

**Nomination of Joshua Michael Kindred to the United States District Court for the
District of Alaska
Questions for the Record
Submitted December 11, 2019**

QUESTIONS FROM SENATOR FEINSTEIN

1. In your hearing before the Senate Judiciary Committee, you said that federal agencies “create regulations that are intended to protect the environment, and they’re prescriptive, and the oil industry was saying to them ‘we can protect the environment in the manner that you seek but there’s a better way to get there’ and there was no way to know if those messages were getting through.” You also expressed a desire for a “collaborative effort” between the oil and gas industry and regulators in creating regulations to govern the industry.

In *Greater Boston Television Corporation v. FCC*, the U.S. Court of Appeals for the D.C. Circuit explained the need for “hard look” review of administrative decisions in certain instances, including when agency decisions are made “in furtherance of . . . improper influence.” Writing for the court, Judge Leventhal described the ideal administrative process as not involving a collaborative effort between industry and agency, but rather between “agencies and courts” which “together constitute a ‘partnership’ in furtherance of the public interest.” (*Greater Boston Television Corporation v. FCC*, 444 F.2d 841, 851-52 (1970))

- a. **What is the proper role for a regulated industry to play in decision making by regulating agencies?**

I do not believe that a regulated industry has a defined role in the process, but do believe that regulating agencies can benefit from a broad array of information, particularly if that information could allow for the more prudent pursuit of environmental protections.

- b. **Should regulated industries have a special role in agency decision making?**

No.

- c. **What is the proper role for courts to play in reviewing decision making by agencies?**

The most prominent modern vehicle for challenging agency action is the Administrative Procedure Act, which mandates that a court is authorized to review agency action in a number of contexts. For example, a court will examine the statutory authority underlying an agency decision in order to determine whether the agency decision exceeded its statutory authority. A court may also examine discretionary decisions, or discrete actions, and review an agency’s compliance with statutory procedural requirements, such as the notice-and-comment rulemaking procedures imposed by the Administrative Procedure Act.

d. How, if at all, does a regulated industry’s involvement in an agency’s decision making process impact the purview of a court in reviewing the decision?

As a threshold matter, the federal courts are courts of limited jurisdiction. One limitation on a federal court’s power to hear a case is that the party has standing. In most, if not all cases, a regulated industry that participated in the rule making will be able to satisfy constitutional standing requirements.

2. In your comments on the National Marine Fisheries Service’s 2016 Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing, you repeatedly urged the agency to ensure that alternative approaches to estimating marine mammal impacts “reflect the best available science, without having to resort to costly and time-consuming external review processes.” Similarly, you stated that applicants may present “more accurate approaches to estimat[ing] potential take” that may not be peer reviewed, if based upon best available science. (Comment Letter, *Re: Secretary of Commerce’s Review of Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing* (July 17, 2017))

Regarding the effects of anthropogenic ocean noise in particular, scientific experts in the field of marine mammal acoustic ecology have specifically cited the need for additional research on this topic—including one of the studies cited in your own comment. (Lucke et al. 2016. Auditory sensitivity in aquatic animals. *J. Acoust. Soc. Am.* 139(6): 3097-3101. <http://asa.scitation.org/doi/full/10.1121/1.4952711>)

a. Considering the lack of available information on how anthropogenic ocean noise impacts marine mammals, how is an agency like NMFS to ensure that an approach is based on best available science, if it is not peer reviewed?

As a judicial nominee, it would not be appropriate for me to comment on political issues or issues that might come before the court.

b. What other process of verification beyond review of fellow scientific experts can determine the quality of the science upon which an impact estimate approach is based?

As a judicial nominee, it would not be appropriate for me to comment on political issues or issues that might come before the court.

3. **Do you believe an agency, such as the EPA, has authority under current statutes such as the Clean Air Act, to regulate pollutants that Congress was not specifically thinking about when it adopted the statute? If not, why not?**

As a judicial nominee, it would not be appropriate for me to comment on political issues or issues that might come before the court.

a. What about greenhouse gases as a pollutant? If not, why not?

As a judicial nominee, it would not be appropriate for me to comment on political issues or issues that might come before the court.

4. Is it ever appropriate for local, state, or federal governments to limit the activities and or use of a private property owner's land in the interest of protecting the general public, the environment, or a specific species of animal?

As a judicial nominee, it would not be appropriate for me to comment on political issues or issues that might come before the court.

5. 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 court judge must always faithfully apply Supreme Court precedent. If so moved, a district court judge may respectfully point out discrepancies or misunderstandings related to a Supreme Court holding, or identify issues that may warrant further review. However, the district court judge should be cautious and restrained in such instances.

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

Only in those rare instances where a compelling justification exists. In doing so, the district court should be guided by relevant supreme court and circuit court decisions.

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

The Supreme Court possesses the authority to overrule its prior decisions. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). As a judicial nominee it would not be appropriate for me to provide commentary as to when the Supreme Court should exercise that authority.

6. 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 that all inferior courts are bound to faithfully apply. That faithful application is a mandate regardless of whether a precedent is academically referred to or described as “super-stare decisis” or “superprecedent”.

b. Is it settled law?

Roe v. Wade is binding precedent that, if confirmed, I will faithfully apply.

7. 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?**

Obergefell is binding Supreme Court precedent that I will faithfully apply if confirmed.

8. 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?

As a judicial nominee, it would not be appropriate for me to express a personal view on a particular Supreme Court opinion. If confirmed, I would faithfully apply the Supreme Court’s decision in *Heller* and all other Supreme Court and Ninth Circuit decisions.

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

In *Heller*, the Supreme Court provided that “nothing in this 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.” 554 U.S. 570, 626-27 (2008).

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

As a judicial nominee, it would not be appropriate for me to express a personal view on a particular Supreme Court opinion. If confirmed, I would faithfully apply the Supreme Court’s decision in *Heller* and all other Supreme Court and Ninth Circuit decisions.

9. 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?

The Supreme Court held that “the First Amendment protection extends to corporations.” *Citizen United v. Fed. Elections Comm’n*, 558 U.S. 310, 342 (2010). It is inappropriate for me to express an opinion about the case. *Citizen United* is binding precedent that I will apply, if confirmed.

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

It is inappropriate for me to express an opinion about the case. *Citizen United* is binding precedent that I will apply, if confirmed.

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

The Supreme Court has held that the Religious Freedom Restoration Act applies to closely-held corporations. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707-08 (2014). *Hobby Lobby* is binding precedent that I will apply, if confirmed. It is inappropriate for me comment further on this issue because it could come before the court in pending or impending litigation.

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

While the Supreme Court has determined that the Constitution contains strong guarantees of equal protection in a variety of contexts, the Court has also made clear that the Constitution strongly protects the free exercise of religion. The intersection and potential reconciliation of these guarantees is the subject of pending and impending litigation, and, therefore, as a judicial nominee it would not offer commentary on whether the Fourteenth Amendment places any limits on the free exercise of religion.

11. 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?

The Supreme Court ruled that state laws prohibiting interracial marriage violate Equal Protection in *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

12. 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 responses to Questions 10 and 11.

13. 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.

14. 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”?

Given the breadth of this topic, it would be difficult for me to provide a meaningful answer. However, if confirmed, I will faithfully follow all statutory law and relevant precedent, including *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1994).

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

Yes.

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

The Supreme Court has explained that legislative history, if clear, may be used to assist in determining the meaning of an ambiguous statutory text. *See Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992); *Milner v. Dep’t of Navy*, 131 S. Ct. 1259, 1267 (2011).

17. 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.

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

I reviewed the questions, conducted research, and reviewed drafted answers. I then shared my draft answers with individuals in the Office of Legal Policy at the United States Department of Justice.

**Nomination of Joshua M. Kindred, to be United States District Court Judge
for the District of Alaska
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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?

Over the past century, the Supreme Court has provided substantial guidance in the area of substantive due process. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483 (1955); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). If confirmed, I would endeavor to follow this guidance in order to properly apply the relevant factors.

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

Yes.

- 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. The Supreme Court in *Glucksberg* and *Obergefell* has indicated that fundamental rights are those rights that are "deeply rooted in this Nation's history and tradition", but that history and tradition "do not set its outer boundaries." *Glucksberg*, 521 U.S. at 710-19; *Obergefell*, 135 S. Ct. at 2598. If confirmed, I would maintain fidelity to the historical sources that the Supreme Court has identified, which have included, among others, statutory laws and the common-law tradition.

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

I would apply precedent from the Supreme Court and Ninth Circuit regarding the right at issue. I would also consider decisions from other circuits, and even district courts, for their persuasive value. *See Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001).

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right has been recognized by any court of appeals?

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*).

Yes, I would faithfully apply the Supreme Court’s decisions in *Casey* and *Lawrence*.

- f. What other factors would you consider?

I would consider any and all factors recognized and articulated by the Supreme Court and the Ninth Circuit.

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

The Supreme Court has repeatedly held that the Equal Protection Clause provides protections against gender discrimination. *See, e.g., Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689-90 (2017); *United States v. Virginia*, 518 U.S. 515, 531-32 (1996). If confirmed, I would faithfully follow this and all precedent.

- 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?

To the extent that the question relates to issues that may be the subject to pending or impending litigation, it would be inappropriate for me, as a judicial nominee, to provide any opinions and commentary.

- 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?

I do not possess any insight as to why the *Virginia* litigation was not initiated until the 1990s.

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

This question appears to seek an opinion on a legal issue that is pending or impending in current litigation. As a judicial nominee, it would be inappropriate for me to answer. *See* Canon 3A(6) of the Code of Conduct for United States Judges. However, the Supreme Court in *Obergefell* held that same-sex couples have a right to marry “on the same terms”

as opposite sex couples. 135 S.Ct. 2584, 2607 (2015). I will faithfully apply *Obergefell* and all other relevant binding precedent.

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

This question implicates specific legal issues that are pending or impending in court, so Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting.

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

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Supreme Court has recognized this right and, if confirmed, I will faithfully apply this and all precedent.

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

The Supreme Court held in *Roe v. Wade* and subsequent cases that the Constitution protects a woman's right to an abortion. If confirmed, I would faithfully follow this and all precedent.

- 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 Supreme Court has recognized this right in *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I will faithfully apply this and all precedent.

- 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.

Please see my responses above.

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 will fulfill my duty to observe and apply all binding Supreme Court and Ninth Circuit precedent, and when applicable precedent makes it appropriate to consider such evidence, I will do so in accordance with controlling precedent.

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

Under Federal Rule of Evidence 702, as well as precedent in the *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), line of cases, expert opinions from these disciplines may be admissible into evidence.

5. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."
 - a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

If confirmed, I would faithfully discharge my duty to apply all Supreme Court and Ninth Circuit precedents, including *Obergefell*. To the extent that the question relates to issues that may be the subject to pending or impending litigation, it would be inappropriate for me, as a judicial nominee, to provide any additional commentary.

- b. When is it appropriate to apply Justice Kennedy's formulation of substantive due process?

Again, if confirmed, I would faithfully discharge my duty to apply all Supreme Court and Ninth Circuit precedents, including *Obergefell*. To the extent that the question relates to issues that may be the subject to pending or impending litigation, it would be inappropriate for me, as a judicial nominee, to provide any additional commentary.

6. 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 spent the majority of my career in either the criminal or environmental arena and, as a result, I have not analyzed or considered this issue in sufficient detail to offer an informed opinion. Nevertheless, if confirmed, I will follow all binding Supreme Court and Ninth Circuit precedent regarding *Brown* and its progeny.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ or ‘equal protection,’ or ‘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 Dec. 6, 2019).

Please see my response to Question 6(a).

- 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?

If confirmed, I would be obliged to follow all Supreme Court and Ninth Circuit precedent, regardless of whether they rely on the original public meaning of the constitutional text.

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

Yes, to the extent that it has been dictated by Supreme Court precedent.

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

If confirmed, I would follow Supreme Court and Ninth Circuit precedent regarding what sources are properly considered in applying constitutional provisions in cases brought before the court.

- 7. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984), the Supreme Court stated:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

- a. Do you agree that the rationale and holding of *Chevron* remain good law?

As stated in my oral testimony, I would faithfully follow all relevant precedent, including *Chevron*.

- b. Are existing limits on the application of *Chevron* deference sufficient to prevent agencies from overstepping their interpretative authority?

This question implicates specific legal issues that are pending or impending in court, so Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting.

- c. If a statute is unclear, what is the appropriate level of deference that should be afforded to an administrative agency's interpretation?

Generally speaking, *Chevron* requires a federal court afford deference to an agency's interpretation of an ambiguous statute if the interpretation is determined to be reasonable. In *Christensen v. Harris County*, the Supreme Court articulated a secondary approach to deference, commonly referred to as *Skidmore* deference, which affords a federal court the ability to determine the appropriate level of deference for each case based on the agency's ability to support its position. The Supreme Court clarified this approach in *United States v. Mead*, holding that a court should grant *Chevron* deference to agency regulations and adjudicatory actions and provide *Skidmore* deference to other agency actions, such as interpretations, guidance, or policy statements. If confirmed, I would follow Supreme Court and Ninth Circuit precedent regarding the appropriate level of deference that should be afforded to an administrative agency's interpretation.

- 8. As a panel moderator at a 2017 conference of the Alaska Oil and Gas Association, you described the positions of some environmentalists as being driven by "passionate ignorance," and you stated that you yourself could be "accused of being apathetically ignorant." Please explain what you meant by each of these phrases.

If I recall correctly, I believe those phrases were used as preface to a question to the panelists. The ultimate gist of the question focused on the difficulty to engage in meaningful discourse in pursuit of solutions to important issues related to both the oil and gas industry and the environment. In other words, people are often extremely passionate about these topics, but sometimes ill-informed as to the underlying facts. I used my Sister as an example of someone who coupled passion with ignorance on environmental issues, and thus felt that describing myself as "apathetically ignorant" in a self-deprecating manner was a fitting, although possibly failed, attempt at humor.

- 9. In a 2017 regulatory update that you authored, you described the Waters of the United States rule as "vague," "overly broad," and based on a "flawed cost-benefit analysis."
 - a. Do you continue to believe that the Waters of the United States rule is "vague," "overly broad," and based on a "flawed cost-benefit analysis"?

I do not recall the specifics of this update and have no personal opinions on this particular topic.

- b. What is the role of a judge in assessing the validity of scientific evidence?

Under Rule 702 of the Federal Rules of Evidence as well as precedent in the *Daubert / Joiner / Kumho Tire* line of cases, expert opinions from these disciplines may be admissible into evidence.

- c. How would you evaluate scientific evidence regarding environmental impact?

If confirmed, I would, on a case by case basis strive to be consistent in my approach to evaluating scientific evidence in a manner consistent with Supreme Court and Ninth Circuit precedent.

**Questions for Joshua M. Kindred
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. In 2015, you testified before the Senate Energy and Natural Resources Committee regarding the Alaska National Interest Lands Conservation Act's effect on the oil and gas industry. Over the course of your testimony, you referenced your "lack of faith" in federal agencies. You specifically complained about "the fact that it's people four thousand miles away who are ultimately making the decision" who, in your view, "are ultimately making the decision that may be ideological in nature rather than practical." You made similar anti-federal agency comments before the Senate Subcommittee on Fisheries, Water, and Wildlife in 2016.

This anti-federal agency view is a common theme with many of President Trump's judicial nominees. Last month, Justice Kavanaugh wrote a statement accompanying the Court's denial of certiorari in the case *Paul v. United States*. He went out of his way to praise a dissent Justice Gorsuch authored in *Gundy v. United States* that criticized the current judicial approach to the nondelegation doctrine as too lax. Together, Justices Kavanaugh and Gorsuch appear to be inviting parties to bring cases that will allow them to overturn decades of precedent and severely limit the ability of federal agencies to put forth regulations that would protect the environment and defend consumers from abuse by corporations, to name a few examples.

a. What is your understanding of the nondelegation doctrine?

The non-delegation doctrine is an administrative law principle that Congress is prohibited from delegating its legislative powers to other entities.

b. If you are confirmed as a federal district court judge, why should a party seeking to enforce agency regulations have confidence that you will do so fairly in view of your stated "lack of faith" in federal agencies?

There are a variety of reasons that parties should feel confident. Perhaps first and foremost, I am no longer an attorney for the Alaska Oil and Gas Association, and, as a result, I am not longer an advocate on its behalf. More importantly, deferring to positions advanced by my prior clients, including the Department of Interior, would violate my role

and responsibility as a judge. Second, I currently serve as a Regional Solicitor for the Department of Interior, and my clients are all federal agencies, and I have a great deal of respect and admiration for each of those agencies. If confirmed, I commit to being fair and impartial to all who appear before me and I will objectively consider the facts of each case and faithfully apply the law.

3. With the Senate's recent confirmation of Dan Brouillette as Energy Secretary, over 30% of President Trump's cabinet consists of former lobbyists. These people are in senior positions tasked with overseeing the industries they previously lobbied for.

Now you have been nominated to be a judge on the District of Alaska. Between 2013 and 2018, you served as Environmental Counsel for the Alaska Oil and Gas Association. The *Anchorage Daily News* described your former employer as "the [oil] industry's lobbying group." In some remarks you gave at an Alaska Oil and Gas Association Conference in 2017, you described your role as "pushing back against federal regulations" in the oil and gas sector.

- a. **Do you find it concerning that the Trump Administration has appointed so many former lobbyists to key administration and judicial positions?**

As a judicial nominee, it would not be appropriate for me to comment on political issues.

- b. **Should you be confirmed to be a judge, why should a litigant coming before you to enforce environmental laws against the oil and gas industry expect to be treated fairly?**

Please see my answer to Question 2(b).

4. In 2017, you assisted in a petition for certiorari to the Supreme Court in *Alaska Oil and Gas Association v. Ross*, a case involving the National Marine Fisheries Service's listing of the bearded seal as a threatened species. In the brief, you argued that the Service improperly based its decision on climate change models that predict continued Arctic sea ice declines through the end of the 21st century and the impact those declines would have on bearded seal populations. You criticized the Service for relying on what the Ninth Circuit called "the best scientific and commercial data available" and claimed reliance on such data would grant the service "unfettered discretion" and "drastically lower (if not entirely remove) the evidentiary threshold required to list a species under the [Endangered Species Act]."

- In your view, what type and quantity of evidence is necessary to list a species as threatened under the Endangered Species Act?**

As a judicial nominee, it would not be appropriate for me to comment on political issues or issues that might come before the court.

5. For the past 6 years, you've spent only a small percentage of your time litigating cases. Between 2013 and 2018, you served as Environmental Counsel for the Alaska Oil and Gas Association, a position you described as being an "advocate for the oil and gas industry." On your Senate Judiciary Questionnaire, you estimated that only 10% of your time in this role was spent on litigation. In 2018, you moved to the Department of the Interior to serve as Regional Solicitor. You estimated that only 25% of your time in this role has been spent on litigation.

Having been largely out of litigation for the past 6 years, what in your view makes you the most qualified person to serve as judge for the District of Alaska?

I do not think I am in the best position to objectively state who is, or is not, the most qualified person to serve as judge for the District of Alaska. However, I would disagree with a suggestion that litigation is the best or exclusive indicator of qualification or a suggestion that I am lacking sufficient litigation experience. My entire legal career has been spent in litigation (in one form or another). I have experienced litigation through the lens of a State Appellate Court. I worked on litigation as a law firm associate. I spent over five years as a prosecutor for the state of Alaska, handling hundreds of cases ranging from low-level assault and drug cases to sexual assaults and homicides. I have taken dozens of cases to trial. Over the past six years I have managed litigation from its inception at the District Court all the way to the United State Supreme Court. In other words, I do believe that I am qualified to serve as judge for the District of Alaska, but I am not in a position to state that I am the most qualified.

6. On your Senate Judiciary Questionnaire you identified two cases from your time as Regional Solicitor for the Department of Interior as among your most significant litigated matters—*Northern Alaska Environmental Center v. United States Department of the Interior* and *Natural Resources Defense Council v. Zinke*. Despite your identification of these cases as among your most significant litigated matters, your name does not appear on any of the briefs in the cases.

What was your role in these two cases?

Assisting in the drafting and editing of briefs as well as oral-argument preparation.

7. 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?

I believe I have, although it might have been best described as tangentially related to implicit bias. It was part of a broader training I received when I was an Assistant District Attorney for the State of Alaska.

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

I commit to seeking out and engaging in any training that will assist me in the pursuit of a more equitable courtroom.

**Nomination of Joshua M. Kindred
United States District Court for the District of Alaska
Questions for the Record
Submitted December 11, 2019**

QUESTIONS FROM SENATOR BOOKER

1. In an NPR article from 2018 titled “Oil Industry Copes with Climate Impacts as Permafrost Thaws,” you are quoted as saying, “It is ironic, and it’s challenging for a state that is so dependent on resource extraction but is also really feeling the impacts of climate change.”¹

- a. Why did you think the situation the oil industry was facing at the time of the interview was “ironic”?

Those statements were part of a long conversation/interview I had with a reporter on the topic of climate change. My statement was not describing the situation that the oil industry was facing as ironic. Rather, as quoted above, I described the situation the state of Alaska was facing as “ironic”.

- b. What were some of the climate change impacts you witnessed in Alaska that led you to call the situation “ironic”?

I was not referring to any specific impacts. Again, my quotes were pulled from a separate interview that discussed climate change in general and I do not believe I received any questions directly as to how the “Oil Industry Copes with Climate Impacts as Permafrost Thaws”.

2. What was your involvement in the development of the Tax Cuts and Jobs Act of 2017 provisions that related to the Arctic National Wildlife Refuge?

None.

3. In 2015, on behalf of the Alaska Oil and Gas Association, you opposed additional protections for polar bears stating that “the polar bear is not an endangered species.”² You argued that the U.S. Fish and Wildlife Service’s analysis of the species status in 2010 “accurately describe[d] the species” status in 2015.³

- a. Do you stand by that comment you submitted to the U.S. Fish and Wildlife Service?

I submitted that comment while serving as Environmental Counsel for the Alaska Oil and Gas Association, and thus the comments are attributable to that organization. However, the statement that that “the polar bear is not an endangered species” is a not a position as much as a restatement of the Fish and Wildlife Service’s position, which both in 2010 and 2017 concluded that the polar bear species is not “endangered”. Currently, and since its original listing, the Fish and Wildlife Service has listed the species as “threatened”.

- b. Why did you believe that there were adequate protections for polar bears in 2015?

Again, the Alaska Oil and Gas Association comments are not a reflection of my

personal beliefs. Rather, the comments are attributable to the organization. However, ultimately, the position that adequate protections existed for polar bears was born from the repeated conclusions of the U.S. Fish and Wildlife Service. For example, in the original Endangered Species Act listing of the polar bear species, FWS concluded: “Documented direct impacts on polar bears by the oil and gas industry during the past 30 years are minimal.” FWS also concluded that: “Since the beginning of the incidental take program, which includes requirements for monitoring, project design, and hazing of bears presenting a safety problem, no polar bears have been killed due to encounters associated with the current industry activities on the North Slope of Alaska.” In announcing the Final Polar Bear Special Rule in 2013, USFWS stated: “Potential harm to polar bears that is incidental to onshore and offshore oil and gas exploration, development, and production activities in Alaska has been effectively governed for decades under the more stringent MMPA provisions. Under this Special Rule, the Department of the Interior will continue to primarily rely on the more stringent provisions of the MMPA to control such activities.” Finally, in its Polar Bear Recovery Plan, FWS stated: “Potential future management concerns posed by disease, oil and gas activities, contamination from spills, and increased Arctic shipping are acknowledged but, because these factors have not been identified as threats at present, no recovery criteria are associated with them.”

4. In 2017, you said that environmentalists were driven by “passionate ignorance.”⁴

a. What did you mean by this comment?

If I recall correctly, I believe those phrases were used as preface to a question to a group of panelists. The ultimate gist of the question focused on the difficulty to engage in meaningful discourse in pursuit of solutions to important issues related to both the oil and gas industry and the environment. In other words, people are often extremely passionate about these topics, but sometimes ill-informed as to the underlying facts. I used my Sister as an example of someone who coupled passion with ignorance, and with whom I struggled to engage in meaningful conversations with.

b. Based on this comment, if you were to be confirmed, do you think it would be unreasonable for a litigant who appears before you on behalf of an environmental nonprofit to question whether you would be a fair and impartial jurist?

I do not think I can answer whether someone’s subjective beliefs are reasonable to not. I can say unequivocally that, if I were confirmed, environmental litigants, like all litigants, would receive fair and impartial treatment.

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

I do not believe that the terms or concepts “originalist” or “textualist” have universally accepted meanings. Nevertheless, I would not consider myself as having adopted a fidelity to either judicial philosophy. I believe that the Supreme Court or Ninth Circuit have provided guidance that could be described as embracing both concepts and, if confirmed, I will faithfully apply all relevant precedent concerning the appropriate modes of constitutional and statutory interpretation.

¹ Elizabeth Harball, *Oil Industry Copes with Climate Impacts as Permafrost Thaws*, NPR (June 11, 2018); *see also* SJQ Attachments to Question 12(e) at 678-79.

² Comment Letter, *Re: Comments of the Alaska Oil and Gas Association and American Petroleum Institute on Five-Year Review of the Polar Bear* (Dec. 14, 2015); *see also* SJQ Attachments to Question 12(c) at 380.

³ *Id.* at 382.

⁴ Joshua Kindred, Moderator, *Not Your Grandfather's Environmentalism*, ALASKA OIL AND GAS ASS'N, Anchorage, Alaska (May 31, 2017), <https://vimeo.com/221215684#t=32m>.

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

Please see my response to Question 5.

7. 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?

The Supreme Court has held that legislative history should be considered only if the statutory text itself is ambiguous. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The Supreme Court has also held that only pre-enactment legislative material may be considered when determining the meaning of a statute. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."). If confirmed, I will apply Supreme Court and Ninth Circuit precedent regarding the use of legislative history.

- 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 7(a).

8. 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.⁵ Was that decision guided by the principle of judicial restraint?

As a judicial nominee, it would not be appropriate for me to express a personal view on a particular Supreme Court opinion. If confirmed, I would faithfully apply the Supreme Court's decision in *Heller* and all other Supreme Court and Ninth Circuit decisions.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁶ Was that decision guided by the principle of judicial restraint? Again, as a judicial nominee, it would not be appropriate for me to express a personal view on a particular Supreme Court opinion. If confirmed, I would faithfully apply the Supreme Court's decision in *Citizens United* and all other Supreme Court and Ninth Circuit decisions.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.⁷ Was that decision guided by the principle of judicial restraint?

Again, as a judicial nominee, it would not be appropriate for me to express a personal view on a particular Supreme Court opinion. If confirmed, I would faithfully apply the Supreme Court's decision in *Shelby County* and all other Supreme Court and Ninth Circuit decisions.

9. 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 the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.⁸ 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.⁹

⁵ 554 U.S. 570 (2008).

⁶ 558 U.S. 310 (2010).

⁷ 570 U.S. 529 (2013).

⁸ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

⁹ *Id.*

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

As a judicial nominee, it would not be appropriate for me to comment on political issues or issues that might come before the court.

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

Please see my response to Question 9(a).

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

Please see my response to Question 9(a).

10. 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.¹⁰ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹¹ 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.¹² In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹³

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

Yes.

- 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.

While it has been a topic that has been discussed in the context of broader training I have received, I have not studied the issue explicitly.

- 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.¹⁴ Why do you think that is the case?

I believe there are a litany of factors at play, ranging from systemic and institutional issues to discrete and individual. However, as a judicial nominee, it would not be appropriate for me to comment on political issues or issues that might come before the court.

- 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.¹⁵ Why do you think that is the case?

Please see my answer to Question 10(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?

I believe that federal judges have a duty to constantly pursue of the fair and equitable administration of law to those matters that come before them. This entails application of the law without regard to an individual's race, as well as the pursuit of eliminating any potential for implicit racial bias.

¹⁰ 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>.

¹¹ *Id.*

¹² 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>.

¹³ *Id.*

¹⁴ U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

¹⁵ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

11. 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.¹⁶ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁷

- 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.

I have not reviewed or studied this question thoroughly enough to provide an informed response.

- 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.

I have not reviewed or studied this question thoroughly enough to provide an informed response.

12. 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.

13. 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.

14. Do you believe that *Brown v. Board of Education*¹⁸ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

15. Do you believe that *Plessy v. Ferguson*¹⁹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No.

16. 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.

17. 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 heritage."²⁰ Do you agree with President Trump's view that a judge's race or ethnicity can be

a basis for recusal or disqualification?

As a judicial nominee, it would not be appropriate for me to comment on political issues or issues that might come before the court.

18. 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,

¹⁶ 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>.

¹⁷ *Id.*

¹⁸ 347 U.S. 483 (1954).

¹⁹ 163 U.S. 537 (1896).

²⁰ 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>.

bring them back from where they came.”²¹ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has held that due process protections apply to all “persons” in the United States, including aliens, regardless of their entry status. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). I will apply this Supreme Court precedent, if confirmed.

²¹ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.