Nomination of Stephen Clark to District Court for the Eastern District of Missouri Questions for the Record
July 18, 2018

QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper application of precedent by judges.

   a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

   It is never appropriate for a lower court to depart from United States Supreme Court precedent. *See, e.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (explaining that lower courts should "leav[e] to th[e Supreme] Court the prerogative of overruling its own decisions").

   b. Do you believe it is proper for a district court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?

   It is never appropriate for a lower court to depart from United States Supreme Court precedent. There may however be circumstances in which a District Judge may address prior cases, gaps in the law, or circuit conflicts regarding proper application of a United States Supreme Court precedent to raise issues for consideration. For example, lower courts must apply controlling United States Supreme Court precedent even if that precedent "'appears to rest on reasons rejected in some other line of [United States Supreme Court] decisions.'" *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (further citation omitted). In such a circumstance, it may be appropriate to flag doctrinal concerns. *Cf. State Oil Co. v. Khan*, 522 U.S. 3, 20-22 (1997) (overruling the prior United States Supreme Court decision in *Albrecht* and noting that though the Court of Appeals "aptly described as *Albrecht*'s 'infirmities, [and] its increasingly wobbly, moth-eaten foundations,'" the lower court "was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents").

   c. When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?

   The United States Supreme Court has given guidance on its application of *stare decisis*, including most recently in *Janus v. Am. Fed'n. of State, Cty., & Mun. Employees, Council 31*, 138 S.Ct. 2448 (2018), and *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018). When determining whether to overrule a prior precedent, the United States Supreme Court considers the "quality of [the case's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed town, and reliance on the decision." *Janus*, 138 S.Ct. at 2478-79. The United States Supreme Court relatedly considers whether it believes the precedent at issue was rightly decided, whether the

question at issue is statutory or constitutional, whether the precedent has been consistently applied, and whether the precedent has been eroded by other related decisions. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 63-68 (2004). However, any decision to overturn United States Supreme Court precedent is for the United States Supreme Court alone to decide, as the United States Supreme Court has reserved to itself the prerogative of deciding when to overturn its own precedents. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 577-579 (2003); *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *State Oil Co. v. Khan*, 522 U.S. 3, 20-22 (1997). As a nominee to a lower federal court, I would not presume to opine on when that prerogative was, or was not, appropriately exercised.

2. During your Senate Judiciary hearing, in response to a question from Senator Coons, you stated that you "resigned from one law firm because of the way I believe it handled" an issue – namely "that that particular firm was pressuring everyone in the firm to vote a certain way on a constitutional amendment on the ballot in Missouri." That constitutional amendment would have legalized certain stem cell research and therapy, which you personally oppose. However, in a February 2016 presentation at Duke University, you said that you resigned from two law firms – Polsinelli, P.C. and Blackwell Sanders LLP – because those firms represented clients that advocated for stem cell research.

   a. Which law firm were you discussing in your response to Senator Coons?

   Polsinelli, P.C.

   b. Identify each and every instance where you have resigned from an employer or organization as the result of a conflict with your personal beliefs.

   I have not resigned from any employer or, to the best of my recollection any organization, as the result of a conflict with my personal beliefs. In the February 2016 presentation, I stated that I resigned from Polsinelli because "I believe the firm had crossed the line here between externally advocating a client's legal position and internally proselytizing a client's moral position." In the presentation, I also stated that I resigned from Blackwell Sanders LLP n/k/a Husch Blackwell LLP because of a "direct [client] conflict" created by the merger of Blackwell Sanders LLP with Husch & Eppenberger LLP.

3. Canon 3 of the Code of Conduct for United States Judges requires federal judges to apply the law impartially and without regard to their personal beliefs. In your February 2016 presentation at Duke University, you said that you resigned from Polsinelli, P.C. and Blackwell Sanders LLP in part because you were unwilling to "compartmentalize" your personal beliefs and professional obligations.

   a. Given your stated unwillingness to set aside your personal views in a professional setting, will you commit to recusing yourself from any case where your personal beliefs conflict with your obligations as a judge?

Please see my answer to Question 2(b), *supra*, for my reasons for resigning from those law firms, as neither was an unwillingness to set aside my personal views. The oath of office set forth in 28 U.S.C. §453 and the Code of Conduct for United States Judges require me, if confirmed, to set aside my personal beliefs in ruling on any case, and I will faithfully adhere to that oath and the Code of Conduct for United States Judges. I will recuse myself as required by 28 U.S.C. §144, 28 U.S.C. §455, the Code of Conduct for United States Judges, and all other applicable laws, rules, and practices governing conflicts and recusal**.**

4. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).)

   The book explains that "superprecedent" is "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation." (The Law of Judicial Precedent, Thomas West, p. 802 (2016).)

   a. Do you agree that *Roe v. Wade* is "super-stare decisis"? Do you agree it is "super-precedent"?

   From the perspective of a lower court nominee, all United States Supreme Court precedent is equally binding, and if confirmed, I will faithfully apply all such precedent.

   b. Is it settled law?

   Roe v. Wade is United States Supreme Court precedent binding on all lower courts. If confirmed, I will faithfully apply it and all other such precedent.

5. Since 2009, you have served on the board of directors for the Missouri chapter of Lawyers for Life. According to Americans United for Life (AUL), Lawyers for Life is a "national network of pro-life attorneys in affiliation with AUL," and Lawyers for Life provides "an opportunity for pro-life attorneys to gather together, exchange insights and recommendations on pro-life legal issues, and collaborate to advance the pro-life cause."

   a. Have you "exchange[d] insights and recommendations on pro-life legal issues"? If so, what were they?

   The "Lawyers for Life, Inc." organization of which I was a director and that is referenced on my Senate Judiciary Committee Questionnaire is a Missouri corporation and does not have a legal, financial, affiliate, or "network" relationship with Americans United for Life (AUL). I am not, and have never

been, affiliated with AUL or the "Lawyers for Life" "affiliates" to which AUL appears to refer in the language quoted in this Question. As such, the quotes referenced in this Question do not pertain to the "Lawyers for Life, Inc." organization of which I was a director.

b. How have you worked "to advance the pro-life cause"?

Please see my answer to Question 5(a).

c. Have you discussed strategies with other members of AUL or Lawyers for Life for overturning precedent concerning a woman's constitutional right to an abortion? If so, what were those discussions?

Please see my answer to Question 5(a).

d. Have you discussed strategies with other members of AUL or Lawyers for Life for overturning precedent concerning a woman's constitutional right to contraceptives? If so, what were those discussions?

Please see my answer to Question 5(a).

e. Have you discussed strategies with other members of AUL or Lawyers for Life for overturning precedent concerning a constitutional right to privacy? If so, what were those discussions?

Please see my answer to Question 5(a).

f. Have you discussed how courts should balance religious liberties against rights to contraceptives, abortion, and privacy? If so, what were those discussions?

Please see my answer to Question 5(a).

6. In a 2016 presentation at Duke University, you said it is "very, very fulfilling and rewarding for me to be able to do pro-life legal work."

a. What is "pro-life legal work"?

Representing as an attorney/advocate clients that assert positions favoring the right to life.

b. In what way have you found "pro-life legal work" to be "fulfilling and rewarding"?

Much of my representation as an attorney/advocate on behalf of many clients, regardless of their positions, has been fulfilling and rewarding. As an attorney

and advocate, I find fulfillment in representing clients, regardless of those clients' personal views.

7. Your name appears in the heading for a December 2016 Lawyers for Life newsletter. Attached to this newsletter is a flyer for the Lawyers for Life organization which reads: Roe vs. Wade gave doctors a license to kill unborn children. Like the Dred Scott decision, Roe is BAD LAW." Your name also appears on this flyer.

   a. Why is *Roe v. Wade* "bad law"?

   I did not write the statement. *Roe v. Wade* is binding precedent of the United States Supreme Court and, if confirmed, I will faithfully apply *Roe* and all binding precedent of the United States Supreme Court and of the Eighth Circuit.

   b. Are lower court judges bound to follow "bad law"?

   All lower court judges are bound to follow binding precedent of the United States Supreme Court and all United States District Court judges are bound to follow the binding precedent of the Circuit Court of Appeals in which their District sits. It is never appropriate for a lower court to depart from United States Supreme Court precedent. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (explaining that lower courts should "leav[e] to th[e Supreme] Court the prerogative of overruling its own decisions"). If confirmed, I will faithfully apply *Roe* and all other such precedent.

8. In February 2012, you made a presentation for Lawyers for Life members entitled "Legal Tools for Preventing Coerced Abortions." In this presentation, you suggested legal strategies lawyers could employ to intimidate abortion providers in instances of "coerced abortions." In this presentation, you also suggested that lawyers seek the appointment of a guardian ad litem for a fetus. Guadians ad litem are appointed to represent the "best interests of a child" in legal proceedings.

   a. What is a "coerced abortion"?

   My presentation addressed legal methods for preventing coercion and intimidation. In the context of the referenced presentation, a coerced abortion is one that is "performed or induced on a woman without her voluntary and informed consent, given freely and without coercion[]" as further defined by Missouri law. R.S.Mo. §188.027.

   b. What is the basis for seeking the appointment a guardian ad litem for a fetus?

   In various contexts, Missouri courts have addressed the issue of appointing guardians ad litem for fetuses or embryos. *See, e.g., O'Grady v. Brown*, 654 S.W.2d 904, 909 (Mo. 1983); and *Gadberry v. Gadberry*, No. 13SL-DR06185

(Circuit Court of St. Louis County, MO, Order dated 5/19/14).

9. In multiple speeches and remarks you have expressed your strong personal opposition to a woman's right to make decisions about her reproductive health, including a woman's constitutional right to choose to have an abortion. You are also an active member of anti-choice organizations, including Lawyers for Life.

    a. Given your strong personal beliefs, will you commit to recusing yourself from any case where *Roe v. Wade* is implicated if you are confirmed? If not, please indicate under what circumstances your impartiality would not be questioned in a case involving *Roe v. Wade*?

    Lawyers for Life, Inc. advocates for the right to life. While I have advocated on behalf of clients asserting the right to life, the numerous letters to the Judiciary Committee in support of my nomination demonstrate that I have a history of impartiality, integrity, and honesty. Many of these letters are from staunch Democrats, past and current Presidents of bar associations, plaintiffs' attorneys, criminal defense attorneys, and a federal public defender. The Committee should rely on my own assurances, and the opinions of these people who know me well, know my character, and know my integrity, that if confirmed, I will faithfully discharge the duties of a United States District Judge fairly and impartially, and with integrity and honesty. The oath of office set forth in 28 U.S.C. §453 and the Code of Conduct for United States Judges require me, if confirmed, to set aside my personal beliefs in ruling on any case, and I will faithfully adhere to that oath and the Code of Conduct for United States Judges. If confirmed, I will recuse myself as required by 28 U.S.C. §144, 28 U.S.C. §455, the Code of Conduct for United States Judges, and all other applicable laws, rules, and practices governing conflicts and recusal. *Roe* is binding precedent of the United States Supreme Court and, if confirmed, I will faithfully apply *Roe* and all binding precedent of the United States Supreme Court and of the Eighth Circuit.

10. In 2016, you referred to medical schools who partner with Planned Parenthood as "training the abortionists of the future." In addition, a September 2015 Lawyers for Life newsletter, on which your name appears, described Planned Parenthood as "the nation's #1 institution for killing innocent life."

    a. If confirmed, will you recuse yourself from any case concerning Planned Parenthood? If not, please indicate under what circumstances your impartiality would not be questioned in a case involving Planned Parenthood.

    My reference to "training the abortionists of the future" referred to the manner in which Planned Parenthood publicizes its relationship with a medical school. In its report titled "1932 – 2012 An Affiliate History of Planned Parenthood of the St. Louis Region and Southwest Missouri," Planned Parenthood stated that in 2006 "The Board approve[d] a partnership with the Washington University School of

Medicine for the new Ryan Residency and Fellowship, to provide training in family planning and abortion care." I did not write the statement in the referenced newsletter.

The oath of office set forth in 28 U.S.C. §453 and the Code of Conduct for United States Judges require me, if confirmed, to set aside my personal beliefs in ruling on any case, and I will faithfully adhere to that oath and the Code of Conduct for United States Judges. I will recuse myself as required by 28 U.S.C. §144, 28 U.S.C. §455, the Code of Conduct for United States Judges, and all other applicable laws, rules, and practices governing conflicts and recusal. Please see also my answer to Question 9(a), *supra*.

11. In Obergefell v. Hodges, the Supreme Court held that "the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples." 135 S.Ct. 2584, 2599 (2015). In a 2016 presentation for the Thomas International Center entitled "Same Sex Marriage, The Conservative Justice," you criticized the Supreme Court's decision in Obergefell, stating that same-sex marriage "is not an issue for nine unelected, unaccountable people with lifetime tenure … [to] be deciding because there is not a constitutional right to same sex marriage."

    a. Please explain your statement that there is not a constitutional right to same-sex marriage.

    In the referenced presentation, I did not criticize *Obergefell*, express concern or offer my personal opinions about *Obergefell*, or state that that there is not a constitutional right to same-sex marriage; I instead explained the views of the dissenting Justices that: same-sex marriage was not a right found in the Constitution, was not an issue that the nine Justices of the United States Supreme Court should decide, was not something that the dissenting Justices would have "banned," and instead was a policy question for legislatures to decide. *See, e.g.*, *Obergefell v. Hodges*, 135 S.Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) ("Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.").

    b. Is the holding in *Obergefell* settled law?

    The *Obergefell* decision is binding precedent of the United States Supreme Court and, if confirmed, I will faithfully apply *Obergefell* and all binding precedent of the United States Supreme Court and of the Eighth Circuit.

12. In a 2016 presentation at Duke University, you said that "one of the next evolutions of same-sex marriage is polygamy."

a. How is polygamy "one of the next evolutions of same-sex marriage"?

In the referenced presentation, I was explaining that, as stated in Chief Justice Roberts' dissent in *Obergefell*, and various sources cited therein, questions exist as to whether and to what extent the *Obergefell* decision contains limiting principles or could be applied to polygamy. *See Obergefell v. Hodges*, 135 S.Ct. 2584, 2621-22 (2015) (Roberts, C.J., dissenting), *citing* Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian "Throuple" Expecting First Child, N.Y. Post, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L.J. 1977 (2015) (internal citation omitted), ("It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If '[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,' why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? . . . If not having the opportunity to marry 'serves to disrespect and subordinate' gay and lesbian couples, why wouldn't the same 'imposition of this disability,' . . . serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?").

13. In 2013 and 2014, you filed briefs on behalf of the anti-choice organization the Missouri Roundtable for Life in opposition to the Affordable Care Act's (ACA) contraceptive mandate. (Brief of Amicus Curiae of Missouri Roundtable for Life, *Hobby Lobby Stores, Inc. v. Sebelius*, 2013 WL 773282 (10th Cir. 2013); Brief of Amicus Curiae of Missouri Roundtable for Life, *Annex Medical, Inc. v. Sebelius*, 2013 WL 1332876 (8th Cir. 2013).) In these briefs, you argued that the ACA's contraceptive coverage mandate was dangerous to women, and you referred to a "robust body of medical evidence indicating that hormonal contraceptives have biological properties that significantly increase women's risk of breast, cervical, and liver cancer, stroke, and a host of other diseases including the acquisition and transmission of human immunodeficiency virus (HIV)." At your Senate Judiciary hearing, in response to a question from Senator Hirono, you said that the "medical evidence" cited in these briefs came from experts hired by your clients and you "didn't have any interactions with those particular experts."

a. Besides the "medical and science advisors" cited in your brief, who have been discredited, what evidence supports the claim in your brief that "hormonal contraceptives have biological properties that significantly increase women's risk of breast, cervical, and liver cancer, stroke, and a host of other diseases including the acquisition and transmission of human immunodeficiency virus (HIV)"?

The referenced briefs on behalf of organizations supporting the right to life do not contain the language quoted or arguments referenced in this Question. At my

Senate Judiciary hearing, Senator Hirono's questions and my responsive testimony referred to an amicus brief filed in *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013).

In *Korte*, the amicus brief of the Breast Cancer Prevention Institute and others relied on the five medical and scientific advisors and over 20 medical studies referenced in the brief. That amicus brief was filed on February 4, 2013. It is my understanding that in later-decided, unrelated cases, District Courts in Wisconsin and Alabama had concerns with unrelated testimony of Dr. John Thorp, Jr. These District Court opinions were issued more than 18 months after our clients filed their brief in *Korte* and more than eleven months after the *Korte* Court issued its opinion, and did not address the testimony or studies relied on in the amicus brief in *Korte*.

14. In this same brief, you argued that women do not necessarily incur greater out-of-pocket costs for preventative care than men because the "need for contraceptives indicates some intimate relationship with a man, quite possibly her husband. The Government apparently assumes without proof that men – whether husbands, roommates, or in some other role – in intimate relationships with women do not contribute to the costs of whatever contraceptive method is used by the couple."

    a. What evidence supports your claim that women do not necessarily incur greater out-of-pocket costs for preventative care than men?

    The briefs referenced in this Question and in Question 13 do not contain the language quoted or arguments referenced in this Question. The language and arguments appear in an amicus brief filed in *Korte*.

    As relates to the language quoted or arguments referenced in this Question, the amicus brief of the Breast Cancer Prevention Institute and others in *Korte* pointed out the Government's lack of evidence to support the Government's assumption that men do not contribute to the costs of the contraceptive method chosen by the couple.

    b. What evidence supports your assertion that women who need contraceptives are in intimate relationships with men who will contribute to the cost of contraceptives?

    Please see my answer to Question 14(a).

15. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its

proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

a. Do you agree with Justice Stevens? Why or why not?

Justice Stevens stated this position in a dissent, as noted, and his position was rejected by the United States Supreme Court in *Heller*. Lower court judges are bound to faithfully apply the Court's decision in *Heller*.

b. Did *Heller* leave room for common-sense gun regulation?

In *Heller*, the United States Supreme Court noted that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *see also id.* at 626-27 ("nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."); *id.* at 627 (recognizing "another important limitation on the right to keep and carry arms[]" regarding the "the sorts of weapons protected") (further citations omitted).

c. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?

As a nominee to a lower court, I am bound by the United States Supreme Court's own reading of its precedents, which appears to be that the question was "judicially unresolved[]" prior to *Heller*. *Id*. at 625.

16. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece … one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years…"

a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

During my July 2017 interview with officials from the White House and the Department of Justice, we discussed an array of legal topics. I do not recall the specific questions or answers about administrative law. As best I recall, we had general discussions about whether my practice included administrative law, and

my understanding of some of the United States Supreme Court's relevant cases on administrative law.

b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

No.

c. What are your "views on administrative law"?

I am aware of a number of relevant United States Supreme Court decisions that touch on the area that would be characterized as or related to administrative law, and as in all other areas of law, if confirmed, I would faithfully apply all binding precedent.

17. When is it appropriate for judges to consider legislative history in construing a statute?

The United States Supreme Court has held that it is appropriate for judges to consider legislative history when the text of the statute is ambiguous. *See, e.g.*, *Matal v. Tam*, 137 S.Ct. 1744, 1756 (2017); *see also Exxon Mobil v. Allapattah Servs.*, 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.").

18. At any point during the process that led to your nomination, did you have any discussions with anyone — including but not limited to individuals at the White House, at the Justice Department, or at outside groups — about loyalty to President Trump? If so, please elaborate.

No.

19. Please describe with particularity the process by which you answered these questions.

I received these questions on July 18, 2018. I reviewed the questions, conducted research (including discussions with others), and drafted answers. I solicited feedback from others, including attorneys with the Department of Justice. I made edits and then authorized the submission of these answers on my behalf. My answers are my own.

Senator Dick Durbin
Written Questions for Ryan Nelson, James Carroll, Stephen Clark, John O'Connor
July 18, 2018

For questions with subparts, please answer each subpart separately.

Questions for Stephen Clark

1. In February 2016 you made a presentation to students at Duke University in which you discussed same sex marriage. You said in your presentation that "one of the next evolutions of same-sex marriage is polygamy."

    a. **What did you mean by this statement?**

    In the referenced statement, I was explaining that, as stated in Chief Justice Roberts' dissent in *Obergefell*, and various sources cited therein, questions exist as to whether and to what extent the *Obergefell* decision contains limiting principles or could be applied to polygamy. *See Obergefell v. Hodges*, 135 S.Ct. 2584, 2621-22 (2015) (Roberts, C.J., dissenting), *citing* Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian "Throuple" Expecting First Child, N.Y. Post, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L.J. 1977 (2015) (internal citation omitted), ("It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If '[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,' why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? . . . If not having the opportunity to marry 'serves to disrespect and subordinate' gay and lesbian couples, why wouldn't the same 'imposition of this disability,' . . . serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?").

    b. **Is there any factual basis for this statement?**

    Please see my answer to Question 1(a).

2. You served on the board of directors of the group Lawyers for Life when they issued a newsletter in December 2016 that said "Like the Dred Scott decision, Roe is BAD LAW." **Do you disagree with this statement that was included in the Lawyers for Life newsletter?**

    I did not write the statement. *Roe v. Wade* is binding precedent of the United States Supreme Court and, if confirmed, I will faithfully apply *Roe* and all binding precedent of the United States Supreme Court and of the Eighth Circuit.

3. In February 2016 you gave a speech at the Thomas International Center entitled "Same Sex Marriage; the Conservative Justice." You discussed the Supreme Court's *Obergefell* decision and implied that it was wrongly decided. Specifically, you said "the conservative justices on the Court believe that judicial restraint is something judges should exercise," and you went on to say that "it is the province of the judiciary to state what the law is, not what it should be."

    a. **Do you believe the Supreme Court used appropriate legal reasoning in deciding the *Obergefell* case?**

    In the referenced presentation, I did not state or imply that *Obergefell* was wrongly decided or offer my personal opinions; I instead explained the views of the dissenting Justices that: same-sex marriage was not a right found in the Constitution, was not an issue that the nine Justices of the United States Supreme Court should decide, was not something that the dissenting Justices would have "banned," and instead was a policy question for legislatures to decide. *See, e.g.*, *Obergefell v. Hodges*, 135 S.Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) ("Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.").

    As a nominee to a lower court, it would be inappropriate for me to comment on the legal reasoning of a decision of the United States Supreme Court; it also would be inappropriate for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts before me. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf.* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

    b. **At your hearing you said you would follow the *Obergefell* case if confirmed. Would you also apply the reasoning the Court articulated in *Obergefell*?**

    The *Obergefell* decision, including its reasoning, is binding precedent of the United States Supreme Court and, if confirmed, I will faithfully apply *Obergefell* and all binding precedent of the United States Supreme Court and of the Eighth Circuit.

Nomination of Stephen R. Clark, Sr.
United States District Court For
the Eastern District of Missouri
Questions for the Record
Submitted July 18, 2018

QUESTIONS FROM SENATOR WHITEHOUSE

1. During your nominations hearing, you stated that "*Obergefell* decided there was a same sex right -- the question is what's the limiting principle in the case. And as I understand it there are currently cases for polygamy that are working their way through the court system."

    a. Does the quotation above, as you stated during your nominations hearing, accurately reflect your own summary of a comment you made in a February 2016 presentation to students at Duke University's Catholic Center entitled "Pious & Professional: Living the Faith at Work"?

    The above quotation from my Senate Judiciary hearing testimony is both an accurate reflection of and consistent with the referenced presentation. In the referenced presentation, I was not offering personal beliefs or opinions about *Obergefell*; instead, I was explaining that, as stated in Chief Justice Roberts' dissent in *Obergefell*, and various sources cited therein, questions exist as to whether and to what extent the *Obergefell* decision contains limiting principles or could be applied to polygamy. *See Obergefell v. Hodges*, 135 S.Ct. 2584, 2621-22 (2015) (Roberts, C.J., dissenting), *citing* Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian "Throuple" Expecting First Child, N.Y. Post, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L.J. 1977 (2015) (internal citation omitted), ("It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If '[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,' why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? . . . If not having the opportunity to marry 'serves to disrespect and subordinate' gay and lesbian couples, why wouldn't the same 'imposition of this disability,' . . . serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?").

    b. Is it accurate that your comment reflects your opinion, as you previously expressed it, that the U.S. Supreme Court's decision in *Obergefell v. Hodges* (2015) makes it more likely that the U.S. Supreme Court will uphold polygamy as legal?

    Please see my answer to Question 1(a), *supra*.

c. Is the view you expressed in the 2016 Duke presentation and in your nominations hearing your personal belief?

Please see my answer to Questions 1(a) and (b), *supra*. It would be inappropriate for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts before me. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf.* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

d. Will you respect the U.S. Supreme Court's *Obergefell* decision as binding precedent if you are confirmed as a judge to an inferior federal court?

The *Obergefell* decision is binding precedent of the United States Supreme Court and, if confirmed, I will faithfully apply *Obergefell* and all binding precedent of the United States Supreme Court and of the Eighth Circuit.

2. Under 28 U.S. Code § 455(a), "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Based upon some of your past statements, should you be confirmed, do you plan to recuse yourself from matters in which your previous statements might create the perception that you are not able to be impartial?

The oath of office set forth in 28 U.S.C. §453 and the Code of Conduct for United States Judges require me, if confirmed, to set aside my personal beliefs in ruling on any case, and I will faithfully adhere to that oath and the Code of Conduct for United States Judges. I will recuse myself as required by 28 U.S.C. §144, 28 U.S.C. §455, the Code of Conduct for United States Judges, and all other applicable laws, rules, and practices governing conflicts and recusal.

3. Should you be confirmed as a federal district judge, would you resign from the advocacy organizations of which you are currently a member?

If confirmed, I will resign from any organization, including advocacy organizations, as required by the Code of Conduct for United States Judges.

4. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."

a. Do you agree with Justice Roberts' metaphor? Why or why not?

Yes, I think it is an apt metaphor for a judge in applying the law to the facts and deciding cases.

b. What role, if any, should the practical consequences of a particular ruling play in a judge's rendering of a decision?

Practical consequences should be taken into account only where the applicable legal doctrine requires it. *See, e.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (noting that courts look to whether the disposition required by a statute's text is absurd). Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that discovery should, among others, be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Generally, practical considerations are more appropriately considered by the political branches.

5. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

    a. What role, if any, should empathy play in a judge's decision-making process?

    Empathy is a worthy trait in people's daily lives. A federal judge's oath requires the judge to "administer justice without respect to persons, and do equal right to the poor and to the rich[.]" 28 U.S.C. § 453. I am aware of instances, however, where the law directs that a judge take into account the status of a litigant, such as when construing the pleadings of a *pro se* party, or when sentencing a criminal defendant pursuant to the Sentencing Reform Act, which directs that a judge should take into account the history and characteristics of the defendant when arriving at an appropriate sentence. 18 U.S.C. § 3553(a)(1).

    b. What role, if any, should a judge's personal life experience play in his or her decision-making process?

    A judge should not allow life experiences to impair his or her ability to apply the law to the facts and decide cases faithfully and impartially.

6. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

    No.

7. What assurance can you provide this committee and the American people that you would, as a federal judge, equally uphold the interests of the "little guy," specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

If confirmed as a United States District Judge, I will faithfully adhere to my oath of office, which requires that I "administer justice without respect to persons, and do equal right to the poor and to the rich[.]" 28 U.S.C. § 453. Similarly, I will faithfully apply, among others, Federal Rule of Civil Procedure 1, which provides that those Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

Nomination of Stephen Robert Clark, Sr. to be
United States District Court Judge for the Eastern District of Missouri
Questions for the Record
Submitted July 18, 2018

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

   The United States Supreme Court has said that a court should look to whether a right is "objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed[.]'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (further citations omitted). I would also look to other relevant cases from the United States Supreme Court for guidance on other factors that should be considered. *See, e.g., Obergefell v. Hodges*, 135 S.Ct. 2584 (2015); *Cruzan v. Dir., Mo. Dep't. of Health*, 497 U.S. 261 (1990); *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

   a. Would you consider whether the right is expressly enumerated in the Constitution?

      Yes, as required by United States Supreme Court precedent.

   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?

      Yes, as required by United States Supreme Court precedent. This inquiry would look at such sources as the historical practice under the common law and in the American colonies, the history of state statutes and judicial decisions, and any long-established traditions. *See Washington v. Glucksberg*, 521 U.S. 702, 710-16 (1997).

   c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of a court of appeals?

      If confirmed, I would be bound to faithfully apply all relevant United States Supreme Court and Eighth Circuit precedent and, as appropriate, would give respectful consideration to precedent from other circuit courts of appeals.

   d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right had been recognized by Supreme Court or circuit precedent?

      Yes.

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*).

As *Casey* and *Lawrence* are binding precedent, I would consider and faithfully apply the holdings and rationales of those cases along with other relevant precedent.

f. What other factors would you consider?

I would consider any other factors that are relevant under United States Supreme Court and Eighth Circuit precedent.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

The Fourteenth Amendment applies to both race and gender. *See United States v. Virginia*, 518 U.S. 515 (1996).

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

From the perspective of a nominee to a lower court, this argument raises a purely academic question. If confirmed, I would be bound to faithfully apply all United States Supreme Court precedent, no matter what arguments are made to the contrary.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

While I am familiar with the case, I do not know why that case did not reach the United States Supreme Court until 1996.

c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

The United States Supreme Court has held that the Fourteenth Amendment prohibits states from "bar[ring] same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607 (2015). The United States Supreme Court considered related issues in *Masterpiece Cakeshop v. Colorado Civil Rights Com'n.*, 138 S.Ct. 1719 (2018). The extent to which the Fourteenth Amendment prohibits discrimination based on sexual orientation in other contexts is pending or impending in courts; accordingly, Canon 3(A)(6) of the Code of Conduct for United States Judges constrains me from commenting on the issue.

d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

As this issue is an impending or pending matter, I am constrained from commenting on the issue as a judicial nominee. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

3. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

The United States Supreme Court recognized such a right in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I would faithfully follow *Griswold*, *Eisenstadt*, and all other binding precedent of the United States Supreme Court and of the Eighth Circuit.

a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

Yes, the United States Supreme Court so held in cases including *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); and *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016). If confirmed, I would faithfully apply *Roe*, *Casey*, *Whole Woman's Health*, and all other binding precedent of the United States Supreme Court and of the Eighth Circuit.

b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The United States Supreme Court recognized such a right in *Lawrence v. Texas*, 539 U.S. 558 (2003). I would faithfully apply *Lawrence* and all other binding precedent of the United States Supreme Court and of the Eighth Circuit.

c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

N/A

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), 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 based on the purported negative impact of such marriages on children.

a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

If confirmed, I would faithfully follow all binding precedent of the United States Supreme Court and of the Eighth Circuit under which a District Court is to consider such evidence.

b. What is the role of sociology, scientific evidence, and data in judicial analysis?

Consideration of such evidence has a role when it is relevant to a disputed issue and reliable. *See* Rules 401 and 702, Fed. R. Evid.; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). The Federal Judicial Center publishes an extensive reference guide to assist judges in addressing complex scientific and technical evidence. *See Reference Manual on Scientific Evidence* (2011).

5. 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. at 489, 490-93.

a. 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?

I have not had occasion to study this question, which is academic in light of the United States Supreme Court's holding in *Brown*. I would faithfully follow *Brown* and all other precedent of the United States Supreme Court and of the Eighth Circuit.

b. How do you respond to the criticism of originalism 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-papers/democratic-constitutionalism (last visited July 17, 2018).

While I have not studied this particular white paper, it appears to reflect that determining a provision's original public meaning can be difficult. This can be true, for example, in the context of technological advancements. *See Carpenter v. U.S.*, 138 S.Ct. 2206 (2018).

c. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

In instances where I, if confirmed as a lower court judge, might be called upon to ascertain the meaning of a constitutional provision, I would consult binding precedent of the United States Supreme Court and of the Eighth Circuit. In the rare instances where those precedents don't provide an answer, I would consider the original public meaning of a constitutional provision dispositive when binding precedent from the United States Supreme Court holds that the original public meaning is dispositive.

d. Does the public's original understanding of the scope of a constitutional provision constrain its application decades later?

Please see my answer to 5(c), *supra*.

e. What sources would you employ to discern the contours of a constitutional provision?

I would faithfully apply all relevant United States Supreme Court and Eighth Circuit precedent that delineate the appropriate sources to use in discerning the contours of constitutional provisions.

6. In *Korte v. HHS*, you filed an amicus brief that argued the Affordable Care Act's contraceptive mandate is unconstitutional because the federal government "entirely failed to consider the robust body of medical evidence indicating that hormonal contraceptives have biological properties that significantly increase women's risks of breast, cervical, and liver cancer, stroke, and a host of other diseases including the acquisition and transmission of human immunodeficiency virus (HIV)." Do you believe that contraceptives cause cancer and/or HIV?

The amicus brief submitted on behalf of the Breast Cancer Prevention Institute and others relied on the five medical and scientific advisors and the over 20 medical studies referenced in the brief. It would be inappropriate for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts before me. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf.* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). If confirmed, I will faithfully apply all binding precedent of the United States Supreme Court and of the Eighth Circuit.

7. Your *Korte v. HHS* amicus brief cited testimony from an expert who was found "not credible" 19 months later. You have since said that you "stood by" everything in your brief.

a. Do you still "stand by" a brief that uses testimony from an expert whose credibility has been called into question?

In *Korte*, the amicus brief submitted on behalf of the Breast Cancer Prevention Institute and others relied on the five medical and scientific advisors and the over 20 medical studies referenced in the brief. That amicus brief was filed on February 4, 2013. It is my understanding that in later-decided, unrelated cases, District Courts in Wisconsin and Alabama had concerns with unrelated testimony of Dr. John Thorp, Jr. These District Court opinions were issued more than 18 months after our clients filed their brief in *Korte* and more than eleven months after the *Korte* Court issued its opinion, and did not address the testimony or studies relied on in the amicus brief in *Korte*. The *Korte* amicus brief that the Breast Cancer Prevention Institute and others submitted therefore complies with applicable standards, and I accordingly stand behind the brief. *See* Rule 38, Fed. R. App. P., Rules 3.1 and 3.3, Ill. R. Prof'l. Conduct, and the Standards for Professional Conduct Within the Seventh Federal Judicial Circuit; *cf.* Rule 11, Fed. R. Civ. P.

b. Do you believe lawyers have a responsibility to make arguments supported by credible evidence?

Yes.

8. In a 2016 brief on behalf of a client in divorce proceedings, you argued that frozen embryos are "human beings, not property." Do you personally believe that frozen embryos are human beings?

In the *McQueen v. Gadberry* case, my client argued that embryos are human beings under Missouri law, including R.S.Mo. §1.205, which provides, *inter alia*, that "Unborn children have protectable interests in life, health, and well-being . . . [and] the term 'unborn children' . . . shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development." (original emphasis removed). My client further noted that in *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 501, 504-07 (1989), the United States Supreme Court considered the constitutionality of R.S.Mo. § 1.205—specifically its provisions that "[t]he life of each human being begins at conception[,]" and that "[u]nborn children have protectable interests in life, health, and well-being[.]" The Court held that these provisions were a legitimate "value judgment[,]" not inconsistent with *Roe v. Wade*, 410 U.S. 113 (1973), and subsequent cases. *Webster*, 492 U.S. at 506. Relatedly, my client noted that the Court left open an "as applied" challenge to § 1.205 in the event that the state were to later attempt to use it to restrict abortion, *id.*—which was not at issue in the *McQueen* case. *See McQueen v. Gadberry*, No. ED103138 (Mo.Ct.App. E.D.), Appellant's Brief filed December 22, 2015, at pp. 11-13. It would be inappropriate for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts before me. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf.* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). If confirmed, I will faithfully apply all binding precedent of the United States Supreme Court and of the Eighth Circuit.

9. During a presentation at Duke University, you stated that "one of the next evolutions of same-sex marriage is polygamy." In your confirmation hearing, you clarified that you were concerned that no limiting principle existed that would prevent the legalization of polygamy after the Supreme Court's decision in *Obergefell v. Hodges*.

   a. Do you believe there needs to be a limiting principle for all marriages or only for same-sex couples to prevent the legalization of polygamy?

      In my confirmation hearing testimony, I did not state that I was "concerned" that no limiting principle existed; I stated that "the question is what's the limiting principle in the case . . ." In the referenced presentation, I did not express concern or offer my personal opinions; I was explaining that, as stated in Chief Justice Roberts' dissent in *Obergefell*, and various sources cited therein, questions exist as to whether and to what extent the *Obergefell* decision contains limiting principles or could be applied to polygamy. *See Obergefell v. Hodges*, 135 S.Ct. 2584, 2621-22 (2015) (Roberts, C.J., dissenting), *citing* Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian "Throuple" Expecting First Child, N.Y. Post, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L.J. 1977 (2015) (internal citation omitted), ("It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If '[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,' why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? . . . If not having the opportunity to marry 'serves to disrespect and subordinate' gay and lesbian couples, why wouldn't the same 'imposition of this disability,' . . . serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?"). It would be inappropriate for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts before me. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf.* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). If confirmed, I will faithfully apply *Obergefell* and all binding precedent of the United States Supreme Court and of the Eighth Circuit.

   b. What do you believe the limiting principle should be in marriage cases?

      Please see my answer to Question 9(a), *supra.*

   c. You referenced cases working their way through the court system that seek to establish a right to polygamy. Can you provide a list of these cases?

      The following are pending cases that, *inter alia*, seek to establish a right to polygamy:

      Kohl, et al. v. Hutchinson, et al., Case. No. 4:17-cv-00598-KGB (E.D. Ark.),

Gunter, et al. v. Bryant, et al., Case No. 3:17-cv-00177-NBB-RP (N.D. Miss.), and

Penkoski, et al. v. Justice, et al., Case No. 1:18-cv-00010-IMK-MJA (N.D.W.Va.).

d. In the same presentation you suggested that "there is not a constitutional right to same sex marriage." What is your basis for claiming "there is not a constitutional right to same sex marriage"?

In the referenced presentation, I did not state or suggest that "there is not a constitutional right to same sex marriage[,]"or offer my personal opinions; I instead explained the views of the dissenting Justices that: same-sex marriage was not a right found in the Constitution, was not an issue that the nine Justices of the United States Supreme Court should decide, was not something that the dissenting Justices would have "banned," and instead was a policy question for legislatures to decide. *See, e.g., Obergefell v. Hodges,* 135 S.Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) ("Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.").

10. Between 2013 and 2017, you served on the board of directors for Lawyers for Life and your name appeared on the heading for each of the organization's newsletters. The December 2016 flyer for Lawyers for Life reads "*Roe v. Wade* gave doctors a license to kill unborn children. Like the Dred Scott decision, Roe is BAD LAW."

a. Why did Lawyers for Life claim *Roe v. Wade* is "BAD LAW"?

I did not write the statement. *Roe v. Wade* is binding precedent of the United States Supreme Court and, if confirmed, I will faithfully apply *Roe* and all binding precedent of the United States Supreme Court and of the Eighth Circuit.

b. Do you personally believe "*Roe v. Wade* gave doctors a license to kill"?

I did not write the statement. Please see also my answer to Question 10(a), *supra.* It would be inappropriate for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts before me. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf.* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

Questions for the Record for Mr. Stephen Clark
Submitted by Senator Richard Blumenthal
July 18, 2018

1. In 2013, you represented the Breast Cancer Prevention Institute in an amicus brief filed in *Korte v. HHS*, opposing the ACA's contraceptive mandate. In that brief, you argued that the government ignored "significantly increased risks of cancers and other serious diseases" stemming from contraceptive use.

   - **Do you believe that contraceptive use is harmful to women's health?**

     The amicus brief submitted on behalf of the Breast Cancer Prevention Institute and others relied on the five medical and scientific advisors and the over 20 medical studies referenced in the brief. It would be inappropriate for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts before me. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf.* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). If confirmed, I will faithfully apply all binding precedent of the United States Supreme Court and of the Eighth Circuit.

   - **Do you believe that the ACA's contraceptive coverage provision is constitutional?**

     The United States Supreme Court ruled on the contraceptive coverage provision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). It would be inappropriate for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts before me. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf.* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). If confirmed, I will faithfully apply *Hobby Lobby* and all binding precedent of the United States Supreme Court and of the Eighth Circuit.

2. In February 2016, you gave a presentation for the Thomas International Center. During that presentation, you criticized *Obergefell* decision as "unconstitutional" and argued that "the conservative justices on the Court believe that judicial restraint is something judges should exercise."

   - **Do you stand by your statement that the Supreme Court's decision acknowledging the right of same-sex couples to marry in *Obergefell* is unconstitutional?**

     In the referenced presentation, I did not criticize the United States Supreme Court's decision in *Obergefell*, state that it was unconstitutional, or offer my personal opinions; I instead explained the views of the dissenting Justices that: same-sex marriage was not a right found in the Constitution, was not an issue that the nine Justices of the United States Supreme Court should decide, was not something that the dissenting Justices would have "banned," and instead was a policy question for legislatures to decide. *See, e.g., Obergefell v. Hodges*, 135 S.Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) ("Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold

commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.").

- **On what basis do you believe that this decision is in error?**

  Please see my answer to the Question immediately above.

- **Do you agree that the principle of *stare decisis* is an important element of judicial restraint?**

  Stare decisis is an important principle of the law. I would, if confirmed as a judge of a lower court, be required to follow the principle of *stare decisis* as directed by the United States Supreme Court and the Eighth Circuit. The United States Supreme Court has given guidance on its application of *stare decisis*, including most recently in *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S.Ct. 2448 (2018) and *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018). If confirmed, I will faithfully apply *Janus*, *Wayfair*, and all binding precedent of the United States Supreme Court and of the Eighth Circuit.

3. In February 2016, you made a presentation to students at Duke University's Catholic Center called "Pious & Professional: Living the Faith at Work." During that presentation, you commented that "one of the next evolutions of same-sex marriage is polygamy."

   - **Do you believe that a same-sex couple is comparable to a polygamous relationship?**

     In the referenced presentation, I was explaining that, as stated in Chief Justice Roberts' dissent in *Obergefell*, and various sources cited therein, questions exist as to whether and to what extent the *Obergefell* decision contains limiting principles or could be applied to polygamy. *See Obergefell v. Hodges*, 135 S.Ct. 2584, 2621-22 (2015) (Roberts, C.J., dissenting), *citing* Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian "Throuple" Expecting First Child, N.Y. Post, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L.J. 1977 (2015) (internal citation omitted), ("It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If '[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,' why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? . . . If not having the opportunity to marry 'serves to disrespect and subordinate' gay and lesbian couples, why wouldn't the same 'imposition of this disability,' . . . serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?").

   - **Do you believe that it is ethical to discriminate against people on the basis of sexual orientation?**

     The question of whether discrimination on the basis of sexual orientation is covered by federal law is pending or impending in various courts. It accordingly would be inappropriate for me to comment on this subject. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf.* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). If confirmed, I will faithfully apply all binding precedent of the United States Supreme Court and of the Eighth Circuit.

Nomination of Stephen R. Clark, Sr.
United States District Court for the Eastern District of Missouri
Questions for the Record
Submitted July 18, 2018

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[1] Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.[2] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[3] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[4]

    a. Do you believe there is implicit racial bias in our criminal justice system?

    As I understand the concept of implicit bias, it is possible that all people have implicit biases of one form or another. This includes implicit racial bias. It also seems clear to me that, unfortunately, racism in various forms—both explicit and implicit—continues to exist in this country, including in some parts of the criminal justice system.

    b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

    I have seen statistics demonstrating that people of color make up a higher percentage of incarcerated individuals than they do of the population generally.

    c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

    While I am generally familiar with the topic, I have not studied the issue.

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[1] JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), *available at* https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/.
[2] *Id.*
[3] ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), *available at* http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.
[4] *Id.* at 8.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.[5] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.[6]

    a. Do you believe there is a direct link between increases of a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

    I have not studied or reached any conclusion about the statistical relationship between incarceration and crime rates.

    b. Do you believe there is a direct link between decreases of a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

    I have not studied or reached any conclusion about the statistical relationship between incarceration and crime rates.

3. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

    Yes.

4. The color of a criminal defendant plays a significant role in capital punishment cases. For instance, people of color have accounted for 43 percent of total executions since 1976 and 55 percent of those currently awaiting the death penalty.[7]

    a. Do those statistics alarm you?

    If confirmed, racial prejudice would have no place, and would play no role, in my courtroom. It would be inappropriate for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts before me. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf.* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). Answering this question would also require me inappropriately to state my opinion on matters of public policy. *Id.* and Cannon 5. If confirmed, I would faithfully follow all relevant United States Supreme Court and Eighth Circuit precedent on capital cases fairly and without regard to person or race.

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[5] THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), *available at* http://www.pewtrusts.org/~/media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

[6] *Id.*

[7] The American Civil Liberties Association, Race and the Death Penalty, https://www.aclu.org/other/race-and-death-penalty (Last visited June 13, 2018).

b. Do you believe it is cruel and unusual to disproportionately apply the death penalty on people of color in compared to whites? Why not?

Please see my answer to Question 4(a), *supra*.

c. The color of the victim also plays an important role in determining whether the death penalty applies in a particular case. White victims account for about half of all murder victims, but 80 percent of all death penalty cases involve white victims. If you were a judge, and those statistics were playing out in your courtroom, what would you do?

Please see my answer to Question 4(a), *supra*.

5. Do you believe that Roe v. Wade was correctly decided?

Roe v. Wade is United States Supreme Court precedent binding on all lower courts. If confirmed, I will faithfully apply *Roe* and all other such precedent.

6. Do you believe that Obergefell v. Hodges was correctly decided?

Obergefell is United States Supreme Court precedent binding on all lower courts. If confirmed, I will faithfully apply *Obergefell* and all other such precedent.

a. In presentation to the Thomas International Center, you discussed Obergefell and said the decision was unconstitutional. Were you correct in this assessment?

In the referenced presentation, I did not state that the United States Supreme Court's decision in *Obergefell* was unconstitutional or offer my personal opinions; I instead explained the views of the dissenting Justices that: same-sex marriage was not a right found in the Constitution, was not an issue that the nine Justices of the United States Supreme Court should decide, was not something that the dissenting Justices would have "banned," and instead was a policy question for legislatures to decide. *See, e.g.*, *Obergefell v. Hodges*, 135 S.Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) ("Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.").

7. Many lawyers represent people who hold views they disagree with. In fact, our history is replete with instances where lawyers represent people they not only disagree with, but also do not think highly of their clients. For instance, John Adams agreed to defend British soldiers who were accused of killing five Boston residents in the Boston Massacre. You on the other hand, have avoided clients who disagreed with you and,

instead, sought out clients who share your ideological positions. You even left two law firms because it represented clients that held views that conflicted with your religious beliefs.

a. Will you commit to recuse yourself from all cases where individuals appear before you who hold views that conflict with your religious beliefs? If not, why?

I believe that lawyers can and do represent people who hold views with which they disagree, and on numerous occasions throughout my career I have represented clients holding views with which I disagree. As I stated in my Senate Judiciary Committee hearing testimony, I resigned from Polsinelli, P.C. because I believe the firm had crossed the line between externally advocating a client's legal position and internally proselytizing a client's moral position. I resigned from Blackwell Sanders LLP n/k/a Husch Blackwell LLP because of a direct client conflict created by the merger of Blackwell Sanders LLP with Husch & Eppenberger LLP.

The oath of office set forth in 28 U.S.C. §453 and the Code of Conduct for United States Judges require me, if confirmed, to set aside my personal beliefs in ruling on any case, and I will faithfully adhere to that oath and the Code of Conduct for United States Judges. I will recuse myself as required by 28 U.S.C. §144, 28 U.S.C. §455, the Code of Conduct for United States Judges, and all other applicable laws, rules, and practices governing conflicts and recusal.

b. You were unable to work at a firm that represented clients who supported stem cell research, which you said violated your religious beliefs, even though you didn't work on any matters involving those clients. Why do you think as a federal judge you would be able to hear cases involving individuals who hold positions that violate your religious beliefs?

As I explained in my Senate Judiciary Committee hearing testimony, I resigned from that firm (Polsinelli P.C.) because I believe the firm had crossed the line between externally advocating a client's legal position and internally proselytizing a client's moral position by pressuring all employees of the firm to vote in favor of a proposed amendment to the Missouri Constitution. Please see also my answers, *supra*. The role of a federal judge does not include advocating or proselytizing, and federal judges are required to hear and fairly and impartially decide all cases that come before them, without regard to their own personal beliefs or the beliefs of the litigants appearing before them. *See* 28 U.S.C. §453 and the Code of Conduct for United States Judges. If confirmed, I will faithfully abide by and adhere to the oath of office set forth in 28 U.S.C. §453 and the Code of Conduct for United States Judges.

c. Why should a litigant like Planned Parenthood believe you will be a neutral arbiter of the law given your anti-choice history?

While I have advocated on behalf of clients asserting the right to life, the numerous letters to the Judiciary Committee in support of my nomination demonstrate that I have a history of impartiality, integrity, and honesty. Many of these letters are from staunch Democrats, past and current Presidents of bar associations, plaintiffs' attorneys, criminal defense attorneys, and a federal public defender. The Committee and litigants should rely on my own assurances, and the opinions of these people who know me well, know my character, and know my integrity, that if confirmed, I will faithfully discharge the duties of a United States District Judge fairly and impartially, and with integrity and honesty. I likewise assure the Committee and litigants that if confirmed, I will faithfully abide by and adhere to the oath of office set forth in 28 U.S.C. §453 and all Cannons of the Code of Conduct for United States Judges.

d. I want to talk about your representation of the Breast Cancer Prevention institute.

Please see my answers to Questions 13–14 of Senator Feinstein, Question 1 of Senator Blumenthal, and Questions 6–7 of Senator Coons.

8. You once said that "one of the next evolutions of same-sex marriage is polygamy." What did you mean by that comment?

In the referenced presentation, I was explaining that, as stated in Chief Justice Roberts' dissent in *Obergefell*, and various sources cited therein, questions exist as to whether and to what extent the *Obergefell* decision contains limiting principles or could be applied to polygamy. *See Obergefell v. Hodges*, 135 S.Ct. 2584, 2621-22 (2015) (Roberts, C.J., dissenting), *citing* Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian "Throuple" Expecting First Child, N.Y. Post, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L.J. 1977 (2015) (internal citation omitted), ("It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If '[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,' why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? . . . If not having the opportunity to marry 'serves to disrespect and subordinate' gay and lesbian couples, why wouldn't the same 'imposition of this disability,' . . . serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?").

Questions for the Record from Senator Kamala D. Harris
Submitted July 18, 2018
For the Nominations of

Stephen Clark, to the U.S. District Court for the Eastern District of Missouri

John O'Connor, to the U.S. District Court for the Northern, Eastern, and Western Districts of Oklahoma

Joshua Wolson, to the U.S. District Court for the Eastern District of Pennsylvania

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

    a. What is the process you would follow before you sentenced a defendant?

    I would approach each sentencing decision with the sincere appreciation that sentencing a criminal defendant is one of the most important and difficult jobs of a United States District Judge. I would also recognize that the ultimate sentence I impose will impact the defendant and his or her family, as well as the community and any known victims of the offense. I would accurately calculate the applicable Sentencing Guidelines range for the offense. Then I would evaluate any applicable statutes, including 18 U.S.C. §3553, the presentence report, the allocution of the defendant, the arguments of counsel, any statements by the defendant's family and friends, and any victim impact statements. After considering all appropriate factors, information, authorities, and materials, I would attempt to impose a sentence "sufficient, but not greater than necessary, to comply" with the congressionally-designated purposes of federal sentencing: "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; [] to afford adequate deterrence to criminal conduct; [] to protect the public from further crimes of the defendant; and [] to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]" 18 U.S.C. § 3553(a).

    b. As a new judge, how do you plan to determine what constitutes a fair and proportional sentence?

    In addition to my answer to Question 1(a), *supra*, I would, if confirmed, continue to read and study the publications issued by the United States Sentencing Commission, as well as all sentencing decisions rendered by the United States Supreme Court and the Eighth Circuit Court of Appeals.

    c. When is it appropriate to depart from the Sentencing Guidelines?

Under United States Supreme Court precedent, the Sentencing Guidelines are not binding on trial judges; they are advisory. *See, e.g.*, *United States v. Booker*, 543 U.S. 220, 246 (2005). Part K of Section 5 of the Sentencing Guidelines lists the specific circumstances under which a trial judge may depart from the advisory Guidelines range. In addition, a judge may, consistent with the factors set out in 18 U.S.C. § 3553, vary either up or down from the advisory Guidelines range. If confirmed, I would carefully consider all such authorities and factors, and the positions of the parties before deciding whether a departure was appropriate.

d. Judge Danny Reeves of the Eastern District of Kentucky – who also serves on the U.S. Sentencing Commission – has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.[1]

i. Do you agree with Judge Reeves?

It would be inappropriate for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts before me. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf*. Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). Answering this question would also require me inappropriately to state my opinion on a matter of public policy. *Id*. and Cannon 5. In either case, the question of which kind of sentencing regime better deters crime is one for the political branches. If confirmed, I would follow all relevant United States Supreme Court and Eighth Circuit precedent on criminal sentencing, and I would ensure that every sentence I impose is fair and reasonable in light of the factors set out in 18 U.S.C. § 3553.

ii. Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?

Please see my answer to Question 1(d)(i), *supra*.

iii. Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.

Please see my answer to Question 1(d)(i), *supra*.

iv. Former-Judge John Gleeson has previously criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from

[1] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf

mandatory minimums.[2] If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:

1. **Describing the injustice in your opinions?**

   If confirmed, I would faithfully apply any applicable mandatory minimum sentence to the extent that the relevant statute was constitutional. I would faithfully apply those laws, as well as any other laws, without regard to my personal views as to whether sentences led to unjust outcomes. Judges also must comply with 18 U.S.C. §3553(c) and "state in open court the reasons for its imposition of the particular sentence . . ." and, where required or appropriate, state that the law required the sentence imposed. All of this can be done without offering personal criticisms of Congress's decision to impose a mandatory minimum sentence, as judges must comply with the Code of Conduct for United States Judges.

2. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**

   The question of what crime to charge is one that our Constitution commits to the Executive Branch. I would raise charging decisions with federal prosecutors only in appropriate situations where permitted by applicable law and consistent with the Code of Conduct for United States Judges.

3. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

   The clemency power is one that our Constitution reserves to the Executive Branch, and if confirmed, I would not advocate for or against clemency for any defendant. If appropriate and permitted by applicable law, a judge may state on the record that he or she would not have imposed a certain sentence but for a statutory mandate to do so. If an Executive Branch official later decides that the case merits clemency consideration, that official would then have the benefit of the judge's recorded view on the justness of the sentence in question.

e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are "generally appropriate for first offenders not convicted of a violent or

[2] *See, e.g.*, "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html

otherwise serious offense." If confirmed as a judge, would you commit to taking into account alternatives to incarceration?

Yes, as permitted by applicable law.

2. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

   a. Does a judge have a role in ensuring that our justice system is a fair and equitable one?

   Yes.

   b. Do you believe that there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.

   I have seen statistics demonstrating that people of color make up a higher percentage of incarcerated individuals than they do of the population generally.

3. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

   a. Do you believe that it is important to have a diverse staff and law clerks?

   Yes.

   b. Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?

   If confirmed, I would ensure that qualified minorities and women are given serious consideration for all positions that I am in a position to fill.