

**Senator Chuck Grassley
Questions for the Record**

**Michelle T. Friedland
Nominee, U.S. Circuit Judge for the Ninth Circuit**

- 1. In your view, is there equivalency between the “marriage equality” debate and the struggle for racial equality? Please explain what you see to be the legal similarities or differences.**

Response: Many Supreme Court cases deciding constitutional questions about racial equality have been resolved solely under the Equal Protection Clause. *See, e.g., Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (holding that school segregation was inconsistent with “the equal protection of the laws guaranteed by the Fourteenth Amendment,” and noting that “[t]his disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment”); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (“[T]he Equal Protection Clause forbids [a] prosecutor to challenge potential jurors solely on account of their race.”); *but see, e.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that a state law prohibiting interracial marriage violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment). In contrast, the Supreme Court’s recent decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), held that section 3 of the Defense of Marriage Act “violat[e] basic due process and equal protection principles.” *Id.* at 2693. The Supreme Court did not decide the merits of *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), in which the question presented had been “[w]hether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.” Whether the Equal Protection Clause or the Due Process Clause guarantees same-sex couples a right to marry is therefore a question still being litigated actively — as is the issue of what standard of scrutiny should be applied in answering that question — including in litigation currently pending in the Ninth Circuit. If confirmed, I faithfully would apply Supreme Court and Ninth Circuit precedent regarding equal protection and due process, just as I would all Supreme Court and Ninth Circuit precedent.

- 2. Your questionnaire indicates you were 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.” Also, some of**

the stated goals and missions of the organization are “countering right-wing distortions of our Constitution” and “debunking conservative buzzwords such as ‘originalism’ and ‘strict construction’ that use neutral-sounding language but all too often lead to conservative policy outcomes.”

- 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 quoted statement, so I cannot comment on what was meant by it. The role of the federal courts is limited by Article III of the Constitution to deciding the actual cases and controversies that come before them. The Constitution gives federal elected officials the authority to make the policy choices necessary to the legislative process, including on questions about how to improve people’s lives. It is federal courts’ role then to apply the laws as written, without questioning the policy choices made by elected officials.

- b. Can you please identify what “right-wing distortions of the Constitution” you are concerned about or feel need to be countered or why concepts such as originalism and strict construction need to be “debunked?”**

Response: I am not familiar with the quoted statement, so I cannot comment on what was meant by it. I am not aware of any distortions that need to be countered, or any concepts that need to be debunked.

- 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 quoted statement, so I cannot comment on what was meant by it, and the term “progressive” has been used in many different ways. If confirmed, my role would be to carefully and faithfully apply the law to the facts of every case that came before me, regardless of how others might characterize my decisions.

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

Response: I am not familiar with the quoted statement, so I cannot comment on what was meant by it. I am not aware of 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 am not familiar with the quoted statement, so I cannot comment on what was meant by it. If confirmed, my sole goal would be to carefully and faithfully apply the law to the facts of every case that came before me.

3. During your hearing, I asked you about the letter you wrote in support of Goodwin Liu and Edward Chen. I didn't fully understand your answer to when I asked you about your understanding of the Senate's role to "advise and consent".

a. Please explain your understanding of that here. What power and responsibilities or restrictions does give the Senate?

Response: The Appointments Clause of Article II of the Constitution provides that the President's appointments of "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law" — other than those "inferior Officers" whose appointment Congress vests "in the President alone, in the Courts of Law, or in the Heads of Departments" — require the "Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2.

b. Please elaborate on how blocking a particular nominee is a "disservice to the nation's judicial system".

Response: The quoted letter to President Obama, which was signed by numerous members of the California legal community including myself, discussed the particular nominations of now-Justice Liu and Judge Chen. The letter explained that the seats for which they were nominated "ha[d] been designated judicial emergencies," as had "other vacancies on those courts" — a designation reflecting the heavy caseloads of both the Ninth Circuit and the District Court for the Northern District of California. The letter stated that "justice suffers increasingly while these positions remain vacant," which I understood to mean that the substantial length of time it takes for many cases in those courts to get resolved due to the large number of cases handled by each judge on those courts is detrimental to the courts' effectiveness, and that filling vacancies would help by providing more judges to share the workload. I joined the letter as a lawyer who practices frequently before both courts and thus had some familiarity with the impact of the courts' workloads.

4. There was a recent decision by the New Mexico Supreme Court¹ where the Court held that a photographer improperly discriminated against a gay couple when she refused to

¹ *Elane Photography, LLC v. Willock*, 2013 WL 4478229 (N.M. Aug. 22, 2013).

take photos for their commitment ceremony for religious reasons and, as the Court stated in its opinion, the Respondents are, “now are compelled by law to compromise the very religious beliefs that inspire their lives.”²

- a. How would you respond if a party in a similar case claimed this was a Freedom of Speech violation? Particularly with respect to a creative and expressive art form such as photography?**

Response: To respond to such a claim, I would expect to consider issues including whether any neutral and generally applicable antidiscrimination law unambiguously purported to require the service to be provided in such circumstances, and, if so, whether First Amendment doctrines relating to freedom of speech or protections against compelled speech required an exception in the circumstances presented.

- b. Do you think the New Mexico state legislature, by requiring companies that advertise publicly to act in this way, compels the company to speak the government’s message?**

Response: If a case came before me raising such a question, I carefully would consider the specific requirements of the law at issue and precedents regarding the First Amendment and compelled speech, such as *Wooley v. Maynard*, 430 U.S. 705 (1977), and *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988).

- c. How would you respond if an individual or company in this circumstance raised a Free Exercise claim?**

Response: To respond to such a claim, I would expect to consider issues including: (1) whether any neutral and generally applicable antidiscrimination law unambiguously purported to require the service to be provided in such circumstances; (2) whether any applicable statute provided an exemption to individuals with religious objections, such as is provided in some circumstances by the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*; and (3) relevant Free Exercise Clause precedents such as *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Employment Division v. Smith*, 494 U.S. 872 (1990).

² *Id.*, Para. 90.

- 5. Do you believe that a judge's gender, ethnicity, or other demographic factor has any or should have any influence in the outcome of a case? Please explain.**

Response: No. A judge's job is to apply the law to the facts in every case, and attributes of a judge such as gender and ethnicity do not change what the law is.

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

Response: The most important attributes of a judge are faithfulness to text and precedent, treating all litigants with respect and carefully considering their arguments, and being hardworking. I possess these attributes.

- 7. 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: The appropriate temperament of a judge is to treat all parties with respect, to work hard, and to have the humility to realize that there may be ideas or arguments one has not thought of and so to always consider carefully the arguments of the parties and the views of one's colleagues. I meet this standard.

- 8. In general, Supreme Court precedents are binding on all lower federal courts. 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.

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

Response: If faced with a case of first impression, I would begin by analyzing the text of any relevant constitutional, statutory, or regulatory provision. I also would study decisions of the Supreme Court and the Ninth Circuit interpreting similar provisions or discussing similar issues — even when there is no controlling precedent that conclusively resolves the issue at hand, there always are cases that articulate legal principles that provide guidance. If the issue were one that other circuit courts or state courts had addressed, I also would look to those courts' decisions as persuasive, though not binding, authority.

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

Response: If confirmed, I would apply decisions of the Supreme Court and the Ninth Circuit even if I believed them to be erroneous.

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

Response: Federal statutes are entitled to a presumption of constitutionality. A federal court should only declare a federal statute unconstitutional if the statute directly violates a constitutional provision or if Congress exceeded its authority when it enacted the statute.

12. Please describe your understanding of the workload of the Ninth Circuit. If confirmed, how do you intend to manage your caseload?

Response: During the 12-month period ending June 30, 2013, an average of 566 appeals per active judge were terminated in the Ninth Circuit, of which an average of 190 were accompanied by a written decision. *See* U.S. Court of Appeals – Judicial Caseload Profile, *available at* <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/appeals-fcms-profiles-june-2013.pdf&page=21>. I would manage this extremely heavy caseload by working very hard, setting strict deadlines for myself and my law clerks, and seeking the advice of my colleagues on efficient workflow systems within chambers.

13. 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: The views of the world community are not relevant to interpreting the Constitution. The Constitution is a domestic document that should be interpreted based on domestic sources — text, precedent, and sources of evidence of original meaning such as the Federalist Papers. In very limited circumstances, however, the Supreme Court has considered foreign law in interpreting the Constitution. For example, in interpreting the Seventh Amendment right to a jury trial in civil cases, the Supreme Court has analyzed 18th-century English common law. *See, e.g., Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990). If confirmed, I would consider foreign law in interpreting the Constitution only in the very limited circumstances in which Supreme Court or Ninth Circuit precedent required me to do so.

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

Response: If confirmed, my duty as a Ninth Circuit judge would be to put aside any personal or political views and to decide cases solely based on text and precedent. The rule of law depends on the ability of judges to do this. I approached cases neutrally as a law clerk at the D.C. Circuit and Supreme Court, and I always have presented issues neutrally when teaching law school classes. In my law practice, I have represented both plaintiffs and defendants, large corporations and not-for-profit organizations, and public institutions and individuals. I believe these experiences have prepared me for the neutral role I would be taking on if confirmed.

15. 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 #14 above.

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

Response: Panels of the Ninth Circuit are bound by prior decisions of the Ninth Circuit unless those decisions are “clearly irreconcilable” with a subsequent *en banc* or Supreme Court decision. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*). Even when sitting *en banc*, an appellate court should depart from one of its prior decisions only in very limited circumstances, such as when doing so “is necessary to secure or maintain uniformity of the court’s decisions,” Federal Rule of Appellate Procedure 35(a)(1), or when “an opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity,” Ninth Circuit Rule 35-1.

17. You have spent your 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: As a judge, the question would always be how to resolve the case at hand in the manner most faithful to text and to precedent, looking at both from a neutral perspective.

This is very different from what my role has been as an advocate, because my duty as an advocate has been to argue for interpretations of text and precedent that best further my clients' positions and interests. If confirmed, my methodology for deciding cases would be to read the decision being appealed; examine the facts in the record; read the parties' briefs; analyze the text of any constitutional, statutory, or regulatory provision at issue; study the relevant precedents of the Supreme Court and the Ninth Circuit; listen with an open mind to the views of the litigants and my colleagues; and then reach the decision that most faithfully applies the law to the facts.

I approached cases neutrally as a law clerk at the D.C. Circuit and Supreme Court, and I always have presented issues neutrally when teaching law school classes, so I am confident that I could make the transition to the neutral perspective that would be required of me as a judge. Of course, the transition to the bench would bring other challenges, such as establishing a well-functioning chambers and preparing to decide cases in areas of the law in which I have not practiced or taught.

18. Do you think that collegiality is an important element of the work of a Circuit Court? If so, how would you approach your work and interaction with colleagues on the Court, if confirmed?

Response: Collegiality is very important to the work of a Circuit Court. I always would treat my colleagues with respect and would consider carefully the views of the other judges with whom I heard cases.

19. At a speech in 2005, Justice Scalia said, "I think it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if you think it should be amended. If that's what it says, that's what it says."

a. Do you agree with Justice Scalia?

Response: Although I am not familiar with the quoted statement, I do agree that judges should rule as the Constitution directs, without regard to personal views or policy preferences.

b. Do you believe a judge should consider his or her own values or policy preferences in determining what the law means? If so, under what circumstances?

Response: A judge's own values or policy preferences should play no role in determining what the law means.

20. Do you think judges should consider the “current preferences of the society” when ruling on a constitutional challenge? What about when seeking to overrule longstanding Supreme Court or circuit precedent?

Response: The current preferences of the society should play no role in a judge’s decision making.

21. What is your judicial philosophy on applying the Constitution to modern statutes and regulations?

Response: If confirmed, I faithfully would follow Supreme Court and Ninth Circuit precedent in applying the Constitution to statutes or regulations — modern or otherwise. I first would analyze the text of any constitutional provision at issue and all Supreme Court and Ninth Circuit precedents interpreting it. If text and precedent did not themselves resolve the issue, I would look to evidence of the original meaning of any constitutional provision at issue. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 581-92 (2008) (analyzing the original public meaning of the phrase “to keep and bear Arms” in the Second Amendment).

22. What weight or consideration should a judge give to evolving norms and traditions of our society in interpreting the written Constitution?

Response: The Supreme Court has held that the phrase “cruel and unusual punishments” in the Eighth Amendment “must draw its meaning from . . . evolving standards of decency.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). I do not understand Supreme Court precedent to call for consideration of evolving norms and traditions in interpreting any other provision of the Constitution.

23. What is your understanding of the current state of the law with regard to the interplay between the establishment and free exercise clause of the First Amendment?

Response: The Supreme Court has observed that the Establishment Clause and Free Exercise Clause “are frequently in tension,” but that “there is room for play in the joints between them.” *Locke v. Davey*, 540 U.S. 712, 718 (2004) (internal quotation marks omitted). The Supreme Court has explained that this means that “there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.” *Id.* at 719.

24. Do you believe that the death penalty is an acceptable form of punishment?

Response: The Supreme Court has held that the death penalty is an acceptable form of punishment when applied in accordance with the Constitution’s requirements. *See, e.g.,*

Gregg v. Georgia, 428 U.S. 153 (1976). If confirmed, I faithfully would apply Supreme Court and Ninth Circuit precedent regarding the death penalty, just as I would all Supreme Court and Ninth Circuit precedent.

25. Some people refer to the Constitution as a “living” document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?

Response: I do not believe that the Constitution is constantly evolving, but rather that the Constitution’s text expresses core principles that remain constant over time. Some of the Constitution’s provisions describe principles that the Framers understood would need to be applied in entirely new circumstances. For example, the Supreme Court has applied the Fourth Amendment’s principle forbidding unreasonable searches to the use of GPS tracking devices, *United States v. Jones*, 132 S. Ct. 945 (2012), and thermal-imaging devices, *Kyllo v. United States*, 533 U.S. 27 (2001). The Framers of course could not have imagined these technologies, but the enduring principles embodied in the Fourth Amendment can still be applied to them.

26. Do you believe there is a right to privacy in the U.S. Constitution?

Response: Various provisions in the Bill of Rights have been held by the Supreme Court to protect rights of privacy. For example, the Supreme Court has held that the First Amendment protects rights of privacy in association. *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 462 (1958). The Supreme Court likewise has held that the Fourth Amendment protects privacy in the home, *see, e.g., Johnson v. United States*, 333 U.S. 10, 14 (1948), and in bodily integrity, *see, e.g., Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013). The Supreme Court also has held that the “liberty” interest protected by the Due Process Clause includes “the right[] to marry, to have children, [and] to direct the education and upbringing of one’s children,” as well as rights “to marital privacy, to use contraception, to bodily integrity, and to abortion.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (internal citations omitted). The Supreme Court further has “assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.” *Id.* If confirmed, I faithfully would apply Supreme Court and Ninth Circuit precedent regarding privacy rights, just as I would all Supreme Court and Ninth Circuit precedent.

a. Where is it located?

Response: The Supreme Court has held that several provisions of the Bill of Rights protect privacy rights, as discussed above.

b. From what does it derive?

Response: Please see above.

c. What is your understanding, in general terms, of the contours of that right?

Response: Please see above.

27. In *Griswold*, Justice Douglas stated that, although the Bill of Rights did not explicitly mention the right to privacy, it could be found in the “penumbras” and “emanations” of the Constitution.

a. Do you agree with Justice Douglas that there are certain rights that are not explicitly stated in our Constitution that can be found by “reading between the lines”?

Response: The Supreme Court more recently has instructed that the proper approach for determining whether an unenumerated right is constitutionally protected is to examine whether the claimed right is “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks and citations omitted). If confirmed, I would follow the methodology required by *Glucksberg*, just as I would all Supreme Court and Ninth Circuit precedent.

b. Is it appropriate for a judge to go searching for “penumbras” and “emanations” in the Constitution?

Response: If confirmed, I would not search for penumbras or emanations in the Constitution. As discussed above, I would follow the methodology required by *Glucksberg*, just as I would all Supreme Court and Ninth Circuit precedent.

28. In *Brown v. Entertainment Merchants Association.*, Justice Breyer supplemented his opinion with appendices comprising scientific articles on the sociological and psychological harm of playing violent video games.

a. When, if ever, do you think it is appropriate for appellate judges to conduct research outside the record of the case?

Response: To identify the factual information relevant to an appeal, an appellate judge should rely on the record compiled during the trial court or administrative proceedings that led to the decision being appealed. If confirmed and a question arose in a particular case before me as to whether it might be appropriate to consult a factual source outside the record, I would look to the relevant appellate and evidentiary rules, including Federal Rules of Appellate Procedure 10 and 16, and Federal Rule of Evidence 201, as well as precedent of the Supreme Court and Ninth Circuit interpreting those rules.

b. When, if ever, do you think it is appropriate for appellate judges to base their opinions psychological and sociological scientific studies?

Response: If confirmed and a case came before me in which the parties were citing social science research, I carefully would consider the relevance of such research to the particular issues in the case, as well as relevant Supreme Court and Ninth Circuit precedent. Courts may consider academic research and writings in determining the admissibility of expert testimony. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

29. What standard of scrutiny do you believe is appropriate in a Second Amendment challenge against a Federal or State gun law?

Response: Neither the Supreme Court nor the Ninth Circuit has articulated the precise methodology or standard of scrutiny to be applied to Second Amendment claims. The question of the appropriate standard of scrutiny to apply to Second Amendment claims was left open in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), and *District of Columbia v. Heller*, 554 U.S. 570 (2008), though the Supreme Court stated in *Heller* that rational-basis review would not be the applicable standard. 554 U.S. at 628 n.27. If confirmed and a Second Amendment challenge to a gun law came before me, if there were no intervening Supreme Court or Ninth Circuit precedent on this issue, I would look to post-*McDonald* Second Amendment decisions from other circuits as persuasive, though not binding, authority. *See, e.g., Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185 (5th Cir. 2012); *Heller v. Dist. of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010).

30. What would be your definition of an “activist judge”?

Response: I would define an “activist judge” as a judge who decides cases based not on what the law requires but on the judge’s own moral values or policy preferences. I also would

define an “activist judge” as a judge who decides issues that do not need to be decided to resolve the case at hand.

31. What weight should a judge give legislative intent in statutory analysis?

Response: In interpreting a statute, if the text of a statute is clear, that is the end of the matter, as the statute must be interpreted based on the text alone. When statutory text is ambiguous, the Supreme Court applies canons of statutory construction such as the rule of constitutional avoidance and the rule favoring an interpretation that gives a function to each word in the statute. To resolve remaining ambiguity, the Supreme Court has looked to legislative history to help determine Congress’s intent and then has tried to resolve the ambiguity in a manner consistent with the Congress’s intent.

32. 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.

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

Response: I reviewed the questions, conducted research, and drafted answers. I then shared my draft answers with the Office of Legal Policy at the Department of Justice. After

receiving feedback from an attorney in the Office of Legal Policy, I made revisions and finalized the answers for submission to the Committee.

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

Response: Yes.

Questions for the Record
Senator Ted Cruz

Responses of Michelle T. Friedland
Nominee, United States Circuit Judge for the Ninth Circuit

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

Response: If confirmed, I would not come to the bench with any overriding judicial philosophy. Instead, my approach to every case would be to apply precedent from the Supreme Court and the Ninth Circuit neutrally and carefully to the facts in front of me. I would treat all counsel and all parties with respect, and I would endeavor to ensure that all parties felt they had a fair hearing even if they did not ultimately prevail. Because I would apply all Supreme Court precedent regardless of which Justice authored the opinion for the Court, I do not expect that my decisions would reflect the approach of any single Justice more than others.

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 faithfully would apply Supreme Court and Ninth Circuit precedent when interpreting the Constitution. The Supreme Court has emphasized that evidence of “*the public understanding*” of a constitutional provision “in the period after its . . . ratification” is a “critical tool of constitutional interpretation.” *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (emphasis in original).

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, I always would be bound by Supreme Court precedent. Panels of the Ninth Circuit are also bound by prior decisions of the Ninth Circuit unless those decisions are “clearly irreconcilable” with a subsequent *en banc* or Supreme Court decision. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*). Even when sitting *en banc*, the court should depart from one of its prior decisions only in very limited circumstances, such as when doing so “is necessary to secure or maintain uniformity of the court’s decisions,” Federal Rule of Appellate Procedure 35(a)(1), or when “an opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity,” Ninth Circuit Rule 35-1.

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: In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Supreme Court held that the San Antonio Metropolitan Transit Authority was not immune from minimum-wage and overtime requirements of the federal Fair Labor Standards Act. In other cases, the Supreme Court has held unconstitutional federal requirements imposed on States. See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). If confirmed, I faithfully would apply these Supreme Court precedents, just as I would all Supreme Court and Ninth Circuit precedent.

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

Response: In *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court invalidated federal statutes as exceeding Congress's power under the Commerce Clause. In doing so, the Court emphasized the non-economic nature of the conduct that was regulated by the statutes at issue. See *Morrison*, 529 U.S. at 610-11, 613; *Lopez*, 514 U.S. at 560-61, 566-67. The Supreme Court did not hold, however, that non-economic activity never could be regulated pursuant to Congress's Commerce Clause authority. In his opinion concurring in the judgment in *Gonzalez v. Raich*, 545 U.S. 1 (2005), Justice Scalia stated that "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37 (Scalia, J., concurring in judgment). If confirmed, I faithfully would apply Supreme Court and Ninth Circuit precedent regarding the Commerce Clause, just as I would all Supreme Court and Ninth Circuit precedent.

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

Response: In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court held that the President's ability to issue an executive order "must stem either from an act of Congress or from the Constitution itself." *Id.* at 585. Justice Jackson's concurring opinion in *Youngstown* provided a "tripartite scheme" that the Supreme Court since has recognized "provides the accepted framework for evaluating executive action in this area." *Medellin v. Texas*, 552 U.S. 491, 524 (2008). If confirmed, I faithfully would apply Supreme Court and Ninth Circuit precedent regarding executive orders and actions, just as I would all Supreme Court and Ninth Circuit precedent.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court instructed that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty." *Id.* at 720-21 (internal quotation marks and citations omitted). If confirmed, I faithfully would apply Supreme Court and Ninth Circuit precedent regarding fundamental rights, just as I would all Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court has applied strict scrutiny under the Equal Protection Clause to classifications, such as those based on race, that are “so seldom relevant to the achievement of any legitimate state interest” that their use likely reflects discriminatory stereotyping. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). The Supreme Court has applied intermediate scrutiny to classifications, such as those based on gender, that are relevant in some circumstances but “frequently bear[] no relation to ability to perform or contribute to society” so “generally provide[] no sensible ground for differential treatment.” *Id.* at 440-41. If confirmed, I faithfully would apply Supreme Court and Ninth Circuit precedent regarding when heightened scrutiny applies, just as I would all Supreme Court and Ninth Circuit precedent.

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: The Supreme Court predicted in *Grutter v. Bollinger*, 539 U.S. 306 (2003), that racial preferences would no longer be necessary in public higher education twenty-five years from the time of that decision. *Id.* at 343. In *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), the Supreme Court further articulated standards for evaluating the constitutionality of the use of race as a factor in public university admissions. Regardless of any expectations I may or may not have, if confirmed, I faithfully would apply *Grutter* and *Fisher*, just as I would all Supreme Court and Ninth Circuit precedent.