Nomination of Joan Larsen
to the U.S. Court of Appeals for the Sixth Circuit
Questions for the Record
Submitted September 13, 2017

QUESTIONS FROM SENATOR WHITEHOUSE

1. At your confirmation hearing, I expressed concern over the dark money campaign behind your nomination process.
    a. Have you ever had any communications of any kind with any individual associated with the Judicial Crisis Network?

Please see my response to Question 13 from Senator Feinstein.

b. What assurance can you give this Committee that you will not be beholden to the special interests that have been running advertisements on your behalf?

A judge's duty is to apply the law fairly and evenhandedly, not in a way that satisfies any special interests; a judge must rule impartially in every case and controversy that comes before the court. As a Justice of the Michigan Supreme Court, I believe I have faithfully and consistently adhered to this duty, and if confirmed as a circuit judge, I would do the same.

c. You explained at your confirmation hearing that you believe that your record on the Michigan Supreme Court reflects an even split of pro-business and pro-individual decisions. On what basis did you make that assertion? Why do you believe these pro-business groups are providing such large donations to support your nomination?

I do not know, and therefore cannot comment on, the thought processes of any group that may have supported my nomination. At my hearing, I was referring to the Michigan Supreme Court opinions I have authored and joined. Reviewing my votes in cases in which a private individual was involved in litigation against a corporation or insurance company reveals that I have ruled in favor of private individuals about as often as I have ruled in favor of business interests. I do not believe it appropriate, however, to base judicial decisions on the status or identities of the parties; judges must rule only according to the law.

2. At your confirmation hearing, you declined to answer numerous questions about your views on certain specific cases and legal issues, indicating that doing so would be inappropriate because it might give future litigants the impression that you would not approach an issue impartially as a judge. In your record of writings and speeches made before your election to the Michigan Supreme Court, however, you have freely opined on particular cases and issues. Why should those same future litigants not be concerned about your impartiality based on your pre-nomination record, just as you propose they would be based on your answers to questions at the confirmation hearing?

A judge's duty is to set all personal beliefs aside and apply the law faithfully and impartially. I believe my record as a Justice of the Michigan Supreme Court establishes that I have adhered to this duty, regardless of any statements made before I assumed office. If confirmed as a circuit judge, I would do the same.

3. What point in time would you use to interpret the meaning of constitutional text? At the time of the drafting? In other words, do you believe that the Fourteenth Amendment should be limited to what the drafters may have thought it meant in 1868? Or, by contrast, do you agree with the view that the scope and understanding of liberty may evolve over time?

Please see my response to Question 6 from Senator Feinstein.

4. In a 2010 article, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, you outlined your belief that under originalism, "Constitutional rights are frozen in the past in the sense that judges are charged with preventing an erosion of those rights as they were originally understood. But the judicial role ends there. Originalists do not believe judges to be licensed to expand those rights beyond the original understanding."
    a. Do you believe that *Brown v. Board of Education* is an example of judges expanding constitutional rights beyond the original understanding?
        i. What about *Griswold v. Connecticut?*
        ii. *Roe v. Wade?*
        iii. *Pierce v. Society of Sisters?*
        iv. *Skinner v. Oklahoma?*
        v. *Loving v. Virginia?*
        vi. *Obergefell v. Hodges?*
        vii. *United States v. Windsor?*
        viii. *Lawrence v. Texas?*
        ix. *Romer v. Evans?*

There is considerable debate, even among originalists, about how originalism should operate in general and how it should apply in any particular case. Each of the aforementioned cases is a precedent of the Supreme Court that binds me as a Justice of the Michigan Supreme Court and would bind me if I were confirmed to the Sixth Circuit. My duty and commitment to follow Supreme Court precedent does not and would not depend upon whether a precedent comports with any particular theory of constitutional interpretation.

5. In a book review from 2000, you wrote, "In the case of abortion, the constitutional right was first formally articulated by the Supreme Court itself, not by the citizenry. . . . The people think the Constitution guarantees a fundamental right to abortion because the Supreme Court told them that it does."
    a. Do you believe there is a fundamental right to abortion in the Constitution?

The Supreme Court has held that there is, first in *Roe v. Wade*, 410 U.S. 113 (1973), and many times since, including in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

b. As a judge, would you continue to uphold and enforce *Roe,* as the Court has done for the past 44 years?

Both in my current role as a Justice of the Michigan Supreme Court and if confirmed to the Sixth Circuit, I will faithfully apply *Roe*, *Casey*, and any other binding precedent of the Supreme Court.

6. In *Mabry v. Mabry* in 2016, you denied review of a court of appeals' decision holding that Michigan's equitable-parent doctrine did not apply to disputes between same-sex couples, thus denying relief to a woman seeking parental rights against a same-sex partner she had been with for fifteen years.
    a. Do you believe that in refusing this appeal you faithfully applied *Obergefell*? Why or why not?

Please see my response to Question 17 from Senator Feinstein.

b. Can you explain your reason for denying review, particularly given that the children of same-sex couples and their constitutional rights were central to the Court's analysis in *Obergefell*?

Please see my response to Question 17 from Senator Feinstein.

c. Do you agree that *Obergefell* compels equal application of parentage laws to custody disputes between same-sex couples who were unconstitutionally prohibited from becoming legally married?

This question appears to call for me to weigh in on a matter that is or could be the subject of litigation, which I cannot do consistent with my ethical obligations. See Canon 3(A)(6), 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. . . ."); Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

d. In *Pavan v. Smith*, 582 U. S._____(2017), the Supreme Court summarily reversed a decision from the Arkansas Supreme Court refusing to list both members of a same-sex married couple on their child's birth certificate. Justice Gorsuch dissented from that decision, arguing that *Obergefell* did not decide the question presented in that case. What is your view?

It would be inappropriate for me, as a judicial nominee, to opine on the merits of any particular Supreme Court opinion. *Pavan* is a precedent of the Supreme Court, and I will faithfully follow it and all other Supreme Court precedent.

e. Do you agree with the majority of the Supreme Court in *Obergefell v. Hodges* that the right to marry is a fundamental right under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and that same-sex couples may

not be deprived of that right and its attendant benefits?

It would be inappropriate for me, as a judicial nominee, to opine on the merits of any particular Supreme Court opinion. *Obergefell* is a precedent of the Supreme Court, and I will faithfully follow it and all other Supreme Court precedent.

7. In a 2004 article, you disagreed with the Supreme Court's inclusion of international law and norms as a factor in deciding *Lawrence v. Texas*, the 2003 landmark ruling striking down Texas's anti-sodomy law as an unconstitutional deprivation of liberty. In the introduction to the article, you framed your criticism of *Lawrence* broadly when you wrote, "The decision of the U.S. Supreme Court in *Lawrence v. Texas*, is remarkable for many reasons, not the least of which is the Court's reliance on international and foreign law sources in its constitutional interpretation."
   a. Besides your objection to the reliance on international law sources, what else do you find "remarkable" about the Court's decision in *Lawrence*?

I do not recall what specifically I meant when I stated that the decision was "remarkable for many reasons" in 2004, but the Court's decision in *Lawrence* was surely worthy of attention, if for no other reason than that it overturned one of the Court's own precedents. The article took no position on whether *Lawrence*'s holding was correct, but instead discussed the Supreme Court's use of comparative and international law in constitutional interpretation.

   b. Do you think that the Supreme Court was correct to overturn *Bowers v. Hardwick* in *Lawrence v. Texas*? Do you consider it to be settled law that a State may not legislatively target LGBT people for disfavored treatment based on certain moral views about sexual orientation or gender identity? If not, why not?

It would be inappropriate for me, as a judicial nominee, to opine on the merits of any particular Supreme Court opinion. *Lawrence* is a precedent of the Supreme Court, and I will faithfully follow it and all other Supreme Court precedent.

   c. In your view, what limits (if any) are there on the government's ability to intrude upon personal decisions regarding the creation of personal relationships, family formation and procreation? Does the right to engage in private, adult, consensual sex without interference by the government belong equally to all people regardless of sexual orientation?

The Supreme Court has held that the Constitution protects many personal decisions against government intrusion. For example, the Court has recognized the right of married and unmarried persons to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and has recognized the right to abortion, *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The Supreme Court has also recognized the right to engage in private, adult, consensual sex regardless of sexual orientation. *Lawrence v. Texas*, 539 U.S. 558 (2003). The remainder of this question, however, appears to request that I weigh in on a matter that is or could be the subject of litigation, which I cannot do consistent with my ethical obligations. See

Canon 3(A)(6), 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. . . ."); Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

8. In a 2012 speech to a Federalist Society chapter, you suggested that the Defense of Marriage Act (DOMA) was constitutionally sound and argued that the President should defend that law. Do you still believe that today? Why or why not?

The speech to which this question refers did not take a position on whether the Defense of Marriage Act could survive a constitutional challenge but instead considered when the Solicitor General's office should defend any statute against a constitutional challenge in court. I discussed my understanding of the traditional view of the Solicitor General's office, quoting former Solicitor General Seth Waxman for the proposition that "the Department of Justice defends Acts of Congress in all but the rarest cases," so long as "professionally respectable arguments can be made in support of [their] constitutionality." Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1078 (2001). With respect to the Defense of Marriage Act, the Supreme Court held Section 3 of the Act unconstitutional in *United States v. Windsor*, 570 U.S. __ (2013). *Windsor* is a precedent of the Supreme Court, and I will faithfully follow it and all other Supreme Court precedent.

9. During your time at OLC, what was the extent of your involvement in the memos related to the War on Terror?

National security information in the Justice Department, as in other parts of the government, is tightly controlled and disseminated on a "need to know" basis. I did not work on the torture memos, policies regarding the treatment of Guantanamo detainees, or warrantless surveillance. Accordingly, I was not read-in on those matters. I learned about them when they became the subject of media reports after I had left government.

   a. Did you work on anything related to the torture memos?

Please see my response to Question 9 above.

   b. Did you work on anything related to Guantanamo detainee policies

Please see my response to Question 9 above.

   c. Did you work on anything related to warrantless surveillance?

Please see my response to Question 9 above.

   d. Regardless of whether you actually worked on memos on these subjects, did you ever informally express an opinion or concerns about OLC's work on these subjects, as Jack Goldsmith and others did while at OLC?

Because I learned about these memos after I had left government, I could not have expressed opinions or concerns about them while at OLC.

10. Given your work at OLC, your approval of the use of signing statements to let a President ignore key provisions in laws passed by Congress, and your dismissive views about Congressional oversight, how can you assure us and the American people that you will be an independent check on President Trump and the executive branch?

As I explained at my hearing, judicial independence means putting the law above everything else, and I have a record of such independence as a Justice on the Michigan Supreme Court. No person—including the President—is above the law. If confirmed, I would not hesitate to hold that any President had exceeded his constitutional authority if the law so commanded. With respect to my record, at OLC, I took seriously my oath to support and defend the Constitution while providing legal advice to the Executive Branch. In my op-ed about signing statements, I made clear that if "the president's duty to protect the country ever authorizes (or compels) him to ignore the expressed will of Congress" it does so only "[b]ecause the Constitution so commands." And in the article I wrote with my professor about the Incompatibility Clause, we discussed congressional oversight as part of our larger discussion of the ways in which the Incompatibility Clause is central to the Constitution's plan for maintaining separation and independence between the legislative and executive powers of government.