 5: In *Novell*, you established a pretty high standard for plaintiffs to meet in refusal-to-deal cases – or cases where monopolists harm their rivals by cutting off or restricting their access to the market. You held that in order to find a violation of Section 2 of the Sherman Act, a plaintiff must prove that the monopolist's alleged misconduct resulted in short-term profit losses

and were irrational except for the anticompetitive effect. Meaning essentially that as long as the monopolist has a reasonable business rationale, they're totally off the hook regardless of how bad it is for competition.

In this decision, you relied heavily on the Supreme Court's decision in *Verizon v. Trinko*, in which Justice Scalia explained that there are very few exceptions from the proposition that there is no duty to aid competitors.

- Judge Gorsuch, today, Sherman Act Section 2 cases are rare – and successful ones are even rarer. Why do you think that is? Is it because there are no monopolies? Or is it just that they're all perfect actors?

RESPONSE: As a federal circuit court judge, I am bound by the precedent of my own court and the Supreme Court. In *Novell v. Microsoft*, I relied on applicable precedent, such as *Trinko*, in holding that Novell had not met its burden of proof that Microsoft's conduct was unlawful. Government officials and private parties decide whether to bring claims under Section 2 of the Sherman Act based on their assessment of the facts and law in particular cases. As a private lawyer and with colleagues I successfully pursued what was at the time, I am told, the largest sustained Section 2 verdict in U.S. history.

- I am increasingly concerned about internet giants that use their positions as dominant media platforms to stifle competition and inhibit the free flow of ideas. In recent years, we've heard countless allegations of online platforms exercising their market power to the detriment of content creators and innovative startups. Google has favored its own products and services in search results while downgrading competitors' products and services. I've also heard from photographers in Minnesota that Google may be taking original content from their distributors' websites without appropriate compensation or attribution. Apple is preventing its competitors in the music streaming market from promoting lower prices to consumers on Apple iOS. And Amazon is using its dominance in the book market to impose unfair contractual terms on publishers and authors.

Judge Gorsuch, in your view, should courts ever consider how the unilateral behavior of a monopolist might affect the free flow of ideas and content?

RESPONSE: Section 2 of the Sherman Act seeks to address anticompetitive conduct by monopolists, including unilateral conduct. Respectfully, I cannot comment on the particular disputes you discuss for they or similar matters may come before me as a judge.

Question 6: During the hearing, you repeatedly said that you simply read the law as it is written. But *how* you read the law is of utmost important. For example, in antitrust law, there are at least two different philosophies as to how to read the laws. Senator Sherman and Justice Brandeis as well as many others believed the goals of antitrust should be fundamentally political – such as the preservation of individual liberty and the protection of democratic institutions from concentrated power. Robert Bork and many other members of the “Chicago School” of economics believe we should view antitrust as a sort of scientific endeavor, the main goal of which should be economic efficiency, even if the result is extreme concentration of power.

- How would you describe your own philosophy on antitrust law?

RESPONSE: As we discussed at the hearing, in deciding cases that come before me, including antitrust cases, I make an effort to apply the law to the facts as impartially as I can, without respect to persons, affording equal right to the poor and rich based on the particular law and the facts applicable to the case at hand.

Question 7: I strongly disagree with the Supreme Court’s ruling in *Citizens United*, which I mentioned to you in our meeting. Recent polling suggests that the decision is deeply unpopular with the American people as well. Part of the reason I think this opinion is held in such low regard is because in several important respects, the Court fundamentally misunderstood how the American public perceives our politics.

One of the conclusions that the Court came to in *Citizens United* was that outside money simply does not, quote “give rise to corruption or the appearance of corruption.” I understand that polls and public opinion don’t factor into a court’s decision-making process, but I think by acknowledging that the appearance of corruption is something to be avoided, the Court also acknowledged that the public’s perception really does matter.

It matters because even just the *appearance* of corruption could cause people to lose faith in our democracy. The majority in *Citizens United* recognized that this was something to be concerned about. But the majority maintained that even with outside money pouring into our elections, the public would still have faith in our system because they would *know* where the money was coming from. Here’s what Justice Kennedy said, writing for the majority, quote:

“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits and citizens can see whether elected officials are ‘in the pocket’ of so-called moneyed interests.”

Part of the reason I find this so galling is that it simply does not reflect the reality that we experience in the wake of this decision. According to the Brennan Center for Justice, groups that hide the identities of their donors spent more than \$800 million on federal races in 2016 alone. Let me say that again: \$800 million.

- Do you agree that the election-related spending made possible by the *Citizens United* decision is capable of creating the appearance of corruption?

Money is pouring into our elections. We don’t know where a lot of it is coming from. And the public thinks it stinks—Republicans and Democrats alike. As I said in my opening statement, our country is confronting a critical moment in our history. The American people’s trust in our government and our institutions is in a freefall. I firmly believe that *Citizens United* is one of the

root causes of that deepening distrust. I believe that *Citizens United* had a very real effect on the ability of the people’s representatives to do their jobs.

One example is especially relevant today to your nomination. In March of last year, less than a week after Merrick Garland had been nominated to the Supreme Court, one of my Republican colleagues told a group of constituents that he thought the Senate should move forward and hold a hearing on Merrick Garland’s nomination. Speaking at a town hall, he said, quote “I would rather have you complaining to me that I voted wrong on nominating somebody than saying I’m not doing my job. I can’t imagine the president has or will nominate somebody that meets my criteria, but I have my job to do. I think the process ought to go forward.”

That quote was later published in a local newspaper. This senator never committed to voting for Garland. He merely said that the Senate should do its job and hold a hearing. But that was all it took to draw the attention of well-funded groups willing to dump millions of dollars into his next race. The groups threatened to run ads against him and fund a candidate to challenge him in the primary. As a result, he changed his position. The episode sent a clear signal to every member of the Senate, and it prevented the Senate from fulfilling one of its core functions. When people say the system is rigged, this is exactly what they are talking about.

I think the courts have an important role to play in ensuring the integrity of our democracy. I think that a big part of their job is making sure that our elections are free and fair. But in order to do that, courts need a clear-eyed view of the facts on the ground. The *Citizens United* majority didn’t have that.

- In your view, what should a judge do when it becomes clear that the assumptions supporting a case like *Citizens United* prove wrong?
- You’ve said that a judge is supposed to decide cases on the facts and the law alone—what do the facts available now tell you about the majority’s reasoning in *Citizens United*?

RESPONSE: In *Citizens United v. FEC* (2010), the Court held that certain restrictions on corporate and union independent expenditures could not be justified by reference to the Government’s interest in preventing *quid pro quo* corruption, or the appearance of such corruption, which had been recognized as a sufficient interest to justify previous restrictions on certain types of political speech. *See Buckley v. Valeo* (1976). In approaching a case that might seek to revisit precedent, the Court would look to the various factors we discussed at the hearing. A judge would also examine the details of the case before him or her, looking at the record with deference to the fact-finder, examining the briefs, and carefully considering the arguments of the parties. I respectfully cannot comment beyond that because the matters discussed in this question may come before me as a judge. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

Question 8: I would like to better understand your views of the disparate impact standard. Generally speaking, disparate-impact claims allow a plaintiff to establish liability in a discrimination case where it can be established that a certain practice has a disproportionate

impact on individuals who belong to a protected class, such as sex, race, color, national origin, or other characteristics. In other words, where a practice has a discriminatory *effect*, even if such a practice was not motivated by a discriminatory *intent*, a plaintiff bringing a discrimination claim may nonetheless establish liability.

- In your view, do our federal civil rights laws, including but not limited to Title VII and the Fair Housing Act, permit disparate impact claims?

RESPONSE: In *Ricci v. DeStefano* (2009), the Supreme Court confirmed that Title VII of the Civil Rights Act, as amended in 1991, which prohibits discrimination because of race, color, religion, sex, or national origin, provides a disparate-impact cause of action. In *Smith v. City of Jackson* (2005), the Supreme Court held that disparate-impact claims are cognizable under the Age Discrimination in Employment Act. More recently, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* (2015), the Supreme Court held that the Fair Housing Act—Title VIII of the Civil Rights Act of 1968—prohibits certain actions that have a disparate impact on a protected class.

- Do you agree with the reasoning in Justice Scalia’s *Ricci v. DeStefano* concurrence? If so, how?
- In your view, are civil rights statutes that prohibit disparate impact discrimination, including but not limited to Title VII and the Fair Housing Act, in tension with the Equal Protection Clause? If so, how?

RESPONSE: Respectfully, the holding of the majority opinion in *Ricci v. DeStefano* is the controlling precedent of the United States Supreme Court, not the concurrence. And to express a personal view agreeing or disagreeing with the concurrence or commenting further would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

Question 9: I would like to better understand your views on federal Indian law and tribal sovereignty. I am one of only two members of the Judiciary Committee who also serves on the Indian Affairs Committee.

One case that reached the Supreme Court in the last term involved a Native American boy who was sexually assaulted by a non-Indian, who managed a store owned by non-Indians on Indian land. There is also a serious problem of non-Indians perpetuating domestic violence and sexual assault against Native American women on reservations. Additionally, there are numerous jurisdictional disputes that arise around business transactions, regulatory authority, and non-violent criminal offenders that involve non-Indians in Indian Country.

- What is the appropriate legal framework for determining whether a tribe has jurisdiction over a non-Indian in Indian Country, both in the civil and criminal context?

- What has been your impression of tribal court systems in general? Do you think that litigants in tribal courts, both Indians and non-Indians, have their rights adequately protected?
- What, if any, Constitutional limitations do you think there are on a tribe's civil or criminal jurisdiction over non-Indians?

RESPONSE: Respectfully, I refer you to my record as a judge in the Tenth Circuit, including *Fletcher v. United States*, *Ute Indian Tribe of the Uintah & Ouray Reservation v. Myton*, and *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*.

Senator Mazie K. Hirono

Questions for the Record following hearing on March 20-23, 2017 entitled:

“On the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States”

The Honorable Neil M. Gorsuch

1. During the hearing, I asked you if the Supreme Court were to assess special restrictions on U.S. citizens of Iranian, Yemeni, Somalian, Syrian, Libyan and Sudanese ancestry, whether you believed *Korematsu* would be applicable precedent. You answered “no”.
 - a. Does *Korematsu* have any precedential value in any case that may come before the Supreme Court?

RESPONSE: As we discussed, no. When he was Acting Solicitor General, Neal Katyal confessed error by the United States in *Korematsu*.

- b. Are there other Supreme Court decisions that have not been overruled that you believe lack precedential value? And if so, which ones?
 - i. For the cases listed, please explain why those cases lack precedential value.

RESPONSE: If I were to list my least favorite or most favorite precedents, I would be suggesting to litigants that I have already made up my mind about these cases and suggest how that would impact theirs. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

- c. What characteristics disqualify a case from having precedential value? And who makes the determination of what those characteristics are?

RESPONSE: As we discussed, in the *Law of Judicial Precedent*, my colleagues and I expressed a mainstream consensus view, representing the work of judges from around the country appointed by Presidents of both parties, about the application of judicial precedent. As outlined in that book, judges consider a number of factors in analyzing precedent.

2. During the hearing, you cited *Loving v. Virginia* as a seminal case. What other cases do you consider “seminal”?
 - a. For cases considered “seminal” do such cases hold more precedential value than those that are not considered seminal? Why or why not?

- b. Do certain cases hold more precedential value than others? What are the qualities of a case that give it more or less precedential weight?

RESPONSE: As I stated at the hearing when asked about them, *Gideon v. Wainwright*, *Brown v. Board of Education*, and *Loving v. Virginia* were seminal decisions. This is not to say these are the only seminal decisions, just an example of a few. In analyzing the precedential value of a decision, I would apply the law of judicial precedent.

3. What remedies are available should the President or Executive Branch disregard a ruling of the Supreme Court or a lower federal court?

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

4. Do you believe that when analyzing a statute, and choosing to use the constructional construction of original public meaning, such a choice reflects your values?
- a. Why choose to discern the original meaning rather than considering tradition, current norms, and precedent as baseline or foundation of your constitutional analysis?

RESPONSE: When Justice Elena Kagan appeared before this Committee, she explained, “[S]ometimes [the Framers] laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that way, we are all originalists.” All judges are trying to discern what the words in the Constitution mean and apply them faithfully to our current circumstances. The same applies to interpreting statutes. It is a choice rooted not in personal values but in the rule of law.

- b. Why do you believe that you are able to separate ideological and partisan views when judging?

RESPONSE: I took an oath to administer justice without respect to persons, to do equal right to the poor and to the rich, and to perform faithfully and impartially all of the duties incumbent upon me as a judge under the Constitution and laws of the United States. I take that oath seriously, and respectfully suggest my record demonstrates that fact. My record shows that, according to my clerks, 97 percent of the 2,700 cases I have decided as a judge were decided unanimously, and I have been in the majority 99 percent of the time. In those rare cases where I

have dissented, my clerks report that I was about as likely to dissent from a judge appointed by a Republican as I was to dissent from a judge appointed by a Democrat. According to the Congressional Research Service, I understand that my opinions have attracted the fewest dissents of any Tenth Circuit judge it studied. That is my record as a judge based on ten years on the bench.

- c. Do you believe that life experiences and unconscious biases play a role in judging?

RESPONSE: I am a strong believer in the federal judiciary. I know many of the men and women of the federal judiciary, and I have witnessed first-hand how hard they work to perform their responsibilities with integrity every day. Those judges come from different walks of life, different experiences, but they agree overwhelmingly on the disposition of cases. They decide cases based on the facts and law and not based on their personal beliefs. Only a tiny fraction of cases heard in the federal courts ever go to the Supreme Court because the lower courts agree on the legal principles that apply. Even at the Supreme Court, the Justices agree unanimously about 40 percent of the time. The overwhelming unanimity in the federal courts—indeed, the strength of the rule of law in this country—is something of which we should all be proud.

5. Do you believe in the validity of laws that address not only specific problems known at the time of the legislation, but that can also arm an agency with broader remedial authority to address new problems of a similar category that arise later?
- a. Specifically, do you agree that the Clean Air Act or the Clean Water Act address not only the specific pollution problems known at the time of passage, but also provide authority for an agency to regulate additional pollutants if it agency determines they are harmful based on later-arising scientific data?

RESPONSE: The scope of the Clean Air Act and the Clean Water Act, and their application to a variety of contexts, is a matter of continuing litigation in the lower courts. As these issues may well come before me, it would not be appropriate for me to comment on them further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

6. Do you regard the decision in *Massachusetts v. EPA* – that greenhouse gases are air pollutants under the Clean Air Act, and that EPA must regulate their emissions if it determines (as it has) that they endanger public health and welfare – as settled law?

RESPONSE: *Massachusetts v. EPA* is a precedent of the Supreme Court, and its interpretation of the provisions and requirements of the Clean Air Act is entitled to all the weight such precedent is due.

7. Do you regard the decision in *American Electric Power v. Connecticut* – that federal common law suits over power plants’ greenhouse gas emissions are displaced because EPA has the authority to regulate those emissions under Section 111(d) of the Clean Air Act – as settled law?
 - a. Do you agree that if the courts determined that EPA *does not* have authority to curb power plants’ greenhouse gas emissions under Section 111(d), then there would no longer be a basis for displacing federal common law remedies?
 - b. Can you explain what Supreme Court precedent says about the constitutionality of citizen suits, and the significance of citizen suits in enforcing our environmental laws?

RESPONSE: *American Electric Power v. Connecticut* is a precedent of the Supreme Court, and it is entitled to all the weight such precedent is due. For another recent discussion of standing doctrine in environmental cases, please see *Massachusetts v. EPA*. Beyond that, because these issues may well come before me, it would not be proper for me to comment further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

8. If President Trump were to direct Administrator Pruitt to end the Clean Power Plan, as is widely reported he plans to do, would you regard the EPA as having an obligation to develop a replacement plan to reduce greenhouse gas emissions sufficient to protect the public health and welfare?

RESPONSE: The Clean Power Plan is currently the subject of an active case or controversy. As these and related issues may well come before me, it would not be appropriate for me to comment on them. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

9. How do you incorporate scientific findings into your decisions and how do you resolve the discrepancy if an agency is making decisions based on conclusions that are contrary to the weight of scientific evidence?

RESPONSE: Under the Administrative Procedure Act (APA), courts defer to an agency’s findings of fact so long as they are supported by substantial evidence, and accordingly the courts ascribe great weight to the factual findings of agency experts, including those with scientific expertise. The APA permits the courts, however, to “set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Although this is a high standard, it provides relief from an agency action where “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency.” *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

10. Do you hold the view that state governments, not EPA, should principally regulate environmental protection, and, if so, how do you reconcile this view with the fact that the perceived failure of states by the 1970s to protect their air and water was the genesis of the EPA, the Clean Water and Clean Air Acts, and other foundations of federal environmental law?

RESPONSE: Under the statutory environmental protection regime currently designed by Congress, both the federal government and the states have important roles to play. The question whether a federal or a state regulatory agency has authority in a particular instance will depend on the relevant facts and law in each case.

11. In *Gonzales v. Raich*, the Supreme Court held that the Commerce Clause, in conjunction with the Necessary and Proper Clause, permits the federal government to control intrastate activities when necessary as part of a "more comprehensive scheme" of economic regulation. Do you agree with the principle that Congress may regulate intrastate, non-economic activities if doing so is necessary to a broader effort to regulate commercial activity?

- a. Do you believe that environmental and land use regulations are commercial activities?

RESPONSE: In *Gonzales v. Raich*, the Supreme Court held that Congress may regulate activities "that have a substantial effect on interstate commerce." 545 U.S. 1, 17 (2005). Whether particular environmental and land use regulations qualify as such are questions that may come before me and depend on the particular facts of the case, and it would not be proper for me to comment on them.

12. Several times in your testimony, you asserted that the standard you set out in the *Luke P.* case was based on precedent from the Tenth Circuit. You testified: "*Luke P.* was a unanimous decision There was no dispute in my court about the applicable law, and because we were bound by circuit precedent in a case called Urban versus Jefferson from 1996 that said that the appropriate standard was *de minimis* and the educational standard had to be more than *de minimis*, and that is the law of my circuit, Senator But the fact of the matter is I was bound by circuit precedent and so was the panel of my court, and they had been bound for 10 years by the standard in Urban versus Jefferson County." When Senator Durbin asked why you added the word "merely" to the *de minimis* standard, you replied: "Senator, all I can say to you is what I've said to you before, it was a unanimous panel of the 10th Circuit following ten-year-old circuit precedent We followed our circuit precedent" When Senator Klobuchar also asked you about the addition of the word "merely" to the *de minimis* standard, you testified: "My recollection is that the 10th Circuit precedent was very clear, that 'some' meant 'more than *de minimis*.' Some meaningful educational benefit in *Rowley* was the Supreme Court precedent and our court interpreted that to mean more than *de minimis*." However, the word "merely" is found nowhere in the Urban case. See *Urban v. Jefferson County School District*, 89 F.3d 720 (10th Cir. 1996). In fact, even the phrase *de minimis* is

mentioned only once: “In the context of a severely disabled child such as Gregory, ‘the ‘benefit’ conferred by the [IDEA] and interpreted by Rowley must be more than *de minimis*.’” 89 F.3d at 726-27 (quoting *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988)). In *Luke P.*, you wrote: “we have concluded that the educational benefit mandated by IDEA must merely be ‘more than *de minimis*.’” *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008) (quoting *Urban v. Jefferson Cty. Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996)). You also characterized this standard as “not an onerous one.” *Luke P.*, 540 F.3d at 1149. Do you agree that your opinion in *Luke P.* was the first in the Tenth Circuit to add the word “merely” before the *de minimis* standard? Do you also agree that your opinion in *Luke P.* was the first in the Tenth Circuit to characterize the standard as “not onerous”?

- a. Do you also agree that your opinion in *Luke P.* was the first in any Circuit to characterize the standard as “not onerous”?

RESPONSE: In *Thompson R2-J School District v. Luke P.*, a unanimous panel of the Tenth Circuit was bound to and did follow circuit precedent in *Urban v. Jefferson County*. The Supreme Court denied certiorari in *Luke P.* As the controlling decision in *Urban* stated:

Gregory’s IEP was reasonably calculated to enable him to receive educational benefits. In the context of a severely disabled child such as Gregory, “the ‘benefit’ conferred by the [IDEA] and interpreted by *Rowley* must be more than *de minimis*.” *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988) The IDEA only entitles Gregory to an appropriate education, and the state “satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Rowley*, 458 U.S. at 203. Gregory received and benefitted from such personalized instruction. The IDEA does not entitle him to more.

This standard was widely employed. Approximately seven other circuits to address the question reached the same conclusion the Tenth Circuit reached in *Urban*. As I explained at the hearing:

“There was no dispute in my court about the applicable law, and there was not because we were bound by circuit precedent, a case called *Urban v. Jefferson County*, 1996, that said that the appropriate standard was *de minimis*. The educational standard had to be more than *de minimis*.

“My recollection is that the Tenth Circuit precedent was very clear, that ‘some’ meant more than ‘*de minimis*.’ ‘Some meaningful educational benefit’ in *Rowley* was a Supreme Court precedent and that our court had interpreted that to mean more than *de minimis*, and that a number of circuits had come to the same conclusion.

“And so, Senator, all I can say is I was trying faithfully, to the best of my ability, to follow Supreme Court precedent in *Rowley*, the Tenth Circuit opinion, as I understood it in *Urban*,

and a number of other circuits had interpreted Rowley in the same way. And my colleagues subsequently after me interpreted it in the same way.”

Chief Judge Tacha, the author of *Urban*, agreed, stating in her testimony at the hearing that “in the Luke P. case, Judge Gorsuch was following very longstanding precedent. . . . Let me also say it was not just our circuit. I believe it was all but two circuits. All the rest of the circuits in the Nation were following the same standard in interpreting the IDEA. Further, I can say with some authority that he was following not as dicta, but as a holding in his case what I wrote in the *Urban* case, which he was following.”

13. In May 2016, the U.S. Departments of Justice and Education released a joint guidance stating that anatomy at birth should not be the only factor considered when placing transgender inmates into men’s or women’s units. The guidance also stated that schools receiving federal funding may not discriminate based on a student’s sex, including transgender students under the Patsy T. Mink Equal Opportunity in Education Act also known as Title IX. Do you interpret Title IX of the Education Amendments of 1972 to ensure that transgendered students do not face discrimination in school?

RESPONSE: This question implicates cases likely to come before the Supreme Court. Accordingly, it would not be proper for me to comment. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

14. Does the Constitution define what a “person” is?

- a. Has the Supreme Court ever ruled that the 14th Amendment confers personhood on a fetus?
- b. If a state were to enact a personhood measure by redefining a fetus as a legal person, would that not be in direct contradiction to the Supreme Court’s holding in *Roe*?

RESPONSE: In *Roe v. Wade*, the Supreme Court held that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.” 410 U.S. 113, 158 (1973). Your question regarding the propriety of a hypothetical state law implicates issues that may come before me as a judge, and therefore it would not be proper for me to comment.

15. Did *Whole Woman’s Health* fully answer the remaining questions about the permissible breadth of pre-viability regulations allowed under *Casey*?

RESPONSE: In *Whole Woman’s Health v. Hellerstedt*, the Court held that certain abortion regulations violated the Fourteenth Amendment and thus were to be enjoined. It would not be

proper for me to comment further, as the question raises issues that may come before me as a judge.

16. As you know, the 14th Amendment's Equal Protection Clause states:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Please explain your understanding of the current constitutional prohibitions against sex discrimination. Does the Equal Protection Clause of the 14th Amendment to the U.S. Constitution prohibit discrimination on the basis of gender or sexual orientation?

RESPONSE: By way of example, in *Mississippi Univ. for Women v. Hogan* (1982) and *J.E.B. v. Alabama ex rel. T.B.* (1994), the Supreme Court held that state practices discriminating on the basis of sex are subject to a heightened level of scrutiny under the Equal Protection Clause. This scrutiny is often referred to as “intermediate scrutiny.” In *United States v. Virginia (VMI)* (1996), the Court emphasized that heightened scrutiny requires an “exceedingly persuasive justification” for sex-based classification. In addition, in *Lawrence v. Texas* (2003) and *Obergefell v. Hodges* (2015), the Supreme Court invalidated state laws implicating sexual orientation.

17. In a 2005 National Review piece, you criticized liberals for using the courts instead going through elected officials to advance their social agenda. In *Hobby Lobby*, the court gave closely held corporations the same rights as individuals in relying on RFRA. Please example why this was not a case of conservative overreach through the courts to affect an expansion of RFRA without legislative action?

RESPONSE: Congress passed the Religious Freedom Restoration Act (RFRA) because it determined that the Supreme Court's interpretation of the First Amendment was insufficiently protective of religious exercise. In a bipartisan bill sponsored by Senator Orrin Hatch, Senator Ted Kennedy, and then-Representative Charles Schumer, Congress prohibited the federal government from substantially burdening the exercise of a sincerely held religious belief unless the government can show it is pursuing the least restrictive means to achieve a compelling governmental interest.

Hobby Lobby brought a claim under this law, and courts had to decide what Congress meant when it included the word “person” in the statute. RFRA requires that “a person” be engaged in the “exercise of religion.” The Dictionary Act, which courts must look to when a term is otherwise undefined, defines a “person” to include corporations, and *Hobby Lobby* is a family-

held corporation that openly exhibits its religious affiliation. For example, as I recall, it plays Christian music in its stores. It refuses to sell alcohol or things that hold alcohol. It closes on Sundays. The Supreme Court concluded that, under the law Congress wrote, Hobby Lobby had a meritorious claim.

- a. Your expansion of religious protections to a corporation in *Hobby Lobby* now creates a potential conflict between the religious freedom of the corporation and that of the individual employee. In applying RFRA, how will you address a conflict between two differing religions? Is it for the courts to rule when one religion trumps another?

RESPONSE: Respectfully, the Tenth Circuit sitting en banc in *Hobby Lobby* applied the law Congress passed as best it could. Congress is free to change the law anytime. Beyond that, respectfully, these questions seek views about matters that might come before me as a judge and it would be improper for me to comment further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

18. Please what role the courts have in determining whether a burden is substantial? Is it just a rubber stamp?

- a. Is there any time when a court can make a determination that a federal law is objectively not a substantial burden on someone's religious beliefs? Under what circumstances?

RESPONSE: The substantial burden test was expressly adopted by Congress in RFRA. The Supreme Court has discussed the history and scope of that test in *Hobby Lobby* and many other cases. *See* 134 S. Ct. at 2775-79. As a judge, I cannot prejudge when that test will or will not be satisfied. Such a decision will depend on the facts and circumstances of each case.

19. In *Allstate Sweeping v. Black* you joined an opinion rejecting *inter alia* a claim of hostile work environment. The court wrote:

But Allstate cites to no cases, nor can we find any, holding that the harassment endured by the principals of an artificial entity can give rise to a racial- or gender-discrimination claim on behalf of the entity itself, absent independent injury to the entity. Indeed, it is not clear to us that an artificial entity could ever prevail on a hostile-work-environment claim. Such a claim has a subjective, as well as an objective, component; there must be proof that “the plaintiff was offended by the work environment.””

In *Hobby Lobby*, you joined the holding that an artificial entity like a for-profit corporation can exercise religion, independently of its owners. But in *Allstate*, you say the opposite, the Court said “[b]eing offended presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience.” How can an artificial entity such as Hobby Lobby assert a religious belief without having the thoughts or feelings necessary in *Allstate*?

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

20. During the hearing, you in an exchange with Senator Cornyn that, “Too few people can get lawyers to help them with their problem,” and later that, “I do think access to justice in large part means access to a lawyer. Lawyers make a difference. I believe that firmly. My grandpa showed that to me—what a difference a lawyer can make in a life.” At the 40th anniversary celebration of the Legal Services Corporation, Justice Scalia’s said,

“I’m here principally to show the flag, to represent the support of the Supreme Court and I’m sure all of my colleagues for the LSC... The American ideal is not for some justice, it is, as the Pledge of Allegiance says, ‘Liberty and justice for all’ or as the Supreme Court pediment has it, ‘Equal Justice.’ I’ve always thought that’s somewhat redundant. Can there be justice if it is not equal? Can there be a just society when some do not have justice? Equality, equal treatment is perhaps the most fundamental element of justice. So, this organization pursues the most fundamental of American ideals, and it pursues equal justice in those areas of life most important to the lives of our citizens.”

Do you agree with Justice Scalia’s statement?

RESPONSE: As discussed at the hearing, I believe that access to justice is a serious problem. Together with my colleagues, I have worked to improve access to justice while on the Standing Committee for Rules of Practice and Procedure and the Appellate Rules Advisory Committee. During my time as a judge, I have also worked alongside my colleagues, Chief Judge Tymkovich and Judge Lucero, and many others in our circuit, to promote the quality of representation of death row inmates. Together with the judges in Oklahoma, we provided training sessions, recruited additional lawyers, and sought and obtained more funds for federal public defenders. I have also written and spoken on ways to encourage greater access to justice and legal services. A good example of this work is *Access to Affordable Justice: A Challenge to the Bench, Bar, and Academy*, 100 *Judicature*, no. 3, Aug. 2016, at 46. I have also spoken and written about

problems in the legal system that affect ordinary people, including the complexity and expense of modern civil litigation. A good example of this work is *Law's Irony*, 37 Harv. J.L. & Pub. Pol'y 743 (2014).

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

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

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

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

RESPONSE: As we discussed, it would not be proper for a nominee to express views that touch on or could be perceived as touching on claims made in pending or impending litigation. *See, e.g., Washington v. Trump* (9th Cir. 2017). Respectfully, and as we discussed, I believe this question does that. To comment further would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

2. During your hearing, I asked you whether there was any circumstance in which the President could violate a statute passed by Congress to authorize torture or warrantless surveillance of Americans. You declined to answer my question. You stated: “[W]e have courts to decide these cases for a reason, to resolve these disputes.”¹ I am troubled that you declined to express any opinion about whether the President has the power to violate laws passed by Congress.
 - a. Justice O’Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”² In a time of war, do you believe that the

¹ Gorsuch Hearing Transcript Day 3, March 22, 2017, at 48-49.

² *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

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

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

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

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

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

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

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

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

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

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

5. Many are concerned that the White House’s denouncement of “judicial supremacy” was an attempt to signal that the President can ignore judicial orders. And after the President’s first Muslim ban, there were reports of Federal officials refusing to comply with court orders.
 - a. If a President refuses to comply with a court order, how should the courts respond?
 - b. Is a President who refuses to comply with a court order a threat to our constitutional system of checks and balances?

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

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

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

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

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

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

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

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

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

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

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

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

10. Since I have been voting on Supreme Court nominations, I can think of only three nominees who were originalists in the same way you have been described: Justice Scalia, Judge Bork, and Justice Thomas.
 - a. How do you compare your approach to interpreting the Constitution to those jurists?
 - b. In what ways does your judicial philosophy differ from theirs?

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

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

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

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

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

RESPONSE: In a number of opinions over many years, including many opinions we discussed at length at the hearing, the Supreme Court has recognized a number of unenumerated rights. These opinions are precedents of the Supreme Court entitled to all the weight due to such precedents. See for example the response to Question 8 above. To the extent your question implicates issues that may come before me as a judge in the future, it would not be proper for me to offer further opinions. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

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

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

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

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

violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

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

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

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

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

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

- b. Does Congress have the authority to fix it?

RESPONSE: Respectfully, whether Congress has the authority to act in this fashion is a question that may arise in future cases and controversies, and it would not be proper for me to comment further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

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

⁹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

¹⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

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

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

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

RESPONSE: As we discussed during my testimony before the Committee, I believe that recent Supreme Court cases, including *United States v. Jones* and *Kyllo v. United States*, demonstrate how the Fourth Amendment's historical protections can apply against technological advancements that obviously were not envisioned at the time of the Amendment's adoption. These cases show how the Court can thoughtfully use historical principles in applying the law to current realities, and I refer you to our extensive discussions at the hearing about them. To the extent your question implicates issues that may come before me as a judge, it would not be proper for me to comment further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

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

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

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

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

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

- a. Do you agree with the Supreme Court’s decisions in *Washington v. Glucksberg* and *Gonzales v. Oregon*?¹⁴
- b. Do you believe that questions related to medical aid in dying should be left to each State?

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

18. In *Allstate Sweeping v. Black*, you joined a unanimous decision rejecting a company’s hostile work environment claim. That decision stated, “Being *offended* presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience.”¹⁵ Yet in *Hobby Lobby* you joined a decision holding that large, for-profit corporations could have religious views, and that those religious views could limit health insurance access for employees.¹⁶
 - a. How do reconcile your divergent views in those cases?
 - b. Given that the contraception mandate is a law of general applicability, why should a woman’s access to contraception be dependent not on the duly enacted law, but instead on her boss’s views?

RESPONSE: *Allstate* involved a hostile-work-environment claim brought under 42 U.S.C. § 1981 and the Equal Protection Clause, whereas *Hobby Lobby* involved a claim under the Religious Freedom Restoration Act (RFRA). A hostile-work-environment claim requires proof that the “plaintiff was *offended*.” A claim under RFRA has no such element. Rather, RFRA requires that “a person” be engaged in the “exercise of religion.” The Dictionary Act, which courts must look to when a term is otherwise undefined, defines a “person” to include corporations. In *Hobby Lobby*, the government conceded and the Supreme Court ultimately

¹³ *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

¹⁴ *Gonzales v. Oregon*, 546 U.S. 243 (2006).

¹⁵ *Allstate Sweeping v. Black*, 706 F.3d 1261, 1268 (10th Cir. 2013) (emphasis in original).

¹⁶ *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152 (10th Cir. 2013).

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

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

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

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

RESPONSE: Respectfully, this question appears to reference an active case or controversy likely to come before the Supreme Court. Accordingly, it would be improper for me to offer a further opinion. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

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

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

¹⁷ *United States v. Pope*, 613 F.3d 1255 (10th Cir. 2010).

¹⁸ *Voisine v. United States*, 136 S. Ct. 2272, 2277 (2016).

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

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

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

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

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

RESPONSE: Respectfully, I cannot agree with your characterization. My record shows that, according to my clerks, 97 percent of the 2,700 cases I have decided were decided unanimously, and I have been in the majority 99 percent of the time. In those rare cases where I have dissented, my clerks report that I was about as likely to dissent from a judge appointed by a Republican as I was to dissent from a judge appointed as a Democrat. According to the Congressional Research Service, I understand that my opinions have attracted the fewest dissents of any Tenth Circuit judge it studied. That is my record as a judge based on ten years on the bench.

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

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

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

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

**Nomination of Judge Neal. Gorsuch, of Colorado,
to be an Associate Justice of the United States Supreme Court
Questions for the Record
Submitted March 24, 2017**

QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

- 1) In your testimony, you noted that you helped draft Attorney General Alberto Gonzales’s statement for a February 6, 2006 Senate Judiciary Committee hearing on the topic of the Bush Administration’s Terrorist Surveillance Program. Certain statements made by the former attorney general at that hearing—specifically, with respect to disputes between DOJ and the White House over domestic intelligence activities—were later determined by the Department of Justice Office of Inspector General to have been “confusing, inaccurate, and [to have] had the effect of misleading those who were not knowledgeable about the program.”
 - a) In addition to drafting Attorney General Gonzales’s testimony, did you help to prepare him for the February 6, 2006 Senate hearing? If so, what was involved in the preparation and what were your roles?

RESPONSE: While it is possible that I participated in some fashion in the preparation of Attorney General Gonzales for his testimony on February 6, 2006, as I testified my recollection of events more than eleven years ago is that my involvement related primarily to serving as a speechwriter for his opening statement, working from material supplied by others.

- b) Reports of disputes between DOJ and the White House related to aspects of the NSA’s warrantless surveillance programs surfaced in the press more than a month prior to the February, 2006 hearing. What did you know about these disputes at the time of the hearing?

RESPONSE: I do not recall what I knew about those disputes at the time of the February 6, 2006 hearing, as it happened more than eleven years ago.

- 2) Your positions *Burwell v. Hobby Lobby* and *Allstate Sweeping v. Black* seem to directly contradict each other. In *Hobby Lobby*, you joined the holding that an artificial entity like a for-profit corporation can exercise religion, independently of its owners. But in *Allstate*, you say the opposite—namely, that “[b]eing offended presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience.” How do you reconcile the reasoning behind the two decisions, beyond the fact that in both of the cases you voted for results that weakened anti-discrimination protections?

RESPONSE: Please see the response to Senator Blumenthal’s Question 9.

- 3) Under current law, what rights does Congress have to documents, materials, and testimony *vis a vis* claims of executive privilege?

RESPONSE: The Supreme Court has recognized the doctrine of executive privilege but also held that such claims may give way to competing interests. *See, e.g., United States v. Nixon*, 418 U.S. 683, 708 (1974). The exact dimensions and scope of executive privilege—especially vis-à-vis Congress—remain matters of controversy. As these and similar issues may come before me as a judge, it would not be proper for me to comment further on them. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

4) The media has circulated a photo of you and Justice Scalia on a fishing trip on the Colorado River.

a) When and where did this trip take place?

RESPONSE: The picture was taken during a fishing trip in Colorado after Justice Scalia's delivery of the John Paul Stevens Lecture at the University of Colorado Law School on October 1, 2014.

b) Did you and Justice Scalia use your own funds to pay for the trip? If not, who paid for the trip?

RESPONSE: I paid my own expenses. I do not know who paid Justice Scalia's.

c) Who else joined you?

RESPONSE: To my recollection, other judges and one of the Justice's former law clerks joined us.

d) Did you take other sporting or vacation trips with him or the other Justices of the Court?

RESPONSE: Other than travel associated with visits to Tenth Circuit Judicial Conferences and other professional events, such as the UK-US Legal Exchange, I do not recall other sporting or vacation trips with Justice Scalia or other Justices of the Court.

5) On Question 26 of your Judiciary Committee Questionnaire, you described your experience in the selection process and listed all interviews or communications with anyone in the Executive Office of the President, the Justice Department, the President-elect transition team or the presidential campaign. Question 26 also asked you to list any interviews or communications with outside groups at the behest of the Executive Office of the President, the Justice Department, the President-elect transition team or the presidential campaign.

a) You indicated that you communicated with Leonard Leo on December 2, 2016 and the week following January 6, 2017. Please provide more information circumstances (how those calls were arranged, who else participated) and content of your communications with Mr. Leo.

- b) Did you have any addition communication with Mr. Leo? If so, please describe the date and contents of the communication.
- c) You did not list any communication with outside groups. Is that answer still accurate? If you have communicated with outside groups, please list the names of groups, the representatives involved, the dates of the communications, and the contents of the communications.
- d) Did any outside groups assist in preparing you for your Senate Judiciary Committee hearing? If so, which groups?

RESPONSE: I have responded to many questions about my experiences in the nomination and confirmation process, both in the Senate Judiciary Committee Questionnaire and at the hearing. Various people have provided me advice, including Senators, Administration and transition personnel, former law clerks, and friends and family.

- 6) On numerous occasions in your testimony, you stated that the Supreme Court’s campaign finance jurisprudence left Congress ample room to legislate. In *Buckley v. Valeo* the Court recognized a “government interest” that it deemed sufficiently strong to justify limits on campaign contributions or spending -- preventing corruption or its appearance.
 - a) Is fighting corruption or its appearance the only constitutionally sound reason for limiting political spending or contributions?
 - b) Does “corruption” only encompass quid pro quo corruption?
 - c) As you know, bribery is already illegal under other federal laws. Can laws governing how elected officials finance our campaigns do anything beyond what bribery laws already do?

RESPONSE: In *Buckley v. Valeo*, the Supreme Court found that concerns regarding *quid pro quo* corruption, or the appearance of such corruption, were sufficiently important to permit limitations on some contributions. 424 U.S. 1, 26-28 (1976). In *Buckley*, the Supreme Court considered whether contribution limits added anything beyond bribery laws. On this point, the Court observed that “laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action.” *Id.* at 27-28. Please also see the response to Senator Leahy’s Question 13.

- 7) On numerous occasions in your testimony, you stated that the Supreme Court’s campaign finance jurisprudence left Congress ample room to legislate. In *Buckley v. Valeo* the Court recognized a “government interest” that it deemed sufficiently strong to justify limits on campaign contributions or spending -- preventing corruption or its appearance.
 - a) Is fighting corruption or its appearance the only constitutionally sound reason for limiting political spending or contributions?
 - b) Does “corruption” only encompass *quid pro quo* corruption?

- c) As you know, bribery is already illegal under other federal laws. Can laws governing how elected officials finance our campaigns do anything beyond what bribery laws already do?

RESPONSE: Please see the response to Question 6.

- 8) What is the originalist argument that *Brown vs. the Board of Education* was correctly decided?

RESPONSE: As I have stated during my testimony, “*Brown v. Board of Education* corrected an erroneous decision, a badly erroneous decision, and vindicated a dissent by the first Justice Harlan in *Plessy v. Ferguson*.” As I further stated during my testimony, “Justice Harlan got the original meaning of the Equal Protection Clause right the first time, and the Court recognized that belatedly. It is one of the great stains on the Supreme Court’s history that it took so long to get to that decision.”

- 9) You currently serve as the Chair of the Advisory Committee on Appellate Rules for the Judicial Conference of the United States. As you may know, Judges David Campbell and John Bates, who are the Chairs of the Judicial Conference Rules of Practice and Procedure Committee and the Advisory Committee on Civil Rules, respectively, recently wrote letters urging Congress not to enact legislation that would make changes to the Federal Rules of Civil Procedure. Judges Campbell and Bates raised serious concerns about Congress circumventing the Rules Enabling Act, which Congress itself wrote and which is intended to ensure that the Federal Rules are amended only after broad public participation and careful review by judges, lawyers and experts. The Judges wrote:

The Rules Enabling Act charges the judiciary with the task of neutral, independent, and thorough analysis of the rules and their operation. The Rules Committees undertake extensive study of the rules, including empirical research, so that they can propose rules that will best serve the American justice system while avoiding unintended consequences ... The Judicial Conference has long opposed direct amendment of the federal rules by legislation rather than through the deliberative process of the Rules Enabling Act.

As a senior member of the Judicial Conference, do you agree that Congress should not directly amend the Federal Rules of Civil Procedure and whether the procedures established by the Rules Enabling Act are preferable to congressional enactment?

RESPONSE: Respectfully, I do not speak for the Judicial Conference, and I do not believe it is appropriate for me as a nominee to opine on questions of Conference policy.

- 10) You said that no one asked you about your position on *Roe v. Wade* or abortion *after* the election. Did anyone associated with the Trump Campaign or an interest group ask about your position regarding *Roe v. Wade* or the legality of abortion *prior* to the election?

RESPONSE: Not to my recollection. As I testified at the hearing, I have made no commitments to anyone on matters that might come before me as a judge.

11) You repeatedly cited the *Youngstown* case and its reasoning and holding, yet under questions in front of the Judiciary Committee, you refused to discuss the reasoning and holding of other cases. How do you justify discussing one case and not another?

RESPONSE: Respectfully, during the hearing I discussed the reasoning and holdings of many cases besides *Youngstown*. For example, in addition to discussing at length the cases I have written or joined in the Tenth Circuit (e.g., *Gutierrez-Brizuela v. Lynch* and *TransAm Trucking v. Administrative Review Board*), I discussed the reasoning and holdings of several Supreme Court decisions—including *Myers v. United States*, 272 U.S. 52 (1926) (Mar. 22 Hrg. Tr. 232:21-233:4); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (Mar. 22 Hrg. Tr. 232:21-233:4); *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) (Mar. 22 Hrg. Tr. 233:5-234:17); *Roe v. Wade*, 410 U.S. 113 (1973) (Mar. 21 Hrg. Tr. 104:25-105:19); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Mar. 21 Hrg. Tr. 104:25-105:19); *Brown v. Board of Education*, 347 U.S. 483 (1954) (Mar. 21 Hrg. Tr. 348:24-350:2); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Mar. 21 Hrg. Tr. 348:24-350:2); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Mar. 21 Hrg. Tr. 350:8-20); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (Mar. 21 Hrg. Tr. 350:8-20); *Employment Division v. Smith*, 494 U.S. 872 (1990) (Mar. 21 Hrg. Tr. 132:18-133:9); *United States v. Jones*, 132 S. Ct. 945 (2012) (Mar. 21 Hrg. Tr. 52:18-53:8); *Kyllo v. United States*, 533 U.S. 27 (2001) (Mar. 21 Hrg. Tr. 219:12-21); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Mar. 21 Hrg. Tr. 219:12-21); *United States v. Booker*, 543 U.S. 220 (2005) (Mar. 21 Hrg. Tr. 219:12-21); *Crawford v. Washington*, 541 U.S. 36 (2004) (Mar. 21 Hrg. Tr. 219:12-21).