

**Nomination of John Charles Hinderaker to the United States District Court for the
District of Arizona
Questions for the Record
Submitted December 11, 2019**

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 Supreme Court precedent.

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?

A district judge must rigorously follow all applicable Supreme Court precedent regardless of that judge's personal views. In a rare instances it may be appropriate and beneficial for a district judge to respectfully identify an issue for Supreme Court review.

c. When, in your view, is it appropriate for a district court to overturn its own precedent?

A district court's decision has no binding force as precedent. *Camreta v. Greene* 563 U.S. 692, 709, n.7 (2011). Federal Rules of Civil Procedure 59(e) and 60 provide the standards under which a district court may reconsider a prior ruling.

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

When to overturn Supreme Court precedent is a question solely for the Supreme Court. In *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019), the Supreme Court set forth factors it may consider in exercising this authority. As a nominee to the district court, it would be inappropriate for me to give an opinion about when the Supreme Court should overturn its own precedent.

2. 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 “superprecedent”?

Roe v. Wade is binding Supreme Court precedent. The Supreme Court has reaffirmed the core holding in *Roe v. Wade* over thirty times. If confirmed, I would faithfully apply the holding in *Roe v. Wade*.

- b. Is it settled law?

Yes.

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Yes.

4. 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?

Under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A), I believe it would be inappropriate for me as a sitting state court judge and federal judicial nominee to publicly comment about the merits of Justice Stevens' dissent. If confirmed, I will faithfully apply all Supreme Court precedent, including *District of Columbia v. Heller*.

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

In *District of Columbia v. Heller*, the Supreme Court stated that “[l]ike most rights, the right secured by the Second Amendment is not unlimited,” and “nothing in [its] 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.*, 554 U.S. 570, 626-27 (2008). There are cases pending in the federal courts involving the application of the Second Amendment and the holding in *Heller* to gun regulations. Thus, I respectfully decline to elaborate further under Canon 3(A)(6) of the Code of Conduct for United States Judges. (“A judge should not make public comment on the merits of a matter pending or impending in any court”.)

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

Under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A), I believe it would be inappropriate for me as a sitting state court judge and federal judicial nominee to publicly comment about the correctness of binding Supreme Court precedent. If confirmed, I will faithfully apply all binding authority regardless of my personal views.

5. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

In *Citizens United v. FEC*, 558 U.S. 310, 342 (2010), the Supreme Court “recognized that First Amendment protection extends to corporations.” If confirmed, I will faithfully follow the holding in *Citizens United*. As a judicial nominee, I believe it would be inappropriate under the Code of Conduct for United States Judges and Canons 2(A), 3(A)(6) and 5(A) to comment further.

b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?

Please see my response to Question 5(a) above.

c. Do you believe corporations also have a right to freedom of religion under the First Amendment?

In *Burwell v. Hobby Lobby Stores Inc.*, the Supreme Court held that a closely held corporation is a “person” under the Religious Freedom Restoration Act. 573 U.S. 682, 707-08 (2014). If confirmed, I will faithfully follow the holding in *Hobby Lobby* and other Supreme Court and Ninth Circuit precedent on the subject. *Hobby Lobby* did not, however, decide whether the Free Exercise Clause applies to corporations. Accordingly, because this question is or may become the subject of litigation, I respectfully decline to elaborate further under Canon 3(A)(6) of the Code of Conduct for United States Judges. (“A judge should not make public comment on the merits of a matter pending or impending in any court.”)

6. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

The Constitution guarantees both the equal protection of the laws and the right to the free exercise of religion. If presented with a case in which those two cherished rights came into conflict, I would analyze the specific facts of the case and apply the applicable legal principles articulated by the Supreme Court to decide the case. I believe it would be improper for me to further discuss my views on this matter. *See* Code of Conduct for United States Judges, Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court”.)

7. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk’s sincerely held religious beliefs?

If faced with this issue, I would consider all applicable legal precedent, including the holding in *Loving v. Virginia*, 388 U.S. 1, 12 (1967) and other relevant Supreme Court opinions addressing the Equal Protection and Free Exercise Clauses. Please also see my answer to Question 6.

8. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist's sincerely held religious beliefs?

Please see my answers to Questions 6 and 7.

9. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.

No.

10. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former 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?**

No.

- 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"?**

During my twenty years as a commercial litigator and my almost two years as a state court judge, I do not recall ever dealing with a matter involving federal administrative law. I realize federal administrative law is important, but I do not have any specific "views on administrative law." If confirmed, I would work hard to understand and faithfully apply Supreme Court and Ninth Circuit precedent regarding administrative law, including *Chevron v. Nat. Resources Def. Council*, 467 U.S. 837 (1984).

11. Do you believe that human activity is contributing to or causing climate change?

As a judicial nominee bound by the Code of Conduct for United States Judges, it would be improper to discuss my personal views on climate change because issues relating to climate change may come before the federal courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court”.)

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

Under *Milner v. Dep’t of Navy*, 562 U.S. 562, 574 (2011) and *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005), judges may consider legislative history in construing an ambiguous statute. If confirmed, I would faithfully apply Supreme Court precedent governing the use of legislative history.

13. 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 any outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I received the questions via email on December 11, 2019. On December 12 and 13, 2019, I reviewed the questions, conducted research, and drafted answers. On December 13, 2019, I sought comment from the Office of Legal Policy regarding my draft answers, and incorporated the Office of Legal Policy’s suggestions where I deemed appropriate. My answers to these questions are my own.

**Questions for John C. Hinderaker
From Senator Mazie K. Hirono**

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

No.

b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?

No.

2. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

a. Do you agree that training on implicit bias is important for judges to have?

Yes.

b. Have you ever taken such training?

Yes, on November 19, 2014, I attended implicit bias training presented by the Arizona Supreme Court.

c. If confirmed, do you commit to taking training on implicit bias?

Having found my previous training useful, I plan to attend additional training on implicit bias in the future.

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QUESTIONS FROM SENATOR BOOKER

1. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

I do not consider myself an “originalist” in the strict sense. However, I do believe that reference to the original public meaning of a constitutional or statutory text can provide both a valuable interpretive tool and promote fidelity to a democratically adopted law. Thus, for example, the Supreme Court analyzed and considered the original public meaning of relevant texts in both the majority opinion and the dissents in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

2. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

As I understand the term, a “textualist” begins the interpretive process by reading the text of the law or instrument being interpreted. If the text is unambiguous, the court applies the plain meaning of the text as written. In contrast, if the text is ambiguous, the court turns to the various canons of interpretation to interpret the meaning of the text. Using this definition, I do consider myself a “textualist.”

3. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress’s intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

- a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

Under *Milner v. Dep’t of Navy*, 562 U.S. 562, 574 (2011) and *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005), judges may consider legislative history in construing an ambiguous statute. If confirmed, I would faithfully apply Supreme Court precedent governing the use of legislative history and statutory interpretation.

- b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn’t it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Please see my response to Question 3(a).

4. Do you believe that judicial restraint is an important value for a district judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

- a. The Supreme Court’s decision in *District of Columbia v. Heller* dramatically changed

the Court's longstanding interpretation of the Second Amendment.¹ Was that decision guided by the principle of judicial restraint?

I agree that judicial restraint is an important value for a district court judge to consider when deciding a case. I understand the principle of judicial restraint to mean that a judge will honor the separation of powers doctrine by deferring to the authority of the legislature to make public policy decisions and enact laws. Judges do this by applying the law as written without regard to their own personal beliefs about what the law should be.

Under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A), I believe it would be inappropriate for me as a sitting state court judge and federal judicial nominee to publicly comment about the correctness of binding Supreme Court precedent, including *Heller*. If confirmed, I will faithfully apply all binding authority regardless of my personal views.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.² Was that decision guided by the principle of judicial restraint?

Under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A), I believe it would be inappropriate for me as a sitting state court judge and federal judicial nominee to publicly comment about the correctness of binding Supreme Court precedent, including *Citizens United*. If confirmed, I will faithfully apply all binding authority regardless of my personal views.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.³ Was that decision guided by the principle of judicial restraint?

Under the Code of Conduct for United States Judges (applicable to nominees), and in accordance with Canons 2(A), 3(A)(6) and 5(A), I believe it would be inappropriate for me as a sitting state court judge and federal judicial nominee to publicly comment about the correctness of binding Supreme Court precedent, including *Shelby County*. If confirmed, I will faithfully apply all binding authority regardless of my personal views.

5. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under

¹ 554 U.S. 570 (2008).

² 558 U.S. 310 (2010).

³ 570 U.S. 529 (2013).

the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.⁴ In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.⁵

- a. Do you believe that in-person voter fraud is a widespread problem in American elections?

Litigation involving this issue is likely pending or impending before the courts. Therefore, it would be inappropriate to comment under Canon 3(A)(6) of the Code of Conduct for United States Judges.

- b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

Litigation involving this issue is likely pending or impending before the courts. Therefore, it would be inappropriate to comment under Canon 3(A)(6) of the Code of Conduct for United States Judges.

- c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

Litigation involving this issue is likely pending or impending. Therefore, it would be inappropriate to comment under Canon 3(A)(6) of the Code of Conduct for United States Judges.

6. According to a Brookings Institution 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.⁶ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.⁷ 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.⁸ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁹

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

Yes, I believe implicit racial bias exists in our society at large, including our criminal justice system.

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

Yes.

- 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.

On November 19, 2019, I attended a presentation on implicit racial bias put on by the Arizona Supreme Court. The presenter's name was Kimberly Papillon of "The Better Mind." Ms. Papillon gave a PowerPoint presentation and provided us with

written materials, including an article she authored called, “The Tools, Twelve Steps and Strategies or Increasing Fairness and Eliminating Unconscious/Implicit Association in Decision-Making.” I have also read a few other articles on the subject, but I cannot recall the publications or the authors.

- d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.¹⁰ Why do you think that is the case?

Any racial disparity in our criminal justice system is deeply concerning. I am not familiar with the study referenced. Assuming the conclusion is correct, it would be logical to conclude that implicit racial bias is contributing to the imbalance.

⁴ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

⁵ *Id.*

⁶ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

⁷ *Id.*

⁸ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

⁹ *Id.*

¹⁰ U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.¹¹ Why do you think that is the case?

Please see my answer to Question 6(d).

- f. What role do you think federal judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

Due process is the cornerstone of a fair and impartial criminal justice system. A judge has a fundamental duty to ensure that every criminal defendant receives due process and a fair trial regardless of race. A trial judge should correct racial bias exhibited by the parties (e.g., the improper exercise of a peremptory strike under *Batson*) or other courtroom participants.

For myself, as a state court trial judge, I believe the first step in addressing implicit racial bias is to acknowledge that it is real, and it can adversely affect my own decision-making process. Judges should receive training to better understand implicit racial bias and how it can adversely affect the decision-making process.

7. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.¹² In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹³
- a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.
- b. Do you believe there is a direct link between decreases in 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.

As a state trial judge, I have not had the opportunity to study the relevant evidence to render an informed opinion on the correlation, if any, between incarceration and crime rates.

As a state trial judge, I have not had the opportunity to study the relevant evidence to render an informed opinion on the correlation, if any, between incarceration and crime rates.

8. 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.

9. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

Yes.

10. Do you believe that *Brown v. Board of Education*¹⁴ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes. *Brown v. Board of Education* is a landmark decision in American jurisprudence that corrected the grave injustice of racial segregation sanctioned by the holding in *Plessy v. Ferguson*.

11. Do you believe that *Plessy v. Ferguson*¹⁵ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. Please see my answer to Question 10.

12. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

No.

13. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican

¹¹ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

¹² Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

¹³ *Id.*

¹⁴ 347 U.S. 483 (1954).

¹⁵ 163 U.S. 537 (1896).

heritage.”¹⁶ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

A judge’s race or ethnicity is not a basis for disqualification. *See* 28 U.S.C. § 455. As a judicial nominee bound by the Code of Conduct for United States Judges, it would not be appropriate for me to comment on political comments regarding cases litigated in the Ninth Circuit. *See* Code of Conduct for United States Judges, Canon 3(A)(6) and 5.

14. President Trump has stated on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”¹⁷ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

In *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), the Supreme Court held that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent.” If confirmed as a district court judge, I would faithfully follow Supreme Court and Ninth Circuit precedent on this issue.

¹⁶ Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

¹⁷ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Questions for the Record from Senator Kamala D. Harris
Submitted December 11, 2019
For the Nomination of**

John C. Hinderaker, to the U.S. District Court for the District of Arizona

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 am currently a state court trial judge. My first rotation was on the criminal bench and during that time I sentenced nearly 500 criminal defendants. Under Arizona law, the legislature provides a sentencing range that varies depending upon the class of felony, the defendant's criminal history and other factors. The sentencing judge starts with the presumptive sentence provided by the legislature and has discretion to move up or down within the sentencing range based upon mitigating and aggravating factors. In some cases, probation may be mandatory or available in the sentencing judge's discretion.

Prior to every sentencing, I would read everything submitted, including the presentence report prepared by the probation department, to understand the specific facts of the crime, the impact on the victim(s), the defendant's background, including prior criminal history, and any other matters that might be relevant to determining mitigating and aggravating factors. Where probation was available, I would staff the matter with the probation department to better understand how to best structure probation.

Going into the sentencing hearing, I usually had an approximate idea about the sentence I intended to impose, but I would always endeavor to keep an open mind. During the hearing, I would consider the arguments of counsel, the statements of the victim(s), if any, and the defendant's allocution. I would decide on aggravating and/or mitigating factors and then make my decision. In some cases, I would suspend the sentence and place the defendant on probation. When doing so, I would try to structure the defendant's probation to protect any victim(s) and the public, help rehabilitate the defendant, and prudently employ the probation department's limited resources. Throughout the sentencing process, I would remain mindful of the four objectives of sentencing: (1) incapacitation; (2) retribution; (3) deterrence; and (4) rehabilitation.

If confirmed, I expect my approach to sentencing in the district court would be very similar to my approach in state court. Instead of relying on Arizona law, I would follow the structure provided by federal statutes and the Sentencing Guidelines and apply all applicable Supreme Court and Ninth Circuit precedent. I would make and consider the required guideline calculation; consider the

presentence report prepared by the United States Probation Office; listen with an open mind to the arguments of counsel and the defendant's allocution; and carefully read the victim impact statements and letters submitted by the victim(s) or in support of the defendant. Throughout this process, I would seek to follow the congressional mandate in 18 U.S.C. § 3553 to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of [§ 3553(a)]."

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

Generally, I would follow the process I explained in response to Question 1(a) and draw upon my experience as a state court judge. Also, if confirmed, I would watch several district court sentencings to get a sense for how other judges in the District of Arizona approach sentencing; talk with my more seasoned colleagues on the federal bench about their sentencing practices and philosophies; consult other judges when faced with a particularly difficult sentencing issue; and consult sentencing statistics from the Administrative Office of the Courts.

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

The Sentencing Guidelines, Part K, Chapter 5, provide specific circumstances that may justify departing from the guideline sentencing range. The factors listed in 18 U.S.C. § 3553(a) may also justify departing from the guideline sentence range. Ninth Circuit precedent also establishes factors that may be considered in departing from the sentencing guidelines. If confirmed, I would consult these sources to ensure that any sentence I would impose would meet the goal of being "sufficient, but not greater than necessary" as provided in 35 U.S.C. § 3553.

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?

Although I have been a criminal judge in state court, I have not handled criminal matters in federal court either as a lawyer or a judge. I have not studied the impact of mandatory minimum sentences on incidents of crime and I do not have personal experience with this topic. Thus, respectfully, I cannot express an opinion on this subject. If confirmed, I will seek to better understand the issues surrounding mandatory minimum sentences.

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

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

Please see my response to Question 1.d.i. Also, I believe the equity of mandatory minimum sentences is a public policy issue within the purview of Congress. Thus, as a judicial nominee, I do not believe it would be appropriate for me to discuss my personal views on mandatory minimum sentences. *See* Code of Conduct for United States Judges, Canon 5.

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

Please see my response to Questions 1.d.i and ii.

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

I am unfamiliar with the position of Judge Gleeson on this issue and I therefore cannot comment, nor would it be appropriate to commit to a future course of action.

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

If confirmed, I believe my authority as a district court judge would extend only to handling sentencing in the cases before me. I do not believe it would be appropriate for a district court judge to discuss charging decisions or policies with a U.S. Attorney or other federal prosecutors, because charging is within the executive branch's sphere of authority under the Separation of Powers doctrine.

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

Please see my responses to Question 1.d.iv.2.

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 otherwise serious

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>

offense.” **If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

As a state judge, I regularly took into account alternatives to incarceration where appropriate, and will continue to do so if I am confirmed to the federal bench.

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 there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

Sadly, yes. I believe reliable and peer reviewed statistical studies show that some racial minorities are disproportionately arrested, prosecuted and incarcerated in the United States.

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

a. **Do you believe 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?**

I will give serious consideration to all qualified applicants, regardless of race or sex.

Senator Josh Hawley
Questions for the Record

John C. Hinderaker
Nominee, U.S. District Court for the District of Arizona

- 1. Please state your understanding of the Supreme Court's holding in *District of Columbia v. Heller*.**

I understand the core holding in *Heller* to be as follows: The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, including self-defense within the home.

- 2. Please state your understanding of the Supreme Court's holding in *McDonald v. City of Chicago*.**

I understand the core holding in *McDonald* to be as follows: The Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right recognized in *Heller* and makes it applicable to state and local governments.

- 3. Is the Second Amendment any less of a robust, individual constitutional right than other constitutional rights, such as those contained in the First Amendment?**

No. In *Heller*, the Court held that the Second Amendment creates an individual right to bear arms. This individual right is on the same level as any other individual right created by the Bill of Rights. Indeed, the Court in *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) stated that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."

- 4. Under *Heller* and *McDonald*, what standard or test would you apply when analyzing whether a state or federal law infringes on individuals' constitutional right to keep and bear arms under the Second Amendment?**

In *Heller*, the Court recognized that the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, including self-defense within the home. To reach this holding, the Court analyzed the text of the Second Amendment and reviewed the historical record leading up to the Second Amendment's adoption, and the common understanding of the Second Amendment's meaning during the years following its

adoption. *District of Columbia v. Heller*, 554 U.S. 570, 577-620 (2008). Based upon this historical inquiry, the Court noted that “it has always been widely understood that the “Second Amendment, like the First and Fourth Amendments codified a *pre-existing* right.” *Heller* at 592 (emphasis in the original). Ultimately, the Court struck down the District of Columbia’s ban on handgun possession in the home as violating the Second Amendment. *Id.* at 635.

As to the sorts of weapons protected by the Second Amendment, the Court noted that the Second Amendment protects weapons “in common use at the time,” which, the Court added, “is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” *Id.* at 627 (quotations and citations omitted). Thus, the Second Amendment’s protections are not limited to only those weapons in existence in the 18th century. *Id.* at 582. The Court in *Heller* also explained that “[l]ike most rights, the right secured by the Second Amendment is not unlimited... Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, 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 626-27.

In *McDonald v. City of Chicago*, the Supreme Court reaffirmed *Heller* and held that the Fourteenth Amendment’s Due Process Clause incorporates the Second Amendment right recognized in *Heller* and makes it applicable to state and local governments. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). As in *Heller*, the Court reviewed the historical record and concluded that a “clear majority of the States in 1868... recognized the right to keep and bear arms as among the foundational rights necessary to our system of Government.” *Id.* at 777. As in *Heller*, the Court in *McDonald* did not analyze the full scope of the Second Amendment right or set forth clear guidance regarding what standards lower courts should use to analyze whether a challenged regulation violates the Second Amendment.

If confirmed to the United States District Court for the District of Arizona, I will also faithfully follow the precedent of the Ninth Circuit, including its holding in *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), which established a two part inquiry, based on *Heller*, for instances where a challenged law burdens conduct falling within the scope of the Second Amendment’s guarantee. First, a district court must determine whether “a prohibition falls within the historical scope of the Second Amendment,” and, if so, the court must then determine the appropriate level of scrutiny. *Id.* at 960 (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)). In determining the proper level of scrutiny, “just as in the First Amendment context,” the court should consider “(1) ‘how close the law comes to the core of the Second Amendment right’ and (2) ‘the severity of the law’s burden on the right.’” *Id.* at 960-61 (quoting *Chovan*, 735 F.3d at 1138). “A law that imposes such a severe restriction on the core right of self-defense that it ‘amounts to a destruction of the [Second Amendment]

right,' is unconstitutional under any level of scrutiny.” *Id.* (quoting *Heller*, 554 U.S. at 629).

In early 2019, the Supreme Court granted certiorari in *New York State Rifle & Pistol Association, Inc. v. City of New York*. That case involves a Second Amendment challenge to a portion of New York City’s firearm licensing scheme. The Court heard oral argument on December 2, 2019. If the Court does not find the case moot and reaches the merits, the Court may provide further guidance regarding the framework under which lower courts should evaluate Second Amendment challenges.

Accordingly, litigation involving the standard or test to apply when analyzing whether a state or federal law infringes on individuals’ constitutional right to keep and bear arms under the Second Amendment is currently pending throughout the federal court system, including before the Supreme Court this term. Therefore, under Canon 3(A)(6) of the Code of Conduct for United States Judges, it would be inappropriate for me to comment further regarding the standard or test I would apply to analyze whether a state or federal law violates the Second Amendment other than to say that, if confirmed, I would faithfully and fully apply the holdings in *Heller*, *McDonald* and any other binding Supreme Court and Ninth Circuit precedent.