

**Nomination of Lawrence James Christopher VanDyke to the United States Court of  
Appeals for the Ninth Circuit  
Questions for the Record  
Submitted November 6, 2019**

**QUESTIONS FROM SENATOR FEINSTEIN**

1. From 2013 to 2014, you served as the Montana Solicitor General. From 2015-2019, you served as the Nevada Solicitor General.

**a. While serving as either Montana or Nevada Solicitor General, did you ever conceive of, recommend, or advocate for a particular litigation position or a specific legal argument that the state ultimately adopted? If so, please describe.**

Yes. The Montana and Nevada Attorneys General frequently considered and evaluated counsel from me and others in the respective offices.

**b. Did you ever recommend that the state should not take a particular litigation position or should not make a specific legal argument that the state nevertheless adopted? If so, please describe.**

Yes. The Montana and Nevada Attorneys General frequently considered and evaluated counsel from me and others in the respective offices.

2. In 2014, when you were a candidate for the Montana Supreme Court, you were endorsed by the National Rifle Association (NRA). On a questionnaire seeking the group's endorsement, you wrote: "I have previously been a member of the NRA, but am not currently a member. I don't want to risk recusal if a lawsuit came before me where the NRA was involved." (VanDyke Response to Question 21 of 2014 NRA Candidate Questionnaire)

In your Senate Judiciary Questionnaire, you stated that you are currently a member of the NRA.

**a. Why did you attempt to ensure that you would be able to preside over cases involving the NRA if you were elected to the Montana Supreme Court?**

Judges (and candidates to become judges) should always seek to minimize the circumstances in which they will be required to recuse from hearing cases.

**b. If confirmed to the Ninth Circuit, will you commit to recusing yourself from any case where the NRA is involved? If not, please explain why you are applying a different recusal standard to yourself now than you did in 2014.**

Please see my response to Question 2(a). As I stated at my hearing, if confirmed to the Ninth Circuit, I will terminate my NRA membership. As I noted on Question 24 of my Senate Judiciary Questionnaire, if I am confirmed, I will carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to

determine if recusal is appropriate on a case-by-case basis. For specific cases on which I have worked, 28 U.S.C. § 455(b)(3) establishes a bright-line test requiring recusal. For other cases on which I have had no involvement, I would carefully evaluate and apply the standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges, and any relevant authorities interpreting these provisions.

**c. Since you have publicly attempted to ensure you could preside over cases involving the NRA, please explain how litigants can expect you to rule impartially in any cases involving gun control.**

Please see my responses to Questions 2(a) and 2(b). I fully recognize the difference between being an advocate or a legislator and being a judge. If confirmed, I will set aside any advocacy positions and policy views and faithfully apply the relevant precedent in the cases that come before me. The importance of judges being fair and impartial is a longstanding view of mine. As evidenced by the speech notes that I provided as an attachment to my Senate Judiciary Committee Questionnaire, during my 2012 judicial campaign I emphasized in literally hundreds of speeches that the “job of our courts is to make sure that everyone gets a fair hearing – nobody should have to worry whether the judge and I see eye-to-eye ... or what his personal views are. [T]hey should know that no matter what the judge’s own preferences are, it will be the law that is applied, not the judge’s own preferences. . . . That is what I believe, and that is the kind of judge I will strive to be if I’m elected.” SJQ Attachments to Question 12(d) at 305.

3. On your 2014 NRA candidate questionnaire, you also indicated that you believe all “[g]un control laws are misdirected” and that you oppose banning the sale or possession “of any firearm.” You also indicated that you would support legislation to repeal state restrictions on carrying guns in sensitive places like banks, government office buildings, places where alcohol is served, and college campuses. (VanDyke Responses to 2014 NRA Candidate Questionnaire)

**Given that you have expressed strong views opposing all gun control measures, will you commit to recusing yourself from any cases involving regulation of guns? If not, please explain how litigants can expect you to rule impartially in any cases involving gun control.**

Please see my responses to Questions 2(a) and 2(b). As noted in my email transmitting the completed questionnaire, the questionnaire was “obviously geared towards legislative candidates,” so I “answered it as if I was a legislative candidate. My role as a [state] Supreme Court justice would be different, obviously. Legislators make the law. Justices apply the law; they shouldn’t be legislating from the bench. And if elected to the Montana Supreme Court, I am 100% committed to being a justice who correctly *applies* the law.” Like the role of a state court justice, the role of a federal judge is very different than that of a legislator. If I am confirmed to the Ninth Circuit, I remain 100% committed to performing my role as a judge by correctly and faithfully applying the law as written without any regard for my personal views or policy preferences.

4. On your 2014 NRA candidate questionnaire, you indicated that you oppose closing loopholes in the federal background check system for gun purchases. (VanDyke Response to Question 8 of 2014 NRA Candidate Questionnaire)

**Why do you believe that every person who buys a gun should not be required to undergo a criminal background check?**

As a federal judicial nominee, it would not be appropriate for me to state my personal opinion on this issue as it is either currently before the courts or may come before the court. Please see my responses to Questions 2 and 3. If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent on any issue that comes before me as a sitting judge, without regard to my personal views or policy preferences.

5. During your hearing, you characterized the Solicitor General role as requiring you to defend state laws and attacks on state laws. But as Montana Solicitor General, you recommended against defending a state statute that prohibited political parties from endorsing candidates in the state's nonpartisan judicial elections. (*Sanders County Republican Central Committee v. Fox*, 717 F.3d 1090 (9th Cir. 2013)) After the Ninth Circuit struck down the law, you emailed Montana Attorney General Tim Fox and wrote: "I guess the next question is whether the state should seek en banc review or seek cert. I strongly think we should not. Enough is enough." Notably, it appears you made this recommendation before you actually read the Ninth Circuit's opinion. (Emails via GREAT FALLS TRIBUNE Records Request (Sept. 2014))

**If your job was simply to defend state laws, then why did you recommend against defending the statute at issue in the *Sanders County* case?**

State and federal solicitors general routinely recommend for or against seeking further appellate review in cases. Some of the general considerations behind the recommendations include the anticipated likelihood of prevailing on appeal, allocation of resources, limiting attorneys' fees liability, and the possibility of receiving a worse decision on appeal. In the Montana Attorney General's office, the Montana Attorney General was the official ultimately responsible for deciding whether to appeal an adverse decision. It would be inappropriate for me to divulge client confidentiality by discussing the reasons for my recommendations to the Montana Attorney General beyond those already available in publicly available documents.

6. As Montana Solicitor General, you defended a state statute claiming that the federal government could not regulate guns manufactured in Montana if the guns remained within the state. (*Montana Shooting Sports Ass'n. v. Holder*, 727 F.3d 975 (9th Cir. 2013))

You called the law "ill-advised" and admitted that you were struggling to come up with "plausible" arguments to defend it. Yet you asked a Federalist Society contact to help craft your argument. (Emails via GREAT FALLS TRIBUNE Records Request (Sept. 2014)) And after the Ninth Circuit struck the law down, you appealed to the U.S. Supreme Court, which declined to hear the case. At your hearing, I asked you why you chose to defend this measure. You said that "it was a challenging law to defend" but that you wanted to "do [your] job and defend that law."

**Why did you go to such lengths to defend this measure but not the statute at issue in the Sanders County case?**

Please see my response to Question 5.

7. In 2016, Nevada voters passed a ballot initiative that would have closed a loophole by requiring the FBI to conduct background checks for certain private gun sales. You called the initiative “defective,” and your office litigated against implementing it. (Ric Anderson, *NRA can't help in lawsuit over gun background checks*, LAS VEGAS SUN (Feb. 23, 2018))

**Why did you oppose this law when it was the clear desire of Nevada voters to implement these background checks?**

Please see my response to Question 5. As in the Montana Attorney General’s office, the Nevada Attorney General was the official ultimately responsible for deciding which cases to litigate and our position in those cases. In the ballot initiative case referenced, the FBI refused to implement the Nevada law notwithstanding repeated requests from the Nevada Governor. A mandamus action was brought against the Governor and Attorney General, which I successfully defended in trial court in my capacity as Nevada’s Solicitor General. The action was dismissed, with the court concluding that “neither the Governor nor the Attorney General has disregarded a clear and specific duty required by law,” and that “unless and until the federal government agrees to enforce [Nevada’s ballot initiative], . . . it is unenforceable as written.”

8. As Montana Solicitor General, you recommended joining an amicus brief arguing that New York’s assault weapons ban was unconstitutional. The brief stated, “[s]tudies show that the federal ‘assault weapons ban’ had no measurable effect on gun violence.” (Brief of Alabama et al. as Amici Curiae in Support of Plaintiffs-Appellants, *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015))

**a. Please identify the specific studies that you personally reviewed to reach the conclusion that my 1994 Assault Weapons Ban “had no measurable effect on gun violence.”**

This multi-state *amicus* brief was authored by Alabama. I did not draft the brief and my name was not on it. The State of Montana joined the brief through the Montana Attorney General. See Multi-State *Amicus* Br. at 17. This question quotes the multi-state *amicus* brief. In its argument section, the *amicus* brief identified the studies it relied on. See *id.* at 12-14.

Multiple studies have shown that there were fewer mass shootings while the Assault Weapons Ban was in effect, and that there were significantly more after it expired. (See, e.g. Professor Louis Klarevas, University of Massachusetts, “Rampage Nation” (2016))

**b. In light of this more recent data, do you agree that the Assault Weapons Ban did, in fact, have a measurable effect on gun violence?**

Please see my response to Question 8(a). I have not reviewed the 2016 study referenced in this question, and do not presently have any informed views concerning the question asked. In any event, if this issue were to come before me in a case, as with any issue, my legal analysis would be focused solely on the law, precedent, and the facts presented in the case before me, not personal or policy views.

9. While you were seeking to become a justice on the Montana Supreme Court, you completed the National Rifle Association's candidate questionnaire and provided your personal views about guns. During your hearing, I asked whether you still maintained the answers that you gave to the NRA. You declined to answer. If you could answer the NRA's questions while seeking to become a justice on the Montana Supreme Court, you should be able to answer the same questions from Senators while seeking a lifetime appointment to the Ninth Circuit. With that in mind, please answer the following:

**Do you stand by the answers that you gave to the NRA when you were seeking a seat on the Montana Supreme Court? If your answer is anything other than an unqualified "yes", please provide your current answers to the NRA's questionnaire, as reproduced below:**

Please see my response to Questions 2, 3, and 4.

***a. Do you agree that the Second Amendment to the United States Constitution guarantees a fundamental, individual right to keep and bear arms that applies to all Americans, regardless of where they live in the United States?***

- i. Yes.* \_\_\_\_
- ii. No.* \_\_\_\_

Please see my response to Questions 2, 3, and 4.

***b. Which of the following statements best represents your opinion on the prevention of violent crime?***

- i. Gun control laws will solve the crime problem.*
- ii. Gun control laws will not solve the crime problem, but they must be a part of the overall solution.*
- iii. Gun control laws are misdirected; the solution is the enforcement of existing laws which punish criminals who misuse firearms and other weapons in the commission of crimes.*
- iv. Other:* \_\_\_\_\_

Please see my response to Questions 2, 3, and 4.

***c. Considering current Montana firearm laws, would you support any additional restrictive state legislation regulating firearms and/or ammunition?***

- i. Yes, I support additional restrictive state legislation regulating firearms and/or ammunition.*

ii. *Yes, I support additional restrictive state legislation regulating firearms. Please explain:*

iii. *Yes, I support additional restrictive state legislation regulating ammunition. Please explain:*

iv. *No, current state firearm laws are sufficient.*

v. *No, current state firearm laws should be improved to benefit law-abiding gun owners and sportsmen in Montana.*

Please see my response to Questions 2, 3, and 4.

**d. *Would you support state legislation banning the manufacture, possession, ownership, purchase, sale and/or transfer of any firearms?***

i. *Yes, for all firearms. Please specify type of restrictions: \_\_\_\_\_*

ii. *Yes, for all handguns. Please specify type of restrictions: \_\_\_\_\_*

iii. *Yes, for some firearms. Please specify types of firearms/restrictions: \_\_\_\_\_*

iv. *No, I oppose banning the manufacture, possession, ownership, purchase, sale and/or transfer of any firearm.*

Please see my response to Questions 2, 3, and 4.

**e. *Many .50 caliber firearms are used in big game hunting and target competition and the .50 caliber BMG cartridge has been used for nearly a century. Would you support legislation prohibiting the ownership and/or sale of any .50 caliber firearms or ammunition in Montana?***

i. *Yes, I would support such legislation. Please explain: \_\_\_\_\_*

ii. *No, I would oppose such legislation.*

Please see my response to Questions 2, 3, and 4.

**f. *In 1994, Congress imposed a 10-year ban on the manufacture, for sale to private individuals, of various semi-automatic\* firearms it termed "assault weapons," and of ammunition magazines capable of holding more than 10 rounds of ammunition, which primarily affected handguns designed for self-defense. Congress' subsequent study of the ban, as well as state and local law enforcement agency reports, showed that contrary to the ban's supporters' claims, the guns and magazines had never been used in more than about 1%-2% of violent crime. Since the ban expired in 2004, the numbers of these firearms and magazines owned have risen to all-time highs and violent crime has fallen to a 42-year low. Would you support state legislation restricting the possession, ownership, purchase, sale, and/or transfer of semi-automatic firearms and/or limits on the capacity of magazines designed for self-defense?***

*\* Semi-automatic firearms have been commonly used for hunting, target shooting, and self-defense since their introduction in the late 1800s. All semi-automatics fire only one shot when the trigger is pulled. They are not fully-automatic machine guns, which have been strictly regulated under federal law since 1934.*

- i.  Yes, I would support such legislation for semi-automatic firearms only.
- ii.  Yes, I would support such legislation for magazines only.
- iii.  Yes, I would support such legislation for semi-automatic firearms and magazines.
- iv.  No, I would oppose such legislation.

Please see my response to Questions 2, 3, and 4.

g. *Federal law requires federally-licensed firearms dealers to keep records of the make, model, caliber, and serial number of all firearms sold. **Would you support state legislation requiring all firearm owners to register all their firearm(s) for entry into a centralized state file or database?***

- i.  Yes, for all firearms.
- ii.  Yes, for all handguns.
- iii.  Yes, for some firearms. Please specify which firearms:
- iv.  No, I oppose state registration of firearms.

Please see my response to Questions 2, 3, and 4.

h. **Would you support the state licensing\* of law-abiding citizens who own, possess and use firearms?**

*\*Licensing, as used here, refers to state legislation requiring firearm owners to obtain a license from a government official or agency to own and possess a firearm. As a rule, firearm owner licensing laws generally require fingerprinting, photographing, and/or a background investigation of the applicant. Note: this is different from acquiring a “permit to carry” a concealed weapon from the state.*

- i.  Yes, for owners of all firearms.
- ii.  Yes, for owners of all handguns.
- iii.  Yes, for owners of some firearms. Please specify which firearms: \_\_\_\_\_
- iv.  No, I oppose state registration of firearm owners.

Please see my response to Questions 2, 3, and 4.

i. *Federal law requires all federally-licensed firearms dealers to conduct a criminal records check prior to the sale of any firearm, whether the sale occurs at their retail store or at a gun show. Access to the FBI-run telephone-based “instant check” system is limited to licensed dealers only. Under federal law, individuals who only occasionally sell firearms from their personal collections are not “engaged in the business” of selling firearms, and are therefore (1) not required to be licensed; (2) not required to conduct records checks prior to transferring firearms, and (3) not permitted to access the records check system used by licensed dealers. Although less than 1% of guns used in crimes are purchased at gun shows (Department of Justice, Bureau of Statistics), gun control advocates are trying to ban firearms sales at gun shows by occasional sellers and private collectors, or require that any transactions involving*

*their legal property be conducted through a licensed dealer. **Would you support legislation restricting firearms sales by occasional sellers and private collectors at gun shows?***

- i.  *Yes, I would support such legislation. Please explain: \_\_\_\_\_*
- ii.  *No, I would oppose such legislation.*

Please see my response to Questions 2, 3, and 4.

*j. In the United States, the number of privately owned guns has risen by more than 10 million annually to an all-time high. Meanwhile, according to the National Center for Health Statistics, firearm accident deaths have decreased by 90 percent over the last century. This trend is due in part to an increasing use of NRA firearm safety training programs by tens of thousands of RA Certified Instructors, schools, civic groups and law enforcement agencies. Nevertheless, several states have recently considered legislation that would mandate the placement of locking devices on firearms kept in the home. These devices greatly restrict access to firearms for self-defense purposes and potentially increase the risk of accidental discharge of a firearm. **Would you support legislation that would mandate the use of locking devices or other locking procedures for firearms stored in the home?***

- i.  *Yes, I would support such legislation. Please explain: \_\_\_\_\_*
- ii.  *No, I would oppose such legislation.*

Please see my response to Questions 2, 3, and 4.

*k. Recently, some employers have extended their “gun-free” workplace rules to employees’ locked private vehicles in parking lots. Such policies effectively disarm law-abiding citizens, including concealed weapon license holders, from the time they leave their house in the morning to their return home in the evening. **Would you support “Employee Protection” legislation that would allow law abiding citizens to keep lawfully transported firearms locked in their personal vehicles while parked on publicly accessible, privately owned parking lots (see 2013 Montana House Bill 571)?***

- i.  *Yes, I would sponsor/cosponsor this legislation.*
- ii.  *Yes, I would support this legislation.*
- iii.  *No, I would oppose this legislation. Please explain: \_\_\_\_\_*

Please see my response to Questions 2, 3, and 4.

*l. Current Montana law (MCA § 45-8-328) lists certain “prohibited places,” including banks, government office buildings and establishments where alcoholic beverages are served, where concealed weapon permit holders (and law enforcement officers) may not carry a concealed firearm. This puts law-abiding citizens at a disadvantage because, although they could carry “openly” in these locations, criminals will obviously ignore the law and carry concealed. **Would you support legislation to repeal the restrictions on where law-abiding citizens may carry a concealed weapon (see 2013 Montana House Bill 358)?***

- i.  Yes, I would sponsor/cosponsor this legislation.
- ii.  Yes, I would support this legislation.
- iii.  No, I would oppose this legislation. Please explain: \_\_\_\_\_

Please see my response to Questions 2, 3, and 4.

m. *Current Montana law allows law-abiding citizens to carry a concealed weapon for defense of themselves and others, free from government interference, anywhere outside the official boundaries of any city or town. In order to cross into a city or town and still be in compliance with Montana law, however, a law-abiding citizen must have a valid concealed weapon permit. **Would you support state legislation to remove the requirement that law-abiding citizens obtain governmental permission in order to provide a means of self-protection when they cross into the boundaries of cities and towns in Montana (see 2013 Montana House Bill 304)?***

- i.  Yes, I would sponsor/cosponsor this legislation.
- ii.  Yes, I would support this legislation.
- iii.  No, I would oppose this legislation. Please explain: \_\_\_\_\_

Please see my response to Questions 2, 3, and 4.

n. *Under the National Firearms Act (NFA), an individual wanting to acquire an NFA-regulated item, such as a firearm sound suppressor or fully automatic firearm, must submit the proper paperwork and fingerprints to the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE), pay a \$200 tax and have a chief local law enforcement officer (CLEO) sign-off on the proper forms. Some CLEOs simply refuse to sign such forms, even for otherwise qualified applicants, because they oppose civilian possession of these items, are fearful of liability or the perceptions of anti-gun constituents, or for other subjective reasons. Legally owned NFA items are very rarely used in crime, with the total number of cases documented numbering in the single digits. This legislation would also include an immunity provision for CLEOs. **Would you support state legislation that would make this process more objective by requiring CLEOs to sign such forms if the applicant is not otherwise prohibited from obtaining an NFA item?***

- i.  Yes, I would sponsor/cosponsor this legislation.
- ii.  Yes, I would support this legislation.
- iii.  No, I would oppose this legislation. Please explain: \_\_\_\_\_

Please see my response to Questions 2, 3, and 4.

o. *Many public colleges and universities allow visitors with concealed handgun permits to carry concealed firearms on their campuses, yet nearly all state-funded higher learning institutions ban faculty, staff and students from carrying concealed handguns on campus -- even if they have permits to carry concealed firearms. The NRA believes a person with a permit to carry a concealed firearm should be able to carry that firearm concealed anywhere he or she has a legal right to be, except in certain "sterile" high-security locations. Assuming each classification of individuals listed below possessed a concealed handgun permit recognized by*

*the state, who do you believe should legally be allowed to carry a concealed handgun on state college and university campuses?*

- i.  *All law-abiding persons, including visitors, faculty, staff and students.*
- ii.  *Visitors, faculty, staff and some students. Please explain: \_\_\_\_\_*
- iii.  *Faculty, staff and students.*
- iv.  *Visitors, faculty and staff.*
- v.  *Faculty and staff.*
- vi.  *Each college or university should determine the policy for its campus.*
- vii.  *No one should be allowed to carry a concealed handgun on state college and university campuses.*

Please see my response to Questions 2, 3, and 4.

*p. The residents of 39 states can legally own firearm suppressors. Contrary to Hollywood portrayals, suppressors are virtually never used in crime or poaching and criminal misuse carries severe penalties. Suppressors can improve shooting accuracy, protect against hearing loss, reduce noise complaints from the public and make shooting and hunting more enjoyable. The current prohibition on hunting suppressor use, in effect, requires firearms to be as loud as they can possibly be, contrary to the manner in which virtually all other noise-emitting objects are treated. Suppressors are strictly regulated under federal law. Individual purchasers must pay a \$200 federal tax; submit to an extensive background check that includes fingerprints and photographs; and obtain the approval of the chief law enforcement officer in their jurisdiction. **Would you support legislation that allows the use of suppressors while hunting and allow law-abiding Montana sportsmen the freedom to protect against hearing loss, improve accuracy and reduce noise complaints?***

- i.  *Yes, I would sponsor/cosponsor this legislation.*
- ii.  *Yes, I would support this legislation.*
- iii.  *No, I would oppose this legislation. Please explain: \_\_\_\_\_*

Please see my response to Questions 2, 3, and 4.

*q. Many states provide civil liability protection to private property owners who allow the public to hunt on their property. Shielding property owners from frivolous lawsuits eliminates a significant concern for property owners and encourages them to open their land to hunting. This enhances public hunting opportunities and assists the state in effectively managing its wildlife populations. **Would you support passing or strengthening liability protections for private landowners who allow hunting on their property?***

- i.  *Yes, I would sponsor/cosponsor this legislation.*
- ii.  *Yes, I would support this legislation.*
- iii.  *No, I would oppose this legislation. Please explain: \_\_\_\_\_*

Please see my response to Questions 2, 3, and 4.

r. Youth/mentored hunting programs have been implemented in 29 states to help promote our hunting heritage by removing barriers to participation. This enormous case study has proven safe beyond anyone's expectations. Mentored hunting allows novice hunters -- young and old -- to hunt prior to completing hunter education requirements if they hunt under the close supervision of a licensed, adult hunter who meets hunter education requirements. This is the "try it before you buy it" concept. These programs also dramatically reduce or eliminate minimum hunter ages. **Would you support a youth/mentored hunting law to help promote Montana's hunting heritage?**

- i.  Yes, I would sponsor/cosponsor a youth/mentored hunting law.
- ii.  Yes, I would support implementing a youth/mentored hunting law.
- iii.  No, I oppose implementing a mentored hunting law. Montanans will prove to be the exception to the rule of extraordinary safety established by the citizens of the 29 states that have implemented this program.
- iv.  Other. Please explain: \_\_\_\_\_

Please see my response to Questions 2, 3, and 4.

s. **For which of the following reasons do you support firearm ownership for law-abiding Montana citizens (please mark any and all that apply)?**

- i.  Constitutional Right.
- ii.  Hunting.
- iii.  Competitive shooting.
- iv.  Informal sport shooting (e.g., plinking).
- v.  Defense of self, family, and home (basic human right).
- vi.  Collecting.
- vii.  Defense of state and nation.
- viii.  All of the above.
- ix.  None of the above.

Please see my response to Questions 2, 3, and 4.

t. **Have you ever run for or held state or local elective office?**

- i.  Yes. Please specify: I ran for a seat on the Montana Supreme Court
- ii.  No.

u. **Are you a member of the National Rifle Association, the Montana Shooting Sports Association, the Montana Rifle & Pistol Association or any other shooting/sportsmen's/gun rights organization?**

- i.  Yes. Please specify: NRA: No. 231424348 (If NRA member, please list membership number)
- ii.  No.

10. In a 2004 op-ed, you wrote that “many studies raise concerns about gay parenting” and that there is “ample reason for concern that same-sex marriage will hurt families, and consequentially children and society.” (One Student’s Response to “A Response to Glendon,” Harv. L. Rec. (Mar. 11, 2004))

Multiple studies have shown “no differences” in healthy outcomes for children in households headed by same-sex and different-sex parents. (“Same-sex and different-sex parent households and child health outcomes: findings from the National Survey of Children’s Health,” J. Dv. Bhav. Pediatr., April 2016)

When asked by Senator Leahy whether you stood by the statements you made in this op-ed, you declined to give a straight answer. Instead, you indicated that your personal views on this issue are not relevant and that some of your views “have definitely changed since 2004.”

**a. On what basis did you conclude that same-sex marriage would “hurt families, and consequentially children and society?” Please identify the specific research you used to support your claim.**

Respectfully, I did not conclude that in the 2004 op-ed. The purpose of that op-ed was to defend Harvard Law Professor Mary Ann Glendon against charges that her voiced concerns about the then-new institution of gay marriage were “absurd.” In opining that it was unfair to characterize those concerns dismissively as “absurd,” I said that the research at that point was “inconclusive” and that there was “reason for concern.” I pointed to the “significant collection of research in *Goodridge* . . . contained in Justice Cordy’s dissent” and a *Weekly Standard* article about families in Scandinavia.

**b. Do you disavow your statement that same-sex marriage would “hurt families, and consequentially children and society?” Please respond “yes” or “no.”**

Please see my response to Question 10(a). As referenced in the question, there has been additional research in the intervening 15 years, but I have not reviewed that research and therefore do not have an informed opinion as to the current state of that research. There have been significant legal developments in this area of the law in the intervening 15 years, and, as in every area of the law, if confirmed I am committed to faithfully applying all precedent.

**c. Please explain what you meant when you told Senator Leahy that your views have changed since 2004. Exactly how have your views changed on this issue?**

As a federal judicial nominee, it would not be appropriate for me to state my personal views on this issue as it may be related to one or more issues that are currently before the courts or may come before the court. If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent on any issue that comes before me as a sitting judge, without regard to my personal views or policy preferences.

**d. Do you believe that the Supreme Court’s decision legalizing same-sex marriage in *Obergefell v. Hodges* has harmed families, children, and society? If so, how? What evidence supports your belief?**

As a judicial nominee, it is not appropriate for me to grade or opine on the decisions of the Supreme Court. If confirmed, I would faithfully apply the Supreme Court’s precedents, including *Obergefell*, and all other applicable precedents in this and every other area of the law.

11. As Montana Solicitor General, you filed an amicus brief in the Supreme Court defending an Arizona law that banned abortion after 20 weeks. Your brief argued that the law created “at most, an incidental burden on the abortion right.” (Amicus Brief of the States of Ohio, Montana, and 14 Other States Supporting Petitioners, *Horne v. Isaacson*, 134 S. Ct. 905 (2014))

**a. What were your substantive contributions to this brief? Please be specific. Which arguments did you personally add, craft, advance, or recommend adding to the brief?**

The Montana Attorney General decided that the State of Montana would be a co-author of that particular multi-state amicus brief. Consistent with that direction, I served as a co-author on the brief along with attorneys in the Ohio Attorney General’s office. Beyond any information that has already been publicly released by my client in that case, it would be inappropriate for me to divulge the advice and recommendations given to my client or co-counsels, or the specifics of the State of Montana’s contribution to the brief versus Ohio’s.

**b. Please explain how a 20-week abortion ban is “at most, an incidental burden” on a woman’s constitutional right to make her own reproductive health care decisions.**

The multi-state *amicus* brief in this case relied on Supreme Court precedent indicating that “[a]n undue burden exists, and therefore a provision of law is invalid, if its *purpose* or *effect* is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” *Casey*, 505 U.S. at 878 (plurality op.; emphases added). The States’ *amicus* brief interpreted the “purpose” prong of this undue-burden test as considering the intent underlying the challenged provision. *See* Multi-state *Amicus Br.* at 18-19. In *Gonzales v. Carhart*, 550 U.S. 124 (2007), for example, the Court upheld the Partial-Birth Abortion Ban Act after “reject[ing] the contention that the *congressional purpose* of the Act was ‘to place a substantial obstacle in the path of a woman seeking an abortion.’” *Id.* at 160 (citation omitted; emphasis added); *see also Mazurek v. Armstrong*, 520 U.S. 968, 972-73 (1997) (per curiam). Likewise, the multi-state *amicus* brief argued that the Arizona law was not an undue burden because its effect did not “generally prohibit a woman from obtaining an abortion before viability,” but “merely channel[ed] elective abortions to the time before a fetus may suffer great pain and before risks to the woman’s health are greatest.” Multi-state *Amicus Br.* at 19.

During your hearing, you characterized the Solicitor General role as requiring you to defend state laws and attacks on state laws.

**c. At the time you filed this brief, Montana did not have a 20-week abortion ban or similar restriction on abortion. Instead, Montana restricts abortions after viability, in accordance with *Roe*. What state law were you defending by getting involved in this case?**

As noted, it was the Montana Attorney General who decided that the State of Montana would be a co-author of this particular multi-state amicus brief. It would have been his decision as to what state interests were furthered by joining or co-authoring any amicus brief, including this one. Consistent with my duty of confidentiality, I cannot disclose what his reasons for joining or authoring may have been beyond what may already be a matter of public record.

12. You have an extended relationship with the Alliance Defending Freedom (ADF), formerly known as the Alliance Defense Fund. You completed an internship with the organization during the summer of 2003, and you have participated in panel discussions for ADF on at least five occasions. Among other positions, ADF opposes women's reproductive rights, marriage equality, civil unions between same-sex couples, and adoption by same-sex couples.

**a. Do you support the organization's positions on women's reproductive rights and the rights of same-sex individuals?**

As a federal judicial nominee, it would not be appropriate for me to state my personal opinion on these issues as they may be related to one or more cases that are currently before the courts or may come before the court. If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent on any issue that comes before me as a sitting judge, without regard to my personal views or policy preferences.

It appears your ADF internship was a Blackstone Fellowship. (Web Archive, *Announcing the 2005 Publius Fellows*, Claremont Institute (May 13, 2005)) According to public reporting, individuals in the Blackstone program are required to sign a "loyalty oath." (Josh Israel, *The 800-Pound Gorilla of the Christian Right*, THINKPROGRESS (May 1, 2014))

**b. Did you ever sign or agree to anything that could be construed as a "loyalty oath" following completion of your fellowship with ADF? If so, what was contained in that "loyalty oath"?**

I have never signed a "loyalty oath" with ADF or any other organization.

13. During your 2014 campaign for the Montana Supreme Court, you criticized trial lawyers on several occasions. You wrote that "the Trial Lawyer money machine is dumping hundreds of thousands of dollars from lawyers with big money suits before the Court trying to make sure their favorite guy gets elected." (*Why are Trial Lawyers Trying to Buy a Judge?*, BILLINGS

GAZETTE (Oct. 8, 2014)) You also characterized the Trial Lawyers as an “organization of wealthy lawyers that for decades has been spending huge sums of money to get justices on the court who will make sure they get big attorney fee awards, whether they deserve it or not.” (Troy Carter, *Ex Justices Say Candidate for Supreme Court a Corporate Puppet*, BOZEMAN DAILY NEWS (Oct. 17, 2014)) In addition, the *New York Times* quoted you as saying that “the courts in Montana had long been controlled by trial lawyers who funded election campaigns in a ‘pay-to-play’ scheme.” (Shaila Dewan, *Montana Judicial Race Joins Big-Money Fray*, NEW YORK TIMES (Nov. 3, 2014))

**What evidence did you rely on when you accused trial lawyers of engaging in a “pay-to-play” scheme with Montana courts? Please provide specific evidence or studies supporting your claim.**

In my Montana judicial race, publicly available campaign-contribution and independent-expenditure records supported that Montana trial lawyers spent hundreds of thousands of dollars supporting my opponent. In October 2014, my campaign reviewed all contributions made to support my opponent and concluded that 82% of the financial supporters of my opponent were lawyers, and that 83% of those lawyer donors either currently had or had recently had a case in front of him as a Montana Supreme Court justice. Less than a quarter of the financial supporters to my campaign were lawyers, and none of them had cases in front me (since I had not previously been a judge).

14. In an email—released though a records request from *The Great Falls Tribune*—you wrote dismissively of “Montanans’ beloved ‘corporations are not people’ argument.” You added that “the ‘corporations-aren’t-people’ crowd likes to villainize” certain types of corporations. (Emails via GREAT FALLS TRIBUNE Records Request (Sept. 2014))

**a. Who were you referring to when you referenced “the ‘corporations-aren’t-people’ crowd”?**

Respectfully, I do not believe I was writing dismissively in the referenced email. I was referring to groups who advocate that corporations should not receive constitutional speech protections. In the referenced email, far from dismissing their concern, I first raised and then distinguished any concern that group might have from unrelated issues in an amicus brief that the Montana Attorney General was considering joining.

**b. Do you believe that corporations are people?**

No. As in every area of the law, however, my personal beliefs are not relevant to how I would approach cases that might come before me. If confirmed, I will faithfully apply applicable precedent to the facts presented without regard to my personal beliefs.

15. During your campaign for the Montana Supreme Court, you argued that dark money in elections has benefits. According to *The Great Falls Tribune*, you “argued there is a benefit to dark money spending in judicial elections because the judges don’t know who spent money to help get them elected.” (John S. Adams, GREAT FALLS TRIBUNE (Oct. 15, 2014))

**Do you know the identity of any individual or organization that spent money in support of your candidacy for the Montana Supreme Court?**

I know the identity of all individuals who donated directly to my campaign because they were required by state law to disclose their identity, which I reported in my periodic campaign finance reports as required by state law. Those individual donations were capped by state law at \$320 per person. And I was told the names of organizations that were reporting independent expenditures in support of my candidacy. Beyond that, no.

16. During your hearing, you said that as a government lawyer you “don’t get to pick” the cases you work on. Much of your work, however, appears to involve situations in which neither the state of Montana nor Nevada was an actual party to the litigation.

**Please list all matters you worked on while serving as Solicitor General of Montana and Nevada in which neither the state of Montana nor the state of Nevada was a party.**

Many, if not most, of the matters on which I worked as the Nevada and Montana Solicitor General served state clients such as state officials or state agencies, but “neither the state of Montana nor the state of Nevada was a party.” And as I believe is typical in most state Attorneys General offices, the Nevada and Montana offices of the Attorney General frequently received requests from other states to join multi-state amicus briefs supporting some party other than my state or a client of the Attorney General’s Office. As the Solicitor General, those requests typically came to me. I would sometimes communicate with other attorneys in the offices about a specific request, and I would communicate with the Attorney General himself about the request, providing whatever information the Attorney General thought would be helpful for him to make a decision on whether or not to join the brief. Ultimately, it was the Attorney General’s decision whether to join, not mine, and the state would join the brief through the Attorney General, and his name would be on the brief, not mine. Consistent with my testimony at the hearing, I did not get to choose which amicus join requests came to me for my evaluation.

I do not have records of all the multistate amicus briefs that I reviewed and communicated about with the Nevada and Montana Attorneys General. I would estimate that during my service as both the Nevada and Montana Solicitor General, I reviewed literally hundreds of such join requests, and that the Attorneys General of those two states may have joined close to a hundred such briefs.

17. In 2017, you were counsel of record on an amicus brief in *Coachella Valley Water Dist. v. Agua Caliente Band of Cahuilla Indians*, which dealt with the scope of water rights for Indian reservations. In your brief, you wrote that the Indian tribe was asserting a “nebulous claim that the federal reservation’s purpose included the need for water.”

**Please explain how you came to the determination that Indian reservations do not have a “need for water.”**

Respectfully, the multi-state *amicus* brief authored by Nevada and representing 10 states did not take a position that the Indian tribe in that case did not need water. In a state like Nevada, often the collective need for water outstrips the supply. The brief asked the Supreme Court to grant review in that case out of concern that the lower court's categorical preemption rationale could cause substantial disruption "in a state like Nevada where many of the groundwater allocation systems are already fully appropriated," and "the longstanding appropriation regime will be disrupted by new, unaccounted-for federal reserved groundwater rights claims that are suddenly asserted for the first time." Br. at 12.

18. From 2015-2017, you were a "non-member" attorney with the Nevada Bar.

**Why did you choose to practice under a special practice rule that granted temporary, non-member status rather than immediately seek full-member status with the Nevada Bar?**

When I began serving as the Nevada Solicitor General in January 2015, I was required to practice under Nevada's special rule applicable to attorneys working in the Office of the Nevada Attorney General through at least October of that year because I would not be eligible to be admitted by taking the Nevada Bar exam until then. When the Nevada Bar informed me in writing that I could continue to practice under the rule indefinitely as long as I remained employed with the Attorney General's Office, I decided because of the heavy press of work to delay taking the Nevada Bar. Later, when we were informed that the Bar changed its interpretation of the rule, I (and all of the other attorneys affected by the rule change) took and passed the Nevada Bar Exam at the next available sitting.

19. A 2007 *Legal Times* article indicated that you waited until you were a year out of law school to apply for clerkships. According to the article, you stated that "the financial pressures of being married with three kids also played into [your] waiting a year before applying." (Anna Palmer, *Judges Look to Clerks with Experience*, LEGAL TIMES (Jan. 8, 2007)) But in a 2008 speech, you indicated that you did in fact apply for clerkships during your final year of law school. According to your notes for the speech, you "applied for only a handful of clerkships during [your] last year of law school, and didn't get any." (Panelist, "Living My Faith as a Lawyer," Ivy League Conference on Faith and Action, Yale University, New Haven, Connecticut (Apr. 12, 2008))

**Please explain the discrepancy between these two accounts.**

While in law school, because of my financial obligations, I applied for only a handful of very competitive clerkships (six judges, as I recall). I did not obtain a clerkship that year. After law school, I applied more broadly. I was blessed to be offered a clerkship by the Honorable Janice Rogers Brown.

20. While serving as Montana Solicitor General, did you ever recommend to Attorney General Tim Fox that the state join a brief you had yet to see, read, or review?

Typically, before circulating its draft multi-state *amicus* brief to other states to join, a state would circulate a memorandum summarizing the issues in the case and the arguments the

authoring state would be making in the brief. On rare occasions where the Attorney General had already joined multi-state amicus briefs addressing the same issue, I would review and summarize the drafting state's memo and forward the drafting state's memo with a tentative join recommendation. Once I received the state's draft brief I would review it to ensure the arguments made were consistent with the earlier memorandum that had served as the basis for the Attorney General's join decision.

21. 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 lower courts to depart from Supreme Court precedent. *See, e.g., Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

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

It may be appropriate, at times, for a circuit judge to identify areas in which Supreme Court cases appear to be inconsistent or in conflict. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (noting, for a unanimous Court, that a circuit judge had aptly described an earlier case's inconsistencies with later jurisprudence). But the Supreme Court has also made clear: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Circuit judges must always follow those instructions.

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

Under Ninth Circuit precedent, "where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (*en banc*). Otherwise, "[g]enerally, a panel opinion is binding on subsequent panels unless and until overruled by an *en banc* decision of this circuit." *United States v. Easterday*, 564 F.3d 1004, 1010 (9th Cir. 2009).

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

A circuit judge must follow Supreme Court precedent. Only the Supreme Court can overturn its own precedent. The Supreme Court has identified factors that it considers in evaluating that question, such as whether the precedent is workable, whether it has been eroded by other precedents, and whether the precedent has led to reliance interests. As a circuit court nominee, it would not be appropriate for me to opine upon when the Supreme Court should revisit its own prior decisions beyond reciting the standard that the Court itself has set forth. If confirmed, I would faithfully adhere to the precedents of the Supreme Court.

22. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of the *Roe* case law as “super-stare decisis.” One text book on the law of judicial precedent, co-authored by Justice 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”? “superprecedent”?**

The decision in *Roe v. Wade* is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

**b. Is it settled law?**

Yes. Please see my response to Question 22(a).

23. 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. The decision in *Obergefell v. Hodges*, is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

24. 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 lower court nominee, it is inappropriate for me to comment about whether I personally agree or disagree with a particular majority decision or dissent from the

Supreme Court, especially in areas in which there is pending or impending litigation. See Canon 3A(6) of the Code of Conduct for United States Judges.

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

In *Heller*, the Supreme Court specifically noted that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” 554 U.S. 570, 626 (2008). The Court also stated that “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. It stated that “another important limitation on the right to keep and carry arms” “is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” *Id.* at 627 (citation omitted). And it stated that it did “not undertake an exhaustive historical analysis today of the full scope of the Second Amendment.” *Id.* at 626. Because the permissible scope of state firearm regulation remains subject to litigation, Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting further.

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

In *Heller* the Court “conclude[d] that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment.” 554 U.S. at 625. As a circuit nominee, I am bound to apply *Heller*’s interpretation of the Supreme Court’s prior cases, and it would not be appropriate for me to comment on whether I personally agree with that or any portion of its decision.

25. 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 (2010), the Supreme Court ruled that “First Amendment protection extends to corporations.” *Id.* at 342 (citing cases). According to the Supreme Court, “political speech does not lose First Amendment protection simply because its source is a corporation.” *Id.* (quotations omitted). As a judicial nominee, it would not be appropriate for me to opine as to whether *Citizens United* was correctly decided, nor would it be appropriate for me to opine on issues currently the subject of pending or impending litigation. If confirmed, I would faithfully apply *Citizens United* and all other precedents of the Supreme Court.

**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 25(a).

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that certain corporations could assert claims under the Religious Freedom Restoration Act of 1993 (RFRA). The Court further held that its “decision on that statutory question makes it unnecessary to reach the First Amendment claim” that had also been raised in the case. *Id.* at 736. As a judicial nominee, it would not be appropriate for me to opine as to whether *Hobby Lobby* was correctly decided. If confirmed, I would faithfully apply *Hobby Lobby* and all other precedents of the Supreme Court. Moreover, it would be inappropriate for me to opine about legal issues currently the subject of pending or impending litigation. See Canon 3A(6) of the Code of Conduct for United States Judges.

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

The Supreme Court has made clear 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. Both of these are well-established and fundamental guarantees in our Nation. Because the intersection of these two guarantees is the subject of pending and impending litigation, it would not be appropriate for me to opine on issues that might come before me if I am confirmed. See Canon 3A(6) of the Code of Conduct for United States Judges. If confirmed, I am committed to faithfully enforcing every provision of the Constitution, including the Equal Protection and Free Exercise Clauses, consistent with the Supreme Court and other applicable precedent.

27. 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). Please see my response to Question 26.

28. 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 response to Questions 26 and 27.

29. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2005. Additionally, you listed your membership in the Religious

Liberties Practice Group Executive Committee (2008-2019); Federalism & Separation of Powers Practice Group Executive Committee (2013-2019); and the Regulatory Transparency Project, State & Local Government Working Group (2016-2019). The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

**a. Could you please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?**

I had no part in writing that language and thus cannot speak to its intended meaning. I have never discussed that language with anyone from the Federalist Society.

**b. How exactly does the Federalist Society seek to "reorder priorities within the legal system"?**

See my response to Question 29(a).

**c. What "traditional values" does the Federalist society seek to place a premium on?**

See my response to Question 29(a).

**d. 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.**

I have not discussed this or any other nomination with anyone at the Federalist Society since this judicial vacancy was announced. Over the years, I have had informal conversations with many friends about my interest in serving as a judge. Given that I have many friends who are members or otherwise involved with the Federalist Society, it is likely that since law school I have discussed my interest with some individuals with ties to the Federalist Society. I do not recall the specifics of any such discussions, however.

**e. What did your role as a member of the Religious Liberties Practice Group Executive Committee entail?**

My role as a member of the Practice Group consisted of calling in to committee conference calls where public programming (e.g., panel discussions, debates, pod-casts, etc.) on recent events of interest to the practice group was discussed and coordinated.

**f. What did your role as a member of the Federalism & Separation of Powers Practice Group Executive Committee entail?**

Please see my response to Question 29(e).

**g. What did your role as a member of the Regulatory Transparency Project, State & Local Government Working Group entail?**

My role as a member of the Working Group was to help develop topics that the working group could prepare a white paper on, help research those topics, and then help write and edit white papers on those topics. During my tenure on the Working Group, we produced two white papers, both of which have been identified and provided with my Senate Judiciary Questionnaire.

30. 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 difference 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?**

I do not recall any such questions related to this nomination. In my role as a Deputy Assistant Attorney General with the Department of Justice, I routinely provide legal advice on administrative law matters to clients and other attorneys in the Department of Justice.

**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?**

Administrative law issues would have been discussed in conjunction with my service on the Regulatory Transparency Project, State & Local Government Working Group, and would have related to the specific issues addressed in the White Papers, which have been provided in conjunction with my Senate Judiciary Questionnaire. Other than that, no.

**c. What are your “views on administrative law”?**

“Administrative law” is a broad topic covering a wide range of issues. If confirmed, I would faithfully follow all statutory law and relevant precedent, including *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1994).

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

As a federal judicial nominee, it would not be appropriate for me to state my personal opinion on this issue as it may be related to one or more cases that are currently before the courts or may come before the court. If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent on any issue that comes before me as a sitting judge, relying on the factual record and applicable law in *that* case, without regard to my personal views.

32. 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); *see also, e.g., Marinello v. United States*, 138 S. Ct. 1101, 1107 (2018).

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

No.

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

I reviewed the questions and drafted answers. I shared my draft answers with individuals in the Office of Legal Policy at the U.S. Department of Justice and received their input. Each answer is my own.

**Written Questions for Lawrence VanDyke**  
**Submitted by Senator Patrick Leahy**  
**Wednesday, November 6, 2019**

1. In 2013, you emailed Montana Attorney General Tim Fox recommending the state not seek en banc review of a Ninth Circuit decision before even reading the court's opinion. And in 2014 you recommended that Montana sign on to an amicus brief without even reading it.

**(a) If you're confirmed to serve as a federal judge, what would you do if a law clerk you hired made legal recommendations without reading the relevant opinions or briefs?**

Typically, before circulating its draft multi-state *amicus* brief to other states to join, a state will circulate a memorandum summarizing the issues in the case and the arguments the authoring state will be making in the brief. On rare occasions where the Attorney General had already joined multi-state amicus briefs addressing the same issue, I would review and summarize the drafting state's memo and forward the drafting state's memo with a tentative join recommendation. Once I received the state's draft brief I would review it to ensure the arguments made were consistent with the earlier memorandum that had served as the basis for the Attorney General's join decision. This is what happened with regard to the 2014 amicus brief that I believe is referenced in the question.

Regarding the 2013 non-appeal recommendation: this was a case about which senior leadership in the Attorney General's office was very knowledgeable. The state had lost in the federal district court and on appeal to the Ninth Circuit. As demonstrated by documents in the public record, there was near uniform consensus by senior leadership that further appeals would be fruitless. This consensus was confirmed when the Ninth Circuit rejected review *en banc* and the Supreme Court denied certiorari.

2. You once advised the Montana Attorney General that the number of parties "on the cover [of a brief] is often more important than the contents of the brief." That, in a nutshell, is exactly what many Americans fear about our judiciary system—that what matters most is who is before the courts, and what special interests want, as opposed to the merits of a particular argument.

**(a) Does that perception concern you? How can you assure us that if confirmed you'll abide by the age-old "don't judge a book by its cover" rule when deciding on the merits of briefs submitted to you?**

As an advocate, I have always believed that every *amicus* brief should bring "to the attention of the Court relevant matter not already brought to its attention by the parties." Supreme Court Rule 37(1). I have endeavored to ensure that every *amicus* brief that I drafted met that standard. Of course, if confirmed, I would welcome and encourage just such *amicus* briefs. Unfortunately, it is well recognized that many *amicus* briefs do not meet that standard. If confirmed, I would judge each *amicus* brief just as I would

judge each case: on the merits of the arguments presented, fairly and neutrally considering the applicable law.

**3. Chief Justice Roberts wrote in *King v. Burwell* that**

**“oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’ So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions?’”**

**Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?**

The Supreme Court has explained that when interpreting statutory text, a judge should consider the words of a provision within the broader context of the statute as a whole. *See, e.g., Sturgeon v. Frost*, 139 S. Ct. 1066, 1084 (2019); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). If confirmed, I would faithfully follow these and other applicable precedents concerning the methods for interpreting statutes.

4. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them “disheartening” and “demoralizing.”

**(a) Does that kind of rhetoric from a President – that a judge who rules against him is a “so-called judge” – erode respect for the rule of law?**

The independence of the federal judiciary is a key aspect of our constitutional structure. Article III of the Constitution provides protections to allow for judicial independence. These protections are designed to enable judges to make decisions that are grounded in law, without respect to criticisms in the public arena that may follow.

**(b) While anyone can criticize the merits of a court’s decision, do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?**

Please see my response to question 4(a).

5. President Trump praised one of his advisers after that adviser stated during a television interview that “the powers of the president to protect our country are very substantial *and will not be questioned.*” (Emphasis added.)

**(a) Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?**

The Supreme Court has held that courts can review decisions by the President, including during times of war or other armed conflict. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

6. Many are concerned that the White House's denouncement of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

**(a) If this President or any other executive branch official refuses to comply with a court order, how should the courts respond?**

As a judicial nominee, it would not be appropriate for me to comment on a hypothetical scenario about a President's non-compliance with a court order. *See* Code of Conduct of U.S. Judges, Canon 3A(6). The appropriate judicial response in any such serious matter would depend on the facts and circumstances of the case. If confirmed, and if such a scenario were to come before me, I would carefully examine the relevant authorities that may bear upon this question.

7. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers."

**(a) Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?**

The Constitution assigns powers over war and foreign affairs to the President and Congress. In evaluating conflicts between the two branches in this area, the Supreme Court has applied Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). *See also Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (citing Justice Jackson's concurrence). Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." If confirmed, I would faithfully apply any applicable precedents, the Constitution, and any statutes that may bear upon the President's exercise of authority, recognizing that under Supreme Court precedent, no person or government official is above the law.

**(b) In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?**

Please see my response to question 7(a).

**8. How should courts balance the President’s expertise in national security matters with the judicial branch’s constitutional duty to prevent abuse of power?**

The Supreme Court has long made clear that it is ultimately “the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803). In evaluating any challenge to Executive action, a court must consider the relevant precedents, constitutional provisions, and any statutory provisions, as applicable, as set forth in my response to Question 7(a) above.

9. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.

**(a) Do you agree with that view? Does the Constitution permit discrimination against women?**

The Supreme Court has repeatedly held that the Equal Protection Clause provides protections against sex 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 applicable precedent.

**10. Do you agree with Justice Scalia’s characterization of the Voting Rights Act as a “perpetuation of racial entitlement?”**

The Supreme Court has made clear that the “historic accomplishments of the Voting Rights Act are undeniable,” and that “dramatic improvements” in voter registration and turnout “are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success.” *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 201-02 (2009). If confirmed, I will faithfully follow Supreme Court precedent interpreting the Voting Rights Act.

**11. What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?**

The Constitution provides in Article I, section 9 that “no Person holding any Office or Profit or Trust under” the United States “shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” I have not had occasion to study this Clause, its history, or any applicable precedents. In addition, inasmuch as there is active or impending litigation concerning this Clause, as a judicial nominee it would not be appropriate for me to opine on this topic. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

12. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a

divided Supreme Court disregarded Congress's findings in reaching its decision. As Justice Ginsburg's dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was "extraordinary" and the Court erred "egregiously by overriding Congress' decision."

**(a) When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?**

As a lower court nominee, it would not be appropriate for me to opine on the appropriateness or not of the Supreme Court's decisions. As a general matter, an appellate court considers the record that has been developed in the court below. Established standards of review govern an appellate court's review of factual findings made in the district court. The decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

**13. How would you describe Congress's authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation's "Second Founding"?**

The Thirteenth, Fourteenth, and Fifteenth Amendments reflect a constitutional commitment to counteracting racial discrimination in the wake of the Civil War. Each of these Amendments provides that Congress has the power to enforce them "by appropriate legislation." U.S. Const., art. XIII, § 2; U.S. Const., art. XIV, § 5; U.S. Const., art. XV, § 2. Under this enforcement power, the Supreme Court has "sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976); *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966). If confirmed, I would faithfully follow the Supreme Court's precedents in this area.

14. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home."

**(a) Do you believe the Constitution protects that personal autonomy as a fundamental right?**

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court held that "there is a realm of personal liberty which the government may not enter" that included, in that case, the right to engage in consensual "private sexual conduct." *Id.* at 578 (citation omitted). If confirmed, I would faithfully follow *Lawrence* and the other Supreme Court precedent in this area.

15. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

**(a) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?**

The Supreme Court has stated that “the doctrine of *stare decisis* is of fundamental importance to the rule of law.” *Hilton v. South Carolina Public Ry. Comm’n*, 502 U.S. 197, 202 (1991). It is never appropriate for lower courts to depart from Supreme Court precedent. *See, e.g., Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). With respect to circuit precedent, the Ninth Circuit has explained that “where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled.” *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (*en banc*). Otherwise, “[g]enerally, a panel opinion is binding on subsequent panels unless and until overruled by an en banc decision of this circuit.” *United States v. Easterday*, 564 F.3d 1004, 1010 (9th Cir. 2009). I would follow these and all applicable precedents if confirmed.

**16.** Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

**(a) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I’m interested in specific examples, not just a statement that you’ll follow applicable law.**

As a specific example, I would recuse myself from any case on which I have worked as a Deputy Assistant Attorney General in the U.S. Department of Justice, or as the Solicitor General of Nevada or Montana. As I noted on Question 24 of my Senate Judiciary Questionnaire, if I am confirmed, I will carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis. For specific cases on which I have worked, 28 U.S.C. § 455(b)(3) establishes a bright-line test requiring recusal. For other cases on which I have had no involvement, I would carefully evaluate and apply the standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges, and any relevant authorities interpreting these provisions.

**17.** It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that “legislation which restricts those political processes

which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”

**(a) Can you discuss the importance of the courts’ responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?**

In the referenced footnote, the Supreme Court indicated that courts have a role in ensuring that democratic processes are open and work as intended and legislation does not undermine participation by citizens entitled to representation. The Supreme Court also introduced the idea of varied levels of scrutiny in assessing constitutionality depending on the constitutional issue presented. If confirmed, I will faithfully follow Supreme Court precedent on this and any other issue.

18. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens and politically motivated hiring and firing at the Justice Department during the Bush administration. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration’s conflicts of interest and the events discussed in the Mueller report we make sure that we exercise our own power properly.

**(a) Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?**

Yes.

19. **Do you believe there are any discernible limits on a president’s pardon power? For example, President Trump claims he has an “absolute right” to pardon himself. Do you agree?**

I have not studied this issue. In addition, as a judicial nominee, it would not be appropriate for me to opine on issues that may require consideration in future cases. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

20. **What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

The Supreme Court has held that the Commerce Clause gives Congress the power to regulate activity that “substantially affects” interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559 (1995). The Court has further held that Congress has the power to enforce the Fourteenth Amendment where there is a “congruence between the means used and the ends to be achieved.” *City of Boerne v. Flores*, 521 U.S. 507, 519, 530 (1997). If confirmed, I would faithfully follow the Supreme Court’s precedents concerning the scope of congressional powers.

21. In *Trump v. Hawaii*, the Supreme Court allowed President Trump’s Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President’s reason for the ban was animus towards Muslims. Chief Justice Roberts’ opinion stated that “the Executive’s evaluation of the underlying facts is entitled to appropriate weight” on issues of foreign affairs and national security.

**(a) What do you believe is the “appropriate weight” that executive factual findings are entitled to on immigration issues? Does that weight shift when additional constitutional issues are presented, as in the Establishment Clause claims of *Trump v. Hawaii*? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?**

In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court held, *inter alia*, that the President’s Proclamation was lawfully issued under 8 U.S.C. § 1182(f). The Court held that “even assuming that some form of review is appropriate, plaintiffs’ attacks on the sufficiency of the President’s findings cannot be sustained” because the Proclamation “thoroughly describes the process, agency evaluations, and recommendations underlying the President’s chosen restrictions.” *Id.* at 2409. The Court also held that “plaintiffs’ request for a searching inquiry into the persuasiveness of the President’s justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere.” *Id.* The decision in *Trump v. Hawaii* is Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court. As a judicial nominee, it would not be appropriate for me to grade the Supreme Court’s cases or opine on legal issues that may require consideration and application in future cases. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

22. **How would you describe the meaning and extent of the “undue burden” standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion? I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.**

The Supreme Court held that an “undue burden” exists where “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992). In *Whole Woman’s Health v. Hellerstadt*, the Court further held that “unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on that right.” 136 S. Ct. 2292, 2309 (2016). I will apply *Casey* and all other Supreme Court precedent addressing abortion if confirmed. As a judicial nominee, it would be inappropriate for me to comment on particular examples that may arise in future cases or that may currently be the subject of pending or impending litigation. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

23. Federal courts have used the doctrine of qualified immunity in increasingly broad ways, shielding police officers in particular whenever possible. In order to even get into court, a victim of police violence or other official abuse must show that an officer knowingly violated a clearly established constitutional right as specifically applied to the facts and that no reasonable officer would have acted that way. Qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many similar cases.

**(a) Do you think that the qualified immunity doctrine should be reined in? Has the “qualified” aspect of this doctrine ceased to have any practical meaning? Should there be rights without remedies?**

According to the Supreme Court, “[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The Supreme Court has held that “the doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.* (quotations omitted). As a judicial nominee, it would be inappropriate for me to grade or opine on the decisions of the Supreme Court. If confirmed, I will faithfully apply the Supreme Court’s precedents and all other applicable precedents in the area of qualified immunity.

24. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted “seismic shifts in digital technology”, such as the “exhaustive chronicle of location information casually collected by wireless carriers today.”

**(a) In light of *Carpenter* do you believe that there comes a point at which collection of data about a person becomes so pervasive that a warrant would be required? Even if collection of one bit of the same data would not?**

The Supreme Court has recognized that new technological developments can influence the Fourth Amendment analysis. New technologies in the digital era can “risk[] Government encroachment of the sort the Framers, after consulting the lessons of history, drafted the Fourth Amendment to prevent.” *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018); *see also, e.g., Riley v. California*, 573 U.S. 373, 402 (2014) (“Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.”) (quotations and citation omitted). But as a judicial nominee, it would be inappropriate for me to comment on particular scenarios that may arise in cases that could come before me

or that may already be the subject of pending litigation. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

25. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because the Executive Branch bypassed the congressional approval generally needed for appropriations. As a member of the Appropriations Committee, I take seriously Congress's constitutional duty to decide how the government spends money.

**(a) With the understanding that you cannot comment on pending cases, are there situations when you believe a president can legitimately allocate funds for a purpose previously rejected by Congress?**

As a judicial nominee, it would be inappropriate for me to opine on hypothetical situations that could arise in future cases that may come before me or may presently be presented in pending or impending litigation. *See* Code of Conduct of U.S. Judges, Canon 3A(6). But in any case concerning a conflict between legislative and executive power, I would apply Supreme Court precedent regarding the specific powers at issue and the separation of powers.

26. During Justice Kavanaugh's confirmation hearing, he used partisan language to align himself with Senate Republicans. For instance, he accused Senate Democrats of exacting "revenge on behalf of the Clintons" and warned that "what goes around comes around." The judiciary often considers questions that have a profound impact on different political groups. The Framers sought to address the potential danger of politically-minded judges making these decisions by including constitutional protections such as judicial appointments and life terms for Article III judges.

**(a) Do you agree that the Constitution contemplates an independent judiciary? Can you discuss the importance of judges being free from political influence?**

The Constitution creates an independent judiciary with protections to insulate judges from political influence. The Code of Conduct for United States Judges likewise reinforces the importance of judges operating independent of the political sphere. *See, e.g.,* Code of Conduct of U.S. Judges, Canon 1 ("An independent and honorable judiciary is indispensable to justice in our society."). These protections and the obligation that judges act independently and impartially, without favor to any interest beyond fair application of the law, are essential to the rule of law. I believe strongly that an independent judiciary is a central feature of our constitutional system and that an independent judiciary promotes the rule of law. If confirmed, I will perform my role with fidelity to the judicial oath of office and the fundamental values of independence and impartiality.

**Senator Dick Durbin**  
**Written Questions for VanDyke and Bumatay**  
**November 6, 2019**

For questions with subparts, please answer each subpart separately.

**Questions for Lawrence VanDyke**

1. According to the Nevada State Bar website, apparently you did not become an active member of the Nevada Bar until October 2017. **Why weren't you an active Nevada Bar member before that date?**

When I began serving as the Nevada Solicitor General in January 2015, I was required to practice under Nevada's special rule applicable to attorneys working in the Office of the Nevada Attorney General through at least October of that year because I would not be eligible to be admitted by taking the Nevada Bar exam until then. When the Nevada Bar informed me in writing that I could continue to practice under the rule indefinitely as long as I remained employed with the Attorney General's Office, I decided because of the heavy press of work to delay taking the Nevada Bar. Later, when we were informed that the Bar changed its interpretation of the rule, I (and all of the other attorneys affected by the rule change) took and passed the Nevada Bar Exam at the next available sitting.

2. **When did you move from Nevada to Virginia?**

April 2019

3. **Since you moved from Nevada to Virginia, how many times have you traveled back to Nevada? Please list the dates of and reasons for any such travel.**

Since I moved from Nevada seven months ago, I have had no occasion to travel back.

4. When you were running for a State Supreme Court seat in Montana in 2014, you repeatedly criticized and attacked trial lawyers. For example, you criticized your opponent for being a trial lawyer. Also, during your campaign, six retired Montana Supreme Court Justices sent a letter in opposition to your candidacy and said "Montanans deserve fair, impartial, independent and non-partisan judges and justices elected by Montana voters—not political hacks, bought and paid for by out of state dark money." You responded by saying "All of the former justices who have criticized me in this race have extensive ties to the Trial Lawyers." **Is it your view that judges and state supreme court justices who have ties to trial lawyers are unable to administer justice fairly?**

No.

5. **Have you yourself ever conducted a trial?**

No. My legal career has primarily been focused on appellate and legal issues litigation. But I have litigated extensively in state and federal trial courts, including arguing many dispositive motions, and litigating many cases in trial court as lead counsel from inception to completion. As the Solicitor General of Nevada, I advised trial teams on legal issues during trial. As a Deputy Assistant Attorney General, I oversee approximately 80 trial attorneys in the Environment and Natural Resources Division who regularly conduct trials around the nation.

**6. Do you believe that elected judges are beholden to the people who donate in support of their campaigns?**

The Supreme Court has held that this can be a risk in judicial campaigns; specifically, that “there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.” *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 884 (2009). In this and every area of the law I would decide cases by faithfully applying Supreme Court and other relevant precedent, and my personal views would be irrelevant.

**7. If you had been elected to the Montana Supreme Court in 2014, would you have been beholden to the donors to your campaign?**

No.

**8. In 2013, you urged that Montana join an amicus brief seeking certiorari in *National Rifle Association v. ATF*, a case challenging a federal law that prohibited the sale of handguns to people under age 21. You wrote in an email to your colleagues on August 28, 2013: “I think we should join this brief. I’m not sure I agree with the strategy of bringing this case to SCOTUS, but I think we want to be on the record as on the side of gun rights (and the NRA).” Why did you want to be on the record as “on the side of” the NRA, even if you did not agree with the legal strategy in the case?**

Part of my role as the Montana Solicitor General was to provide counsel and recommendations to the Montana Attorney General for his consideration and ultimate decision. It would be inappropriate for me to divulge client confidentiality by discussing the reasons for my recommendations to the Montana Attorney General beyond those already available in publicly available documents.

**9. Your extensive record of support for positions taken by the NRA in both your personal and professional capacity raises questions whether you could be impartial in deciding cases in which the NRA has taken a position. Will you commit that, if you are confirmed, you will recuse yourself from cases in which the NRA has taken a litigation position?**

As I stated at my hearing, if confirmed to the Ninth Circuit, I will terminate my NRA membership. As I noted on Question 24 of my Senate Judiciary Questionnaire, if I am confirmed, I will carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of

Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis. For specific cases on which I have worked, 28 U.S.C. § 455(b)(3) establishes a bright-line test requiring recusal. For other cases on which I have had no involvement, I would carefully evaluate and apply the standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges, and any relevant authorities interpreting these provisions. I fully recognize the difference between being an advocate and being a judge. If fortunate enough to be confirmed, I would set aside any advocacy positions and faithfully apply the relevant precedent in the cases that come before me.

10.

a. **Have you been paid honoraria by the Federalist Society?**

Yes.

b. **If so, how much in honoraria did they pay you, and for what did they pay you?**

\$8,000 over a period of two years for speaking engagements presented to student and lawyer groups, as well as participation in a working group.

11. On October 22, 2013 you emailed Dean Reuter, the General Counsel of the Federalist Society, about a petition for certiorari that you were drafting in the case *Montana v. Holder*. In this case, you were defending a Montana state law that said that guns manufactured and sold in Montana were outside of the scope of federal regulation under the Commerce Clause.

You emailed Mr. Reuter to share your view that “the statute was passed as an arguably ill-advised attempt to challenge the Feds’ overreaching commerce clause power (think *Wickard* meets guns).” Then you told Mr. Reuter that you were “having trouble coming up with any plausible (much less good) arguments of how to get around” Supreme Court precedents on the Commerce Clause and asked for “ideas for good (or at least plausible) arguments.”

Reuter responded by connecting you with an academic, saying “you are both long-time Federalist Society sympathizers and there is a good reason for the two of you to be in touch.”

**Why did you seek guidance from the General Counsel of the Federalist Society for a brief you were working on as Solicitor General for the State of Montana?**

Respectfully, I did not seek guidance from anyone employed by the Federalist Society. I asked Mr. Reuter to connect me with academic experts who had extensively studied and litigated in the Supreme Court the issues that I was briefing, because I knew that Mr. Reuter might know the individuals and be able to connect us. Mr. Reuter did that, and their assistance was very helpful.

**12. How many times did you contact employees of the Federalist Society to seek guidance for briefs you were working on in your capacity as a state Solicitor General? Please list and describe each contact.**

See my response to Question 11. I do not recall any other instances where I asked an employee of the Federalist Society to connect me with a subject-matter expert in connection with a brief I was working on.

**13. Do you believe that a child is capable of fairly representing himself or herself in court without counsel in a legal proceeding, for example an immigration proceeding?**

I have not had occasion to study this issue closely, but my understanding is that Federal Rule of Civil Procedure 17(c) allows a general guardian, committee, conservator, or fiduciary to sue or defend on behalf of a minor, and if a minor does not have an appointed representative the minor may sue by a next friend or by a guardian ad litem. The rule requires a court to appoint a guardian ad litem or issue another appropriate order to protect a minor who is unrepresented in an action.

14.

**a. Is waterboarding torture?**

I have not studied this question closely during my career in private practice and state and federal government. But it is my understanding that Congress has passed a law indicating that waterboarding constitutes torture when it is intentionally used “to inflict severe physical or mental pain or suffering” upon a detainee. 18 U.S.C. § 2340(1).

**b. Is waterboarding cruel, inhuman and degrading treatment?**

Again, I have not studied this question closely. But it is my understanding that Congress has passed a law providing that no person in the custody or under the control of the United States Government may be subjected to any interrogation technique not authorized in the Army Field Manual. 42 U.S.C. § 2000dd-2(a)(2). It is also my understanding that waterboarding is not authorized in the Army Field Manual.

**c. Is waterboarding illegal under U.S. law?**

Please see my responses to Questions 14(a) and 14(b).

15.

**a. Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such undisclosed donations to be problematic.**

Because this question addresses an ongoing political debate, Canon 5 of the Code of Conduct for United States Judges indicates that I should not provide my personal opinion. With that said, I have not studied this question in the context of my own nomination, and I am unaware of any such expenditures supporting my nomination.

**b. If you learn of any such donations, will you commit to call for the undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

I am not aware of any such donations in support of my nomination. As a judicial nominee, it would not be appropriate for me to opine on such political matters. *See* Code of Conduct of U.S. Judges, Canon 5. If confirmed, I will evaluate all actual or potential conflicts under 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any other applicable rules or guidelines. I will also, as necessary and appropriate, consult with colleagues and ethics officials within the court system.

**c. Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

Please see my responses to Questions 15(a) and 15(b).

16.

**a. Do you interpret the Constitution to authorize a president to pardon himself?**

I have not researched or studied this issue. In addition, as a judicial nominee, it would not be appropriate for me to opine on hypothetical issues that may require consideration in future cases. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

**b. What answer does an originalist view of the Constitution provide to this question?**

Please see my response to Question 16(a).

**Nomination of Lawrence VanDyke  
to the United States Court of Appeals for the Ninth Circuit  
Questions for the Record  
Submitted November 6, 2019**

**QUESTIONS FROM SENATOR WHITEHOUSE**

1. Your questionnaire indicates that you became a member of the Federalist Society beginning in 2005.

a. What was your primary motivation for joining the organization?

I was attracted to the Federalist Society because, while in law school, I enjoyed going to Federalist Society events on campus where there would be genuine and open discussions about a variety of legal issues from a broad cross-section of viewpoints. This same trait drew me to join the organization as a member after law school.

b. If confirmed, do you plan to remain an active participant in the Federalist Society?

If confirmed, I will likely attend events sponsored by the Federalist Society, and events sponsored by other organizations, as appropriate and consistent with my duties as a judge.

c. If confirmed, do you plan to donate money to the Federalist Society?

No.

d. Have you had contacts with representatives of the Federalist Society in preparation for your confirmation hearing? Please specify.

No.

2. Your updated questionnaire indicates that you were previously a member of the NRA.

a. For how many years were you a member of the NRA? What was your level of involvement with the NRA during that time? When did you choose to leave the organization?

Throughout my adult life, I would estimate that I have joined as an annual member of the NRA approximately five times. I do not recall, nor do I have records, of when I was a member. I had a basic membership during these times. In all instances I left the organization because my membership lapsed. In January 2018, I rejoined the NRA as an annual member after not having been a member for many years. In December 2018, I took an NRA-sponsored range safety course and was certified as a Range Safety Officer.

b. You completed an NRA questionnaire in 2014, wherein you indicated your opposition to banning the manufacture, possession, ownership, purchase, sale, and/or transfer of any firearm, as well as your belief that gun control laws are misdirected. In light of the number of mass shootings that have taken place since you completed this questionnaire, have your views on gun control and/or gun possession changed?

As noted in my email transmitting the completed questionnaire to the NRA, the questionnaire was “obviously geared towards legislative candidates,” so I “answered it as if I was a legislative candidate. My role as a [state] Supreme Court justice would be different, obviously. Legislators make the law. Justices apply the law; they shouldn’t be legislating from the bench. And if elected to the Montana Supreme Court, I am 100% committed to being a justice who correctly *applies* the law.” Like the role of a state court justice, the role of a federal judge is very different than that of a legislator. If I am confirmed to the Ninth Circuit, I remain 100% committed to performing my role as a judge by correctly and faithfully applying the law as written without any regard for my personal views or policy preferences. Moreover, inasmuch as there may be active or impending litigation concerning these issues, as a judicial nominee it would not be appropriate for me to opine on my personal views on this topic.

c. You have also been a member of the International Defensive Pistol Association since 2011 and the Western Nevada Pistol League from 2015-2019. What is your current level of involvement with these organizations? If confirmed, do you plan to remain a member and/or donate money to these organizations?

I am currently a member of the International Defensive Pistol Association. I am no longer a member of the Western Nevada Pistol League. Unlike the NRA, neither of these organizations engages in political advocacy. Both exist to further the safe and legal enjoyment of recreational shooting sports. Membership in IDPA is required to participate in IDPA-sponsored sporting events, so I will likely continue my membership for that purpose. Membership in WNPL provides a discount for participation in such events held at WNPL’s range facilities, so I will likely renew my membership upon my return to Nevada if confirmed. Beyond payment of annual membership dues, I do not plan to donate money to the organizations.

d. In light of your strong and public personal views on guns and gun control, will you commit to recusing yourself from gun-related cases if confirmed?

Please see my response to Question 2(b). I fully recognize the difference between being an advocate or a legislator and being a judge. If fortunate enough to be confirmed, I would set aside any advocacy positions and policy views and faithfully apply the relevant precedent in the cases that come before me. As I noted on Question 24 of my Senate Judiciary Questionnaire, if I am confirmed, I will carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis. For specific cases on which I have worked, 28 U.S.C. § 455(b)(3) establishes a bright-line test requiring recusal. For

other cases on which I have had no involvement, I would carefully evaluate and apply the standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges, and any relevant authorities interpreting these provisions.

3. Congress has made it a priority to crack down on animal fighting and other animal cruelty crimes, which lead to significant and unnecessary animal suffering, and which may, in some cases, be directly connected with other criminal activities, such as drug trafficking and gang violence. Accordingly, Congress has directed the Department of Justice to prosecute such crimes. As Deputy Assistant Attorney General of the Natural Resources Section at the Department of Justice:

a. Have you supervised or otherwise worked on animal cruelty or animal fighting cases?

No.

b. Are you aware of the June 26, 2019, letter that I and five of my Senate colleagues sent to Assistant Attorney General Jeffrey Bossert Clark, of the Environment and Natural Resources Division at the Department of Justice, regarding the Division's enforcement of criminal laws pertaining to animal cruelty? If yes, when should Congress expect to receive a response to this letter?

No.

4. A Washington Post report from May 21, 2019 ("A conservative activist's behind-the-scenes campaign to remake the nation's courts") documented that Federalist Society Executive Vice President Leonard Leo raised \$250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven't already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.

a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

I had not previously, but I have reviewed it as requested in the above question.

b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary?

As a judicial nominee, it would not be appropriate for me to opine on political matters relating to the nomination and confirmation of federal judges. *See* Code of Conduct of U.S. Judges, Canon 5.

c. Mr. Leo was recorded as saying: “We’re going to have to understand that judicial confirmations these days are more like political campaigns.” Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

Please see my response to Question 4(b).

d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

I do not.

e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we “stand at the threshold of an exciting moment” marked by a “newfound embrace of limited constitutional government in our country [that hasn’t happened] since before the New Deal.” Do you share the beliefs espoused by Mr. Leo in that recording?

Please see my response to Question 4(b).

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

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

I think that Chief Justice Roberts’ metaphor is a useful way of concisely stating what the proper role of a judge is. Like an umpire, judges must be constantly vigilant to always render decisions based on the impartial application of the relevant legal rules and not allow their own personal preferences or views to affect the outcome of a case.

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

A judge may only consider the practical consequences in rendering decisions where the governing legal authorities direct or allow the judge to do so. In all circumstances, however, the judge must be careful to not allow his or her personal preferences to affect the decision. The judge must exercise judgment based on faithfully and neutrally applying the relevant law and the factual record.

6. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a trial judge to make a subjective determination?

No. The inquiry is an objective one. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (“[T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.”).

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

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

Empathy is an important human trait that I believe all people should seek to cultivate, including judges. But neutrality and fairness are the *sine qua non* of the judicial role. Judges must base their decisions on the law and not on the identity of the litigants, the judge’s personal preferences, or any other non-legal factor. That is among the reasons why judges must agree to “administer justice without respect to persons.” 28 U.S.C. § 453. Judges should also treat all litigants with dignity and respect, and ensure they are all provided equal treatment under the law.

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

A judge’s life experience must not play a determinative role in the decision-making process because cases must be decided objectively based only on the governing law. But a judge’s life experiences can play a role in helping to understand the facts presented in a given case and create a recognition that the judge’s own perspective is not the only valuable viewpoint, and thus instill a readiness and openness to actively listen to all litigants.

8. In her recent book, *The Chief*, Supreme Court reporter Joan Biskupic documents the Court’s decision-making process in *NFIB v. Sebelius*, the landmark case concerning the constitutionality of the Affordable Care Act’s individual mandate and Medicaid expansion plan. Biskupic reported that the final votes, 5-4 to uphold the individual mandate as a valid exercise of the taxing clause, and 7-2 to curtail the Medicaid plan, “came after weeks of negotiations and trade-offs among the justices.”

a. In your view, what is the role of negotiating with other judges when deliberating on a case?

Open discussion of a case with other judges is a natural part of the appellate process, as multi-judge panels seek to reach agreement on the decision and the reasoning of the decision. These discussions must focus on governing law, including precedent, and not on outside considerations.

b. As a judge, under what circumstances would you consider conditioning your vote in one case or on one issue in a case on your vote, or the vote of a colleague's, in another?

Each case must be decided on its own merits. It would be inappropriate for me to condition or trade my vote in one case based on the outcome of any other case.

c. Are there aspects or principles of your judicial philosophy that you consider non-negotiable? For example, if you consider yourself an originalist are there circumstances in which you might stray from the result dictated by that philosophy?

I consider my understanding of the proper role of a judge to be non-negotiable, which includes a willingness to follow the precedent, law, and facts wherever they lead the judge, without imposing the judge's own personal or policy preferences on the law. It is also non-negotiable that judges must be impartial, neutral, and treat all litigants with dignity and respect, and ensure they are provided equal treatment under the law.

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

No.

10. The Seventh Amendment ensures the right to a jury "in suits at common law."

a. What role does the jury play in our constitutional system?

The right to a jury trial in "suits at common law" is a foundational feature of our federal Constitution, enshrined in the Bill of Rights. Juries play an invaluable role in our legal system.

b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

To the extent there is pending or impending litigation associated with this issue, it would not be appropriate for me to opine on the topic as a judicial nominee. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

c. Should an individual's Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please see my response to Question 10(b).

11. What do you believe is the proper role of an appellate court with respect to fact-finding?

Generally, an appellate court considers a factual record that has been developed in the court below and gives deference to those factual findings. Well-established standards of review

govern an appellate court's treatment of factual findings in various contexts, and I will faithfully follow all applicable precedent with respect to those standards if I am confirmed.

12. Do you believe fact-finding, if done by appellate courts, has the potential to undermine the adversarial process?

As noted in Question 11, the standards applicable to appellate review of factual findings are well-established, and it would be inappropriate for me to depart from those standards based on any personal belief. Please see my response to Question 11.

13. What deference do congressional fact-findings merit when they support legislation expanding or limiting individual rights?

The Supreme Court has addressed this issue in *Whole Woman's Health v. Hellerstedt* and other cases. In *Whole Woman's Health*, the Court held that courts "must review legislative 'factfinding under a deferential standard'" but not give legislative facts "dispositive weight." 136 S. Ct. 2292, 2310 (2016). I will faithfully apply this and all other precedent addressing this issue if confirmed.

14. Earlier this year, the Federal Judiciary's Committee on the Codes of Conduct issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.

a. Have you read Advisory Opinion #116?

Yes.

b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

i. Determining whether the seminar or conference specifically targets judges or judicial employees.

ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

If confirmed, I commit to comply with the Code of Judicial Conduct, including the obligation to avoid impropriety or the appearance of impropriety. I will evaluate my participation in any activity to ensure compliance with my ethical and legal obligations. If I have any question about whether an activity complies with the Code of Judicial Conduct, I will consult with the ethics attorneys at the Administrative Office of the U.S. Courts.

c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

Please see my response to Question 14(b).

Senate Judiciary Committee  
“Nominations”  
Questions for the Record  
November 5, 2019  
Senator Amy Klobuchar

Questions for Lawrence VanDyke, Nominee to the Ninth Circuit Court of Appeals

During your campaign for the Montana Supreme Court, you argued that dark money creates less danger of a conflict of interest than direct contributions because, “when you know a specific attorney who is representing a case before you gave \$25,000, that’s much more of a problem.” I believe that when unlimited, undisclosed money floods our campaigns, it undermines our elections and shakes the public’s trust in our democracy.

- Does this statement reflect your current views about campaign finance regulations?

In my comments in the *Great Falls Tribune*’s article referenced I was simply pointing out the factual reality that almost all of the disclosed donors giving large sums of money to support my opponent had, or had recently had, cases in front of him. I believed that was an accurate statement of the facts. I compared this with my opponent’s stated concerns about “dark money” influence in the election, and opined that I found this difference “interesting.” I do not recall “defend[ing] the use of dark money in judicial campaigns.” That was the *Great Falls Tribune*’s characterization, not mine. In any event, as a judicial nominee, it would not be appropriate for me to state my personal views on this issue as it is currently an issue of political controversy and it also may be related to one or more issues that are currently before the courts or may come before the court. If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent on any issue that comes before me as a sitting judge, without regard to my personal views or policy preferences.

- What do you believe is the appropriate legal standard to review a campaign finance regulation?

The Supreme Court has decided many cases involving campaign finance regulation, including *McCutcheon v. F.E.C.*, 134 S. Ct. 1434 (2014); *Citizens United v. F.E.C.*, 558 U.S. 310 (2010); *Davis v. F.E.C.*, 554 U.S. 724 (2008); *Randall v. Sorrell*, 548 U.S. 230 (2006); *McConnell v. F.E.C.*, 540 U.S. 93 (2003); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); and *Buckley v. Valeo*, 424 U.S. 1 (1976). If confirmed, I would faithfully apply these and any other relevant precedents of the Supreme Court and Ninth Circuit if a case involving campaign finance regulation were to come before me.

At your hearing, you said that you would take an “originalist or textualist approach” and review what “the Constitution meant to the people at the time when it was enacted.” I want to ask you to respond to a few lines from Justice Marshall’s opinion in *McCulloch v. Maryland*. He argued that the Founders could not have anticipated every possibility, or “exigency,” when they drafted

the Constitution, and that the Founders must have intended our Constitution “to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”

- What is your perspective on the point Justice Marshall made in *McCulloch*?

I agree with Justice Marshall’s point, as I think many textualists or originalists would. *See, e.g.,* Antonin Scalia, *Scalia Speaks* 189 (Scalia & Whelan, ed. 2017).

**Nomination of Lawrence VanDyke, to be United States Circuit Judge  
for the Ninth Circuit  
Questions for the Record  
Submitted November 6, 2019**

**QUESTIONS FROM SENATOR COONS**

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

The Supreme Court has provided significant guidance in the area of substantive due process, and lower court judges should pay close attention to its cases to identify the factors to consider. *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).

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

Yes. The Supreme Court has incorporated many expressly enumerated rights against the States under the Due Process Clause. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). I would apply all precedent relevant to the right at issue.

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. In *Glucksberg*, the Supreme Court held that fundamental rights are those rights that are "deeply rooted in this Nation's history and tradition." *See also Obergefell*, 135 S. Ct. at 2598 ("History and tradition guide and discipline this inquiry but do not set its outer boundaries."). I would consult the historical sources that the Supreme Court has identified, which have included, among others, statutory laws and the common-law tradition. *Glucksberg*, 521 U.S. at 710-19.

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

I would apply precedent from the Supreme Court and Ninth Circuit regarding the right at issue. I would also evaluate 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?

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 all factors recognized by the Supreme Court and Ninth Circuit precedent.

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

The 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?

If confirmed, I will apply all Supreme Court and other precedent. Arguments that are not consistent with precedent will not affect my decisions.

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 know why the *Virginia* litigation was not brought until the 1990s. From the perspective of a circuit nominee, however, it does not matter: *Virginia* is binding precedent of the Supreme Court that circuit judges must follow.

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

In *Obergefell v. Hodges*, the Supreme Court 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. To the extent this question asks about legal issues that are pending or impending in current litigation, I cannot answer that as a judicial nominee. See Canon 3A(6) of the Code of Conduct for United States Judges.

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?

The Supreme Court has recognized this right in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). 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* (as well as *Casey* and other 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 to Questions 3, 3(a), and 3(b).

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 for judges to consider evidence that sheds light on our changing understanding of society?

The Supreme Court has held that societal changes can be relevant to a court’s analysis in numerous contexts. When the Supreme Court has directed lower courts “to consider evidence that sheds light on our changing understanding of society,” the lower courts should do so. If confirmed, I will follow the Supreme Court’s holdings on this issue, including *Virginia* and *Obergefell*.

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

It would depend on the relevant Supreme Court precedent. As one example, the Supreme Court has generally indicated that district judges act in a “gatekeeping role” for this type of evidence when considering a relevant fact under Federal Rule of Evidence 702. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

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?

The Supreme Court has clearly held that same-sex couples have a right of privacy, *Lawrence v. Texas*, 539 U.S. 558 (2003), and a right to marry, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and that the Supreme Court has instructed that “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018). If confirmed, I will faithfully apply these and other relevant Supreme Court and Ninth Circuit precedents.

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

Please see my responses to Question 1 and its subparts.

6. You are a member of the Federalist Society, a group whose members often advocate an “originalist” interpretation of the Constitution.

a. 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. 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?

As I testified at my hearing, I believe that *Brown v. Board of Education* was correctly decided and holds a unique place in American jurisprudence. As a lower court nominee, I would be bound by the Supreme Court’s decision regardless of whether it is consistent with my interpretive philosophy. That said, while I have not analyzed this issue in great detail, I am generally aware that some well-respected originalist scholars assert that *Brown*’s holding comports with the original meaning of the Fourteenth Amendment. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

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 Nov. 7, 2019).

Originalists have acknowledged and addressed similar concerns. See, e.g., Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 399-402 (2012). While determining the original public meaning of constitutional language can be a difficult inquiry, that does not undermine the validity of the effort or of the originalist philosophy. But this question raises an academic point from the perspective of a circuit nominee. Circuit judges must follow the interpretive approach and precedent that the Supreme Court has held applies to a given constitutional provision, whether or not they personally agree with that approach.

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?

The Supreme Court’s prevailing view of the Constitution is always dispositive. If confirmed, as a lower court judge I will always faithfully apply Supreme Court and Ninth Circuit precedent regardless of the judicial philosophy utilized in those precedents.

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

Please see my response to Question 6(c).

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

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 a 2004 op-ed for *The Harvard Law Record*, you wrote about “homosexual ‘rights,’” asserted that “many studies raise concerns about gay parenting,” and stated that there is “ample reason for concern that same-sex marriage will hurt families, and consequentially children and society.”

a. Since *Obergefell v. Hodges* legalized same-sex marriage nationwide, has same-sex marriage hurt children?

In the intervening 15 years, there has undoubtedly been additional research beyond the “inconclusive” research that I referenced in my 2004 op-ed. I have not reviewed that research and therefore do not have an informed opinion as to the current state of that research. There have also been significant legal developments in this area of the law in those intervening years, including the *Obergefell* decision. If confirmed, I will faithfully apply *Obergefell* and all precedent if issues involving same-sex marriage come before me.

b. Can same-sex couples effectively raise children?

Please see my response to Question 7(a).

c. In the same op-ed, you suggested that “homosexuals can leave the homosexual lifestyle,” and you referred to the “chimera of ‘tolerance’ affiliated with homosexual rights.” Please explain what you meant by these statements.

The purpose of my 2004 op-ed was to defend Harvard Law Professor Mary Ann Glendon against charges that her voiced concerns about the then-new institution of gay marriage and a possible coming conflict between gay rights and religious liberty were “absurd.” I believed that it was unfair to characterize those concerns dismissively as “absurd.” My reference to “the view that homosexuals can leave the homosexual lifestyle” was in the context of providing an example where an English bishop was investigated by the police for his advocacy of that view.

d. During the hearing on your nomination, you testified that your opinions have evolved. Please explain how your views have evolved on the topic of LGBT rights.

As a federal judicial nominee, it would not be appropriate for me to state my personal views on this issue as it may be related to one or more issues that are currently before the courts or may come before the court. If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent on any issue that comes before me as a sitting judge, without regard to my personal views or policy preferences.

8. In *United States v. Windsor*, you encouraged Montana to join an amici brief arguing that constitutionalizing same-sex marriage would “Poison the Political Well,” citing “robust democratic debates across the country.”

a. Do you agree that it is a federal court’s responsibility to strike down laws that violate due process and equal protection?

This question quotes a multi-state *amicus* brief authored by Indiana. I did not draft the brief and my name was not on it. The State of Montana joined the brief through the Montana Attorney General. See Multi-State *Amicus* Br. (inside cover). That said, I do agree that it is the responsibility of the courts to carefully review all claims brought before them, including due process and equal protection claims, and to resolve those claims fairly and neutrally in accordance with all relevant precedent. I am committed to doing that if confirmed.

b. When is it appropriate for a court to consider whether striking down a law would have poisonous political consequences if that law violates due process or equal protection?

Please see my response to Question 8(a).

9. As Solicitor General of Montana, you supported joining an amici brief in *Sevcik v. Sandoval* that defended Nevada’s same-sex marriage ban.

a. The amici brief argued that the case did not implicate a fundamental right because same-sex marriage was not “deeply rooted in this Nation’s history and tradition.” Do you agree that *Obergefell* rejected the use of this test as dispositive of what constitutes a fundamental right?

This question quotes a multi-state *amicus* brief authored by Indiana. I did not draft the brief and my name was not on it. The State of Montana joined the brief through the Montana Attorney General. See Multi-State *Amicus* Br. at i. In *Obergefell*, the Supreme Court held that state laws are unconstitutional “to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.” 135 S. Ct. at 2605. In reaching this conclusion, the Court explained that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries.” *Id.* at 2598. If confirmed, I will faithfully apply *Obergefell* and all precedent.

b. The brief also argued that the same-sex marriage ban did not involve a suspect

class. Please state your understanding of the definition of what constitutes a suspect class.

Please see my response to Question 9(a). The Supreme Court has indicated that its “traditional indicia of suspectness” (for purposes of triggering heightened scrutiny based on a suspect classification) include whether a class has been “subjected to such a history of purposeful unequal treatment . . . as to command extraordinary protection from the majoritarian political process.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Apart from generally describing previous Supreme Court precedent, however, I cannot comment further under Canon 3A(6) of the Code of Conduct for United States Judges as this question broadly implicates legal issues that could come before me as a judge.

c. Do you believe that LGBT Americans have been discriminated against historically?

Yes.

d. Additionally, the brief argued that “[t]raditional marriage laws do not classify based on sexual orientation or target homosexuals.” Please explain how same-sex marriage bans do not classify individuals based on sexual orientation.

Please see my response to Question 9(a). This question quotes Indiana’s multi-state *amicus* brief. In its argument section, the *amicus* brief addressed that argument on pages 12-15 of the brief. In *Obergefell*, the Supreme Court held that state laws are unconstitutional “to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.” 135 S. Ct. at 2605. If confirmed, I will faithfully apply *Obergefell* and all precedent.

10. In *Elane Photography v. Willock*, you supported and contributed to an amici brief that defended a company that refused to photograph a same-sex wedding. In an email to colleagues, you argued that the case was not about “gay rights,” but rather it was about the First Amendment and religious freedom. During the hearing on your nomination, you testified that you did not think it was appropriate to question whether a person sincerely holds a religious belief. When the Supreme Court struck down laws banning interracial marriage, which a majority of states had when *Loving v. Virginia*, 388 U.S. 1 (1967), was decided, some opponents of interracial marriage raised religious objections. Do you agree that a business cannot refuse to photograph the wedding of an interracial couple on the basis of religion?

The Supreme Court has made clear that the Constitution contains strong guarantees of equal protection in a variety of contexts, including that state laws prohibiting interracial marriage violate Equal Protection in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The Court has also made clear that the Constitution strongly protects the free exercise of religion. Both of these are well-established and fundamental guarantees in our Nation. Because the intersection of these two guarantees is the subject of pending and impending litigation, it would not be appropriate for me to opine on issues that might come before me if I am confirmed. See Canon 3A(6) of the Code

of Conduct for United States Judges. If confirmed, I am committed to faithfully enforcing every provision of the Constitution, including the Equal Protection and Free Exercise Clauses, consistent with the Supreme Court and other applicable precedent.

11. You completed a questionnaire for the National Rifle Association during your campaign for the Montana Supreme Court. On the questionnaire, you indicated that you oppose banning the manufacture, possession, ownership, purchase, sale, and/or transfer of any firearm. Can a state constitutionally restrict some purchases, sales, ownership, possession, or transfers of firearms (for example, firearm possession by a felon)?

In *Heller*, the Supreme Court specifically noted that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” 554 U.S. 570, 626 (2008). The Court also stated that “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. It stated that “another important limitation on the right to keep and carry arms” “is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” *Id.* at 627 (citation omitted). And it stated that it did “not undertake an exhaustive historical analysis today of the full scope of the Second Amendment.” *Id.* at 626. Because the permissible scope of state firearm regulation remains subject to litigation, Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting further.

12. You filed a cert. petition in *Montana v. Holder* defending the Montana Firearms Freedom Act, though you noted in an email that you were “having trouble coming up with any plausible (much less good arguments) of how to get around *Raich*.”

a. Do you believe *Gonzales v. Raich*, 545 U.S. 1 (2005), and *Wickard v. Filburn*, 317 U.S. 111 (1942), remain good law?

Yes.

b. If a firearm is manufactured and sold entirely intrastate, can the federal government regulate its manufacture and sale?

Yes. Binding Ninth Circuit precedent so holds. *See Montana Shooting Sports Ass’n v. Holder*, 727 F.3d 975 (9th Cir. 2013).

c. Do you still believe that the federal government’s Commerce Clause power is “overreaching,” as you stated in your email?

As a judicial nominee, it would be inappropriate for me to opine on my personal beliefs about whether or not specific decisions of the Supreme Court or the Ninth Circuit are correctly decided. If confirmed, I will faithfully apply all precedent, regardless of my personal views as whether that precedent was correctly decided.

13. You published a note in the *Harvard Law Review* in 2004. Law Professor Brian Leiter asserted that your note represented “scholarly fraud” and was “riddled with . . . errors and misleading innuendo.” Do you continue to believe that your note was accurate?

Yes.

14. You filed an amicus brief in *Christian Legal Society Chapter of the University of California Hastings College of the Law v. Martinez* supporting the claim that the University of California Hastings’ failure to recognize the Christian Legal Society (CLS) as a campus organization, based on its exclusion of LGBT students from membership, violated CLS’s First Amendment rights. In a 2005 student note in the *Harvard Law Review*, you argued that antidiscrimination requirements cannot serve “a permissible purpose in the context of an organization whose primary purpose is to promote a message and when that message itself depends upon exclusion of the protected class.” What is the proper relationship between the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment?

Please see my response to Question 10.

15. As Montana Solicitor General, you supported Montana joining an amici brief in *Sebelius v. Hobby Lobby Stores, Inc., sub nom Burwell v. Hobby Lobby Stores, Inc.*, challenging the Affordable Care Act’s contraceptive mandate.

a. Do you agree that the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.* was limited to closely held companies like Hobby Lobby?

This question references a multi-state *amicus* brief authored by Michigan and Ohio. I did not draft the brief and my name was not on it. The State of Montana joined the brief through the Montana Attorney General. *See Multi-State Amicus Br.* at 37. To the extent this question asks me to opine on how the *Hobby Lobby* decision and rationale would apply in future cases, as a judicial nominee it would be inappropriate for me to answer that question because these issues remain the subject of pending or impending litigation. *See Canon 3A(6) of the Code of Conduct for United States Judges.*

b. When does the law require deference to an employer’s religious beliefs that conflict with generally applicable laws protecting others’ fundamental rights?

Please see my responses to Questions 10 and 15(a).

**Questions for Lawrence VanDyke  
From Senator Mazie K. Hirono**

1. In 2017, you were the counsel of record on a Supreme Court amicus brief against a Native American tribe seeking to protect its water rights. You opposed the Ninth Circuit’s decision, which found that when the United States established the Agua Caliente Reservation in the desert, it impliedly reserved a water right that included groundwater because for many locations in the western United States, groundwater is the only viable source of water. You argued that the Ninth Circuit’s decision would subject states like Nevada to a new water right “that has no historical basis beyond the nebulous claim that the federal reservation’s purpose included the need for water.”

**a. Is it your view that a Native American tribe whose reservation was placed in the desert has a “nebulous” claim that its land included the right to water?**

Respectfully, the multi-state *amicus* brief authored by Nevada and representing 10 states did not take a position that the Indian tribe in that case, or any other Indian tribe, did not need water. In a state like Nevada, often the collective need for water outstrips the supply. The brief asked the Supreme Court to grant review in that case out of concern that the lower court’s categorical preemption rationale could cause substantial disruption “in a state like Nevada where many of the groundwater allocation systems are already fully appropriated,” and “the longstanding appropriation regime will be disrupted by new, unaccounted-for federal reserved groundwater rights claims that are suddenly asserted for the first time.” Br. at 12.

**b. Under your argument, Native American reservations do not necessarily include the basic rights required to survive. In your view, are the rights of Native American tribes on reservations limited to only the surface of the land itself?**

No. Please see my response to Question 1(a).

2. In 2004, you wrote an op-ed as a law student defending a professor who opposed same-sex marriage. You argued that “many studies raise concerns about gay parenting” and there is “ample reason for concern that same-sex marriage will hurt families, and consequently children and society.”

At the hearing, you stated that your personal views had changed since writing your op-ed in 2004, but as a lawyer, you continued to oppose same-sex marriage. Public emails from your time as Montana Solicitor General reveal that you advocated for the Montana Attorney General to join amicus briefs arguing against the rights of same-sex couples to marry. You also “strongly recommended” that Montana join a brief opposing the New Mexico Human Rights Act for protecting a same-sex couple from discrimination by a photography company that refused to photograph their wedding. You wrote: “I worked with Andrew Brasher in the Alabama SG’s office to revise the intro to this brief to make it stronger.”

**a. Is it still your view that parenting by same-sex couples is concerning and “that same-sex marriage will hurt families, and consequently children and society”?**

Respectfully, I did not conclude that in the 2004 op-ed. The purpose of that op-ed was to defend Harvard Law Professor Mary Ann Glendon against charges that her voiced concerns about the then-new institution of gay marriage were “absurd.” In opining that it was unfair to characterize those concerns dismissively as “absurd,” I said that the research at that point was “inconclusive” and that there was “reason for concern.” In the intervening 15 years, there has undoubtedly been additional research beyond the “inconclusive” research that I referenced in my 2004 op-ed. I have not reviewed that research and therefore do not have an informed opinion as to the current state of that research. There have also been significant legal developments in this area of the law in those intervening years, including the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). If confirmed, I will faithfully apply *Obergefell* and all precedent if issues involving same-sex marriage come before me.

**b. Is it your view that a child raised by a same-sex couple is harmed by what you call “gay parenting”?**

Please see my response to Question 1(a).

**c. Can you provide specific examples of how same-sex marriage will hurt children and families?**

Please see my response to Question 1(a).

**d. You opposed same-sex marriage not only as a law student, but you also continued to oppose it as a lawyer. During this time period, laws and Supreme Court precedent have changed to protect the rights of same-sex couples. Have your views on same-sex marriage evolved along with these legal changes or is it still your view that protecting the rights of same-sex couples is harmful to society?**

Please see my response to Question 1(a). As a federal judicial nominee, it would not be appropriate for me to state my personal views on this issue as it may be related to one or more issues that are currently before the courts or may come before the court. If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent on any issue that comes before me as a sitting judge, without regard to my personal views or policy preferences.

**e. What can you point to in your record to show potential litigants who may appear before you, if you are confirmed as a judge, that you can fairly and impartially uphold a valid law protecting same-sex couples?**

As the Solicitor General of Nevada, Solicitor General of Montana, and in my current role as a Deputy Assistant Attorney General in the Department of Justice, I have regularly been tasked with defending laws or government actions or taking legal positions

that were not the same as my personal preferences. In those instances, I have always put aside my personal preferences and faithfully fulfilled my role as an advocate for my clients. This is why all three of the public officials that I worked for – Nevada Attorney General Adam Laxalt, Montana Attorney General Tim Fox, and Assistant Attorney General Jeffery Clark – have publicly praised my performance in those roles. It is also why so many of my former and current colleagues have praised my work in those roles and supported my judicial nomination. I recognize that, if I am confirmed, the role of a judge is very different from the role of an advocate. And if I am confirmed, I will set aside any advocacy positions and policy views and faithfully apply the relevant precedent in the cases that come before me. But the fact that I have been able to put aside my personal preferences and faithfully perform my role as an advocate in high profile litigation for a variety of important clients is, I believe, strong evidence that I will continue to faithfully put aside my personal preferences and neutrally apply the law if I am confirmed.

The importance of judges being fair and impartial is a longstanding view of mine. As evidenced by the speech notes that I provided as an attachment to my Senate Judiciary Committee Questionnaire, during my 2012 judicial campaign I emphasized in literally hundreds of speeches that the “job of our courts is to make sure that everyone gets a fair hearing – nobody should have to worry whether the judge and I see eye-to-eye ... or what his personal views are. [T]hey should know that no matter what the judge’s own preferences are, it will be the law that is applied, not the judge’s own preferences. . . . That is what I believe, and that is the kind of judge I will strive to be if I’m elected.” SJQ Attachments to Question 12(d) at 305 (emphasis omitted).

3. In 2013, you signed a Supreme Court amicus brief in *Isaacson v. Horne* that argued that an Arizona law banning abortions after 20 weeks was constitutional based on a “growing body of scientific literature showing that a fetus can suffer physical pain at twenty weeks’ gestation.” In fact, an email from your time as Montana Solicitor General shows that you actually edited this brief and added a section comparing the state’s interest in restricting a woman’s control over her own body to “prevent[] fetal pain” to laws “criminalizing the cruel infliction of pain on animals.”

**a. Is it your view that a state’s interest in preventing fetal pain can override a woman’s right to control her own body and choose not to undergo childbirth?**

The Montana Attorney General decided that the State of Montana would be a co-author of that particular multi-state amicus brief. Consistent with that direction, I served as a co-author on the brief along with attorneys in the Ohio Attorney General’s office. I faithfully performed my role in that case as an advocate for my client, the State of Montana and the Montana Attorney General.

The multi-state *amicus* brief in that case relied on Supreme Court precedent indicating that “[a]n undue burden exists, and therefore a provision of law is invalid, if its *purpose* or *effect* is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” *Casey*, 505 U.S. at 878 (plurality op.; emphases added). The States’ *amicus* brief interpreted the “purpose” prong of this

undue-burden test as considering the intent underlying the challenged provision. *See* Multi-state *Amicus* Br. at 18-19. In *Gonzales v. Carhart*, 550 U.S. 124 (2007), for example, the Court upheld the Partial-Birth Abortion Ban Act after “reject[ing] the contention that the *congressional purpose* of the Act was ‘to place a substantial obstacle in the path of a woman seeking an abortion.’” *Id.* at 160 (citation omitted; emphasis added); *see also* *Mazurek v. Armstrong*, 520 U.S. 968, 972-73 (1997) (per curiam).

Likewise, the multi-state *amicus* brief argued that the Arizona law was not an undue burden because its effect did not “generally prohibit a woman from obtaining an abortion before viability,” but “merely channel[ed] elective abortions to the time before a fetus may suffer great pain and before risks to the woman’s health are greatest.” Multi-state *Amicus* Br. at 19.

The arguments made in that brief do not necessarily reflect my own views; they were arguments made as an advocate on behalf of my client. As a federal judicial nominee, it would not be appropriate for me to state my personal opinion on these issues as they may be related to one or more cases that are currently before the courts or may come before the court. If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent on any issue that comes before me as a sitting judge, without regard to my personal views or policy preferences.

**b. Do you agree that under your argument, if states can criminalize cruel infliction of pain on animals to further their “general interest in preventing pain,” states could criminalize abortions after 20 weeks to further that same interest?**

One of the arguments made in the multi-state *amicus* brief was that states have an interest in preventing the infliction of unnecessary and avoidable “severe fetal pain.” Multi-state Br. at 1. In support of that argument, the brief stated: “States have long furthered a general interest in preventing pain, as evident, for example, by the ubiquity of laws criminalizing the cruel infliction of pain on animals. *See, e.g.*, Alaska Stat. § 11.61.140 (criminalizing infliction of ‘severe and prolonged physical pain or suffering on an animal’); Fla. Stat. § 828.12 (criminalizing ‘infliction of unnecessary pain’ on animals).” Multi-state *Amicus* Br. at 7. Like all the arguments made in that brief, these were arguments made as an advocate on behalf of my client. As a federal judicial nominee, it would not be appropriate for me to state my personal opinion on these issues as they may be related to one or more cases that are currently before the courts or may come before the court. If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent on any issue that comes before me as a sitting judge, without regard to my personal views or policy preferences.

4. You argued in *Isaacson v. Horne* that the Arizona law banning abortions after 20 weeks is not an undue burden because it “merely channel[s] the woman’s choice rather than prohibit[s] it” because a woman has “adequate time” in the first 20 weeks of pregnancy to choose to have an abortion before it is banned.

**a. Is it your view that state laws banning certain abortions are “merely channeling” a woman’s choice?**

Please see my response to Question 3(a).

**b. Based on your argument, would you say that state laws banning certain guns are “merely channeling” a gun owner’s choice?**

Please see my response to Question 3(a).

5. In advocating for Supreme Court review in *Isaacson v. Horne*, one of the issues you presented to the Court was whether it should reconsider its precedent in *Roe v. Wade* and its progeny, “in light of the recent, compelling evidence of fetal pain and significantly increased health risk to the mother for abortions performed after twenty weeks gestational age.” Judicial nominees come before us and claim that regardless of their extreme record, they will put aside their personal views and follow Supreme Court precedent. But in your case, you have actually tried to get the Supreme Court to change its decades-old, well-established precedent protecting a woman’s right to control her own body.

**What facts in your record can you point to – beyond a claim that you will follow precedent – that shows you will honor the full scope of *Roe v. Wade*, if you are confirmed as a judge?**

Respectfully, the multi-state brief referenced did not ask the Supreme Court to reconsider *Roe v. Wade* or its progeny. The language quoted in the question is from the questions presented in the case, which are prepared by the petitioner in each case, not by *amici*. *Amici* in their briefing often only address a subset of the arguments made by the petitioners. This was true in the multi-state *amicus* brief that Montana co-authored in the *Isaacson v. Horne* case. On the very first page of that brief the multi-state *amici* carefully “noted” for the Court that our arguments did “not attempt to invalidate the central ‘undue burden’ framework established by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).” Multi-state *Amicus* Br. at 1. If confirmed, I will faithfully apply all Supreme Court and Ninth Circuit precedent, including *Roe* and *Casey*, on any issue that comes before me as a sitting judge. Please also see my response to Question 2(e).

6. When you campaigned to become a Montana Supreme Court Justice in 2014, you actively sought out an endorsement from the National Rifle Association (NRA) and completed its candidate questionnaire. In submitting your questionnaire, you highlighted that you were “instrumental in Montana in joining many multi-state briefs in the United States Supreme Court on gun issues.” In the NRA questionnaire, you indicated your opposition to nearly all forms of restrictions on guns, including state licensing of firearm owners, and background checks for private gun sales.

**a. Do you still stand by the responses you provided in this NRA questionnaire?**

As a federal judicial nominee, it would not be appropriate for me to state my personal opinion on these political or policy issues. As noted in my email transmitting

the completed questionnaire, the questionnaire was “obviously geared towards legislative candidates,” so I “answered it as if I was a legislative candidate. My role as a [state] Supreme Court justice would be different, obviously. Legislators make the law. Justices apply the law; they shouldn’t be legislating from the bench. And if elected to the Montana Supreme Court, I am 100% committed to being a justice who correctly *applies* the law ....” Like the role of a state court justice, the role of a federal judge is very different than that of a legislator. If I am confirmed to the Ninth Circuit, I remain 100% committed to performing my role as a judge by correctly and faithfully applying the law as written without any regard for my personal views or policy preferences.

**b. Do the responses you provided in this NRA questionnaire accurately reflect your current views?**

Please see my response to Question 6(a).

**c. Given your NRA questionnaire, will you agree to recuse yourself from all cases involving the NRA, if you are confirmed?**

Please see my response to Question 6(a). If confirmed to the Ninth Circuit, I will terminate my NRA membership. As I noted on Question 24 of my Senate Judiciary Questionnaire, if I am confirmed, I will carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis. For specific cases on which I have worked, 28 U.S.C. § 455(b)(3) establishes a bright-line test requiring recusal. For other cases on which I have had no involvement, I would carefully evaluate and apply the standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges, and any relevant authorities interpreting these provisions.

**d. In the NRA questionnaire, you stated that you believe all law-abiding persons, including visitors, staff, and students, should be able to carry concealed guns on public colleges and universities. At least 16 states ban carrying concealed weapons on college campuses. Last Sunday, a gunman opened fire at an off-campus college party in Texas, leaving at least two people dead and 12 injured. Does this tragedy make you reconsider your position that all law-abiding citizens should be able to carry concealed guns on college campuses, including college parties and college classes?**

Like all Americans, I am appalled at the tragic consequences from the illegal use of firearms. As a judicial nominee, it would be improper for me to opine on the many political and policy questions being considered with regard to these tragedies. If confirmed, if a case comes before me in this area, just like in every case I will faithfully apply the law and precedent to the factual record before.

7. In addition to answering numerous questions in the NRA questionnaire affirming that you do not support restrictions on gun ownership, you hand wrote a note on the questionnaire stating,

“I have previously been a member of the NRA, but am not currently a member. I don’t want to risk recusal if a lawsuit came before me where the NRA was involved.”

**Is it your view that it is proper to actively seek an endorsement from the NRA and signal your enthusiasm for the NRA’s positions, while explicitly attempting to avoid recusing yourself from NRA cases as a judge by simply not being an official NRA member?**

Please see my response to Question 6(a). I fully recognize the difference between being an advocate or a legislator and being a judge. If fortunate enough to be confirmed, I would set aside any advocacy positions and policy views and faithfully apply the relevant precedent in the cases that come before me, just as I said I would do in my correspondence to the NRA.

8. In 2015, you sought a nationwide injunction to block the Obama administration’s “Waters of the United States” (WOTUS) rule, which would have increased the number of bodies of water protected under the Clean Water Act. The district court judge blocked the rule in the 12 states that were a party to the lawsuit.

In August of this year, the Ninth Circuit narrowed a district court’s nationwide injunction blocking the Trump administration’s asylum ban. The Ninth Circuit limited the injunction to the states in the Circuit.

**a. In your 2015 brief, you argued that “[t]here is no geographical limit on the Court’s equitable authority” and the “Court has broad discretion to” impose a nationwide injunction. Is that still your view?**

The Nevada Attorney General decided that the State of Nevada would join in that multi-state litigation. Consistent with that direction, I served as a co-counsel in that litigation on behalf of the State of Nevada. I faithfully performed my role in that case as an advocate for my client, the State of Nevada and the Nevada Attorney General. The arguments made in that litigation do not necessarily reflect my own views; they were arguments made as an advocate on behalf of my client. As a federal judicial nominee, it would not be appropriate for me to state my personal opinion on these issues as they may be related to one or more cases that are currently before the courts or may come before the court. If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent on any issue that comes before me as a sitting judge, without regard to my personal views or policy preferences.

**b. In your view, what criteria should be considered in determining whether an injunction should be issued on a nationwide basis?**

As a judicial nominee, it would not be appropriate for me to opine on issues that are being considered in pending or impending litigation. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

9. You recommended that the State of Montana join a Supreme Court amicus brief filed in 2013 defending the Defense of Marriage Act. The brief argued against recognizing same-sex

marriages, claiming that “the choice to promote traditional marriages is based on an understanding that civil marriage recognition arises from the need to encourage biological parents to remain together for the sake of their children. It protects the *only* procreative relationship that exists and makes it more likely that unintended children, among the weakest members of society, will be cared for.” In an email to the Indiana Solicitor General, you wrote that the brief was “very well written and persuasive” and noted you had submitted your recommendation to the Montana Attorney General.

**a. Is it your view that marriage protects the “*only* procreative relationship that exists”?**

This question quotes a multi-state amicus brief authored by Indiana. I did not draft the brief and my name was not on it. The State of Montana joined the brief through the Montana Attorney General. See Multi-State *Amicus* Br. (inside cover). The arguments made in that litigation do not necessarily reflect my own views; they were arguments made as an advocate on behalf of a client. As a federal judicial nominee, it would not be appropriate for me to state my personal opinion on these issues as they may be related to one or more cases that are currently before the courts or may come before the court. As a legal matter, the Supreme Court has addressed some of the issues presented in that litigation in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). If confirmed, I will faithfully apply *Obergefell* and all relevant Supreme Court and Ninth Circuit precedent on any issue that comes before me as a sitting judge, without regard to my personal views or policy preferences.

**b. In your view, does “the need to encourage biological parents to remain together for the sake of their children” through marriage still exist today?**

Please see my response to Question 9(a).

10. As Solicitor General of Nevada, you led several states to file an emergency motion asking for a nationwide injunction blocking the Obama administration’s rule expanding the number of people eligible for overtime pay. In 2017, you gave a speech at a Federalist Society event that appeared to take credit for stopping the rule long enough for the Trump administration to issue a new rule. In your notes for the speech, you wrote: “So how do you challenge a practice that has been going on for 70+ years?” Your response was: “Federalist Society: you go back to original meaning – the text!”

**a. Your statements suggest that “originalism” is really an outcome-driven judicial philosophy. Is it your view that to challenge a decades-old practice, the solution is to rely on its “original meaning”?**

Respectfully, I do not believe my statement suggests originalism is an outcome-driven judicial philosophy. I do not believe that. I believe one of the merits of originalism is that it constrains judicial discretion and helps prevent a judge’s personal preferences from influencing the judicial process. What I was attempting to say in the

quoted speech, with some rhetorical flourish, was that the states' position in the litigation you reference was supported by an originalist reading of the relevant statutory law.

**b. As the Solicitor General of Nevada leading the case, why did you choose to file your emergency motion in Texas instead of Nevada? According to the notes for your Federalist Society speech, you pointed out that “Most people thought we could not challenge the existence of a minimum salary requirement – had been around too long.” You then note, “So we challenged the rule in federal district court in Texas.”**

In that case, I was lead counsel, not just for the State of Nevada, but for a 21-state coalition. Accordingly, we had many venue options. It would be inappropriate for me to divulge client confidentiality on how strategic litigation decisions were made, including the choice of venue.

11. We only have a few minutes to question nominees who come before us, but the American Bar Association (ABA) does a more extensive review process for each nominee. In your case, they conducted 60 interviews with a representative cross section of lawyers, judges, and your former coworkers. They rated you Not Qualified by a majority vote. They reported you were described as: “arrogant, lazy, an ideologue,” that you “lack[] humility . . . do[] not have an open mind, and do[] not always have a commitment to being candid and truthful.” That last comment is particularly disturbing for someone who has been nominated for a lifetime position as a judge.

**a. Have you ever not been candid or truthful to a court?**

I have always been candid and truthful to a court.

**b. Have you ever not been candid or truthful while under oath?**

I have always been candid and truthful while under oath.

**c. At the hearing, you stated that you met with the ABA for three hours, but that the interviewer did not give you enough time to respond to these concerning statements about you. How much time do you think you would need to respond to these statements?**

I do not know. It would depend on many factors, including whether the interviewer was willing to actually engage with my responses fairly and without bias, as opposed to treating the interview like a hostile deposition.

12. 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?**

Judges are ethically and morally bound to decide cases without regard to bias, prejudice, or preference. I agree that training to help judges understand and fulfill this obligation is important.

**b. Have you ever taken such training?**

I do not recall receiving training on implicit bias.

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

If confirmed, I will participate in any training opportunities offered to assist me in learning my role and performing it to the best of my ability. I am not presently familiar with the training programs that may exist for federal judges on this or other topics, but if such trainings were offered, I would expect to participate in them.

**Nomination of Lawrence VanDyke**  
**United States Court of Appeals for the Ninth Circuit Questions for the Record**  
**Submitted November 6, 2019**

**QUESTIONS FROM SENATOR BOOKER**

1. In 2013, while you were Montana’s Solicitor General, Montana joined an amicus brief before the U.S. Supreme Court in *Elane Photography v. Willock*, in which a photography company had been found to have violated a New Mexico law by refusing to photograph a commitment ceremony between two women.<sup>1</sup> The brief argued that New Mexico’s law “force[d] its residents to create expressive works that communicate a particular viewpoint.”<sup>2</sup> In recommending to Montana’s Attorney General that the state join this brief, you wrote the following in an e-mail: “I think this is an important case for the future of religious freedom in America. . . . This is an important case because there is a fairly obvious collision course between religious freedom and gay rights, and this case (because it is an extreme case) could be very important in establishing that gay rights cannot always trump religious liberty.”<sup>3</sup>

a. Why, in your view, was this case concerning a photographer’s refusal to photograph a same-sex commitment ceremony “an important case for the future of religious freedom in America”?

The Court has made clear that the Constitution strongly protects the free exercise of religion. The Supreme Court has also made clear that the Constitution contains strong guarantees of equal protection in a variety of contexts, including same-sex relationships. Both of these are well-established and fundamental guarantees in our Nation, and there have recently been cases, including cases at the Supreme Court, that consider the intersection of these two guarantees. Because the intersection of these two rights is the subject of pending and impending litigation, it would not be appropriate for me to opine on issues that might come before me if I am confirmed. *See* Canon 3A(6) of the Code of Conduct for United States Judges. If confirmed, I am committed to faithfully enforcing every provision of the Constitution, including the Equal Protection and Free Exercise Clauses, consistent with the Supreme Court and other applicable precedent.

b. What is the “fairly obvious collision course” that you described “between religious freedom and gay rights”?

Please see my response to Question 1(a).

c. Why, in your view, was it important to “establish[] that gay rights cannot always trump religious liberty”?

Please see my response to Question 1(a).

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<sup>1</sup> Brief of Alabama et al. as Amici Curiae Supporting Petitioner, *Elane Photography LLC v. Willock*, 134 S. Ct. 1787 (2014) (No. 13-585), 2013 WL 6665007.

<sup>2</sup> *Id.* at \*3.

<sup>3</sup> *VanDyke Seeks Supreme Court Seat*, GREAT FALLS TRIB. (Sept. 17, 2014), <https://www.greatfallstribune.com/story/news/local/2014/09/17/vandyke-politician-nature/15812491>.

2. You published an article in 2004 in which you argued that same-sex marriage would harm children.<sup>4</sup> You wrote that “many studies raise concerns about gay parenting” and that there is “ample reason for concern that same-sex marriage will hurt families, and consequentially children and society.”<sup>5</sup>

a. What sources did you rely on for your claim that same-sex marriage in the United States would “hurt families, and consequentially children and society”?

Respectfully, I did not conclude that in the 2004 op-ed. The purpose of that op-ed was to defend Harvard Law Professor Mary Ann Glendon against charges that her voiced concerns about the then-new institution of gay marriage were “absurd.” In opining that it was unfair to characterize those concerns dismissively as “absurd,” I said that the research at that point was “inconclusive” and that there was “reason for concern.” I pointed to the “significant collection of research in *Goodridge* . . . contained in Justice Cordy’s dissent” and a *Weekly Standard* article about families in Scandinavia. In the intervening 15 years, there has undoubtedly been additional research beyond the “inconclusive” research that I referenced in my 2004 op-ed. I have not reviewed that research and therefore do not have an informed opinion as to the current state of that research. There have also been significant legal developments in this area of the law in those intervening years, including the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). If confirmed, I will faithfully apply *Obergefell* and all precedent if issues involving same-sex marriage come before me.

b. Do you stand by your statements about same-sex parents and their children? If not, please explain specifically how your views have changed, and please provide any available documentation of any such changes.

Please see my response to Question 2(a). As a federal judicial nominee, it would not be appropriate for me to state my personal views on this issue as it may be related to one or more issues that are currently before the courts or may come before the court. If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent on any issue that comes before me as a sitting judge, without regard to my personal views or policy preferences.

3. Impartiality is a fundamental part of a federal judge’s duties. Impartiality is central to the rule of law and judicial independence. Canon 3 of the Code of Conduct for United States Judges instructs: “A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently.” Canon 3(C), moreover, specifically provides: “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”

In addition to the concerns in your record about LGBTQ rights raised above, and elsewhere, the American Bar Association’s letter on your nomination stated: “Some interviewees raised concerns about whether Mr. VanDyke would be fair to persons who are gay, lesbian, or otherwise part of the

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<sup>4</sup> Lawrence VanDyke, *One Student’s Response to “A Response to Glendon,”* HARV. L. REC. (Mar. 11, 2004), <http://hlrecord.org/one-students-response-to-a-response-to-glendon>.

<sup>5</sup> *Id.*

LGBTQ community. Mr. VanDyke would not say affirmatively that he would be fair to any litigant before him, notably members of the LGBTQ community.”<sup>6</sup>

a. If you are confirmed, why should a same-sex couple arguing their case before you expect to have a fair and impartial judge, in light of your record of LGBTQ rights?

As I stated during my testimony, it is a fundamental belief of mine that every person is created in the image of God and should be treated with dignity and respect. I recognize the importance of being a fair, impartial, and neutral judge, and if confirmed I am fully committed to that. The importance of judges being fair and impartial is a longstanding view of mine. As evidenced by the speech notes that I provided as an attachment to my Senate Judiciary Committee Questionnaire, during my 2012 judicial campaign I emphasized in literally hundreds of speeches that the “job of our courts is to make sure that everyone gets a fair hearing – nobody should have to worry whether the judge and I see eye-to-eye . . . or what his personal views are. [T]hey should know that no matter what the judge’s own preferences are, it will be the law that is applied, not the judge’s own preferences. . . . That is what I believe, and that is the kind of judge I will strive to be if I’m elected.” SJQ Attachments to Question 12(d) at 305. I will faithfully apply all Supreme Court and Ninth Circuit precedent on any issue that comes before me as a sitting judge.

b. Given the positions you have taken on LGBTQ rights, would you recuse yourself from any cases involving the rights of LGBTQ people if you are confirmed?

As I noted on Question 24 of my Senate Judiciary Questionnaire, if I am confirmed, I will carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis. For specific cases on which I have worked, 28 U.S.C. § 455(b)(3) establishes a bright-line test requiring recusal. For other cases on which I have had no involvement, I would carefully evaluate and apply the standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges, and any relevant authorities interpreting these provisions. Moreover, I fully recognize the difference between being an advocate and being a judge. If confirmed, I will set aside any advocacy positions and policy views and faithfully apply the relevant precedent in the cases that come before me.

4. In 2014, while you were Montana’s Solicitor General, the General Counsel of the Second Amendment Foundation sent you an e-mail requesting support in the form of an amicus brief.<sup>7</sup> In discussing the possibility of filing a brief on behalf of the state of Montana with the state’s Attorney General, you wrote, “Should I ask them if they know of someone who could ghost-write a first draft for us?”<sup>8</sup>

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<sup>6</sup> Letter from William C. Hubbard, Standing Comm. on the Fed. Judiciary, Am. Bar Ass’n, to Senators Lindsey Graham & Dianne Feinstein, Comm. on the Judiciary, U.S. Senate (Oct. 29, 2019), [https://www.americanbar.org/content/dam/aba/administrative/government\\_affairs\\_office/10-29-2019-vandyke-rating.pdf](https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/10-29-2019-vandyke-rating.pdf).

<sup>7</sup> E-mail from Lawrence VanDyke to Tim Fox (Apr. 4, 2014, 1:11 PM), *in* John Adams Records Request – Sept. 2014, at 645.

<sup>8</sup> *Id.*

a. In your time as Montana’s Solicitor General, were there other occasions on which an interest group would “ghost-write a first draft” of a brief to be filed on behalf of the state of Montana?

No.

b. If so, please identify any organizations that provided you with drafts of briefs that were filed on behalf of the state of Montana, without public acknowledgment of the outside group’s role.

Please see my response to Question 4(a).

c. While you were Montana’s Solicitor General, did your office’s filings always comply with the applicable disclosure requirements for amicus briefs? For example, the Federal Rules of Appellate Procedure require amicus briefs to include “a statement that indicates whether: (i) a party’s counsel authored the brief in whole or in part; (ii) a party or a party’s counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) a person—other than the amicus curiae, its members, or its counsel— contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.”<sup>9</sup>

Yes.

5. During your campaign for Montana Supreme Court in 2014, you completed a National Rifle Association questionnaire and proclaimed your support for many NRA-endorsed positions.<sup>10</sup> You asserted that you believe that that “[g]un control laws are misdirected.”<sup>11</sup> You also stated that you would support legislation to “repeal the restrictions on where law-abiding citizens may carry a concealed weapon” and to make it easier to purchase unusual weapons “such as a firearm sound suppressor or fully automatic firearm.”<sup>12</sup>

In response to questioning from Senator Blumenthal at your hearing, you noted: I was sent a questionnaire by the NRA when I was running for the Montana Supreme Court. It was kind of a weird questionnaire, in that it—for the purposes that they had sent it to me, because it was clearly designed for legislators. It said things like, would you support, would you sponsor certain legislation? I filled it out. I told them I was filling it out as a legislator, because that’s the way the questionnaire was designed. But I specifically told—when I submitted that, I wrote in the e-mail to them, Senator, that obviously I’m not running to be a legislator, and I believe that the job of a judge is very different than being a legislator. Judges’ jobs are not to make the law, set policy; they are to apply the law; and that I was fully committed to doing that, Senator.

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<sup>9</sup> Fed. R. App. P. 29(a)(4)(E).

<sup>10</sup> Lawrence VanDyke, *Nat’l Rifle Ass’n of Am. Political Victory Fund, 2014 Montana Candidate Questionnaire*, in SJQ Supplement Letter (Oct. 23, 2019).

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 4.

a. If this was “kind of a weird questionnaire” that was “clearly designed for legislators,” why did you complete it as a candidate for a judicial office on the state’s highest court?

I was asked to complete the questionnaire to be considered for an endorsement. As noted in my email transmitting the completed questionnaire, the questionnaire was “obviously geared towards legislative candidates,” so I “answered it as if I was a legislative candidate. My role as a [state] Supreme Court justice would be different, obviously. Legislators make the law. Justices apply the law; they shouldn’t be legislating from the bench. And if elected to the Montana Supreme Court, I am 100% committed to being a justice who correctly *applies* the law.” Like the role of a state court justice, the role of a federal judge is very different than that of a legislator. I fully recognize the difference between being an advocate or a legislator and being a judge. If I am confirmed to the Ninth Circuit, I remain 100% committed to performing my role as a judge by correctly and faithfully applying the law as written without any regard for my personal views or policy preferences.

b. After receiving the NRA’s questionnaire, why did you nevertheless “fill[] it out as a legislator,” when you were seeking a seat on the Montana Supreme Court?

Please see my response to Question 5(a).

c. You said that you indicated to the NRA that “the job of a judge is very different than being a legislator.” Yet you responded directly to each of the 21 multiple-choice questions on the NRA’s questionnaire. Please explain how, as a judicial candidate, you completed the NRA’s questionnaire any differently from what a legislative candidate would have done.

Please see my response to Question 5(a).

d. In your e-mail to the NRA submitting the completed questionnaire, you wrote, “[I]f I am elected to the Montana Supreme Court, I am 100% committed to being a justice who correctly *applies* the law – just like Justice Scalia did in the *Heller* decision.”<sup>13</sup> Please explain what you meant by that commitment.

Please see my response to Question 5(a). I meant that as a judge it would not be appropriate for me to allow my policy and political preferences to influence my judicial decision-making. As a judge, my decisions would be based strictly on an impartial and fair application of the law and precedent to the factual record before the court.

e. Please refer to Canon 3 of the Code of Conduct for United States Judges, on judicial impartiality, discussed above. If you are confirmed, why should a party defending a gun violence prevention law in a case before you expect to have a fair and impartial judge, in light of the NRA policy positions you endorsed when you were seeking another judgeship?

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<sup>13</sup> E-mail from Lawrence VanDyke to Brian Judy (Sept. 18, 2014), in SJQ Supplement Letter (Oct. 23, 2019); see *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Please see my responses to Questions 5(a) and 5(d).

f. Given the NRA policy positions you endorsed when previously seeking a judicial office, would you recuse yourself from any cases involving the Second Amendment if you are confirmed?

If confirmed to the Ninth Circuit, I will terminate my NRA membership. As I noted on Question 24 of my Senate Judiciary Questionnaire, if I am confirmed, I will carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis. For specific cases on which I have worked, 28 U.S.C. § 455(b)(3) establishes a bright-line test requiring recusal. For other cases on which I have had no involvement, I would carefully evaluate and apply the standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges, and any relevant authorities interpreting these provisions.

6. As Montana’s Solicitor General, you reportedly “placed a special emphasis on writing amicus briefs supporting gun rights and anti-abortion laws.”<sup>14</sup> For example, while you were in that position Montana co-led an amicus brief before the U.S. Supreme Court arguing that “*Roe v. Wade* and its progeny” should be “revisited in light of the recent, compelling evidence of fetal pain and significantly increased health risk to the mother for abortions performed after twenty weeks gestational age.”<sup>15</sup>

a. In your view, is it accurate to say that as Montana’s Solicitor General you “placed a special emphasis on writing amicus briefs supporting gun rights and anti-abortion laws”?

No.

b. What specific aspects of *Roe v. Wade* and subsequent Supreme Court case law do you believe should be “revisited”?

Respectfully, the multi-state brief referenced did not ask the Supreme Court to reconsider *Roe v. Wade* or its progeny. The language quoted is from the questions presented in the case, which are prepared by the petitioner in each case, not by *amici*. *Amici* in their briefing often only address a subset of the arguments made by the petitioners. This was true in the multi-state *amicus* brief that Montana co-authored in the *Issacson v. Horne* case. On the very first page of that brief the multi-state *amici* carefully “noted” for the Court that our arguments did “not attempt to invalidate the central ‘undue burden’ framework established by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).” Multi-state *Amicus* Br. at 1.

Moreover, the arguments made in that brief, just as with all arguments I’ve made as an advocate, do not necessarily reflect my own personal views; they were arguments made as an advocate on behalf of my client. As a federal judicial nominee, it would not be

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<sup>14</sup> Shaila Dewan, *Montana Judicial Race Joins Big-Money Fray*, N.Y. TIMES (Nov. 2, 2014), <https://www.nytimes.com/2014/11/03/us/montana-judicial-race-joins-big-money-fray.html>.

<sup>15</sup> Amicus Brief of the States of Ohio, Montana, and 14 Other States Supporting Petitioners, *Horne v. Isaacson*, 134 S. Ct. 905 (2014) (No. 13-402), 2013 WL 5837683.

appropriate for me to state my personal opinion on these issues as they may be related to one or more cases that are currently before the courts or may come before the court. If confirmed, I will faithfully apply all Supreme Court and Ninth Circuit precedent, including *Roe* and *Casey*, on any issue that comes before me as a sitting judge.

7. In the *Harvard Law Review*, you published a book review that defended the constitutionality of teaching intelligent design in public schools.<sup>16</sup> You started from the premise that there has been a “dogmatic presentation” of “naturalistic evolution,” which “has long enjoyed a pedagogical monopoly in our nation’s public schools.”<sup>17</sup> The author of the book, you wrote, “persuasively argues that presentation of [intelligent design] in public schools would not impermissibly ‘establish’ religion, even though it may incidentally lend support for a variety of religious claims.”<sup>18</sup> You also noted that the Establishment Clause would not be violated, in part, because intelligent design’s “allu[sion] to a ‘designer’ . . . is strictly predicated upon empirical and philosophical evidence without sectarian trappings.”<sup>19</sup>

a. In 1987, the Supreme Court struck down a state law that forbade the teaching of evolution unless it was accompanied by instruction on creationism, because that law impermissibly endorsed religion and violated the Establishment Clause.<sup>20</sup> Please explain how the views you expressed here are consistent with Supreme Court precedent.

The entire purpose of the book that I reviewed was to analyze Intelligent Design against the backdrop of the Supreme Court’s Establishment Clause precedents, including *Edwards v. Aguillard*, 482 U.S. 578 (1987), and determine whether the presentation of Intelligent Design would be consistent with Supreme Court precedent, or not. After a book-length analysis, the author concluded that it would be. I do not think I could summarize the book’s analysis and conclusions any better or more succinctly than I have already done in my 8-page book review, which I have already provided as an attachment to my Senate Judiciary Committee Questionnaire. Since I have not reviewed this issue since law school, I have nothing to add to the book review’s summary.

b. Please explain what you meant when you wrote that evolution “has long enjoyed a pedagogical monopoly in our nation’s public schools” and has had a “dogmatic presentation.”

I meant that naturalistic evolution was the only theory of origins taught in public schools.

c. Please explain why, in your view, the teaching of intelligent design in public schools only “incidentally” supports religious claims without endorsing religion under the

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<sup>16</sup> Lawrence VanDyke, Note, *Not Your Daddy’s Fundamentalism: Intelligent Design in the Classroom*, 117 HARV. REV. 964 (2004), in SJQ Attachments to Question 12(a) at 95.

<sup>17</sup> *Id.* at 965.

<sup>18</sup> *Id.* at 969.

<sup>19</sup> *Id.* at 965.

<sup>20</sup> *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987).

Establishment Clause.

Please see my response to Question 7(a). The quoted language is a summary of the conclusion reached by the author in the book I reviewed. Again, I do not think I could summarize the book's analysis and conclusions any better or more succinctly than I have already done in my 8-page book review, which I have already provided as an attachment to my Senate Judiciary Committee Questionnaire. Since I have not reviewed this issue since law school, I have nothing to add to the book review's summary.

8. During your campaign for a seat on the Montana Supreme Court in 2014, you defended the use of dark money in judicial campaigns. As the *Great Falls Tribune* reported:

VanDyke argued there is a benefit to dark money spending in judicial elections because the judges don't know who spent money to help get them elected. "When you know a specific attorney who is representing a case before you gave \$25,000 (to a PAC that supported the judge's election) that's much more of a problem," VanDyke said.<sup>21</sup>

a. Do you stand by your defense of dark money in judicial elections?

In my comments in the *Great Falls Tribune's* article I was simply pointing out the factual reality that almost all of the disclosed donors giving large sums of money to support my opponent had, or had recently had, cases in front of him. I believed that was an accurate statement of the facts. I compared this with my opponent's stated concerns about "dark money" influence in the election, and opined that I found this difference "interesting." I do not recall "defend[ing] the use of dark money in judicial campaigns." That was the *Great Falls Tribune's* characterization, not mine. In any event, as a judicial nominee, it would not be appropriate for me to state my personal views on this issue as it is currently an issue of political controversy and it also may be related to one or more issues that are currently before the courts or may come before the court. If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent on any issue that comes before me as a sitting judge, without regard to my personal views or policy preferences.

b. Following the logic of your argument, do you believe that dark money in congressional and presidential elections would have the same kind of "benefit" you cited? Please explain why or why not.

Please see my answer to Question 8(b).

9. In 2017, as Nevada's Solicitor General, you were the counsel of record on an amicus brief before the Supreme Court in a case involving an Indian tribe's suit challenging regulations on groundwater. The Ninth Circuit had ruled that, when the federal government created Indian reservations, it also reserved water rights for them.<sup>22</sup> Your amicus brief argued that it was a

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<sup>21</sup> John S. Adams, *VanDyke Alleges Race 'Pay-to-Play,'* GREAT FALLS TRIB. (Oct. 15, 2014), in SJQ Attachments to Question 12(e) at 378.

<sup>22</sup> *Agua Caliente Band of Cahuilla Indians v. Coachella Vall. Water Dist.*, 849 F.3d 1262 (9th Cir. 2017).

“nebulous claim that the federal reservation’s purpose included the need for water.”<sup>23</sup> The brief also argued that the Ninth Circuit had made an “erroneous extension of the implied reservation of water rights to groundwater in the absence of a clear expression of Congressional intent.”<sup>24</sup> The Supreme Court denied certiorari.

- a. Why is an Indian reservation’s “need for water”—particularly for a reservation located in a dry desert climate—a “nebulous claim”?

Respectfully, the multi-state *amicus* brief authored by Nevada and representing 10 states did not take a position that the Indian tribe in that case, or any other Indian tribe, did not need water. Nor did the brief take the position that the Indian tribe’s claim in that particular case was a “nebulous” claim; the quoted language was a concern about the broad reach and scope of the lower court decision in that case, and how it might be applied in other cases. In a state like Nevada, often the collective need for water outstrips the supply. The brief asked the Supreme Court to grant review in that case out of concern that the lower court’s categorical preemption rationale could cause substantial disruption “in a state like Nevada where many of the groundwater allocation systems are already fully appropriated,” and “the longstanding appropriation regime will be disrupted by new, unaccounted-for federal reserved groundwater rights claims that are suddenly asserted for the first time.” Br. at 12.

- b. In your view, what kind of evidence would have been sufficient to show a “clear expression of Congressional intent” to reserve groundwater rights?

Please see my response to Question 9(a). As is often the purpose of a cert-stage *amicus* brief, the purpose of Nevada’s cert-stage multi-state *amicus* brief was not to argue definitively for one specific answer to your question. It was to encourage the Supreme Court to grant review in the case and resolve the “uncertainty” and “conflict” surrounding your question by settling a three-way split of lower court authority. See *Multi-state Amicus Br.* at 2-3. The Supreme Court did not grant review. As for my personal views, as a judicial nominee, it would not be appropriate for me to state my personal views on this issue as it also be related to one or more issues that are currently before the courts or may come before the court. If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent, including the Ninth Circuit’s *Agua Caliente* decision, without regard to my personal views or policy preferences.

10. During the century before President Trump came into office, the Senate had *never* confirmed a judicial nominee over the objections of *both* home-state Senators, according to the Congressional Research Service.<sup>25</sup> If you’re confirmed, you would be part of a major break from

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<sup>23</sup> Brief of the States of Nevada, Arizona, Arkansas, Idaho, Nebraska, North Dakota, South Dakota, Texas, Wisconsin, and Wyoming as Amicus Curiae in Support of Petitioners, *Coachella Vall. Water Dist. v. Agua Caliente Band of Cahuilla Indians*, 138 S. Ct. 468 (2017) (No. 17-40), 2017 WL 3485656, at \*12.

<sup>24</sup> *Id.* at \*18.

<sup>25</sup> BARRY J. MCMILLION, CONG. RESEARCH SERV., R44975, THE BLUE SLIP PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: FREQUENTLY ASKED QUESTIONS 8 & n.47 (2017), <http://www.crs.gov/Reports/pdf/R44975>; MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., RL32013, THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY, 1917-PRESENT 7-

that longstanding Senate tradition of respect for the views of home-state Senators through the blue slip process.

- a. Do you think the Trump Administration meaningfully consulted with your home-state Senators about your nomination?

The nomination and confirmation of federal judges is a matter committed to the political branches. As a judicial nominee, it would not be appropriate for me to opine on such matters. *See* Code of Conduct of U.S. Judges, Canon 5.

- b. Did you indicate any objection or concerns to anyone in the Administration or on the majority side of the Senate Judiciary Committee about testifying before the Committee over the objections of both of your home-state Senators?

No. Please see my response to Question 10(a).

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

While the term “originalism” may have different meaning to different persons, I take it to refer generally to the act of interpreting a text in accordance with its original public meaning – i.e., how reasonable persons with knowledge of the law would have interpreted it at the time of its adoption. The Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). Ultimately, however, lower court judges must follow the precedents of the Supreme Court without regard to whether they were decided with an originalist approach or not. *See, e.g., Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). I will faithfully do that.

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

Textualism is an interpretative theory similar to originalism that is generally associated with statutory, as opposed to constitutional, interpretation. Textualism focuses on the public meaning or understanding of the statutory text when the statute was enacted. I believe textualism is consistent with separation of powers established in the Constitution and the judiciary’s role to say what the law is.

13. 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 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); *see also, e.g., Marinello v. United States*, 138 S. Ct. 1101, 1107 (2018). 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 13(a).

14. 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?

Yes. Judges have a very important role, but also a limited role. The principle of judicial restraint is related to the separation of powers and the recognition that it is political branches, not the courts, that make the policy decisions and laws. Based on this principle, the Supreme Court has held, for example, that courts should “avoid reaching constitutional questions in advance of the necessity of deciding them,” *Camreta v. Greene*, 563 U.S. 692, 705 (2011), and should consider non-constitutional arguments challenging a statute before reaching constitutional arguments, *Jean v. Nelson*, 472 U.S. 846, 854 (1985).

a. The Supreme Court’s decision in *District of Columbia v. Heller* dramatically changed the Court’s longstanding interpretation of the Second Amendment.<sup>26</sup> Was that decision guided by the principle of judicial restraint?

*Heller* is binding Supreme Court precedent that I will apply if confirmed. As a judicial nominee, it is inappropriate for me to opine on my views whether any particular Supreme Court precedent was rightly decided.

b. The Supreme Court’s decision in *Citizens United v. FEC* opened the floodgates to big money in politics.<sup>27</sup> Was that decision guided by the principle of judicial restraint?

*Citizens United* is binding Supreme Court precedent that I will apply if confirmed. As a judicial nominee, it is inappropriate for me to opine on my views whether any particular Supreme Court precedent was rightly decided.

c. The Supreme Court’s decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.<sup>28</sup> Was that decision guided by the principle of judicial restraint?

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<sup>26</sup> 554 U.S. 570 (2008).

<sup>27</sup> 558 U.S. 310 (2010).

<sup>28</sup> 570 U.S. 529 (2013).

*Shelby County* is binding Supreme Court precedent that I will apply if confirmed. As a judicial nominee, it is inappropriate for me to opine on my views whether any particular Supreme Court precedent was rightly decided.

15. 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.<sup>29</sup> 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.<sup>30</sup>

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 15(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 15(a).

16. 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.<sup>31</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>32</sup> 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.<sup>33</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>34</sup>

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<sup>29</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

<sup>30</sup> *Id.*

<sup>31</sup> 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>.

<sup>32</sup> *Id.*

<sup>33</sup> 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>.

<sup>34</sup> *Id.*

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

While I have not personally studied this issue, I would be disappointed but not surprised to learn that implicit racial bias exists in our criminal justice system. I believe it is a fundamental duty of every judge to treat every litigant with dignity, respect, fairness, and equal justice. Beyond that, as a judicial nominee, it would not be appropriate for me to comment on matters that are political or could be the subject of litigation.

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

While I have not personally studied this issue, I would be disappointed but not surprised to learn that people of color are disproportionately represented. I believe it is a fundamental duty of every judge to treat every litigant with dignity, respect, fairness, and equal justice. Beyond that, as a judicial nominee, it would not be appropriate for me to comment on matters that are political or could be the subject of litigation.

- 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.

No.

- 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.<sup>35</sup> Why do you think that is the case?

As a judicial nominee, it would not be appropriate for me to comment on matters that are political or could be the subject of litigation.

- 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.<sup>36</sup> Why do you think that is the case?

Please see my response to Question 16(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?

In all cases it is a fundamental duty of every judge to treat every litigant with dignity, respect, fairness, and equal justice. Judges must continually strive to strictly comply with that duty, including participating in training to help ensure this duty is met.

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<sup>35</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

<sup>36</sup> Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

17. 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.<sup>37</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>38</sup>

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 studied this issue and am not able to offer an informed view on it. Moreover, as a judicial nominee, it would not be appropriate for me to comment on matters that are political or could be the subject of litigation.

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.

Please see my response to Question 17(a).

18. 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.

19. 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.

20. Do you believe that *Brown v. Board of Education*<sup>39</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

As I testified at my hearing, I believe that *Brown v. Board of Education* was correctly decided and holds a unique place in American jurisprudence and history.

21. Do you believe that *Plessy v. Ferguson*<sup>40</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No.

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<sup>37</sup> 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>.

<sup>38</sup> *Id.*

<sup>39</sup> 347 U.S. 483 (1954).

<sup>40</sup> 163 U.S. 537 (1896).

22. 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.

23. 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.”<sup>41</sup> Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

I do not believe a judge’s race or ethnicity is a basis for recusal. *See* 28 U.S.C. § 455. Beyond that, as a judicial nominee, it would not be appropriate for me to opine on political comments regarding cases litigated in the Ninth Circuit. *See* Code of Conduct of U.S. Judges, Canons 3(A)(6), 5.

24. 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.”<sup>42</sup> 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. Beyond that, as a judicial nominee, it would not be appropriate for me to opine on a political matter. *See* Code of Conduct of U.S. Judges, Canon 5.

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<sup>41</sup> 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>.

<sup>42</sup> 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 November 6, 2019**  
**For the Nomination of**

**Lawrence VanDyke, to the U.S. Court of Appeals for the Ninth Circuit**

1. On October 29, a substantial majority of the American Bar Association's Standing Committee on the Federal Judiciary rated you "Not Qualified." The ABA concluded that your accomplishments "are offset by the assessments of interviewees that Mr. VanDyke is arrogant, lazy, an ideologue, and lacking in knowledge of the day-to-day practice including procedural rules." Some interviewees also raised concerns about whether you would be fair to people in the LGBTQ community.

To arrive at its final rating, the ABA conducted 60 interviews of lawyers, judges, and one other person who has worked with you in four different states. It also obtained more than 600 pages of publicly produced emails involving and/or written by you, news reports where you had been interviewed, and articles and opinions written about you.

**a. Do you agree that 60 interviews and more than 600 pages of written material provides a sufficient basis to evaluate a nominee's record, temperament, and bias?**

I do not believe that the ABA's rating is a fair representation of my integrity, professional competence, or temperament. And I do not believe that the ABA's rating is reflective of the views of the vast majority of amazing individuals that I have had the privilege to work with throughout my career.

**b. Are you concerned that, after reviewing this amount of material and information, a substantial majority of the ABA concluded that you are unqualified and may harbor biases towards the LGBTQ community?**

Please see my response to Question 1(a). I am, of course, disappointed. As noted in my answers to the Senate Judiciary Committee Questionnaire, a case that I consider to be one of my most significant cases was a matter where I was privileged to represent a LGBTQ advocacy organization before the Supreme Court. As stated at my hearing, I personally believe that every person is created in the image of God and entitled to be treated with dignity and respect. I also strongly believe that the role of a judge is to treat everyone fairly, neutrally, and to provide equal justice under the law.

**c. Do you believe that, based on your record and your ABA rating, members of the LGBTQ have legitimate reason to express concern about your ability to serve as a fair and impartial judge?**

No. Please see my responses to Questions 1(a) and 1(b).

2. In 2015, the U.S. Supreme Court ruled in *Obergefell v. Hodges* that the right to marry is fundamental and must be guaranteed to all same-sex couples.

a. **In your view, does the right to marry carry an implicit guarantee that everyone should be able to exercise that right equally?**

In *Obergefell v. Hodges*, the Supreme Court held that same-sex couples be afforded the right to marry “on the terms as accorded to couples of the opposite sex.” 135 S. Ct. 2584, 2607 (2015). If confirmed, I would faithfully follow all Supreme Court and Ninth Circuit precedent, including *Obergefell*. Beyond that, as a judicial nominee, it would not be appropriate for me to comment on matters that are political and could be the subject of litigation.

b. **If a state or county makes it harder for same-sex couples to marry than for straight couples to marry, are those additional hurdles constitutional?**

The Supreme Court has made clear that the Constitution contains strong guarantees of equal protection in a variety of contexts. If confirmed, I will faithfully apply as Supreme Court and Ninth Circuit precedent, including Equal Protection precedent, in cases before me. Beyond that, as a judicial nominee, it would not be appropriate for me to comment on matters that are political and could be the subject of litigation. *See* Canon 3A(6) of the Code of Conduct for United States Judges.

c. **If a state or county makes it harder for same-sex couples to adopt children, are those additional hurdles constitutional?**

Please see my response to Question 2(b).

**Nomination of Lawrence Vandyke**  
**United States Court of Appeals for the Ninth Circuit**  
**Questions for the Record**  
**Submitted November 5, 2019**

**Senator Mike Lee**

➤ As a circuit court judge, you would be bound by both Supreme Court precedent, and Ninth Circuit precedent when not sitting en banc. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

It is the duty of a lower court judge to faithfully apply Supreme Court and circuit precedent. *See, e.g., Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Where an issue in a case is not governed by existing precedent, a judge should determine the meaning of the relevant legal authority by looking at the text and context, *see, e.g., Sturgeon v. Frost*, 139 S. Ct. 1066, 1084 (2019); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017), and applying well-established legal canons and rules of construction. If confirmed, I would faithfully follow applicable precedent concerning the methods for interpreting statutes.

➤ In *Glucksberg*, Chief Justice Rehnquist explained that the Supreme Court’s “method of substantive-due-process analysis has two primary features: First, [the Court has] regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, [the Court has] required in substantive-due-process cases a careful description of the asserted fundamental liberty interest.” What do you think it means for a right to be “objectively rooted in this nation’s history and traditions?” How would you go about analyzing a whether a right asserted by a litigant satisfies the *Glucksberg* test?

The Supreme Court has explained that history and tradition are relevant factors for a substantive due process analysis. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015); *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997). In conducting this inquiry, I would consult the historical sources that the Supreme Court has identified, which have included, among others, statutory laws and the common-law tradition. *See Glucksberg*, 521 U.S. at 710-19. I would also follow the Supreme Court’s guidance in considering the “novelty” of an asserted right as a factor. *See, e.g., District Attorney’s Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72 (2009).

➤ Under our Constitution, which branch of government bears the primary burden of adapting legal norms to changing societal conditions? Under what, if any circumstances, should

the work of judges be influenced by changed societal conditions or attitudes, as opposed to focusing solely on the changes made by the legislature to legal texts?

Under our Constitution, it is the political branches that bear the primary burden of adapting legal norms to changing societal conditions. Judges “do not sit as a super-legislature to weigh the wisdom of legislation.” *Day–Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). The ratifiers of our Constitution authorized courts to exercise “neither force nor will but merely judgment.” The Federalist No. 78, p. 465 (C. Rossiter ed. 1961 (A. Hamilton)). Whether a legal norm may be considered “unwise, improvident, or out of harmony with a particular school of thought” is not an appropriate consideration for a judge in applying that legal rule. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

➤ Can you walk me through your understanding of how the Supreme Court evaluates compelled speech cases? What counts as “speech” under the First Amendment; do the rules on compelled speech vary depending on whether or not the “speech is sold rather than given away;”<sup>1</sup> and how high is the hurdle the government must clear to establish that it has a “compelling interest” in regulating speech?

The Supreme Court’s approach to compelled speech cases is encapsulated in Justice Jackson’s oft-cited statement from *West Virginia State Board of Education v. Barnette*: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” 319 U.S. 624, 642 (1943). The Supreme Court has held that the First Amendment protects not only “the right to speak” but also “the right to refrain from speaking.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The Supreme Court has also held that under some circumstances the First Amendment protects individuals from being forced to fund others’ speech. See, e.g., *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Keller v. State Bar of California*, 491 U.S. 1 (1990). The Court has repeatedly explained that the First Amendment’s protection is “not diminished” because the speech is “sold.” *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755 (1988) (citing *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973); see also *New York Times v. Sullivan*, 376 U.S. 254 (1964)). The Supreme Court has also repeatedly explained that the “compelling state interests” test in the First Amendment context is a “stringent standard” that “reflects the fundamental principle that governments have “no power to restrict expression because of its message, its idea, its subject matter, or its content.”” *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (citations omitted). If confirmed, I would faithfully apply these and all other precedents.

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<sup>1</sup> *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755 (1988) (“Of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away.”).