

**Nomination of Steven Grasz to the U.S. Court of Appeals for the Eighth Circuit  
Questions for the Record  
Submitted November 8, 2017**

**QUESTIONS FROM SENATOR FEINSTEIN**

1. Mr. Grasz, as you are aware, the American Bar Association (ABA) Standing Committee on the Federal Judiciary rated you unanimously “Not Qualified” to be a judge on the U.S. Court of Appeals for the Eighth Circuit. No nominee has received this rating since 2006; and the previous two nominees rated by the ABA as unanimously Not Qualified were never confirmed by the Senate.

Part of the ABA’s process includes interviews with those who know you and your work, including judges and other attorneys. In your case, because the ABA conducted two different evaluations, over 200 individuals were interviewed. Based on these interviews and the evaluators’ review of your record and materials, several concerns were raised in the ABA’s statement issued on October 30, 2017 (“ABA Statement”).

One concern was that your “colleagues expressed the view, that, in terms of judicial temperament,” you are “not ‘free from bias.’” Additionally, “[m]any” interviewees were concerned whether “Mr. Grasz would be able to detach himself from his deeply-held social agenda and political loyalty to be able to judge effectively.” (p. 5)

- a. **Why do you believe your colleagues expressed a concern over your ability to be an impartial judge “free from bias”?**

Due to the nature of the process it is not possible to know the reasoning behind these anonymous comments. In my role as Chief Deputy Attorney General I represented the State of Nebraska in a number of high-profile cases involving controversial issues. However, as I testified at my hearing, I fully understand the fundamental difference between serving as an advocate and a judge. Advocates represent their clients’ interests. Judges must be neutral officials who apply the law as it exists, and not according to any personal views or opinions. If I am so privileged to be confirmed, I will faithfully perform my duties as a judge to dispense justice fairly and impartially and without regard to the identity of the parties.

- b. **Have any of your colleagues or members of the legal profession ever talked to you about their concerns about your ability to be impartial given your strong political views? If so, please describe the context and the concern.**

No. On the contrary, I have received overwhelming support from those who know me and are familiar with my work, including from those who do not share my political views.

The ABA Statement notes that you had “a certain amount of caginess, and at times, a lack of disclosure with respect to some of the issues which the evaluators unearthed.” (p. 7) And the ABA concluded that “a number of lawyers were missing” from your lists provided as part of the “10 most significant litigated matters” in your Senate Questionnaire. (p. 5)

- c. With regard to “issues the evaluators unearthed” that were undisclosed, please explain what those were and why you did not disclose them. In addition, please identify information missing from your Senate Questionnaire, if any, including any counsel required to be listed pursuant to Question 16.**

The ABA’s rules require evaluators to disclose adverse comments and afford nominees the opportunity to respond. I believe those issue that were “unearthed” are those referenced in the report.

Regarding Question 17 of the Senate Judiciary Questionnaire, the Question asks for the “individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.” My response to Question 17 contains the requested information for co-counsel for each case and also for the principal opposing counsel for each of the ten cases listed. To my knowledge, my response is accurate and responsive.

Another concern raised in the ABA Statement was an “unusual fear of adverse consequences expressed by those from whom interviews were solicited, of all political parties, based on the nominee’s deep connection and allegiance to the most powerful politicians in his state.” (p. 6)

- d. Please explain your “deep connections and allegiance to the most powerful politicians in [your] state.”**

I have served as General Counsel to the Nebraska Republican Party. I have also served as legal counsel to the Mayor of Omaha’s two campaigns and have held positions with the campaign committee of Nebraska’s Governor. I formerly served as Nebraska’s Chief Deputy Attorney General.

- e. Have you ever retaliated against an opposing counsel, colleague, or any other individual in your professional work, including because such an individual criticized you or your work?**

No. To do so would be unprofessional, unethical, and contrary to my deeply held personal beliefs.

- f. What, if anything, do you believe gave rise to such fears on the part of the interviewees?**

I do not know the source of these comments and cannot determine what the bases for these comments are. I have, in the course of my representation of a client, sought the

discipline of state government officials who violated the civil rights of my client. *See Bennie v. Munn*, 822 F.3d 392 (8th Cir. 2016). I do not know if this is related.

2. In a Nebraska Attorney General Opinion you authored published in 1996, you wrote “we would be remiss if we did not state the obvious: The legal question presented by the examination of the constitutionality of partial-birth abortion...necessarily exposes the moral bankruptcy which is the legacy of *Roe v. Wade*.”

**a. What is the “moral bankruptcy” that you wrote “is the legacy of *Roe v. Wade*”?**

This comment was made in the context of an opinion request from a State Senator asking for advice in drafting legislation banning partial-birth abortion. The statement followed a graphic medical description of the partial-birth abortion procedure which the United States Congress later determined to be a “brutal and inhumane.” *See Gonzales v. Carhart*, 550 U.S. at 157.

**b. The opinion you wrote was an official document issued on behalf of Nebraska’s Attorney General’s Office. From whose perspective were you writing about “obvious” “moral bankruptcy”? Your own? The state’s?**

Attorney General’s Opinions are official documents of the Office of the Attorney General and represent the opinion of the Nebraska Attorney General.

**c. What role does morality play in the legal analysis of matters involving constitutional law and constitutional rights?**

The statement about moral bankruptcy played no role in the legal analysis of the proposed ban on partial-birth abortion. The opinion expressly stated the proposed legislation must be carefully drafted to comply with requirements of Supreme Court precedent and specifically *Planned Parenthood v. Casey*.

3. In a 1999 article entitled, *If Standing Bear Could Talk...Why There is No Constitutional Right to Kill a Partially Born Human Being* (“*Standing Bear*”), you argued that *Roe* and *Casey* were inapplicable in evaluating the constitutionality of a ban on certain abortion procedures. The U.S. Supreme Court, however, held in both cases in which it has examined such bans (*Stenberg v. Carhart* and *Gonzales v. Carhart*) that *Casey* (preserving the core holding of *Roe*) does apply.

The ABA Statement on your nomination notes that you “continue[] to adhere to views [] expressed in ‘If Standing Bear Could Talk.’” (p. 6)

**a. Please explain which views you expressed in this article you continue to adhere to and which you no longer support.**

Respectfully, my personal views or opinions, including those related to an article I wrote

nearly twenty years ago, would not be relevant to my role as a circuit judge should I be so privileged as to be confirmed. In *Gonzales*, the Supreme Court upheld the federal ban on partial-birth abortion under the *Casey* test. In the Eighth Circuit, as in the Supreme Court, *stare decisis* applies where the question at issue has been squarely addressed in a prior decision. If I am confirmed to this position, I would be bound to follow and apply all Supreme Court and Eighth Circuit precedent, including *Planned Parenthood v. Casey*.

In *Standing Bear*, you wrote that “[l]ower federal courts...need not extend questionable jurisprudence into new areas of the law or apply it in areas outside of where there is clear precedent.” (p. 28)

**b. Please explain what you meant by the term “questionable jurisprudence” and what that encompasses.**

This statement, written as a commentator nearly 20 years ago, immediately followed my statement that “lower court judges are obliged to follow clear legal precedent regardless of whether it may seem unwise or even morally repugnant to do so.” Questionable jurisprudence, in the context of the article, could include that which had unclear application to the facts presented by the instant case. As a judge, should I be so privileged to be confirmed, I would be bound to follow and apply all Eighth Circuit and Supreme Court precedent.

**c. Please list all of the U.S. Supreme Court cases that you consider to be “questionable jurisprudence.”**

As a judge, should I be so privileged to be confirmed, I would be bound to follow and apply all Eighth Circuit and Supreme Court precedent.

**d. Specifically, is *Roe v. Wade* or *Planned Parenthood v. Casey* “questionable jurisprudence”?**

See response to Questions 3(a) and 3(c).

**e. Please explain what you consider constitutes “clear precedent.”**

Any precedent of the United States Supreme Court or the applicable Circuit, within the terms of the respective holdings.

In *Standing Bear*, you wrote that the Supreme Court “has arbitrarily chosen birth, not viability, as the thamaturgical moment when a child gains the constitutional status of personhood.” (p. 30) You also wrote that “abortion jurisprudence is based on definitions and arbitrary distinctions.” (p. 32)

**f. In your view, what is the non-arbitrary moment that a fetus or fertilized egg “gains the constitutional status of personhood”?**

See response to Questions 3(a) and 3(c).

**g. What are the “arbitrary distinctions” in “abortion jurisprudence” you are referring to?**

See response to Questions 3(a) and 3(c).

**h. What did you mean in *Standing Bear* when you wrote that “[a]bortion jurisprudence is, to a significant extent, a word game”? (p. 30)**

This statement, written as a commentator nearly 20 years ago, was in reference to a related statement in the same article that in the context of abortion law “terminology and definitions are of critical importance.”

4. In 1999, you co-authored the petition for certiorari in *Stenberg v. Carhart* after the Eighth Circuit struck down Nebraska’s ban on so-called “partial-birth” abortions. One of the questions you urged the Supreme Court to consider was whether “[i]n light of... the lack of any constitutional textual basis, the Court should now recognize that abortion is more properly a public policy legislative matter than a constitutional issue for judicial decision?” You went on to argue that the “fundamental public policy issue involved in abortion is one that defies judicial determination.” In granting certiorari, the Supreme Court did not take up your question and decided the case – upholding the Eighth Circuit.

**a. What did you mean by a “lack of any constitutional basis”? Does the text of the Constitution provide a basis for a woman’s right to abortion?**

The language in question was drafted personally by the Attorney General for the purpose of presenting an issue for the Supreme Court’s consideration. The Court declined to take up the issue. The Supreme Court has held, and affirmed, that the right to abortion is protected by the Fourteenth Amendment.

**b. Does the text of the Constitution provide a basis for a woman’s right to contraception?**

The Supreme Court has held, and affirmed, that the right to abortion comes from the liberty interest under the 14<sup>th</sup> Amendment.

**c. Do you still hold the view that the issue of abortion is “one that defies judicial determination”?**

See response to Question 4(a).

5. You have made strong public statements criticizing *Roe v. Wade* and expressing your fervent opposition to legalized abortion. **Given your record, and the ABA’s finding regarding**

**your colleagues' concern over your impartiality and ability to be "free from bias," if confirmed, why should litigants believe you will be impartial and they will get a fair hearing in a case involving abortion?**

I believe in, and am deeply committed to, the rule of law. I would follow my solemn oath to dispense equal justice and perform my duties with impartiality.

6. In 1995, the Nebraska Attorney General's Office submitted an amicus brief at the U.S. Supreme Court in *Romer v. Evans*, in support of Colorado's constitutional amendment barring protections for the LGBT community. **Did you work on or contribute to that brief? If yes, please provide what you specifically worked on and what role you played.**

The brief in question was written by outside counsel on behalf of the seven amici states. It was not drafted by the Nebraska Attorney General's Office, and I have no recollection of any involvement.

7. At your hearing, Senator Durbin asked you whether "there have been instances when Americans have been discriminated against because of sexual orientation." You answered, "Senator, absolutely."

However, in 2013, during the City of Omaha's convention to review its charter, you introduced a charter amendment that appears to permit discrimination against LGBT people in employment and public accommodation, in conflict with a city ordinance. The transcript of the convention proceedings show that when you were asked at the convention if your proposed amendment created an "end run" around the anti-discrimination ordinance, you said: "If you want to call protecting religious freedom of individuals an end run and subjugate those individual religious liberties to someone else's employment rights, yes."

**a. What did you intend for this amendment to accomplish?**

Omaha is a home rule city. The City Charter of a home rule city is the equivalent of its constitution. I sought for the Omaha Charter to provide the same protections that the Nebraska Constitution and current federal law, 42 USC 2000bb, provide. The language I proposed was substantially identical to those documents for that reason.

Reports indicate you introduced the amendment because you said "many business owners live in fear of lawsuits over expressing their views or refusing to provide service to gay or transgender customers." ("Review of Omaha's Charter," *Omaha World-Herald*, Dec. 4, 2013)

**b. Was that, in fact, one of the reasons for your introduction of the amendment?**

The cited news article misquotes me. The transcript from the public hearing shows I actually said, "there are Christian ministries here in town who had to . . . violate their own religious beliefs because they don't want to stop providing services to people."

- c. Would the text of your proposed amendment permit an employer to refuse to hire an LGBT person if they had a sincerely-held religious belief objecting to such persons?**

Given that the amendment I proposed was based on existing state and federal law that could come before me as a circuit judge, if I am so privileged to be confirmed, it would not be appropriate for me to opine on this question.

- d. Would the text of your proposed amendment permit a business owner to refuse to provide service to an LGBT person with a sincerely-held religious belief objecting to such persons?**

See response to Question 7(c).

- e. Would the text of your proposed amendment permit an employer to refuse to hire someone of color if they had a sincerely-held religious belief objecting to such persons?**

See response to Question 7(c).

- f. Would the text of your proposed amendment permit a business owner to refuse to provide service to someone of color if they had a sincerely-held religious belief objecting to such persons?**

See response to Question 7(c).

- g. When you agreed with Senator Durbin that there have been “instances when Americans have been discriminated against because of sexual orientation,” in your mind, were any of those instances related to discrimination in employment or refusal of service to LGBT individuals?**

When responding to Senator Durbin, I did not have any specific instances in mind. Rather, I was making a general observation regarding society.

8. At your hearing, Senator Durbin asked you about the ban on polygamy that the U.S. federal government conditioned the State of Utah’s statehood upon in 1894. You said, “if that provision is not already the subject of litigation, I would anticipate that it would be in light of the *Obergefell* decision.” When Senator Durbin clarified he was asking specifically about the 1894 enabling act from Congress, you said, “I was commenting, Senator, about the possibility of a challenge to anti-polygamy provisions.”

In *Obergefell*, the U.S. Supreme Court held that two individuals in a “same-sex couple[] may exercise the fundamental right to marry.” 135 S. Ct. 2584, 2605 (2015)

- a. Why do you “anticipate” that a challenge to bans on polygamy would be the**

**subject of litigation after the Court in *Obergefell* held that same-sex couples have the same right to marry as any other two adult individuals?**

Because bans on polygamy have already been the subject of litigation in the federal courts post-*Obergefell*, including a petition for certiorari to the United States Supreme Court. *See, e.g., Brown v. Buhman*, No. 16-333(S.Ct.).

9. In your Senate Questionnaire, submitted to the Committee on August 24, 2017, you indicated that you were a Board Member of the Nebraska Family Alliance from “August 2015 to Present.” At your hearing, you told Senator Blumenthal, “I am no longer a member of that board.”

**a. When did you end your board membership with the Nebraska Family Alliance?**

Because of my judicial nomination, I decided to step aside from any positions that I believe it would not be appropriate for me to hold as a judge. I verbally resigned from this board on September 19, 2017. I followed this by a confirming letter on September 25, 2017.

**b. Why did you end your board service after submitting your Senate Questionnaire?**

See response to Question 9(a).

The Nebraska Family Alliance is opposed to state bans on conversion therapy for LGBT youth, arguing that these bans “trample on parental rights.” (Nate Grasz, “Legislation Criminalizing Conversion Therapy,” July 21, 2017) At your hearing, you told Senator Blumenthal that you “have never repudiated any of [the Nebraska Family Alliance’s] views.”

**c. Did you ever express any concern as a Board Member when the organization took its position to oppose bans on conversion therapy? Do you stand by the organization’s position today?**

The NFA had no official position on this subject while I was on the Board. It was never discussed by the Board.

**d. Have you ever expressed concern as a Board Member with a position taken by the Nebraska Family Alliance? If so, which positions?**

It would not be appropriate for me to opine on political questions and/or provide personal views as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges. *Cf* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

10. In 2013, you criticized a speaker’s remarks on voting rights which you said “were an extensive reiteration of the Democratic Party’s current talking points aimed at convincing



voters that Republicans are engaged in ‘voter suppression.’ This nation-wide strategy is designed to help maintain high minority voter turnout in the next election.”

Last year, the U.S. Court of Appeals for the Fourth Circuit struck down a sweeping North Carolina law instituting a strict voter identification requirement and making several other changes that decreased access to voting. The court found that “the new provisions target African Americans with almost surgical precision...Faced with this record, we can only conclude that the North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent.” (*North Carolina NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).) This May, the U.S. Supreme Court denied North Carolina’s petition for certiorari to appeal the ruling.

**a. What evidence did you rely upon in making your contention that the Democratic Party has a “nation-wide strategy...to help maintain high minority voter turnout” that is based on arguments about partisan voter suppression?**

The question calls for me to opine on a political question, which would not be appropriate for me to do as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges. *Cf* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

**b. Do you believe that racial discrimination in voting still exists?**

Discrimination in voting, on the basis of race, is a violation of federal and state law. Allegations of racial discrimination in voting continue to be litigated in the federal courts. If I am so privileged to be confirmed, I would faithfully follow the law and precedent in this area. It would not be appropriate, under the applicable ethical canons, for me to opine further.

**c. Do you believe that 3-5 million people voted illegally in the 2016 Presidential election? If so, on what basis have you reached that conclusion? If not, do you believe it is appropriate for President Trump to make that claim?**

This is a political question about which I cannot opine. *See* Canon 5, Code of Conduct for United States Judges. *Cf* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

11. In 1999, Nebraska press reported that you sent the Nebraska Department of Education a letter that raised concerns with education standards that taught evolution as fact as an interference with students’ religious rights. The Department of Education reacted to your letter by reportedly making “minor changes in the standards to make it clear that evolution is to be taught as theory rather than as fact.” (“Evolution Debate Fuels State Review,” *Omaha World-Herald*, May 8, 1999)

**a. Did you in fact send such a letter? If so, what prompted you to get involved in this**

**issue as the Deputy Attorney General of Nebraska?**

It is the job of the Attorney General's Office to review every proposed regulation from all state agencies, including the Board of Education's standards. The Attorney General looks for potential legal problems with all such proposed regulations. As Chief Deputy, I recommended approval of the State Board of Education's final standards for the teaching of evolution and the Attorney General approved the regulation. The initial concern that was identified in an earlier draft was that it could have been construed as demanding that all students accept the view that there is no creator (as accepted by various religions), which raised Establishment Clause concerns. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987).

**b. Do public education standards that include the teaching of evolution as fact interfere with a student's own free exercise of religion as protected by the First Amendment? If so, how?**

*See* response to Question 11(a).

12. In 1999, the Nebraska Attorney General's Office challenged the U.S. Environmental Protection Agency's (EPA) 1991 regulations requiring water utilities to monitor levels of lead and copper in drinking water. With regard to this rule, the EPA's website notes that lead and copper exposure may harm health "ranging from stomach distress to brain damage." You wrote a letter to the editor calling these regulations "outrageous and unnecessary." ("A Cheap Shot," Lincoln Journal Star, Apr. 13, 2000) **Please describe why these water safety regulations were "outrageous and unnecessary."**

To the best of my recollection, these regulations affected more than sixty Nebraska towns that could not afford the unfunded mandates imposed by the regulations. The legal issue was whether the EPA had authority to regulate local water supplies not involving any aspect of interstate commerce. It was the position of the State of Nebraska, as well the affected towns, that the regulations were unnecessary and unlawful.

13. On your Senate Questionnaire, you indicated that you served from June 2015 to March 2017 as Assistant Secretary for both the Nebraskans for the Death Penalty, Inc. and Nebraskans for Capital Punishment, Inc.

**a. Why did you join these organizations and take a leadership role within them?**

I was retained as legal counsel to a ballot committee due to my experience litigating initiative and referendum cases in both trial and appellate courts. Nebraskans for the Death Penalty, Inc. was a ballot committee organized for the purpose of placing the legislature's repeal of capital punishment on the ballot for Nebraska voters to decide. Nebraskans for Capital Punishment, Inc. was another name reserved by my client, but was never used. My position as "Assistant Treasurer" was assumed purely to facilitate legal filings in the course of my legal work without the need to bother the organization's

officers.

**b. Why did your membership in the organization end in March 2017?**

The work of the ballot committee ended in 2016 and it was inactive after that time. However, formal action to have my name removed from corporate documents did not come until March 2017.

14. On your Senate Questionnaire, you listed your membership in the Federalist Society, including your service on the Nebraska Lawyers Chapter Steering Committee. You indicated that you joined the organization this year.

**a. On what date did you join the Federalist Society in 2017?**

On February 21, 2017, I received a call from a partner in a Lincoln, Nebraska law firm who is an old friend. He said he was trying to start a Nebraska Lawyers Chapter and wanted to know if I would help. He specifically asked if I would be willing to serve on the Chapter Steering Committee. On February 27, 2017, I completed and returned a form to him. I then paid my dues on line.

**b. Why did you join the Federalist Society this year, including taking a leadership position in a local chapter?**

See response to Question 14(a).

**c. All but one of President Trump's circuit court nominees thus far have been members of the Federalist Society. Did you believe that you needed to join the organization in order to be considered for a circuit court judgeship?**

I did not. I joined at the request of a local friend.

**d. Did anyone suggest that joining the Federalist Society was important for your potential nomination?**

No.

15. Would you describe your approach to constitutional interpretation to be "originalist"? If so, what does that mean to you? If not, how would you describe your approach?

I have never found it necessary to put a label on my approach to constitutional interpretation. My approach is to follow the standard rules of construction with regard to the Constitution. This means starting with the text and its plain meaning. It also means following any applicable precedent.

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

Statutory construction must start, and, if possible, end, with the words of the text. When the words of the text are ambiguous, judges look to the plain meaning of the words used in their most natural sense with the aid of historical context. This may include legislative history.

17. 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?**

I am not aware of any situation in which it would be appropriate for a lower court to depart from Supreme Court precedent. It is the role of the Supreme Court to decide whether a prior decision should be reversed.

**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?**

Judges of inferior courts, including circuit courts, are bound to apply Supreme Court precedent, and if I am so privileged to be confirmed I will do so faithfully and to the best of my ability. There are circumstances where concurring circuit judges have questioned existing precedent in separate writings. However, they must still follow the precedent.

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

In the Eighth Circuit, a panel is bound by the decisions of prior panels. Only where the panel is compelled to overturn a circuit precedent by a Supreme Court decision or where the Eighth Circuit is sitting en banc are prior precedents overturned.

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

If I am so privileged to be confirmed I will be following Supreme Court precedent. It would not be appropriate for me opine on the role of the Supreme Court in this regard.

18. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

**a. Do you agree that *Roe v. Wade* is “super-stare decisis”? Do you agree it is “superprecedent?”**

*Roe v. Wade*, as affirmed in its main holding by *Planned Parenthood v. Casey*, is binding precedent of the Supreme Court. If I am so privileged to be confirmed, I will faithfully follow and apply it. For judges on lower courts, all Supreme Court precedent is “superprecedent.”

**b. Is it settled law?**

See response to Question 18(a).

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

*Obergefell v. Hodges* is binding precedent of the United States Supreme Court. If I am so privileged to be confirmed, I will faithfully follow and apply it.

20. 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?**

I have not had occasion to consider *District of Columbia v. Heller* in detail. It is binding precedent of the United States Supreme Court. If I am so privileged to be confirmed, I will faithfully follow and apply it.

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

In *Heller*, the Supreme Court stated, “nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or law imposing conditions and qualifications on the commercial sale of arms.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

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

See response to Question 20(a).

21. According to your Senate Questionnaire, you joined the Federalist Society this year. You also sit on the Nebraska Lawyers Chapter Steering Committee for the organization. The Federalist Society's "About Us" webpage, states that, "[l]aw 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." The same page states 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. 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 role in authoring that statement, and I do not know precisely what the Federalist Society meant by it.

**b. As a member of the Federalist Society, explain how exactly the organization seeks to "reorder priorities within the legal system."**

*See* response to Question 21(a).

**c. As a member of the Federalist Society, explain what "traditional values" you understand the organization places a premium on.**

*See* response to Question 21(a).

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

I received the questions from the Office of Legal Policy at the Department of Justice on November 8, 2107. I reviewed the questions and drafted answers. I then shared the answers with the Office of Legal Policy. After conferring with lawyers there, I made revisions and authorized the Office to submit the responses to the Committee on my behalf.

**Senator Dick Durbin**  
**Written Questions for Steven Grasz**  
**November 8, 2017**

For questions with subparts, please answer each subpart separately.

**Questions for Steven Grasz**

1. The American Bar Association Standing Committee on the Federal Judiciary gave you a rating of “not qualified” to serve on the 8th Circuit. The judgment of the 15-member ABA Standing Committee was unanimous, with one abstention. The Standing Committee reported that its determination was based on 183 interviews conducted with your peers, plus an additional 24 interviews conducted as part of their second evaluation.

a. **Do you believe that all 14 non-abstaining members of the Standing Committee were biased when they each voted to rate you “not qualified” to serve on the 8<sup>th</sup> Circuit?**

I respect the time and effort put into the ABA’s review, but I respectfully disagree with the Standing Committee’s conclusion. As a judicial nominee, I believe that is otherwise inappropriate for me to comment on the rating.

b. The Statement of Pamela Bresnahan on behalf of the Standing Committee concerning your nomination noted that the initial lead evaluator “encountered a reluctance on the part of members of the Nebraska bar to respond to her inquiries. Among those who did respond, many express reservations about speaking, and were concerned about possible repercussions from their participation.” **Do you believe it would be appropriate for any member of the Nebraska bar who spoke to the ABA about your nomination to face repercussions for speaking?**

Of course not.

c. The Statement of Ms. Bresnahan also noted that the second lead evaluator “encountered a similar and unusual fear of adverse consequences expressed by those from whom interviews were solicited, of all political parties, based on the nominee’s deep connection and allegiance to the most powerful politicians in his state.” **Do you believe it would be appropriate for politicians in your state to seek adverse consequences against those who were interviewed by the ABA about your nomination?**

Of course not.

d. One Senator described the ABA’s evaluation of you as “a biased, baseless attempt filled with vagaries and innuendo intended to damage Steve’s outstanding legal reputation.” **Do you agree?**

See response to Question 1(a).

- e. Another Senator described the two attorneys on the Standing Committee who interviewed you as “blatant partisans with a sad track record of hackery.” **Do you agree?**

See response to Question 1(a).

2. In your questionnaire you report that you worked as the General Counsel for the Nebraska State Republican Party from 2007 to 2013. You have also represented Nebraska Governor Pete Ricketts.

- a. **Please discuss the work that you have performed on behalf of the Nebraska Republican Party.**

I provided legal research and consultation as needed related to party rules, the party constitution, state accountability and disclosure act compliance and Federal Election Commission compliance.

- b. **Please discuss the work that you have performed on behalf of Governor Ricketts.**

I have served as his campaign treasurer. I have also provided limited legal representation related to his campaign committee.

- c. **In your view, do you have any conflicts of interest, or appearances of conflicts of interest, with the Nebraska Republican Party or Governor Ricketts?**

28 U.S.C. § 455(a) requires a federal judge to “disqualify himself in any proceeding in which his partiality might be questioned.” 28 U.S.C. § 455(b) lists additional grounds for recusal. If I am so privileged as to be confirmed, I would apply the recusal statute, along with the precedents interpreting it and any applicable canons of judicial ethics, in deciding whether to disqualify myself from a particular case.

3. In your 1999 law review article in the Creighton Law Review, you wrote:

Lower federal courts are obliged to follow clear legal precedent regardless of whether it may seem unwise or even morally repugnant to do so. However, a court need not extend questionable jurisprudence into new areas or apply it in areas outside of where there is clear precedent.

- a. **How is a lower court judge supposed to decide when jurisprudence is “questionable”?**

Please see my response to Question 3(b) of Ranking Member Dianne Feinstein.

- b. **What standard should a judge follow in making such a determination?**

Please see my response to Question 3(b) of Ranking Member Dianne Feinstein.



4. You note in your questionnaire that you served as the Assistant Secretary for Nebraskans for the Death Penalty, Inc., from June 2015 to March 2017. You also served as the Assistant Secretary for Nebraskans for Capital Punishment, Inc. for the same time period.

You represented Nebraskans for the Death Penalty, Inc., in the 2016 case *Hargesheimer v. Gale*, which involved a referendum petition that sought to reinstate capital punishment in Nebraska after the state legislature had repealed it in 2015. In the *Hargesheimer* case, several opponents of the death penalty had challenged the validity of the referendum petition, arguing that Governor Ricketts should have been listed as a sponsor under state law because he had donated significant amounts to Nebraskans for the Death Penalty and had advocated for the referendum. You argued that the Governor did not need to be listed as a sponsor, and the state Supreme Court agreed.

The referendum proceeded and in 2016 Nebraskans voted to reinstate the death penalty and resume executions that had been put on hold.

**In your questionnaire, you make a commitment to “recuse in any litigation where I have ever played a role” and to consider recusal if you had an appearance of a conflict of interest. If you are confirmed, would you recuse yourself from cases that may arise before the 8<sup>th</sup> Circuit involving Nebraska’s death penalty, given your role in the litigation that led to its reinstatement and given your work for two pro-death penalty organizations that advocated for it?**

Please see my response to Question 2(c) above and my response to Question 13(a) of Ranking Member Dianne Feinstein.

5. In a Nebraska Attorney General opinion that you co-authored in 1996, you discussed the possibility of legislation to prevent Nebraska from recognizing same-sex marriages conducted in other states. You described the possibility of the Nebraska Supreme Court recognizing same-sex marriages performed in Hawaii as a “grave danger.” **In your view, what danger is posed by marriage equality?**

In 1996, a state senator requested advice on how to prevent Nebraska’s marriage law from being circumvented by courts in other jurisdictions. The danger referred to in this opinion giving legal advice was to the continued viability of Nebraska’s laws as they were then written. Nebraska’s laws, of course have been preempted by the Supreme Court’s decision in *Obergefell v. Hodges*. If I am so privileged to be confirmed, I will faithfully follow and apply it.

6. In 1992, you co-authored a Nebraska Attorney General Opinion in which you discussed a proposed hate crimes bill that would have prohibited intimidation on grounds including sexual orientation. You wrote that including “sexual orientation” could make the bill unconstitutionally vague because it “could conceivably include all ‘orientations’ of a sexual nature (bigamy, pedophilia, etc.)” You advised the bill sponsor that “you may want to avoid potential challenges by making the proposed language more precise.” **Is it still your view that the term “sexual orientation” could include bigamy and pedophilia?**

The Opinion neither represented my personal views nor any definitive legal judgment about the meaning of the term “sexual orientation.” At the time, “sexual orientation” was not defined in either Nebraska law or in the proposed legislation. Because the proposed legislation imposed criminal penalties, which are subject to challenge under the Due Process Clause for vagueness, the Attorney General’s Opinion advised the Senator he “may want to avoid potential challenges by making the proposed language more precise.”

7. In a Nebraska Attorney General opinion that you co-authored in 1996, you advised a State Senator on whether a partial birth abortion ban would be constitutional. You wrote the following:

We would be remiss if we did not state the obvious: the legal question presented by the examination of the constitutionality of partial-birth abortion is so inherently macabre, and utterly divorced from moral or rational foundation that it undermines the credibility of the legal system, and necessarily exposes the moral bankruptcy which is the legacy of *Roe v. Wade*.

- a. **Please discuss what you meant by the “moral bankruptcy which is the legacy of *Roe v. Wade*.”**

Please see my response to Question 2(a) of Ranking Member Feinstein.

- b. **If you are confirmed, would you recuse yourself from cases interpreting or involving *Roe v. Wade*, given your unequivocal statement that the legacy of *Roe v. Wade* is “moral bankruptcy” and the appearance of a conflict that this statement creates?**

Please see my response to Question 2(c) above and my response to Question 5 of Ranking Member Feinstein.

8. In your questionnaire you list yourself as having been a member of the Federalist Society starting in 2017.

- a. **Why did you join?**

Please see my response to Question 14(a) of Ranking Member Feinstein.

- b. **Did anyone suggest to you that you join the Federalist Society in order to enhance your prospects for a judicial nomination?**

Please see my response to Question 14(d) of Ranking Member Feinstein.

- c. **If so, who suggested this to you and when?**

Please see my response to Question 14(d) of Ranking Member Feinstein.

- d. **Are you aware that President Trump publicly thanked the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

The question calls for me to opine on political questions and/or provide personal views, which would not be appropriate for me to do as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges. *Cf* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

- e. **Please list each year that you attended the Federalist Society's annual conference.**

I have never attended this event.

9. In 2012 you authored a paper for the Federalist Society's website entitled "Judicial Selection in Nebraska" in which you discussed Nebraska's system for appointing state court judges. You wrote in particular about concerns that, "the current system appears to foster disproportionate influence from special interest groups on one side of the political spectrum."

- a. **Do you think the Federalist Society is a special interest group?**

The question calls for me to opine on political questions and/or provide personal views, which would not be appropriate for me to do as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges. *Cf* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

- b. **Do you think the Federalist Society, which President Trump publicly credited for assembling his list of 21 Supreme Court candidates, has an influence on judicial selection and appointments in 2017?**

The question calls for me to opine on political questions and/or provide personal views, which would not be appropriate for me to do as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges. *Cf* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

10. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

The Judicial Crisis Network has also spent money on advertisements supporting President Trump's Circuit Court nominees, including then-Justice Joan Larsen.

- a. **Do you want outside groups or special interests to make undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination?**

I am not aware of any such donations made in support of my nomination. I have not solicited any such donations, nor could I ethically do so.

- b. **Will you condemn any attempt to make undisclosed donations on behalf of your nomination?**

See response to Question 10(a).

- c. **Will you call for any such 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?**

See response to Question 10 (a).

11.

- a. **Can a president pardon himself?**

It would not be appropriate for me, as a judicial nominee, to give previews or pre-judge even theoretical legal issues.

- b. **Can an originalist view of the Constitution provide the answer to this question?**

See my response to Question 11(a).

- c. **If the original public meaning of the Constitution does not provide a clear answer, to what should a judge look to next?**

See my response to Question 11(a).

12. **Do you agree, as a factual matter, with President Trump's claim that 3 to 5 million people voted illegally in the 2016 election?**

The question calls for me to opine on political questions and/or provide personal views, which would not be appropriate for me to do as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges. *Cf* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

13. **In your view, is there any role for empathy when a judge is considering a criminal case – empathy either for the victims of the alleged crime, for the defendant, or for their loved ones?**

A judge should have empathy for the parties and attorneys who appear before him, particularly given it may be the first or only experience that a party will have with the federal judicial system. But a judge should never allow personal opinions or experiences to justify a departure from the law, including any relevant precedent.

The role of a circuit judge is to apply the law and precedent to the record on appeal under the applicable standard of review.

14.

- a. **Do you believe that the role of a judge on the federal court of appeals is to apply Supreme Court and Circuit precedent in all cases?**

Yes, to the extent such precedent exists. In some cases, however, the role of an appeals court judge is to apply state law in the context of a particular case (as in diversity jurisdiction cases) or to construe statutes or regulations where no precedent exists, following applicable rules of construction.

- b. **Do you believe there are cases that come before the Circuit Courts that are of first impression or that are not directly covered by precedent?**

Please see my response to Question 14(a).

- c. **In such cases, what would be your approach to reaching a decision if you are confirmed?**

If the appeal concerns a matter of statutory construction, I would follow applicable rules of construction, starting with the plain meaning of the terms of the statute. I would also look to any analogous case law, including that of the Supreme Court and the Eighth Circuit, the arguments of the parties, and the legal analysis of my fellow panel members.

**Nomination of Leonard Grasz to the  
United States Court of Appeals  
for the Eighth Circuit  
Questions for the Record  
Submitted November 8,  
2017**

**QUESTIONS FROM SENATOR WHITEHOUSE**

1. 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 generally agree that this metaphor is apt, as it highlights the fundamental difference between an advocate and a judge.

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

Generally, none. The wisdom of legislative enactments is within the prerogative of the legislative branch. The law, however, sometimes calls upon a judge to consider the practical consequences of a particular ruling. For instance, when presented with a motion for a temporary restraining order or a preliminary injunction, a judge should consider whether a failure to issue such an order or injunction would result in “irreparable harm” to the movant. Further, within the context of statutory construction, judges do sometimes consider whether a proposed construction would produce an absurd result.

- c. 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 judge to make a subjective determination?

I do not. There are definitions and precedent as to what constitutes a material fact and what does not. Generally, judges apply an objective, reasonable factfinder standard to determine whether or not there are genuine disputes regarding material facts. In doing so, the judge is not to apply his or her own opinion about the relative strength of the evidence.

2. 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?

Please see my response to Question 13 of Senator Durbin.

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

A judge's life experiences may help a judge to understand issues or factual records before the court. However, they cannot be used to tilt the scales of justice. A judge must perform his or her duties impartially and according to the law without regard to his personal life experiences.

- c. Do you believe you can empathize with "a young teenage mom," or understand what it is like to be "poor or African-American or gay or disabled or old"? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

Please see my response to Question 2(b).

3. 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?

Never.

4. Based on over 200 confidential interviews, you received a unanimous "Not Qualified" rating from the ABA. Their report questioned your commitment to stare decisis, expressed anxiety about your "gratuitously rude" conduct, and doubted your ability to "detach [yourself] from [your] deeply-held social agenda and political loyalty to be able to judge objectively, with compassion and without bias."

- a. Can you describe your views on stare decisis and why your colleagues would "question [your] commitment to it"?

Circuit judges are bound to follow the precedent of the Supreme Court. Stare decisis is based on the principle that the rule of law requires continuity. The Supreme Court has stated that, "[s]tare decisis promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the integrity of the judicial process." *Payne v. Tenn.*, 501 U.S. 808 (1991). In the Eighth Circuit, "[i]t is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." *U.S. v. Betcher*, 534 F.3d 820, 823-24 (8th Cir. 2008). Stare decisis applies where the question at issue was squarely addressed in prior decisions. *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *Passmore v. Astrue*, 533 F.3d 658 (8th Cir. 2008).

Because of the nature of the ABA's process, it is impossible for me to know the reasoning behind comments regarding my commitment to stare decisis. I can assure this Committee that I believe strongly in the importance of stare decisis, and I will faithfully adhere to my duty to apply Supreme Court and circuit precedent, if I am so privileged to be confirmed.

- b. A number of your colleagues expressed the view that you would not be free from bias as a judge, and specifically that you "would be unable to separate [your] role as an advocate from that of a judge." On what basis might your colleagues have formed that opinion?

Please see my response to Question 1(a) of Ranking Member Feinstein.

5. The ABA report also stated: “Mr. Grasz maintains that his own pro-life agenda has no impact on his conclusion as to how a lower court could and should have avoided *Roe* and *Casey*. He was unable to identify the lack of objectivity that his personal convictions had created.” What is your response to that conclusion? How can you assure this committee that you will uphold a woman’s right to choose given your extensive advocacy to undermine that right?

The ABA’s conclusions regarding my view as to “how a lower court could and should have avoided *Roe* and *Casey*” relied heavily on their characterization of a law review article I wrote in 1999. Their report omitted key aspects of the article. It is my understanding that the ABA’s conclusion was publically refuted by United States District Judge Richard Kopf, who was the judge in Nebraska’s partial-birth abortion trial and the author of a law review article responding to my 1999 article. With regard to my commitment to uphold Supreme Court precedent on abortion, please see my response to Question 5 of Ranking Member Feinstein.

6. Since 2015, you have served on the Board of the Nebraska Family Alliance and you are currently its Board Director. Troublingly, the Nebraska Family Alliance has published articles supporting the dangerous and inhumane practice of conversion therapy. According to a 2009 report of the American Psychological Association, the techniques used to try to change sexual orientation and gender identity include inducing nausea, vomiting, or paralysis while showing the patient homoerotic images; providing electric shocks; having the individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts; using shame to create aversion to same-sex attractions; orgasmic reconditioning; and satiation therapy. Every leading medical and therapeutic organization, including the American Psychological Association and the American Medical Association, have rejected this practice. The American Psychiatric Association published a statement in 2000 concluding that: “In the last four decades, ‘reparative’ therapists have not produced any rigorous scientific research to substantiate their claims of cure.”
  - a. Do you support the Nebraska Family Alliance’s endorsement of conversion therapy? If so, how do you reconcile that support with the overwhelming rejection of the practice by the scientific and medical communities?

Please see my response to Question 9(c) of Ranking Member Feinstein.

- b. As a judge how can you assure us that we can trust your judgement with respect to assessing scientific evidence?

The role of an appellate judge with regard to evidence in the appellate record is governed by the applicable standard of review. Findings of fact are made by trial courts.

7. The Supreme Court held in *Price Waterhouse v. Hopkins* that treating employees differently in the workplace based on whether they conform to sexual stereotypes is a form of sex discrimination that is prohibited by Title VII of the Civil Rights Act of 1964.



- a. Do you recognize this as binding precedent with respect to the protections against sex discrimination provided by Title VII?

If I am so privileged as to be confirmed, I will faithfully follow and apply all Supreme Court precedent, including any precedent regarding Title VII.

- b. Do you believe that there are certain stereotypes about how men and women are supposed to act that are beyond what was meant by the Supreme Court in *Price Waterhouse*? For example, the stereotype that men are supposed to date women and not men?

The question calls for me to opine on a matter that may be the subject of pending litigation, which would not be appropriate for me to do as a judicial nominee. *See* Canon 3(A)(6), Code of Conduct for United States Judges. *Cf* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

- c. Does Title VII protect against discrimination based on sexual orientation? Based on gender identity?

My understanding is that this question is the subject of active litigation in federal court. Accordingly, I cannot comment on the issue. *See* Canon 3(A)(6) and Canon 1.

8. What limitations, if any, does the Constitution impose on government funding and government sponsorship of religious activity?

The Establishment Clause of the First Amendment to the Constitution and Supreme Court precedent interpreting this Clause govern this area of law.

9. In response to Senator Durbin’s question about a provision of the 1894 Enabling Act prohibiting polygamy in Utah, you stated, “I do have to be very careful how I answer because if that provision is not already the subject of litigation, I anticipate that it would be in light of the *Obergefell* decision.”

- a. Why would litigation over the legality of polygamy flow from the Supreme Court’s recognition of a constitutional right for same-sex partners to marry?

Please see my response to Question 8(a) of Ranking Member Feinstein.

- b. Do you believe that same-sex marriage is morally equivalent to polygamy?

The question calls for me to opine on political questions and/or provide personal views, which would not be appropriate for me to do as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges. *Cf* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

- c. Do you believe that same-sex marriage is legally equivalent to polygamy?

The question calls for me to opine on political questions and/or provide personal views, which would not be appropriate for me to do as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges; *cf* also Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

10. In response to Senator Sasse’s question about times your professional duty led you to advance outcomes that did not align with your personal policy agenda, you cited hate crimes legislation as an example. You later described your work on hate crimes legislation to Senator Durbin, including an opinion you wrote concluding that “protecting LGBT citizens from hate crimes through this legislation was a valid and constitutional act.” Does that mean that you do not support hate crimes legislation like the proposed Nebraska law you opined on?

The reference to Senator Sasse was intended to be an example of something that did not fit the seeming stereotype of my work. It was not intended to convey any personal opinion on the merits of the proposed legislation one way or another.

**Nomination of Leonard Steven Grasz, to be United States Circuit Judge for the Eighth Circuit**

**Questions for the Record  
Submitted November 8, 2017**

**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?

In considering a case on the merits, I would faithfully apply the factors and considerations outlined in United States Supreme Court and Eighth Circuit precedent for determining whether an asserted right is fundamental and thus protected under the Fourteenth Amendment. In making this assessment, I would review the underlying precedents as well as the briefs submitted to the court. I would discuss the matter with my law clerks and court colleagues to determine the legally correct answer.

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

Please see my response to Question 1.

- 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?

Please see my response to Question 1.

- 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?

Please see my response to Question 1.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?

Please see my response to Question 1.

- 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*).

Please see my response to Question 1.

- f. What other factors would you consider?

Please see my response to Question 1.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across

race and gender, or does it only require racial equality?

The United States Supreme Court has repeatedly held the Equal Protection Clause of the Fourteenth Amendment applies beyond racial classifications. The scope of the Fourteenth Amendment's application to particular groups is currently the subject of active litigation, and so I cannot comment further. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). If I should be so privileged as to be confirmed, I would faithfully review and apply the applicable precedents of the Supreme Court and the Eight Circuit.

- 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?

Please see my response to Question 2.

- 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?

Please see my response to Question 2.

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

Please see my response to Question 2.

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

Please see my response to Question 2.

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

The United States Supreme Court has held the Constitution protects this right as set forth in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

The United States Supreme Court has held the Constitution protects this right as set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

- 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 United States Supreme Court has held the Constitution protects this right as set forth in *Lawrence v. Texas*, 539 U.S. 558 (2003).

- 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). I will add that the Court's decisions on those issues, as on all others, will be binding on me as a circuit-court judge, should I be so privileged as to be confirmed.

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, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

- a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

Trial courts consider the evidence presented by litigants in each new case according to the applicable rules of evidence. Appellate courts consider the evidence in the appellate record under the applicable standard of review. If faced with this question, I would evaluate the ruling of the district court for consistency with the rules of evidence and any relevant Supreme Court or Eighth Circuit precedent on the appropriateness of considering different kinds of evidence.

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

Please see my response to Question 4(a).

5. Last year, you retweeted a speech by then-Oklahoma Attorney General Scott Pruitt calling for the next Supreme Court justice to be a textualist and an originalist. You are a member of the Federalist Society, which advocates 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?

This is a question of academic debate. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 955-84(1995). However, it is not something I have thought much about as I have never questioned this landmark decision. *Brown* is settled law, and I would apply it faithfully, regardless of its consistency or inconsistency with any theory of constitutional interpretation.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘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-pages/democratic-constitutionalism> (last visited November 8, 2017).

If I am so privileged as to be confirmed, academic debate over methods of constitutional interpretation would have little relevance to my work as a member of an inferior court. My job would be to faithfully apply existing Supreme Court and Eighth Circuit precedent.

6. In its review of your nomination, the American Bar Association determined based on interviews with colleagues and professional peers that you “would be unable to separate [your] role as an advocate from that of a judge.”
  - a. Please discuss a professional assignment you have undertaken supporting a position with which you did not agree.

The question necessarily calls for me to opine on political questions and/or provide personal views, which would not be appropriate for me to do as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges. *Cf* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”). It would also not be appropriate for me to criticize arguments or positions I have previously advanced on behalf of clients. In my experience, however, one would be hard pressed to find a lawyer who has represented clients for more than 20 years (as I have) who has not advanced zealously for positions with which he disagrees on multiple occasions.

- b. Should bias disqualify someone from being a judge? If not, how should a judge go about recognizing and managing his or her biases?

Judges must be committed to following the law instead of their own preferences. The rule of law is paramount. The law does not bend to my opinions or anyone else’s.

7. Although the Supreme Court has declared that women have a constitutional right to an abortion, in an article entitled *If Standing Bear Could Talk . . . Why There Is No Constitutional Right To Kill A Partially Born Human Being*, you asserted that lower courts could treat abortion jurisprudence as a “word game” and uphold anti-abortion laws based on the semantics of a challenged law. The American Bar Association’s report on your nomination states that you “continue[] to adhere[]” to views you expressed in the article.

- a. What role did your personal views on abortion play in your prior advocacy or writings on the issue?

The question necessarily calls for me to opine on political questions and/or provide personal views, which would not be appropriate for me to do as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges. *Cf.* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

- b. Does a lower court ever have the ability to fail to apply a higher court’s ruling to the entire scope of cases to which it applies?

No. *Stare decisis* applies to *all* questions at issue that were squarely addressed in prior decisions. *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *Passmore v. Astrue*, 533 F.3d 658 (8th Cir. 2008).

- c. If a lower court believes in good faith that the higher court’s opinion is flawed, does the lower court have the authority to interpret the holding as narrowly as possible?

Please see my response to Question 7(b).

8. You wrote an opinion while working in the Nebraska Attorney General’s Office in which you claimed that a piece of legislation “necessarily exposes the moral bankruptcy which is the legacy of *Roe v. Wade*.”

- a. What role does morality play in determining whether a challenged law or regulation is unconstitutional or otherwise illegal?

Please see my response to Question 2(c) of Ranking Member Feinstein.

- b. As a judge, how would you weigh moral arguments made by parties?

Moral arguments are generally the province of the legislative, not the judicial, branch. To the extent that the Supreme Court or Eighth Circuit precedents call upon judges to consider moral arguments in assessing the constitutionality of a piece of legislation, I would do so. However, the role of the judicial branch is always to apply the law as it exists, not as a judge or party may wish it existed.

9. You wrote a petition for certiorari in *Stenberg v. Carhart*. The case was before the Supreme Court to determine whether a law banning partial-birth abortions was unconstitutional. However, in your brief, you argued that the Supreme Court should overturn *Roe* and *Casey* and find abortion to be “more properly a public policy legislative matter than a constitutional issue for judicial decision.”

Please see my response to Question 4(a) of Ranking Member Feinstein.

- a. Under what circumstances should a court revisit settled precedent?

Please see my responses to Questions 17(a)-(d) of Ranking Member Feinstein.

- b. Under what circumstances is it appropriate to overturn precedent when a narrower ground for ruling is available?

Please see my responses to Questions 17(a)-(d) of Ranking Member Feinstein.

10. You represented the State of Nebraska in a case opposing a woman's adoption of her same-sex partner's biological child. When asked by a justice if the best interest of the child was more controlling than state statutes, you replied, "No. Best interest does not apply until the statutory requirements have been met." Do same-sex parents have the same rights under the Constitution as opposite-sex parents?

Because questions of parental rights post-*Obergefell* are currently the subject of active litigation, I must refrain from commenting. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."). *Cf* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). Should such a case come before me, I will (if so privileged to be confirmed) carefully review the briefs and the applicable precedent to determine the proper outcome.

11. In 2013, you advocated for an amendment to the Omaha City Charter that emphasized the rights of citizens to exercise religious rights free from any burden, including those derived from rules of general applicability. When opponents to the amendment raised concerns that the amendment may allow discrimination against LGBT individuals and racial minorities, you called those arguments "off the wall." You also rejected the argument that the protection of rights of LGBT individuals constitutes a compelling government interest. It is ever appropriate for the government to limit an individual's free exercise rights, for example, to prohibit discrimination?

Please see my response to Question 7 of Ranking Member Feinstein.



**Questions for the Record for Leonard Steven Grasz**  
**Submitted by Senator Richard Blumenthal**  
**November 6, 2017**

1. In 1992, you authored a Nebraska Attorney General Opinion on the constitutionality of a proposed hate crimes bill that would have focused on, among other things, crimes that target people for their actual or perceived sexual orientation. You wrote that “the term ‘sexual orientation’ leaves room for a potential challenge on the basis of vagueness. This term could conceivably include all ‘orientations’ of a sexual nature (bigamy, pedophilia, etc.)” The term “sexual orientation” has been well established to encompass lesbian, gay, and bisexual individuals—and, thanks to the Matthew Shephard and James Byrd Jr. Hate Crimes Prevention Act of 2009, we now have federal protections against hate crimes motivated by bias on the basis of sexual orientation.

- a. **How do you interpret the term “sexual orientation” in hate crimes law today?**

- Please see my response to Question 6 of Senator Durbin. Additionally, if I am so privileged to be confirmed, I would interpret the term “sexual orientation” consistent with its statutory definition and any and all applicable Supreme Court and Eighth Circuit precedent.

- b. **Do you still believe protections for lesbian, gay, and bisexual Americans might be unconstitutionally vague?**

- Please see my response to Question 1(a) and Question 6 of Senator Durbin.

- c. **If confirmed, will you commit to applying all relevant laws when considering a federal hate crimes case?**

- Absolutely. Please see my response to Question 1(a).

2. You previously served as a board member of the Nebraska Family Alliance. During the hearing, I asked you if had ever repudiated any of the NFA’s positions, and you answered that you had not. We must therefore conclude that you stand by the organization’s positions during your time as a member of the board. Among the most disturbing content in the NFA’s written materials are articles supporting the dangerous and inhumane practice of conversion therapy—even for minors. Conversion therapy is a so-called “treatment” aimed at changing someone’s sexual orientation, often through the use of harmful, cruel, or invasive procedures. Many of the victims of such treatment are minors who have little to no say in the matter. Every leading medical and therapeutic organization, including the American Psychological Association and the American Medical Association has unanimously and unequivocally recognized that LGBT people’s identities should not be targeted for change.

- a. **Do you believe that “conversion therapy” is a valid medical procedure?**

The question calls for me to opine on political questions and/or provide personal views, which would not be appropriate for me to do as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges. *Cf* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”). Please also see my response to Question 9(c) of Ranking Member Feinstein.

In the article “Sexual Orientation, Gender Identity, and Race: Are They Three of a Kind?” the NFA has claimed that the terms “sexual orientation” and “gender identity” describe “behaviors,” rather than “traits” like race.

**b. Do you agree with this? What are the legal implications of treating sexual orientation as a behavior and not a trait?**

Please see my response to Question 2(a).

While you were serving as a board member, the NFA published a piece titled “Changing the Conversation About Marriage.” In discussing the Supreme Court’s historic marriage equality ruling, the article states that: “Sadly, the *Obergefell* decision didn’t just redefine marriage. It actively threatens free speech and freedom of religion in our nation.”

**c. Do you agree? How does this ruling threaten free speech and the free exercise of religion?**

My understanding is that this question is the subject of active litigation in federal court. Accordingly, under the canons, I cannot comment on the issue. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”). *Cf* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

The NFA’s website has an entire page devoted to misleading information about the safety of reproductive health procedures, stating that “abortion harms women,” that “Planned Parenthood and the abortion industry don’t stand for women,” and that “There is no such thing as a ‘safe’ abortion.” The website also refers to the right to privacy as “newly discovered,” implying that it is somehow illegitimate.

**d. Do you agree with these views?**

The question calls for me to opine on political questions and/or provide personal views, which would not be appropriate for me to do as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges. *Cf* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

3. In the American Bar Association's statement on why it rated you as "not qualified" to serve as a judge, it cited many members of the Nebraska bar who questioned your ability to "separate [your] role as an advocate from that of a judge." The statement also indicated that your colleagues doubt your commitment to *stare decisis*. Based on the opinions of many of your peers, the ABA determined that you lack the "judicial temperament" to be a federal judge, and, perhaps most troublingly, many of those who were interviewed expressed concerns about "possible repercussions from their participation" in the ABA's investigation.

- a. **Why did your colleagues fear that you would retaliate against them if they cooperated with the ABA's investigation?**

Please see my response to Questions 1(e) and 1(f) of Ranking Member Feinstein.

- b. **What assurances can you provide this Committee of your commitment to *stare decisis*? That you have the judicial temperament to be a judge?**

Please see my response to Question 1(a) of Ranking Member Feinstein and to Question 4 of Senator Whitehouse.

**Nominations Hearing**  
**November 1, 2017**  
**Question for the Record from Senator Sasse to L. Steven Grasz**

1. Please detail your interactions with the American Bar Association during the course of your nomination.

On August 4, 2017, I received a letter from ABA Standing Committee on the Judiciary Chair, Nancy Scott Degan, notifying me that University of Arkansas School of Law Professor Cynthia Nance had been assigned to conduct my evaluation. Over the next few weeks, I heard from many attorneys and federal and state court judges who had been contacted or interviewed by Professor Nance and provided positive feedback about me. A past ABA representative to the Nebraska State Bar Association related to me that she had told Professor Nance of my involvement in defending, on separation of powers grounds, the Nebraska Supreme Court's budget from proposed cuts by the Governor, even though I was serving as the Governor's campaign treasurer at the time.

On September 1, 2017, Professor Nance interviewed me for approximately two hours at Husch Blackwell LLP, in Omaha, Nebraska. The interview was cordial and relaxed. I was given the clear impression the feedback received by Professor Nance in her interviews with other attorneys was overwhelmingly positive. Near the very end of the interview, Professor referred to the ABA's policy of affording me the opportunity to address any adverse comments received during interviews. She stated she had received some comments expressing concern as to whether I would be able to be fair and impartial "given my extensive political involvement." In response, I told Professor Nance about my solemn belief in the rule of law and specifically that cases should be decided based on the law and the law alone. I noted she seemed satisfied with my response. No mention was made as to any other issue or concern, including regarding my integrity or temperament. As the interview ended, Professor Nance expressed the hope that I would invite her to my investiture.

On September 21, 2017, I received a call to schedule a follow-up interview from Laurence Pulgram, an attorney with Fenwick & West LLP in San Francisco. When I asked why a second interview was needed, he responded that concerns had been raised as to my ability to judge "divorced from ideology."

On October 9, 2017, Mr. Pulgram interviewed me for approximately three-and-a-half hours at Husch Blackwell LLP, in Omaha, Nebraska. This interview differed markedly from my first interview. It was significantly more hostile. During one section of the interview, Mr. Pulgram repeatedly referred, in a negative tone, to "you guys." When I asked to whom he was referring, he replied "conservatives and Republicans."

Mr. Pulgram insisted on knowing my personal views on a number of controversial topics, including abortion, the death penalty, and adoption by same-sex couples. He asked whether all my children attended Concordia Lutheran Schools. He repeatedly pressed me to "admit" that my personal views on abortion would lead me to use my position to "advance a pro-life view." I repeatedly assured him that my personal views were irrelevant to how I would perform the duties of a judge.

A significant portion of the second interview was spent on my White Paper regarding state judicial selection. Mr. Pulgram seemed to misunderstand the thesis of my paper, claiming I was opposed to the “Missouri Plan” of merit selection for state court judges. I am not, and the White Paper makes clear that I was suggesting only minor improvements to the process for selecting judges in Nebraska. He also sought to argue with me regarding my criticism of the role of interest groups, including trial lawyer’s groups and the ABA, in the process. He characterized my support of a friend who had applied for a seat on the Nebraska Supreme Court as part of a plot “to get a young far-right voice on the Nebraska Supreme Court.”

Mr. Pulgram raised a number of issues not discussed in my first interview with Professor Nance. For instance, he spent a good deal of time on my son’s work at the Nebraska Family Alliance and tried to coax me into giving opinions of my son’s work. He also asked about several cases I worked on as Chief Deputy Attorney General of Nebraska, including an amicus brief I worked on in 1999 on behalf of the State of Nebraska and ten other states (including Illinois and Hawaii) in support of the State of Vermont in a same-sex marriage case.

At the end of the interview, Mr. Pulgram gave me the opportunity to respond to an additional adverse comment that had been received by the ABA: that I was “overly aggressive in litigation to the verge of incivility.” In response, I expressed my firmly held belief that civility is an expectation in my legal practice and personal life at all times. I also spent considerable time throughout the interview relaying my deeply held views on the rule of law, the proper role of judges, separation of powers, and the importance of adhering to precedent and not legislating from the bench regardless of the issue or any personal views.

Following our interview, Mr. Pulgram contacted additional attorneys and judges about me. One interviewee relayed to me that Mr. Pulgram wanted to know whether I would follow an agenda “dictated by the Federalist Society and the religious right.”

On October 30, 2017, the ABA informed me via a letter transmitted by e-mail that they had determined that I was “Not Qualified” to serve as a federal circuit court judge. The ABA subsequently released a written report, explaining its reasoning. I disagree with much of the substance of the report, but would like to highlight one substantive error: the report claimed that “Mr. Grasz has stated he spends about 50% of his professional time lobbying.” This is untrue. According to the records of my law firm, I have spent less than 1% of my time on lobbying activities in 2017. My non-litigation work includes a wide variety of legal activities, such as work on health care scope-of-practice issues, administrative law issues, and, most notably, my work for the Papio-Missouri River Natural Resources District for which my firm serves as general counsel.

## Questions for the Record for Leonard Steven Grasz

### Senator Mazie K. Hirono

1. On November 15, 2017, Pamela Bresnahan, Chair of the American Bar Association's Standing Committee on the Federal Judiciary testified to the Senate Judiciary Committee about her committee's rating of you as "Not Qualified" for the U.S. Court of Appeals for the Eighth Circuit. During that oral testimony, and in the written statement she submitted to the Judiciary Committee, she mentioned a document you authored related to your state judicial nominations commission. She told our committee that you shared the document with the ABA Standing Committee. Please produce a copy to us in the Senate Judiciary Committee.

Please see my response to the similar request from Ranking Member Feinstein which I received on November 17, 2017.

2. At your hearing I asked you to comment on a few positions advocated by the Nebraska Family Alliance, on whose board you very recently served. You refused, saying it would violate the Canon of Judicial Ethics to comment. But your board service indicates a commitment to the organization, which has very clear positions on things such as abortion, gay rights, and conversion therapy. As you admitted to Senator Blumenthal, you have never renounced your affiliation with this group, its mission or positions.

There is nothing in the Code of Conduct for United States Judges that would prevent you from discussing your view on issues you have already given your tacit endorsement by virtue of your board service. Indeed, the commentary on Canon 2C reads, "Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired." Past affiliation can give rise to the same perception.

**a. What role did you have as Director of the Board with respect to the positions taken by the Family Alliance?**

During the two years I served, the Board of Directors was a governance board and did not manage day to day details. Please see my response to Question 9(c) of Ranking Member Feinstein.

**b. Did you help draft any of the positions of the Family Alliance?**

Please see response to Question 2(a) above.

**c. Did you ever have to vote on any of these positions before they became the official positions of the Alliance?**

Please see response to Question 2(a) above.

**d. Do you agree with the Vision Statement of the Nebraska Family Alliance, on whose board you served from 2015 until after the time you submitted your Senate**

**Judiciary Questionnaire? If not, did you ever voice privately or publically any disagreement with it?**

Please see my response to Question 9(d) of Ranking Member Feinstein.

- e. **Did you, as did the Nebraska Family Alliance, oppose state legislation that would prohibit discrimination in employment based on sexual orientation and gender identity? If not, did you ever privately or publically oppose that position?**

Please see my response to Question 9(d) of Ranking Member Feinstein.

- f. **The Policy Director of the Alliance, who happens to be your son, said about the employment discrimination bill: "We've seen similar laws across the country and what we know is, rather than being used to stop actual discrimination, they're used to go after people of faith and to punish those who hold different beliefs on marriage." Do you agree that employment non-discrimination laws that protect LGBT people are being used to "go after people of faith and punish those who hold different beliefs about marriage?" How? Can you give an example?**

Please see my response to Question 9(d) of Ranking Member Feinstein.

- g. **Did you agree with what the Nebraska Family Alliance wrote in an amicus brief in *Obergefell v Hodges*, that only parenting of "a mother and a father...provides children with the optimal environment for their cognitive, social and emotional development from infancy through adolescence." If not, did you ever voice privately or publically any disagreement with filing the brief, or including that position in the brief?**

Please see my response to Question 9(d) of Ranking Member Feinstein.

- h. **Did you agree with the Nebraska Family Alliance's support for so-called "conversion therapy," as evidenced by the inclusion on its website of videos endorsing the practice and videos of people who felt it helped them with their problems related to "unwanted same-sex attraction." If not, did you ever voice privately or publically opposition to their support of conversion therapy?**

Please see my responses to Questions 9(c) and 9(d) of Ranking Member Feinstein.

3. In 2013, you served on the City of Omaha Charter Review Convention you advocated for an amendment that would have allowed for discrimination by employers against LGBTQ employees under the guise of religious liberty. When asked by a fellow Convention member if this amendment would "create an exemption for business owners who don't want to hire gays and lesbians to circumvent or do any end run around the city human rights ordinance," you responded "Yes."

**a. Do you believe that the law should permit anyone with a moral objection to homosexuality to fire someone for being gay?**

Please see my responses to Question 7 of Ranking Member Feinstein.

**b. Do you believe that the law should permit anyone with a moral objection to transgender people to fire an individual based on their identity?**

Please see my responses to Question 7 of Ranking Member Feinstein.

4. In your 1999 Creighton Law Review article, you said that “a court need not extend questionable jurisprudence into new areas or apply it in areas outside of where there is clear precedent.”

**a. How do you determine what is ‘questionable jurisprudence’?**

Please see my response to Question 3(b) of Ranking Member Feinstein.

**b. Would that include *Roe v Wade* and its progeny?**

Please see my response to Question 3(b) of Ranking Member Feinstein.

**c. Would that include cases that have recognized protections for the LGBT community?**

Please see my response to Question 3(b) of Ranking Member Feinstein.

**d. Would that include the cases that have upheld the individual mandate within the Affordable Care Act?**

Please see my response to Question 3(b) of Ranking Member Feinstein.

**e. How do you determine where there is “clear precedent”?**

Please see my response to Question 3(e) of Ranking Member Feinstein.

5. In February, 2004, you wrote:

“The whole nation watched last year as Chief Justice [now Senate candidate] Roy Moore was kicked off the Alabama Supreme Court . . . for refusing to remove a Ten Commandments [monument in the Alabama court building] . . . Many conservatives, myself included had mixed feelings about this, as we believed the courts had badly misconstrued the Establishment Clause.”



- a. **Roy Moore defied federal law, Supreme Court precedent and orders from United States Court of Appeals for the Eleventh Circuit. What about removing him from the bench after that gave you mixed feelings?**

The title of my opinion piece was “Judges must follow law” and I was critical of Justice Moore’s actions. I stated, “You can’t have judges just refusing to follow the law.”

- b. **Do you still agree with Roy Moore on his construction of the Establishment Clause?**

As I stated in the 2004 opinion piece, judges must follow the law. As a judge, should I be confirmed, I would be bound to follow and apply all Eighth Circuit and Supreme Court precedent, including all precedent on the Establishment Clause.

- c. **If you are confirmed to the Eighth Circuit, and you come up against a law or part of the Constitution you think the Supreme Court has “badly misconstrued” what will you do?**

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

6. During the 2013 Omaha Charter Review, in which you were involved as a private citizen, you stated that you knew of “businesses that are scared to death . . . that there are people who refuse to testify [about the proposed religious conscience change] . . . that there are Christian ministries here in town who had to change their practices and their own religious beliefs because they don’t want to stop providing services to people.”
- a. **During the 1950s and 1960s, one argument used to defend racial discrimination from constitutional scrutiny was that it was a component of a sincerely held religious belief. How do you differentiate that argument from the argument you made to support discrimination on the basis of sexual orientation?**

Please see my response to Question 7(c) of Ranking Member Feinstein.

7. During the 2013 Omaha Charter Review, a fellow committee member asked what would happen if someone who “working for [someone] right now, and [once the religious conscience clause] has passed . . . and now it’s time for a promotion. They’re gay, they’re lesbian, they’re transgender . . . I am not going to promote you. It is my religious right under this ordinance.” You responded that “I don’t think it’s likely in an actual court case. I do think it’s possible” though.
- a. **In light of numerous instances of discrimination on the basis of sexual orientation, do you still stand by the belief that this is an unlikely situation to arise in a court case?**

Please see my response to Question 7(c) of Ranking Member Feinstein.

8. During the 2013 Omaha Charter Review, another of your fellow committee members asked whether you believed that “the protection of rights of gays, lesbians, bisexuals and transgender people [was] a compelling government interest.” You responded that such a belief is “not in state law. That’s not even in federal law.”

**a. In light of the Obergefell ruling that struck down same-sex marriages bans on the basis that “the Due Process and Equal Protection Clauses of the Fourteenth Amendment [requires that] couples of the same-sex may not be deprived of . . . the fundamental right to marry” do you still hold the same view expressed above? I am not asking for your personal view, but for your view of what the law is.**

Please see my response to Question 7(c) of Ranking Member Feinstein. I will add that should I be so privileged as to be confirmed, I would apply all binding Supreme Court precedent, including *Obergefell*.

9. In 2001, you asserted that you felt the Nebraska same-sex marriage ban would stand up to a legal challenge because “there’s no reason to think it’s constitutionally infirm . . . Marriage is something that states regulate. It’s a creation of state law.”

**a. What was the basis that led you to that conclusion?**

The basis for my legal analysis in 2001 was the existing longstanding precedent regarding this area of law.

**b. Do you believe that is still correct as a statement of the law?**

No. The *Obergefell* decision preempted Nebraska marriage law as well as Eighth Circuit law on this subject and created new precedent. As a circuit judge, should I be confirmed, I will faithfully follow all Supreme Court precedent including *Obergefell*.

10. In spite of your 2001 analysis, due to the ruling in Obergefell, same-sex couples cannot be deprived of the fundamental right to marriage because of the Equal Protection and Due Process Clauses in the Fourteenth Amendment.

**a. Do you believe that this was a correct decision by the Supreme Court? If so, what has changed your mind since your 2001 analysis of the issue? If not, does this fit into your category of ‘questionable jurisprudence’ that judges are not obligated to perpetuate?**

Respectfully, my personal views or opinions would not be relevant to my role as a circuit judge. If I am so privileged as to be confirmed to this position, I would be bound to follow and apply all Supreme Court precedent, including *Obergefell*.

**b. If a state tried to implement a same-sex marriage ban through a novel approach, would you apply Obergefell?**

In the Eighth Circuit, as in the Supreme Court, *stare decisis* applies where the question at issue has been squarely addressed in a prior decision. If I am confirmed to this position, I would be bound to follow and apply all Supreme Court and Eighth Circuit precedent, including *Obergefell*.

11. You have been heavily involved in pro-death penalty advocacy. Even after the Nebraska state legislature repealed the death penalty in 2015, you served as an officer and a lawyer for the group Nebraskans for the Death Penalty, which got, and won, a referendum on the 2016 ballot to re-instate it.

**It's been made clear by extensive research that the death penalty is not a deterrent to crime. Can you point to any evidence-based studies that show the death penalty is effective?**

Respectfully, my personal views or opinions would not be relevant to my role as a circuit judge. In addition, the question calls for me to opine on a political question, which would not be appropriate for me to do as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges. *Cf.* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

If I were so privileged as to be confirmed, I would faithfully follow and apply all applicable Eighth Circuit and Supreme Court precedent on the subject.

12. Nebraska, like other places in the United States, pursued a tough stand on crime and criminals, declaring a war on drugs, lengthening sentences, slamming the door on parole, and adding prison beds as fast as they were filling them up. You have stated that that you don't “want to see Nebraska step back from its tougher approach to crime.”

**a. Do you still hold this belief?**

Please see my response to Question 11 above.

**b. How do you reconcile this in the face of statistical evidence that has concluded these methods have either been ineffective or even harmful to crime fighting?**

Please see my response to Question 11 above.

**c. How does your view on criminal justice inform your views on the law?**

Please see my response to Question 2(b) of Senator Whitehouse.

13. You are a member of the Steering Committee of the Nebraska Chapter of the Federalist Society. You wrote a “White Paper” for the organization, where you complained about the influence of various liberal groups in the Obama Administration's process of selecting judges. You wrote, that “there are a number of interest groups with potentially

disproportionate influence including the ACLU, Planned Parenthood, the Nebraska Association of Trial Attorneys, the Nebraska Defense Counsel Association and the Nebraska State Bar Association itself... [t]hey say, the current system appears to foster disproportionate influence from special interest groups on one side of the political spectrum.”

But President Trump has taken this natural tendency to consult with one’s allies to absurd heights. He has outsourced his judicial selection process entirely and overtly to the Federalist Society and the Heritage Foundation.

**This is both an abdication of his responsibility and a cynical attempt to repay the most conservative of his political supporters. Why haven’t you criticized that President’s unprecedented reliance on outside groups to choose his judges and justices?**

The question calls for me to opine on a political question, which would not be appropriate for me to do as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges. *Cf* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).