

**Responses of Michael H. Simon
Nominee to be United States District Judge for the District of Oregon
to the Second Set of Written Questions of Senator Jeff Sessions**

- 1. During your hearing, you stated that “I have been involved as a volunteer lawyer for the ACLU for a number of years and it certainly is true in my case . . . that we do not necessarily agree with all of the positions taken by the American Civil Liberties Union.” In follow-up Question 1, you were asked to “describe in detail the legal or policy positions advocated by the ACLU with which you disagree.” You responded:**

“As a member of the Lawyers Committee of the ACLU of Oregon, I participated in meetings to decide whether the ACLU of Oregon would accept or decline requests to provide legal representation in specific matters and whether the ACLU would appear as an *amicus curiae* in specific litigation. The decisions of the Lawyers Committee were made by majority vote, and its deliberations and vote counts were consistently treated as confidential and subject to the attorney-client privilege under Oregon law. Thus, all that I can say in direct response to this question is that on some occasions my vote in the Lawyers Committee was in the minority.”

While I understand that, in certain cases, you are bound by the attorney-client privilege, the question did not ask you to disclose the advice you provided the ACLU. Rather, it asked you to describe in detail the legal or policy positions advocated by the ACLU with which you disagree, consistent with your testimony. Please take this opportunity to describe such positions.

Response: Rule 4.1 of the ABA Model Code of Judicial Conduct (2007) provides that a judge or judicial candidate shall not "make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court" or "in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." In light of this rule and its commentary, I am not at liberty to describe the legal or policy positions advocated by the ACLU with which I disagree. I will faithfully follow all governing precedent, and to the best of my recollection I have never publicly discussed any of these matters.

- 2. During your hearing, you stated that the primary focus of your “activities for the American Civil Liberties Union of Oregon has been involved in First Amendment issues.” In follow-up Questions 2(a)(i) and (ii), you were asked whether you personally agreed with the ACLU’s position regarding the Pledge of Allegiance, and whether you have ever expressed an opinion regarding that position. In response, you stated:**

“Under the rule of law, a judge’s personal opinion is not relevant to the decision in a case, which must be based solely on the application of law to facts. If confirmed by the Senate, in all cases that came before me I would fairly determine the facts and faithfully apply the law, including all governing precedent.”

While I appreciate your willingness and commitment to follow precedent, your response did not answer either question. Please take this opportunity to answer those questions.

Response: Question 2(a) asks for my personal opinion on whether the Pledge of Allegiance is unconstitutional because it includes the words "under God." This issue was decided earlier this year by the U.S. Court of Appeals for the Ninth Circuit, which held that the Pledge of Allegiance does not violate the Establishment Clause. *Newdow v. Rio Linda Union School District*, 597 F.3d 1007 (9th Cir. 2010). That decision is binding in the Ninth Circuit and entitled to full *stare decisis* effect. I will faithfully follow all governing precedent. In addition, to the best of my recollection, I have never publicly discussed this matter. In light of Rule 4.1 of the ABA Model Code of Judicial Conduct (2007), I am not at liberty to comment further.

- 3. In follow-up Questions 2(b)(i) and (ii), you were asked whether you agreed with the ACLU's positions regarding religious displays on public land, and if not, whether you ever expressed your disapproval. In response, you stated:**

"Under the rule of law, a judge's personal opinion is not relevant to the decision in a case, which must be based solely on the application of law to facts. If confirmed by the Senate, in all cases that came before me I would fairly determine the facts and faithfully apply the law, including all governing precedent."

You then cited some of the governing precedent. While I appreciate your willingness and commitment to follow precedent, your response did not answer either question. Please take this opportunity to answer those questions.

Response: Question 2(b) asks for my personal opinion on whether, under the Establishment Clause, "communities must remove all vestiges of America's history and heritage that include religious symbols on public lands or on city or county seals." This issue has been decided by the Supreme Court in a series of opinions that I refer to in my original answer. These decisions are governing precedent, and I will faithfully follow them. In addition, to the best of my recollection, I have produced to the Committee on the Judiciary all of my public statements on this topic, and they are consistent with my response. In light of Rule 4.1 of the ABA Model Code of Judicial Conduct (2007), I am not at liberty to comment further.

- 4. In follow-up Question 2(c)(i), you were asked whether you agreed with the positions advocated by the ACLU of Northern California in an *amicus brief* regarding doctors who refused to give infertility treatments to gay or lesbian patients on the basis of the doctors' personal religious beliefs. In response, you stated:**

"I am not familiar with the amicus brief from the ACLU of Northern California referred to in this question. In addition, under the rule of law, a judge's personal opinion is not relevant to the decision in a case, which must be based solely on the application of law to facts. If confirmed by the Senate, in all cases that came before

me I would fairly determine the facts and faithfully apply the law, including all governing precedent.”

While I appreciate your willingness and commitment to follow precedent, your response did not answer the question. The brief to which I refer is available at: http://www.aclunc.org/issues/lgbt/asset_upload_file416_6018.pdf. Please familiarize yourself with the brief and take this opportunity to answer the question.

Response: I have reviewed the brief that the ACLU of Northern California submitted to the California Supreme Court in the case of *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court*, 81 Cal. Rptr.3d 708, 44 Cal.4th 1145, 189 P.3d 959 (Cal. 2008). I have also reviewed the decision of the California Supreme Court in that case. A decision of a state Supreme Court is not binding on a federal court in questions of federal constitutional law, and the federal questions presented in this case may someday come before a federal court in the District of Oregon. Accordingly, I am not at liberty to comment on the correctness of either the position taken by the ACLU of Northern California or the decision of the California Supreme Court in this case. In addition, to the best of my recollection, I have never publicly discussed the specific questions raised in this case.

- 5. In follow-up Question 2(d)(i), you were asked whether you agreed with the ACLU's opposition to tax exemptions for churches, as the ACLU of Alaska has argued. In response, you stated:**

“I am not familiar with the legal position taken by the ACLU of Alaska referred to in this question. In addition, under the rule of law, a judge's personal opinion is not relevant to the decision in a case, which must be based solely on the application of law to facts. If confirmed by the Senate, under all cases that came before me I would fairly determine the facts and faithfully apply the law, including all governing precedent.”

While I appreciate your willingness and commitment to follow precedent, your response did not answer the question. The case to which I refer is *Coonrod, Metcalfe, and ACLU of Alaska v. State of Alaska*, No. 3AN-06-8866CI, and the Superior Court's memorandum opinion on the merits is available at: <http://www.akclu.org/NewsEvents/CoonrodMemoDecision.pdf>. Please familiarize yourself with the ACLU of Alaska's position and take this opportunity to answer the question.

Response: I have reviewed the decision of the Superior Court for the State of Alaska in the case of *Coonrod, Metcalfe, and ACLU of Alaska v. State of Alaska*, Case Nos. 3AN-06-08866 CI and 3AN-06-08943 CI (consolidated). A decision from a state trial court is not binding on a federal court in questions of federal constitutional law, and the federal questions presented in this case may someday come before a federal court in the District of Oregon. Accordingly, I am not at liberty to comment on the correctness of either the position taken by the ACLU of Alaska or the decision of the Alaska Superior Court in this case. In addition, to the best of my recollection, I have never publicly discussed the specific questions raised in this case.