

**Responses of Andrew D. Hurwitz  
Nominee to be United States Circuit Judge for the Ninth Circuit  
to the Written Questions of Senator Chuck Grassley**

- 1. You clerked for Judge Newman, then a District Court Judge for the District of Connecticut, when he presided over the two abortion cases, known as *Abele I* and *Abele II*. Over 30 years later, in 2003, you wrote a lengthy law review article entitled “Jon O. Newman and the Abortion Decisions: A Remarkable First Year.” Your article chronicled the influence *Abele II* had on the Supreme Court’s *Roe v. Wade* decision.**

**In footnote 55 of your article, you wrote that in fall of 1972, just after you finished clerking for Judge Newman, you interviewed for a Supreme Court clerkship. Is it fair to say that this interview occurred after the *Abele II* opinion was issued but before the Supreme Court ruled in *Roe v. Wade*?**

Response: Yes.

- 2. In your article, you state that Judge Newman hoped to “side-step” the constitutional confrontation in *Abele I* by holding Connecticut’s interest in protecting the life and morals of the mother was not a sufficient state interest to overcome the right to privacy. You then disclosed the following about Judge Newman’s rationale:**

**“The clear unstated premise of Judge Newman’s approach (made express in conversations with his law clerk) was that the Connecticut legislature... would leave well enough alone and not provoke a constitutional attack on a second statute.”**

**You seem to be suggesting Judge Newman believed the *Abele I* decision not only struck down a 110 year-old statute outlawing abortion, but at the same time, had effectively precluded the legislature from offering a revised statute.**

**Do you believe Judge Newman’s approach was the appropriate?**

Response: I do not think it appropriate for a former law clerk to comment on the correctness of an opinion written by a judge during the clerkship term. I did not mean in the article, however, to suggest that Judge Newman’s concurring opinion in *Abele I* had precluded the legislature from offering a revised statute (it did not), but rather to document his prediction (which turned out to be incorrect) that such a statute would not be passed.

- 3. You note in your article that, contrary to what Judge Newman believed would happen, the Connecticut legislature quickly responded to *Abele I* and passed a new statute. The new statute included all of the same prohibitions as the original, but this time it expressly stated the State’s interest was in protecting the life of the unborn child. You wrote:**

**“[Judge Newman] candidly conceded that a court could never resolve the philosophical issue of whether a fetus was a human being from the moment of conception, or whether abortion amounted to murder.”**

**Do you agree that Judge Newman should have deferred to the legislature upon recognizing that the court could never resolve these “philosophical” questions?**

Response: As noted above, I do not think it appropriate for a former law clerk to comment on the correctness of an opinion written by a judge during the clerkship term. Judgments about policy matters are within the province of the legislature, and courts should not second-guess such judgments. However, a court may be required to determine whether a statute before it is constitutional, notwithstanding the good faith belief of the legislature that the statute rests on sound policy grounds.

- 4. You also observed that the development of *Roe*’s much-criticized trimester framework “provides the most direct evidence of Judge Newman’s influence on the . . . decision.” In your article, you emphasize a portion of Judge Newman’s opinion in *Abele II* that suggests viability as an appropriate threshold. You then chronicled how, originally, Justice Blackmun’s draft opinion drew the line for legal abortion at the first trimester. But, Judge Newman’s opinion influenced the Justices’ thinking. You therefore conclude:**

**This viability dictum, first introduced by Justice Blackmun into the *Roe* drafts only after Justice Powell had urged that he follow Judge Newman’s lead, effectively doubled the period of time in which states were barred from absolutely prohibiting abortions.**

**Even though Judge Newman expressly stated in *Abele II* that “we need not and should not express any conclusion about statutes advancing more limited interests” such as preserving life after viability, he nonetheless speculated that “the state interest in protecting the life of a fetus capable of living outside the uterus could be shown to be more generally accepted and, therefore, of more weight in the constitutional sense.” Judge Newman then took the opportunity to note that there “appears to be a medical consensus that the fetus normally becomes viable approximately 28 weeks after conception.” Ultimately, Judge Newman’s dictum on viability became the line the Supreme Court chose to draw in *Roe*.**

- a. Do you agree that Judge Newman’s discussion of viability was dictum?**

Response: Yes. He described it as such in *Abele II*.

- b. Please explain your view on the proper use and role of dictum in judicial opinions.**

Response: I believe that courts should not decide issues not posed by the case before them. As I have said in several opinions, if the issue is important, it will be posed by a subsequent case in which the court will have the benefit of arguments by counsel and, in the case of an appellate court, the benefit of an opinion below. If a judge believes that it is important to flag an issue for future consideration, he can do so simply by noting that the issue was not decided because it was not argued, as I have done in the past. *See, e.g., Gipson v. Kasey*, 214 Ariz. 141, 148 ¶ 41, 150 P.3d 228, 235 (2007) (Hurwitz, J., concurring).

**c. In what circumstances do you believe it is appropriate for a judge to opine on matters not essential to the disposition of the case?**

Response: As noted above, I do not think it appropriate for judges to decide an issue not before the Court.

**5. Do you believe there is a right to privacy in the U.S. Constitution?**

Response: Yes, the Supreme Court has so held in a line of cases that includes *Griswold v. Connecticut*, 381 U.S. 479 (1965).

**a. Where is it located?**

Response: The Supreme Court has indicated that the right to privacy is a liberty interest protected by the due process clauses of the Fifth and Fourteenth Amendments. As a Ninth Circuit judge I would be bound by and would follow those Supreme Court decisions.

**b. From what does it derive?**

Response: The Court has held that the due process clauses protect certain fundamental rights and that the right to privacy is one of those rights.

**c. What is your understanding, in general terms, of the contours of that right?**

Response: The Court has described the right to privacy protected by the due process clause as including “the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

**6. In *Griswold*, Justice Douglas stated that, although the Bill of Rights did not explicitly mention the right to privacy, it could be found in the “penumbras” and “emanations” of the Constitution.**

- a. **Do you agree with Justice Douglas that there are certain rights that are not explicitly stated in our Constitution that can be found by “reading between the lines”?**

Response: The Supreme Court has held that there are certain fundamental rights protected by the Constitution that are not expressly enumerated. I do not think, however, that those rights are identified by “reading between the lines” of the Constitution. The Supreme Court has held that those rights are identified by determining whether they are “deeply rooted in this Nation’s history and tradition.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

- b. **Is it appropriate for a judge to go searching for “penumbras” and “emanations” in the Constitution?**

Response: No. Although some Justices have so suggested, I do not think that the Supreme Court has adopted such an approach and I believe that the job of a judge interpreting the Constitution is difficult enough without requiring a judge to search for “penumbras” and “emanations.”

7. **During an ABA-sponsored panel covering capital punishment cases and the affects they have on civil litigation, you said Judges presiding over capital cases often ‘take the easy way out’ by relying on the harmless error standard of review rather than confronting the “real issues of the case.”**

- a. **Please explain what you meant by this comment?**

Response: I do not have a transcript or notes from that panel, but my recollection is that I spoke at that panel about a problem peculiar to capital cases, where the jury is not only the finder of fact on guilt but also makes the decision on sentencing. Appellate courts correctly find error at trial harmless when the proof of guilt is overwhelming, as it often is in capital cases. But I was concerned that some courts did not independently determine whether trial error could have affected the jury’s sentencing decision, given that *Chapman v. California*, 386 U.S. 18 (1967), requires the state to establish beyond a reasonable doubt that error of a constitutional dimension could not have affected a jury verdict.

I did not suggest that the harmless error doctrine is not applicable in capital cases. I have both written and joined opinions in which harmless error was found and death sentences were affirmed.

- b. **How are judges shirking their duty by hiding behind the harmless-error standard rather than confronting the real issues of the case?**

Response: See above. Because in many cases there is overwhelming evidence of the guilt of a capital defendant, the issue of importance is often whether the penalty phase of the trial has been conducted without prejudicial error, and courts

should separately determine whether harmless error during the guilt phase contributed to a verdict in the penalty phase.

**8. Are you personally opposed to the death penalty?**

Response: As a sitting judge, I do not believe that is appropriate to express personal opinions as to matters that come before our courts. The Supreme Court has made clear that, except in very limited instances, the death penalty is not cruel and unusual punishment, and I have voted in scores of cases to impose a death penalty.

**9. Do you believe capital punishment is a constitutionally valid form of punishment?**

Response: Yes. The death penalty is a constitutionally appropriate form of punishment with very limited exceptions (youth, mental retardation) specified by the Supreme Court.

**10. While a member of the Arizona Board of Regents, the Board confronted the issue of affirmative action on several occasions. In fact, it undertook two formal studies on minorities in the Arizona university system, one in 1989 and another in 1996. During the 1989 study, you chaired a sub-committee on the task force.**

**a. What was the name of the sub-committee and its particular function in the study?**

Response: I cannot recall, or find any records, as to the nature of the subcommittee I chaired.

**b. Please describe your roll in the context of the overall study process.**

Response: In 1989, I was one of 31 citizens (and 5 members of the Board of Regents) asked to study the issues of minority recruitment, retention, and graduation in the Arizona University systems as a member of the Ad Hoc Committee on University Access and Retention. The Committee eventually submitted a report, entitled "Our Common Commitment," to the Board of Regents, and I have supplied a copy of that report to the Judiciary Committee. I left the Board in 1996, and did not participate in the study undertaken that year.

**11. Beginning in 1995, questions were raised in Arizona about the propriety of the affirmative action policies used by the state's universities. In 1996, the Board of Regent's commissioned a follow-up study to the 1989 study.**

**Part of the genesis of this debate was California's then-recently passed Proposition 209, which prohibited, in part, the use of "race, sex, or ethnicity" in public school admissions criteria. You cited Proposition 209 in a 1999 article for the Arizona Business Gazette that praised affirmative action and criticized Proposition 209.**

Since that time, the U.S. Supreme Court ruled in *Grutter v. Bollinger*, which declared a 25-year sunset on Constitutionally-permissible affirmative action policies.

- a. **In light of *Grutter*, have your views on affirmative action changed? If so, how?**

Response: *Grutter* holds that law schools can have a compelling interest in attaining a diverse student body and can use narrowly tailored admission programs to achieve that goal consistent with the equal protection clause of the Fourteenth Amendment. The *Grutter* opinion endorses Justice Powell's opinion in *Regents of California v. Bakke*, 438 U.S. 265 (1978). My view before *Grutter* was that Justice Powell's opinion effectively was the controlling opinion in *Bakke* -- and thus binding on lower courts -- as it stated the narrowest ground for the Court's disposition of the case. By endorsing Justice Powell's opinion (although finding it not necessary to conclude whether it was formally binding as precedent), *Grutter* was consistent with my previous views.

- b. **Justice Thomas, in his opinion concurring in part and dissenting in part in *Grutter*, cited more recent Boalt Hall admission statistics. He noted that, despite Prop. 209, Boalt Hall eventually was able to increase the representation of minority students in its entering class to levels higher than when affirmative action policies were in place. In light of this information, do you still believe that affirmative action policies are necessary to avoid a "mediocre" legal profession?**

Response: I have no reason to question the statistics cited by Justice Thomas. Nor am I aware of the measures taken by Boalt Hall before *Grutter* to recruit and retain qualified minority applicants. In the article cited, I suggested that law school classes "made up of *only* the majority" would lead to a mediocre profession and suggested that there were appropriate mechanisms available under the Constitution to avoid that result. I believe those statements are consistent with the later opinion of the Court in *Grutter*. Since *Grutter*, all law schools of which I am aware have managed to avoid admitting classes made up of only the majority, while still maintaining high standards of quality.

**12. What is the most important attribute of a judge, and do you possess it?**

Response: I think that the most important attribute of a judge is fidelity to the law and the ability to decide cases solely on the facts and law before the court. I believe that my record on the Arizona Supreme Court demonstrates that I possess this attribute, and the surveys conducted by the Arizona Judicial Performance Review Commission confirm that those who have appeared before me believe I have this attribute.

**13. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

Response: Above all, a judge must have humility. Humility requires that a judge understand that his role in our system of government, while important, is limited. The role of a judge is not to make policy decisions or second-guess the other branches of government, but rather to apply the law to the facts of the case before him. Humility requires that judges recognize that they are not infallible. Humility also requires that judges interact with all who come before them in a courteous and professional fashion and accord all a fair judgment of their cases. I believe that my record on the Arizona Supreme Court demonstrates that I possess this temperament, and the surveys conducted by the Judicial Performance Review Commission confirm that those who have appeared before me believe I have such a temperament.

**14. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

Response: Yes.

**15. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: If the case of first impression involved statutory or constitutional interpretation, my first resort would always be to the language of the relevant provision. If the language is clear and unambiguous on the point at issue, there is no need to resort to other sources. If not, I would consider the historical context in which the provision was adopted, the intent of the drafters of the provision, and in the case of statutory construction, the provision's relationship with the broader statutory scheme as a whole. I would also review relevant decisions of the Supreme Court and the Ninth Circuit. Even when there is no controlling precedent that conclusively resolves the issue at hand, there is often precedent which gives some guidance. If the issue were one on which neither the Supreme Court nor the Ninth Circuit had spoken, but which other courts (including state courts) had addressed, I would also look to such out-of-circuit authority for guidance.

**16. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your own best judgment of the merits?**

Response: As a circuit judge, I would be obliged to follow a Supreme Court decision even if I believed it in error. As a state court judge, I have the same obligation. A circuit

judge should follow previous decisions of the Circuit unless and until they are reexamined through the en banc procedure or overruled by the Supreme Court.

**17. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?**

Response: A statute enacted by Congress is entitled to a strong presumption of constitutionality. Members of Congress take an oath to support and defend the Constitution, and courts should start from the premise that other branches of government have acted in a constitutional fashion. If, however, a court concludes that a statute was not authorized by the powers granted Congress under Article I of the Constitution, or infringes upon rights protected under the Constitution, it has a duty to say so.

**18. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?**

Response: In general, I think that the principle of stare decisis dictates against an appellate court overturning its own precedent within the circuit. If, however, a panel decision is contrary to Supreme Court precedent, contrary to another decision of the circuit (something that should very rarely be the case), or otherwise manifestly flawed, the en banc procedure provides a mechanism for overturning the decision.

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

Response: I personally drafted these responses and reviewed the draft with an official of the Department of Justice before submitting them.

**20. Do these answers reflect your true and personal views?**

Response: Yes.



**Responses of Andrew David Hurwitz  
Nominee to be United States Circuit Judge for the Ninth Circuit  
to the Written Questions of Senator Amy Klobuchar**

- 1. If you had to describe it, how would you characterize your judicial philosophy? How do you see the role of the judge in our constitutional system?**

Response: I do not find it useful to use labels in describing my judicial philosophy. I think that the central philosophy of all judges should be to decide the individual case before them solely on the basis of the law. The role of the judge in our constitutional system, while important, is limited. Judges should not second-guess legislative or executive policy judgments, but should and must ensure that the other branches of government do not infringe upon individual constitutional rights or exceed the powers granted them under Articles I and II.

- 2. What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff?**

Response: I believe I have acted in this fashion throughout my career on the Arizona Supreme Court, and commit to doing so if confirmed as a circuit judge. Those who have appeared before me have indicated in responses to surveys distributed by the Arizona Judicial Performance Review Commission that they regard me as having acted impartially in cases before me.

- 3. In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? How does the commitment to stare decisis vary depending on the court?**

Response: Stare decisis is important because it provides predictability in the law; the law should not change simply because the composition of a court has changed. The Supreme Court should, however, reserve the right to overrule manifestly incorrect prior decisions, as it did in *Brown v. Board of Education*. Lower courts should be even more firmly committed to stare decisis in the case of their own prior decisions, as appellate review is available to a litigant who believes that a decision is in error.

**Responses of Andrew D. Hurwitz  
Nominee to be United States Circuit Judge for the Ninth Circuit  
to the Written Questions of Senator Jeff Sessions**

**1. In 2002, you published an article in the *New York Law School Legal Review* entitled, “Jon O. Newman and the Abortion Decisions: A Remarkable First Year.” The article analyzes two opinions (*Abele I*, *Abele II*) authored by Judge Newman, then on the U.S. District Court of Connecticut, and their influence on the Supreme Court’s decision in *Roe v. Wade*. According to your article and your Senate Questionnaire, you clerked for Judge Newman at the time he authored these opinions.**

**a. In your article, you praised Judge Newman’s reasoning in these cases as a “careful and meticulous analysis of the competing constitutional issues” and described his decision in *Abele II* as “striking, even in hindsight.” Are these your opinions today?**

Response: The article was written for a New York Law School Law Review Symposium dedicated to Judge Newman’s first thirty years on the bench, and I was invited as one of his former clerks to submit an article. I tried at that time to document the historical record about the effect of Judge Newman’s decisions on subsequent Supreme Court jurisprudence without expressing my personal opinions as to the correctness of the Judge’s reasoning, something I think it would be improper for a law clerk to do, either then or now. As a sitting judge, I would regard it as inappropriate to express such opinions today (the article was written before I joined the bench, although published thereafter). Whether or not one agrees with his conclusions, I do believe that Judge Newman carefully identified the important competing constitutional interests involved in the *Abele* case, particularly in light of then-existing Supreme Court jurisprudence, and that the Supreme Court’s attention to this new district judge’s opinion was striking.

**b. In your article, you wrote that Judge Newman “placed primary reliance on the natural implications of *Griswold*: if the capacity of a fetus to be born made it a person endowed with Fourteenth Amendment rights, the same conclusion would seemingly also apply to the unfertilized ovum, whose potentiality for human life clearly could lawfully be terminated under *Griswold*.” Do you believe that there are any significant differences between an unfertilized ovum and a human fetus? Please explain your answer.**

Response: The quoted language is an accurate description of the starting point of Judge Newman’s analysis in *Abele II*. He eventually did conclude, however, that a state has a substantially greater interest in protecting a fetus than an unfertilized ovum. There are obvious biological differences between an unfertilized ovum and a human fetus. Subsequent Supreme Court decisions reflect those distinctions, allowing greater state regulation of abortion than of contraception.

- c. **In your article, you wrote that Judge Newman “candidly conceded that a court could never resolve the philosophical issue of whether a fetus was a human being from the moment of conception, or whether abortion amounted to murder.” Do you believe that the question of when human life begins is a matter of biology or of philosophy? Please explain your answer.**

Response: The quoted language is an accurate description of what Judge Newman said in *Abele II*. I recognize a wide variety of sincere views are held by reasonable people as to this issue, but, as a sitting judge, I believe that I should not express personal views on such matters. I can assure the Committee that my personal views on this subject, or any other, would not play a role in my judicial decision making, and never have.

- d. **Do you believe that the Constitution, properly interpreted, confers a right to abortion?**

Response: The Supreme Court has held that, although states may regulate a woman’s access to abortion, they may not entirely prohibit the procedure. As a circuit judge, I would be bound to follow all Supreme Court precedent.

- e. **Do you believe that the Constitution, properly interpreted, compels taxpayer funding of abortion?**

Response: No. The Supreme Court held in *Harris v. McRae*, 448 U.S. 297 (1980), that the Constitution does not compel such funding.

- f. **Do you believe that the Constitution, properly interpreted, prohibits informed consent and parental involvement provisions for abortion?**

Response: No. The Supreme Court held in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), that the Constitution does not prohibit informed consent and parental involvement provisions.

- g. **In your article, you wrote: “In sweeping dictum, Judge Newman then went on to confront the state’s argument that its laws were necessary to prevent the abortion of viable fetuses.” Do you believe that it is appropriate for judges to engage in “sweeping dictum”? Please explain your answer.**

Response: No. I believe that courts should not unnecessarily decide issues not posed by the case before them. As I have said in several opinions, if the issue is truly important, it will be posed by a subsequent case in which the court will have the benefit of arguments of counsel and in the case of an appellate court, the benefit of an opinion below. *See, e.g., Gipson v. Kasey*, 214 Ariz. 141, 148 ¶ 41, 150 P.3d 228, 235 (2007) (Hurwitz, J., concurring).

- h. In your article, you cited correspondence between Justices Blackmun, Powell, and Marshall concerning “when the State’s legitimate interests might allow restriction of abortion rights” – after the first trimester, following viability, or at some other point. Ultimately, the Justices were influenced by Judge Newman’s choice of viability as the point at which a state may place restrictions on a woman’s “abortion freedom.” The Justices agreed to this cut-off despite the fact that, as you wrote, “Justice Powell recognized that the Court did not have to treat the issue at all.” Do you believe that it is appropriate for judges to decide an issue not before the court in order to choose among competing policy considerations? Please explain your answer.**

Response: As noted above, I do not think it appropriate for judges to decide an issue not before the Court, and I do not think that choosing among competing policy considerations justifies doing so.

- 2. You served as *pro bono* as lead counsel in the seminal Supreme Court case of *Ring v. Arizona*, which struck down Arizona’s death penalty sentencing scheme as unconstitutional, and also invalidated several other States’ statutes as well. You were quoted in an article by the *Arizona Attorney* newsletter as saying that the experience was “the best episode in [your] wonderful career in private practice.”**

- a. Assuming the *Arizona Attorney* accurately quoted you, please explain whether you were referring to the experience of arguing before the Court, or the outcome of the case.**

Response: I was referring to the experience of arguing before the Supreme Court.

- b. Do you believe that the death penalty is an acceptable form of punishment? Please explain your answer.**

Response: Yes. The death penalty is a constitutionally appropriate form of punishment with very limited exceptions (youth, mental retardation) specified by the Supreme Court.

- c. Do you believe that the death penalty constitutes cruel and unusual punishment under the Constitution? Please explain your answer.**

Response: No. The Supreme Court has made clear that the death penalty is not cruel and unusual punishment. I have voted in scores of cases to impose a death penalty, and could not have done so consistent with my oath to support and defend the Constitution if the penalty were per se cruel and unusual.

- 3. In *Roper v. Simmons*, Justice Kennedy relied in part on “evolving standards of decency” in holding that capital punishment for any murderer under the age of 18 was unconstitutional.**

- a. **Do you agree with Justice Kennedy’s analysis? Please explain your answer.**

Response: As a judge, I am bound to follow Supreme Court precedent, whether or not I would have employed the same analysis as the opinion of the Court in any particular case. I therefore would be required to conclude that capital punishment could not constitutionally be imposed on a murderer under the age of 18.

- b. **How would you determine what constitutes “evolving standards of decency” and how it determines constitutionality? In your answer, please include what factors you would consider in that analysis.**

Response: All legislation begins with a presumption of constitutionality, and it is the job of the political branches of government to determine matters such as standards of decency. Supreme Court decisions since *Trop v. Dulles*, 356 U.S. 86 (1958), have required use of “evolving standards of decency” in evaluating Eighth Amendment claims, and if confronted with such a claim, I would be mandated to first look to Supreme Court precedent, and, if none existed, then to precedent in the court on which I am serving. I do not believe that a judge’s personal opinions play any role in determining whether a statute violates the Eighth Amendment.

- c. **In your view, could a judge conclude that “evolving standards of decency” dictate that the death penalty is unconstitutional in all cases? In your answer, please include what factors you believe are relevant to a judge’s analysis.**

Response: I do not believe that a judge could so conclude, given that the death penalty is mentioned in the Constitution and has been repeatedly held constitutional by the Supreme Court.

- d. **Could a judge conclude that a “changing legal landscape” dictates that the death penalty is unconstitutional in all cases? In your answer, please include what factors you believe are relevant to a judge’s analysis.**

Response: I do not believe that a judge could so conclude, given that the death penalty is mentioned in the Constitution and has been repeatedly held constitutional by the Supreme Court.

- e. **In your view, is it possible for something to be constitutional one day and unconstitutional the next in light of a “changing legal landscape”?**

Response: I do not believe that the Constitution changes from one day to the next, although I recognize that the Supreme Court may effectively produce that result when it overrules a prior decision. That is one reason why the Court should be very cautious in doing so.

**4. In a 2007 speech to Planned Parenthood, then-Senator Obama said:**

**“We need somebody who’s got the heart, the empathy, 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. And that’s the criteria by which I’m going to be selecting my judges.”**

**a. Do you agree with the President’s statement?**

Response: I would not presume to tell the President by what criteria he should be selecting judges, a task given to his discretion (subject to the advice and consent of the Senate) under the Constitution. Nor can I speak with authority as to what other criteria the President uses in judicial selection, although I can say that I was never asked about empathy during the selection process. I emphasize that I have, and will continue to, base my judicial decisions on the law, not on personal beliefs or other extraneous matters.

**b. Do you believe you fit the President’s criteria?**

Response: I believe that the law must govern a judge’s decisions, and that they should not be based on personal characteristics of the judge or his or her personal beliefs. I believe that judges must treat all who come before them with courtesy and humility, and I believe that I possess and have exhibited those traits.

**c. Do you believe judges should ever base their decisions on a desired outcome as opposed to the law and facts presented? If so, under what circumstances?**

Response: No.

**d. Do you believe a judge should consider his or her own values or policy preferences in determining what the law means? If so, under what circumstances?**

Response: No.

**Responses of Andrew D. Hurwitz  
Nominee to be United States Circuit Judge for the Ninth Circuit  
to the Written Questions of Senator Tom Coburn, M.D.**

- 1. Some people refer to the Constitution as a “living” document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

Response: No.

- a. If not, please explain.**

Response: The principles of the Constitution do not change with the times.

- 2. Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

Response: No.

- a. If not, please explain.**

Response: The principles of the Constitution do not change with the times.

- 3. Do you believe empathy is an essential ingredient for arriving at just decisions and outcomes and should play a role in a judge’s consideration of a case?**

Response: No.

- a. If not, please explain.**

Response: A judge should decide cases based on the law and the facts of the case before him.

- b. Can you provide an example of a case where you had to set aside your feelings of empathy for the litigant and, instead, pursue a result that was consistent with the law?**

Response: In a recent decision involving foreclosure of a deed of trust on a residence, I noted that the Court of course understood the difficult personal situation created by the loss of a home, but nonetheless was required to apply the law as written. *In Re Vasquez*, 228 Ariz. 357, ¶ 4, 621 Ariz. Adv. Rep. 22 (Nov. 18, 2011).

- 4. What principles of constitutional interpretation would you look to in analyzing whether a particular statute infringes upon some individual right?**

Response: I would of course look to binding Supreme Court precedent first. If there were none, I would then look to precedents within my circuit. Assuming that neither my circuit nor the Supreme Court had addressed the issue, I would then analyze the language of the statute and the Constitution. If the language of the relevant provisions does not solve the issue, I would look to persuasive opinions of other courts for guidance. I would also look at the origin and history of the constitutional provision and would always start from the presumption that if a statute can reasonably be interpreted as constitutional, a court should do so.

- 5. The U.S. Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment of the United States Constitution “protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” As Justice Scalia’s opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Leaving aside the *McDonald v. Chicago* decision, do you personally believe the right to bear arms is a fundamental right?**

Response: As a sitting judge, I do not believe I should express a personal opinion as to matters settled by Supreme Court decisions. *McDonald* holds that the right to bear arms is a right protected by the Due Process Clause of the Fourteenth Amendment because it is fundamental to our scheme of ordered liberty, and thus settles this issue as a matter of law. 130 S. Ct. 3020, 3050 (2010). As a judge, I would faithfully apply this Supreme Court precedent.

- a. Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

Response: Yes, at least as against infringement by the federal government. As I note below, not every protection in the Bill of Rights has been held by the Supreme Court to be applicable against the states under the Fourteenth Amendment.

- b. Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.**

Response: Yes. With some exceptions, the Supreme Court has held that the rights guaranteed by the Bill of Rights are fundamental rights that apply against the States under the Due Process Clause of the Fourteenth Amendment. But the Court has not held that all rights guaranteed by the Bill of Rights are fundamental. For example, the Fifth Amendment’s Indictment Clause does not apply to the States, *Hurtado v. People of State of Cal.*, 110 U.S. 516, 534-38 (1884); the Sixth



Amendment's unanimous jury requirement does not apply to the States, *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972) (plurality opinion); and the Seventh Amendment's guarantee of a jury trial in civil cases does not apply to the States, *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211, 217-222 (1916).

- c. **The *Heller* Court further stated that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.” Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.**

Response: I have not done independent research on the historical origins of the Second Amendment, but have no reason to disagree with the Supreme Court's statement.

- d. **What limitations remain on the individual, Second Amendment rights now that the amendment has been incorporated against the States?**

Response: The Court identified some limitations in *Heller*, explaining 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.” 554 U.S. at 626. But because the Supreme Court's decisions in *Heller* and *McDonald* do not fully resolve what limitations may be legally placed on an individual's right to bear arms, I do not believe it appropriate to speculate on how the Court may rule in future cases.

6. **In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the “evolving standards of decency” to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter and you are obliged to follow it, but do you agree with Justice Kennedy's analysis?**

Response: I do not believe it appropriate for a sitting judge to comment about whether he agrees with the analysis in an opinion of the Supreme Court, which both as a state judge, and, if confirmed, as a circuit judge, I am obligated to follow. Under *Roper*, I am obliged to hold that the death penalty cannot be imposed on a murderer under the age of 18.

- a. **When determining what the “evolving standards of decency” are, justices have looked to different standards. Some justices have justified their decision by looking to the laws of various American states,<sup>1</sup> in addition to foreign law, and in other cases have looked solely to the laws and traditions**

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<sup>1</sup> *Roper v. Simmons*, 543 U.S. 551, 564-65.

**of foreign countries.<sup>2</sup> Do you believe either standard has merit when interpreting the text of the Constitution?**

Response: I believe the laws and traditions of foreign countries do not control the interpretation of our Constitution. Decisions of the Supreme Court, which I am obliged to follow, however, hold that reference to law of the various American states is permissible in determining whether a punishment is “unusual” under the Eighth Amendment.

**i. If so, do you believe one standard more meritorious than the other? Please explain why or why not.**

Response: As noted above, I do not believe that the laws and traditions of foreign countries should control the interpretation of the Eighth Amendment.

**7. In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?**

Response: No, although as Justice Scalia’s recent opinion in *United States v. Jones*, 2012 WL 171117 (2012), demonstrates, the Founders’ understanding of English common law traditions may inform constitutional interpretation.

**a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?**

Response: Only in the instance noted above.

**b. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?**

Response: As stated above, foreign laws should not be relied upon when interpreting our laws.

**8. In 2002, you published an article in the *New York Law School Legal Review* entitled, “Jon O. Newman and the Abortion Decisions: A Remarkable First Year.” The article analyzes two opinions (*Abele I*, *Abele II*) authored by Judge Newman and their influence on the Supreme Court’s decision in *Roe v. Wade*. You clerked for Judge Newman at the time he authored these opinions. Further, in footnote 55 of the article, you wrote,**

**The author received some small inkling of the influence of *Abele II* on the Court’s thinking in the fall of 1972, when interviewing for clerkships at the Supreme Court. Justice Powell devoted over an hour of conversation to a discussion of Judge Newman’s analysis, while Justice Stewart (my future**

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<sup>2</sup> *Graham v. Florida*, 130 S.Ct. 2011, 2033-34.

boss) jokingly referred to me as ‘the clerk who wrote the Newman opinion.’ I assume that the latter was based on Judge Newman’s generous letter of recommendation, a medium in which some exaggeration is expected.

**Did you assist Judge Newman in researching and/or writing the *Abele* opinions?**

Response: I assisted in research, but Judge Newman wrote the opinion, as he did all opinions which bore his name during the time I clerked for him.

- 9. Your article states *Abele II* had a “crucial influence” on the *Roe* decision and Judge Newman’s “careful and meticulous analysis of the competing constitutional issues” in *Abele II* was reflected in “almost perfect lockstep” in *Roe*. Numerous other scholars have credited Judge Newman’s opinion as having a decisive effect on the thinking of the *Roe* majority. Do you still believe *Abele II* had a “crucial influence” on *Roe*?**

Response: I think that the historical record, particularly the papers of retired Justices, indicates the influence of the *Abele II* opinion, whether or not one agrees with the Supreme Court’s decision.

- 10. In *Abele II*, Judge Newman opines: “If the fetus survives the period of gestation, it will be born and then become a person entitled to the legal protections of the Constitution. But its capacity to become such a person does not mean that during gestation it is such a person. The unfertilized ovum also has the capacity to become a living human being, but the Constitution does not endow it with rights ...” Similarly, in your article, you wrote that Judge Newman “candidly conceded that a court could never resolve the philosophical issue of whether a fetus was a human being from the moment of conception, or whether abortion amounted to murder.”**

- a. Do you believe the question of when a fetus becomes a human being is a philosophical question?**

Response: In the article, I was accurately describing what Judge Newman said in fn. 9 of his *Abele II* opinion, which was that there was a wide range of views on this topic in philosophy and religion. I did not express my personal opinion in the article, and I do not think it appropriate for a sitting judge to express his views on such issues.

- b. Does science play a role in when a fetus becomes a human being?**

Response: As explained above, I do not believe that it is appropriate for a sitting judge to express a personal view on this issue or how that determination should be made. If presented with a case implicating these issues, I would apply the law as determined by Supreme Court and Ninth Circuit precedents, without regard to my personal views.

**c. What is the difference between being a “human being” and believe alive?**

Response: I am unaware of any Supreme Court or Ninth Circuit jurisprudence making a distinction between being a “human being” and “being alive.”

**i. Please explain.**

Response: See above.

**d. Do you believe there is a difference between an unfertilized ovum and a fetus?**

Response: Yes.

**i. Please explain.**

Response: Although I am not a scientist, there is an obvious biological difference. The decisions of the Supreme Court also recognize a legal distinction, allowing far greater state regulation of abortion than of contraception.

**11. In your article, you state: “in language that once again virtually echoes that of *Abele II*, *Roe* concluded that ‘by adopting one theory of life,’ Texas may not ‘override the rights of the pregnant woman.” Does it matter to the legal reasoning whether the “theory of life” is based on science or philosophy?**

Response: As a sitting judge, I do not believe that it is appropriate for me to criticize the reasoning of a Supreme Court decision. The point of the article was simply to suggest that the Supreme Court seemed to have followed the reasoning of *Abele II*.

**a. Should the courts take into consideration these questions about science and technology and how they affect the law or should they rely solely on *stare decisis*?**

Response: Trial courts do, and should, hear evidence in appropriate cases about science and technology, and make factual findings based on these matters. In general, appellate courts should rely on trial courts to hear evidence and find the relevant facts, and should not make such factual findings on their own. The principle of *stare decisis* suggests that appellate courts should be reluctant to overturn prior decisions. In the Ninth Circuit, a three-judge panel may not overrule a prior decision of the Court – only the en banc Court may do so.

**12. In all 50 States, death is recognized and defined as the irreversible cessation of the brain and heart activity. It seems like common sense and logic that if a lack of brain waves and a heartbeat signifies death, then the presence of brain waves and a**

**heartbeat signifies life. Do you agree that the irreversible cessation of brain and heart activity constitutes death under the law?**

Response: I have not researched the law in other states. In Arizona, a statute, Ariz. Rev. Stat. § 14-1107, requires that “a determination of death must be made in accordance with accepted medical standards.” The Arizona Supreme Court has stated that “while the common law definition of death is still sufficient to establish death, the test of the Harvard Medical School or the Commissioners on Uniform State Laws [for brain death], if properly supported by expert medical testimony, is also a valid test for death in Arizona.” *State v. Fierro*, 124 Ariz. 182, 185-86, 603 P.2d 74, 77-78 (1979).

**a. Does the presence of brain waves and a heartbeat equate to life under the law? Please explain.**

Response: I am not familiar with the law of other states. Arizona law defines knowingly and recklessly causing the death of an unborn child at any state of its development as manslaughter, but the legislature has determined to exempt a death caused by a lawfully performed abortion. Ariz. Rev. Stat. § 13-1103.

**13. If someone driving a car hits a pregnant woman who has a 28-week-old fetus and the woman survives but the fetus dies, that person can be held prosecuted for murder of the fetus. Thus, society recognizes that fetus as a life, as evidenced by law. However, if a pregnant woman wants to terminate that fetus at 28 weeks, the courts prevent states from protecting that life and recognizing the termination of that life as murder. How do you explain this inconsistency in the law?**

Response: I do not think it appropriate for a sitting judge to opine on issues that may someday come before him, as Chief Justice Roberts recognized when posed similar questions during his confirmation hearing. As noted above, I am not familiar with the law of other states, but Arizona law does allow for prosecution for manslaughter pursuant to Ariz. Rev. Stat. § 13-1103 for causing the death of an unborn child, but expressly exempts from the criminal statute lawfully performed abortions. As the Arizona Supreme Court stated in *State v. Brewer*, “[we] can assume that the legislature, when it drew up this statute in 1983, considered the complex issue of when the murder statute should apply.” 170 Ariz. 486, 508, 826 P.2d 783, 805 (1992).

**14. In Abele II, Judge Newman writes: “perhaps in the view of some of the legislators who enacted this statute, abortion is considered the deliberate killing of a human being. ... But under the Constitution, their judgment must remain a personal judgment ... a judgment they may not impose upon others by force of law.” Do you believe judges are better equipped to decide the standards of human decency than the people’s elected representatives?**

Response: No.

**15. Do you agree with Judge Newman that abortion is a “constitutional right of special significance?”**

Response: The Supreme Court has held that under certain circumstances, the Constitution prohibits a state from denying access to an abortion. I would refrain from ranking constitutional rights.