

**Senator Chuck Grassley
Questions for the Record**

**Vince Girdhari Chhabria
Nominee, U.S. District Judge for the Northern District of California**

- 1. In an interview on National Public Radio you said that your “own personal view is that it would violate the equal protection clause of the U.S. Constitution to deny same-sex couples the right to marry” and that “history is on our side that eventually same-sex couples throughout the country will be permitted to marry.”**

If the Supreme Court holds that state laws and amendments that ban same-sex marriage are constitutional, how will “history being on your side” impact your decisions on the bench regarding same-sex marriage bans?

Response: If confirmed, I would faithfully apply such precedent without regard to any views I may hold, as I would all binding Supreme Court and Ninth Circuit precedent on any issue that came before me.

- 2. In an article you co-authored, titled *Courts Wrongly Continue Bias Against Gays*, you wrote that “our constitutional jurisprudence is based on reason applied to current circumstances, not custom or belief, no matter how long or sincerely held.”**

Does the meaning of the constitution change based on reason applied to current circumstances or does the original public meaning of the text remain the basis that constitutional decisions should be made no matter how long ago the text was written?

Response: I do not believe that the meaning of the Constitution changes, except when it is amended in accordance with Article V. The Constitution’s words and principles are fixed, and those words and principles must be applied to current circumstances. As the Supreme Court has recently reiterated, in applying the words of the Constitution to current circumstances, the meaning of those words at the time they were written, and the public’s understanding of the meaning of the constitutional text at the time it was adopted, plays a critical role in constitutional interpretation. *See District of Columbia v. Heller*, 554 U.S. 570, 605 (2008). If confirmed, I would apply this and all other applicable Supreme Court and Ninth Circuit precedent relating to constitutional interpretation.

- 3. In San Francisco’s brief for *Catholic League for Religious and Civil Rights v. City and County of San Francisco* you argued that the Board of Supervisor’s resolution urging “Archbishop Niederauer and the Catholic Charities of the Archdiocese of San Francisco to defy all discriminatory directives of Cardinal Levada” and place children for adoption with same-sex couples did not have the primary purpose to inhibit Catholicism because it was aimed at denouncing discrimination and not Catholicism.**

- a. Can you articulate any limiting principle for this argument?**

Response: This case was heard by an eleven-member en banc panel of the Ninth Circuit, and the judges of that panel appeared to disagree on whether there was a limiting principle for the argument identified above. Three members of the panel wrote that the resolution was constitutional under the Supreme Court's three-part test first set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in part because “both San Francisco’s history of promoting gay rights and the timing of the defendants’ resolution, incendiary though it may be, is aimed at expressing the defendants’ position on the secular issue of same-sex adoption.” *Id.* at 1061 (Silverman, J., concurring). Three other members of the panel wrote that the resolution was unconstitutional because, among other things, it “entangle[d] itself in church governance” in violation of the *Lemon* test. *See Catholic League for Religious & Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1057 (9th Cir. 2010) (en banc) (Kleinfeld, J., dissenting). Five other members of the panel concluded there was no federal jurisdiction in the case, but suggested that they, although in agreement on standing, had differing views about the merits of the plaintiffs’ argument and the City’s response to it. *Id.* at 1068 & n. 3 (Graber, J., concurring).

If confirmed and presented with an argument similar to the one advanced by the City in this case, my prior advocacy on behalf of my clients, as with any case or controversy before me, would play no role in my decisionmaking, which would be limited to a careful review of the facts and the parties’ arguments, and a faithful application of Supreme Court and Ninth Circuit Establishment Clause precedent.

- b. In your view, would a government entity’s action denouncing Catholicism for not ordaining women as priests be permissible for the same reason? Namely, because it only denounced discrimination against women?**

Response: As a prospective district judge, I would be reluctant to prejudge the validity of either a resolution similar to the one enacted by my client or a resolution similar to the one hypothesized in this question, but as with any case or controversy before me, my prior advocacy on behalf of my client would play no role in my decisionmaking.

- 4. In a recent Supreme Court decision, Justice Kennedy wrote that DOMA “humiliates,” “demeans,” “disapproves,” “seeks to injure,” and that it is a “bare congressional desire to harm.”**

- a. In your view, when and under what circumstances should a judge make findings regarding Congressional intent of the laws it writes?**

Response: The Supreme Court recently reiterated that “[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Milner v.*

Dep't of Navy, 131 S. Ct. 1259, 1264 (2011) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). If confirmed, I would make findings regarding Congressional intent when called upon to do so by Supreme Court and Ninth Circuit precedent. As discussed below, most commonly courts make findings regarding Congressional intent after examining legislative history for the purpose of resolving an ambiguity in statutory language.

b. When is legislative intent relevant in determining the outcome of a case?

Response: Courts should begin by applying the text of the statute to the facts of the case, with the hope and expectation that the text will resolve the matter and constitute an unambiguous reflection of legislative intent. In the event the language of the statute is ambiguous, however, courts consider legislative history to help discern legislative intent. *See, e.g., Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1267 (2011). Furthermore, as noted in the question, the Supreme Court has in some circumstances gone beyond the text of a statute or ordinance to help discern legislative intent in cases involving constitutional claims. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993). However, if a statute is “otherwise constitutional,” a court should not strike it down “on the basis of an alleged illicit legislative motive.” *United States v. O'Brien*, 391 U.S. 367, 383 (1968). If confirmed and presented with a constitutional challenge to a statute or ordinance, I would faithfully apply Supreme Court and Ninth Circuit precedent on the relevance of legislative intent in the circumstances of that case.

c. I expect all federal judges to follow the law and respect every citizen's first amendment religious liberty rights. What is your understanding of a church's right to define marriage how they see fit?

Response: The Supreme Court recently explained that the Free Exercise Clause of the First Amendment “protects a religious group's right to shape its own faith and mission” and protects against “government interference with an internal church decision that affects the faith and mission of the church itself.” *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 132 S. Ct. 694, 706-07 (2012). If confirmed, I would faithfully apply this and other applicable Supreme Court and Ninth Circuit precedent regarding the First Amendment right of a church to control its faith and mission.

d. Is there a right for clergy to decline to officiate at the marriage of any particular couple?

Response: Please see the response to Question 4(c) above. *See also Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 976 (N.D. Cal. 2010) (“no religion will be required to change its religious policies or practices with regard to same-sex couples,

and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs”) (quoting *In re Marriage Cases*, 183 P.3d 384, 451-52 (Cal. 2008)).

5. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Response: If confirmed, I would reach a decision in cases by first developing a firm grasp of the facts, and then applying the law narrowly to those facts, without deciding or addressing any issue that is unnecessary to the resolution of the case. In cases involving statutory interpretation, I would first look to the language of the statute, with the hope and expectation that the case can be resolved simply by applying that language to the facts of the case. I would also look to applicable Supreme Court and Ninth Circuit precedent. If the statute were ambiguous and if there is no applicable Supreme Court and Ninth Circuit precedent, I would look to other circuits and district courts for persuasive authority, and where appropriate I would examine the history of the applicable provision. In cases involving constitutional challenges to statutes, I would approach the matter as described in my response to Question 14 below.

If confirmed, I would not expect the transition from advocate to judge to be difficult for me, for two reasons. First, I believe I took well to the role of a law clerk during my three years clerking in the federal judiciary, during which time I was called upon to analyze cases neutrally rather than advocate for one side or another. Second, I believe my primary strengths as an advocate have been the ability to think objectively and treat opposing parties and their counsel fairly – traits that would carry over well to my new role if I were confirmed.

6. How will you use the Sentencing Guidelines to guide you in criminal cases?

Response: Although the Sentencing Guidelines are now advisory rather than mandatory, I believe uniformity in sentencing is critical to our criminal justice system, and that a person should not receive a different sentence depending upon whose court he or she appears in. Therefore, the Guidelines would serve as my starting point in sentencing decisions, and I would give them substantial deference.

7. **Some have contended that a judge should have empathy for those who appear before them. My concern is that when someone suggests a judge should have empathy, they are really suggesting the judge should place their thumb on the scales of justice to tilt it in the favor of the proverbial little guy. In your personal opinion, is it ever the role of a judge to favor one party over another?**

Response: I believe it is never appropriate for a judge to favor one party over another.

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

Response: The most important attribute of a judge is to be objective and to decide cases impartially, giving thorough consideration to both sides' arguments and applying the law to the facts as narrowly as possible. I believe I possess this attribute.

9. **Your questionnaire indicates you are a member of the American Constitution Society for Law and Policy. There is nothing wrong with membership in such groups, but I do have a question about how the goals of that organization might affect your judgments, if confirmed. Peter Edelman, as chair of the board of directors for American Constitution Society for Law and Policy, stated he would help to engage a younger audience about how the law can improve the lives of everyday citizens. "What we want to do is promote a conversation — the idea of what a progressive perspective of the constitution is and what it means for the country." He also indicated that a goal of the organization is "countering right-wing distortions of our Constitution."**

- a. **What is your view of the role of the courts on improving the lives of everyday citizens?**

Response: I am not familiar with the intended meaning of the above quotes. I believe the courts can improve the lives of everyday citizens by promoting the rule of law and ensuring all parties who appear before the court are treated fairly, impartially and respectfully. I also believe it is important for judges to ensure that all people who come into contact with the judicial system – parties, attorneys, witnesses, victims and jurors – are treated with respect and come away with a positive impression of the judicial system.

- b. **Can you please explain, in your view, the idea of what is a progressive perspective of the constitution?**

Response: I am not familiar with the intended meaning of the statement quoted above. If confirmed as a district judge and called upon to adjudicate a constitutional question, I would apply the applicable text and binding precedent to the facts of the case without regard to labels such as "conservative" or "progressive."

- c. What does the idea of a progressive perspective of the constitution mean for the country, in your view?**

Response: I am not familiar with the intended meaning of this statement, and as someone who has focused on advocating for his client I have not developed a view on what a “progressive perspective of the constitution” would mean for the country.

- d. Can you please identify what “right-wing distortions of the Constitution” you are concerned about or feel need to be countered? Please explain.**

Response: I am not familiar with the intended meaning of this statement, and am not familiar with any distortions that need to be countered.

- e. If you are confirmed as a federal judge how would you seek to promote a “progressive perspective of the Constitution; or counter “right-wing distortions of the Constitution?”**

Response: I would not seek to do either. If confirmed, my role would be limited to impartially applying the law to the facts of the case before me.

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

Response: A judge should be modest and respectful. Modesty in this context means that a judge should not be quick to assume he or she knows the right answer, and should not reach a final decision before allowing the parties to complete their presentations. Respect in this context means that a judge should treat all who appear in his or her courtroom well, be they attorneys, parties, witnesses or jurors. I believe these are the most important elements of judicial temperament, and that I possess these traits.

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

Response: Yes. I am committed to following the precedents of higher courts faithfully and giving them full force and effect regardless of whether I agree or disagree with those precedents.

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

Response: If faced with a case of first impression, I would first look to the language of the applicable statutory or regulatory provision, with the hope and expectation that the case can be resolved simply by applying that language to the facts of the case. If the answer were not clear, I would seek guidance from analogous Supreme Court and Ninth Circuit precedent, from analogous precedent from other circuits and from district courts. Where appropriate, I would also examine the history of the applicable provision.

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

Response: I would apply binding Supreme Court or Ninth Circuit precedent regardless of whether I believed the court erred in its decision.

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

Response: Statutes enacted by Congress are presumed constitutional, and should only be struck down if they are in clear violation of a provision of the constitution. If presented with a constitutional challenge to a Congressional statute, I would first inquire whether the parties are properly before the court, that is, whether there is jurisdiction over the matter in the first place. If not, I would dismiss the case. If jurisdiction existed, I would inquire whether the doctrine of constitutional avoidance applies, and if so would decide the case without ruling on the constitutionality of the statute. If the doctrine of constitutional avoidance did not apply, I would proceed by applying the presumption in favor of the constitutionality of Congressional statutes. I would look first to the text of the constitutional provision at issue, along with the text of the statute being challenged. I would also look to binding Supreme Court and Ninth Circuit precedent. In the event the case could not be resolved by application of the plain language of the constitutional provision and binding precedent, I would look to persuasive precedent from other circuits and from the district courts, and would, when appropriate, look to the history of the constitutional provision and the statute being challenged. It bears noting, however, that the presumption in favor of the constitutionality of the statute becomes more important when the text of the constitutional provision and binding precedent do not provide clear answers.

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

Response: I have never allowed any personal views I may hold to interfere with my advocacy on behalf of my clients, or to interfere with the legal advice I have provided my

clients. Similarly, if confirmed, I would never allow any personal views I may hold to interfere with my application of the law to the facts of the case before me. Furthermore, I believe two of my primary strengths as an advocate have been: (i) my ability to think objectively and impartially; and (ii) my consistent respect for the other side's arguments and the people who make those arguments. I believe those who have worked with me, be they co-clerks, colleagues, clients or opposing counsel, would attest to this.

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

Response: Please see response to question 15 above.

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

Response: If confirmed, I would not rely on foreign law or the views of the world community in determining the meaning of the Constitution unless the Supreme Court or Ninth Circuit issued a decision requiring me to do so.

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

Response: If confirmed, my policy would be to familiarize myself with cases immediately after they are filed, promptly schedule case management conferences, work with counsel for the parties to develop an efficient case management schedule, and continue monitoring cases throughout the process to ensure that the rules of discovery are not abused and that the case is not unnecessarily delayed.

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

Response: I believe judges play an important role in controlling the pace and conduct of litigation. If confirmed, I would take the steps identified in my response to Question 18 to control my docket.

20. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Response: Please see my response to Question 5 above.

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

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

Response: No.

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

Response: No.

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

Response: I drafted these responses and presented them to Justice Department officials. After receiving comments from them, I edited the responses and authorized the Justice Department to submit them on my behalf.

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

Response: Yes.

**Questions for the Record
Senator Ted Cruz**

**Responses of Vince Girdhari Chhabria
Nominee, United States District Court for the Northern District of California
9/25/2013 Judicial Nominations Hearing**

Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice’s judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response: If confirmed, my approach would be to decide cases impartially, applying the law to the facts as narrowly as possible, without deciding or addressing any issues unnecessary to the resolution of the case. I served as a law clerk at the United States Supreme Court during the October 2001 term. I developed a deep respect for all nine of the Justices who served during that term, and would seek to emulate qualities in all of them, but two Justices come immediately to mind, perhaps because I knew them best of the nine. First, with respect to my former boss, Justice Stephen Breyer, I would seek to emulate his open-mindedness, his tireless work ethic, and his passion for the law. Second, during my clerkship I came to know the late Chief Justice William Rehnquist as the ultimate straight shooter – someone who spoke and wrote clearly, decided cases impartially, issued short opinions that said no more than necessary, and got his work done very quickly. In these respects, the Chief possessed the most important attributes of a district judge, and above all I would seek to emulate those attributes if confirmed.

Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Response: If confirmed, I would follow binding Supreme Court and Ninth Circuit precedent with respect to interpretation of the Constitution. As the Supreme Court recently explained in *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008), public understanding of text around the time of enactment plays a critical role in constitutional interpretation, and I would follow that and all other binding precedent.

If a decision is precedent today while you’re going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Response: If confirmed as a district judge, I would never overrule precedent.

Explain whether you agree that “State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).

Response: The Supreme Court made this statement in holding that the San Antonio Metropolitan Transit Authority was not immune from federal minimum wage and overtime requirements. In

other cases, the Supreme Court has struck down the imposition of federal requirements upon the states. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997). If confirmed, I would faithfully apply *Garcia*, *Printz*, and any other Supreme Court or Ninth Circuit precedent regarding limitations on federal power in relation to the states.

Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: Under Supreme Court precedent, there are three areas in which Congress may regulate pursuant to its Commerce Clause power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or people or things in interstate commerce; and (3) activity that has a substantial effect on interstate commerce. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000), *United States v. Lopez*, 514 U.S. 549 (1995). Although *Morrison* and *Lopez* emphasized the non-economic nature of the conduct Congress attempted to regulate in those cases, they did not hold that Congress could never regulate non-economic conduct pursuant to its Commerce Clause authority. In his concurring opinion in *Gonzales v. Raich*, 545 U.S. 1, 37 (2005), Justice Scalia concluded that under the Court's Commerce Clause jurisprudence Congress may regulate non-economic activity if doing so was a necessary part of a more general regulation of interstate commerce. If confirmed, I would faithfully apply *Morrison*, *Lopez*, *Raich* and all other applicable Supreme Court and Ninth Circuit precedent to the facts of the case in adjudicating any Commerce Clause question.

What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

Response: The President's ability to issue executive orders or take executive action is subject to the limits on the exercise of federal power set forth in the constitution, including the Bill of Rights. The guidelines for determining whether the President has exceeded these limits are set forth in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring), along with the opinions of the Court in subsequent cases such as *Medellin v. Texas*, 552 U.S. 491 (2008) and *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In addition, executive branch regulatory actions are subject to limitations set forth in cases such as *Gonzales v. Oregon*, 546 U.S. 243 (2006) and *Chevron, U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984). If confirmed and called upon to adjudicate a case involving the limits of executive power, I would faithfully apply these and all other pertinent Supreme Court and Ninth Circuit precedent.

When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?

Response: Under Supreme Court precedent, a right is "fundamental" only if it is deeply rooted in our nation's history and tradition and "implicit in the concept of ordered liberty." *Chavez v. Martinez*, 538 U.S. 760, 775 (2003). *See also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 (2010). If confirmed, I would follow this and all other applicable Supreme Court and Ninth Circuit precedent in adjudicating any question regarding fundamental rights.

When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: The Supreme Court has applied strict or intermediate scrutiny in only a narrow set of cases, such as those involving classifications based on race, gender and religion. With respect to strict scrutiny, the Court has stated that it only applies in cases where the characteristics of a class, such as race, “so seldom provide a relevant basis for disparate treatment.” *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2418 (2013) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989)). The Court has stated that intermediate scrutiny applies to gender-based classifications because, even though there are sometimes legitimate reasons to classify based on gender, such classifications have historically been used “to create or perpetuate the legal, social, and economic inferiority of women.” *United States v. Virginia*, 518 U.S. 515, 534 (1996). If confirmed, I would follow binding Supreme Court and Ninth Circuit precedent in adjudicating any question regarding heightened scrutiny.

Do you “expect that [15] years from now, the use of racial preferences will no longer be necessary” in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: In *Grutter*, the Supreme Court held that the use of racial preferences in admission to the University of Michigan Law School lawfully served the school’s interest in a diverse student body, but predicted that by 2028 the use of racial preferences “will no longer be necessary to further the interest approved today.” 539 U.S. at 343. If confirmed, I would apply binding Supreme Court and Ninth Circuit precedent on the use of race in university admissions, including the Court’s recent decision in *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013).