Senator Chuck Grassley
Questions for the Record

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Nominee, U.S. District Judge for the Central District of California

1. **At your hearing, Senator Vitter asked about your approach to constitutional interpretation and requested that you clarify your argument that "law must adapt to a changing world within ethical constraints" and that the Constitution "allow[s] later generations to interpret the law through the lens of each generation as each generation learns what freedom means, as society matures."**

   These remarks were taken from a presentation, where you spoke about the similarities in interpreting biblical texts and constitutional texts. To provide greater context for these remarks, the section of your speech discussing constitutional interpretation says:

   > **This system for applying and interpreting the Torah—the majority of stages in a given time rules—has allowed Jewish law to adapt to a changing world, a world that could not have been imagined by the people at the time the law was given at Sinai, while at the same time enabling it to stay true to the intent of Jewish law and tradition, changing only when there is an overriding ethical reason to do so. Thus, at least the conservative movement has interpreted halacha, for example, to affirm that same sex marriages have the same sense of holiness and joy as that expressed in so-called traditional marriages, and that the ordination of women as rabbis and cantors is not only permissible but to be celebrated, and is now routine.**
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   > **This same idea, majority rule—that the law must adapt to a changing world within ethical constraints—has allowed the US Supreme Court to find our Constitution, for example, couldn't abide a law that prohibited marriages between people of different races, and most recently that it includes a right to marriage equality for gays and lesbians. In doing so, Supreme Court Justice Anthony Kennedy remarked: 'The nature of injustice is that we may not always see it in our times. The generation that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.'**
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   > **That is, allow later generations to interpret the law through the lens of each generation as each generation learns what freedom means, as society matures.**[1]

[1] *Remarks: Congregation Adat Ari El,* Senate Questionnaire Attachments at 18. (Series of speeches given at various dates, during a program that involves members of the congregation, discussing portions of the Torah and its relevance to modern times/current events.)

At your hearing, you noted that the Constitution is "an amazing document and it allows for interpretation, which the Supreme Court has done over many years and I think it's allowed for interpretation in a way to allow it to deal with situations that the authors could have never imagined. For example, in the Fourth Amendment situation, search and seizure today we have GPS devices and iPhones, we have things that the search and seizure doctrine can deal with. So I believe to that extent it can be interpreted in such a way that it can deal with today's problems and today's issues we're confronted with."

a. Please clarify your approach to constitutional interpretation. What factors do you examine when resolving constitutional questions?

i. How will you weigh these factors?

Response: In resolving questions that involve provisions of the Constitution, I apply precedent as established by the Supreme Court and Ninth Circuit to the facts before me. Precedent is the only factor that matters in rendering my decisions.

ii. Provide all orders or reports and recommendations you've authored as a magistrate judge that address claims requiring constitutional interpretation.

Response: To the best of my recollection, during my 14 years as a magistrate judge I have not authored orders or reports and recommendations requiring constitutional interpretation. I have issued orders and reports and recommendations applying constitutional precedent to the facts before me that did not involve constitutional interpretation.

iii. Please describe in more detail the "majority rule" approach to interpretation referenced in your speech.

Response: By "majority rule," I intended to convey the notion that when a majority of the Supreme Court issues a ruling, that ruling is binding precedent that must be followed.

b. In past statements, you compared your approach to constitutional interpretation and Justice Kennedy's approach to constitutional interpretation in *Obergefell v. Hodges*.[2] As you read *Obergefell*:

[2] *Obergefell v. Hodges*, 135 S.Ct. 1039 (2015).

i. Is the right to enter into a same-sex marriage provided by the Constitution's guarantee of due process?

Response: In *Obergefell v. Hodges*, the Supreme Court stated that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." *Obergefell*, 135 S. Ct. 2584, 2604-05 (2015). The Court held that "same-sex couples may exercise the fundamental right to marry [and] [n]o longer may this liberty be denied to them." Id.

ii. Is the right to enter into a same-sex marriage provided by the Constitution's guarantee of equal protection?

Response: In *Obergefell v. Hodges*, the Supreme Court stated that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." *Obergefell*, 135 S. Ct. 2584, 2604-05 (2015). The Court held that "same-sex couples may exercise the fundamental right to marry [and] [n]o longer may this liberty be denied to them." Id.

iii. If it is not found in either of those provisions, where in the text of the Constitution is the right found?

Response: As described above, the Supreme Court has indicated that the right to enter into a same-sex marriage is found in the Constitution's guarantee of due process and equal protection.

c. In your hearing testimony, you stated that the constitutional interpretation approach taken by the Court in *Obergefell* is similar to Supreme Court cases where the Court has held Fourth Amendment protections exist in cases challenging GPS monitoring and cell phone monitoring. In *U.S. v. Jones*, a case that addressed a Fourth Amendment challenge to the attachment and monitoring of a GPS to a person's vehicle, three justices on the Court took different approaches when interpreting the protection provided by the Constitution.[3] Justice Scalia found that the government's attachment of a GPS to Jones' vehicle with the purpose of monitoring the vehicle's movement on public streets constituted a search under the Fourth Amendment. Under Justice Scalia's analysis, the attachment of a GPS to Jones' vehicle constituted a physical invasion of his constitutionally protected property, for the purpose of

[3] *United States v. Jones*, 132 S.Ct. 945, 951 (2012).

obtaining information, and as a result, violated the Fourth Amendment: "The Government physically occupied private property for the purpose of obtaining information.... such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."[4] Justice Alito's concurrence took a separate approach, finding that the government's attachment of a GPS to Jones' vehicle constituted a search because the government's long-term monitoring of Jones' vehicle using the GPS violated his reasonable expectation of privacy. In his concurrence, Justice Alito stated that 18th-century tort law of trespass to chattels should not apply to modern century surveillance. Justice Sotomayor's concurrence agreed that the attachment of the GPS constituted a search because the government physically invaded Jones' personal property in order to gather information. However, Justice Sotomayor critiqued the application of the reasonable expectation of privacy test to modern technology that allows the government to conduct extended surveillance without committing any type of physical trespass. Justice Sotomayor contended that because GPS surveillance could "generate . . . . a precise, comprehensive record of a person's . . . . movements that reflect a wealth of detail about her familial, political, professional, religious, and sexual associations,"[5] and the government's ability to "store such records and efficiently mine them for information years into the future."[6] Justice Sotomayor also contended that this technology's potential for abuse by law enforcement should be taken into account when assessing an individual's reasonable expectation of privacy. Justice Sotomayor contended that the more appropriate test should be "whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain . . . . their political and religious beliefs, sexual habits, and so on."[7]

i. Which of these three approaches is the most consistent with your own approach to constitutional interpretation?

Response: Justice Scalia authored the majority opinion in *Jones*, which is binding precedent. I don't have any particular approach to constitutional interpretation, other than to follow Supreme Court and Ninth Circuit precedent, including the majority opinion in *Jones*.

ii. In your testimony, you observed that the constitutional interpretation employed in cases like *Jones* and *Obergefell* are similar.

1. Please describe how the constitutional interpretation in the two cases is similar.

[4] *Id*. at 949.
[5] Id. at 956.
[6] Id.
[7] Id.

Response: I believe that the constitutional interpretation employed in cases like *Jones* and *Obergefell* is similar to the extent that both applied the language of the Constitution to situations that the framers of the Constitution most likely did not contemplate.

2. **What type of analysis should courts use to allow the Constitution to deal with today's problems and today's issues?**

   Response: District court judges should apply Supreme Court and Ninth Circuit precedent, such as *Jones*. I believe I have consistently applied precedent during my 14 years on the bench.

2. **During the nomination hearing, you were asked about your contention that in order to adequately afford defendants with a fair trial, jurors need to replace the question "I wonder what he did" with "I wonder what he was falsely accused of doing." In response to a question about that standard you said, "I believe that the role that I was talking about and the principles I was referring to was due process in general and how it is incumbent on our system to make sure everyone is afforded due process, whether it's in the context of the presumption of innocence or whatnot. As a magistrate judge for 14 years I've done what I can to make sure that everyone in front of me is afforded a level of due process, and if I am fortunate enough to be confirmed I will make sure everyone that appears before me as a district court judge is afforded that same level of due process." In the past, you've spoken about what is required to guarantee that everyone in front of a judge is afforded a level of due process. For example, you've noted that:**

   Due process also demands that there be some meat behind a suspicion that someone has engaged in wrongdoing, that people not be charged with a crime unless a neutral decision maker says it can go ahead. But these safeguards are applied by human beings, people with biases and personal motives. The result is a system that can't always be trusted. For example, unsubstantiated charges—charges made by officers who feel so moved—are leveled against minorities on a daily basis because of their minority status. Racial profiling has become commonplace in cities throughout the US. Last year on the New Jersey turnpike, almost 75% of the motorists who were stopped by law enforcement were black, even though African Americans made up less than 18% of traffic violators. In a predominantly white county in Florida, 70% of the traffic stops and most of the searches of cars were against African Americans and Latinos. Of the 1000 stops of these two groups, however, less than 10 traffic citations were issued.

   The problem goes beyond the mere stop and harassment of individuals. It should no longer come as a surprise to anyone that certain law enforcement

officers, albeit a small number, produce convictions by planting evidence, coercing confessions and giving perjured testimony.[8]

In "a system that can't always be trusted," that includes racial profiling that is now "commonplace," and is filled with certain law enforcement officers that "produce convictions by planting evidence, coercing confessions, and giving perjured testimony," how have you successfully afforded every individual in your court room the same level of due process?

Response: I believe that in my 14 years as a bench officer I have afforded every litigant, whether in the civil or criminal context, the level of due process that is afforded by the law. I have also afforded every party and witness, law enforcement or otherwise, the same level of respect and fair treatment that is the hallmark of the district judges whom I most admired while a lawyer, and who have served as role models for me since I became a magistrate judge.

a. To that end, what role should a judge play in remedying racial profiling?

Response: A judge should not address racial profiling, or any issue, not appropriately presented by the parties. There may be the limited circumstance where an action directly challenges alleged profiling, and the parties agree on a consent decree that involves, for example, the judge supervising the decree.

b. Did racial profiling play a role in any of the cases that you presided over in your as a magistrate judge? If so, please list the cases and describe the measures you took in order to diminish the impact of racial profiling.

Response: As stated above, a judge should not address racial profiling, or any issue, not appropriately presented by the parties. While a number of pro se civil rights plaintiffs in cases I have handled have alleged that they were targeted based on race, I do not believe that any such allegations have survived the screening stage, *i.e.*, I have not ordered service of the complaints on the defendants, and the complaints were ultimately dismissed. Therefore, I do not believe that racial profiling has played a role in any case that I presided over.

c. Some scholars have suggested that racial profiling is an important factor when evaluating the constitutionality of traffic stops and subsequent searches and seizures, do you agree?

Response: As this issue could be presented in a case over which I may someday preside, if fortunate enough as to be confirmed as a district judge, I do not believe it would be appropriate for me at this time to offer an opinion

[8] *Remarks: Congregation Adat Ari El,* Senate Questionnaire Attachments at 29. (Series of speeches given at various dates, during a program that involves members of the congregation, discussing portions of the Torah and its relevance to modern times/current events.)

as to what factors would be important in evaluating the claim. Rather, I would apply governing Supreme Court and Ninth Circuit precedent to guide me in my decision-making.

3. **In the hearing, Senator Vitter, asked you, "if you were confirmed as a district court judge you will give instructions to the jury, will they include a mandate to consider what the defendant was falsely accused of doing?" You responded to this question by stating, "that is not what the law is, so I would only instruct juries as to what the law is." In your testimony before the Committee you noted that you gave these remarks in an attempt to encourage individuals to fulfil their civic responsibility and participate in jury duty.[9] At the time you gave those remarks, to a group of individuals you were encouraging to serve on a jury, did you know that the standard you articulated "is not what the law is?" Did you clarify in any meaningful way during those remarks that your view "was not what the law is"?**

   Response: As indicated in my Senate Judiciary Questionnaire, I have given remarks at my synagogue on multiple occasions. The comments concerning criminal accusations and due process were not contained in the same talk when I was encouraging a positive attitude toward jury service. Nevertheless, in my comments concerning due process -- which were made before my appointment as a magistrate judge -- I was not articulating a standard that should be applied by jurors at the end of the case in their consideration of the evidence. Rather, I was speaking rhetorically, talking about my experience while a Deputy Federal Public Defender where some prospective jurors seemed to view defendants as guilty even before the evidence began, based solely on the accusation. It was the power of the accusation that I sought to convey to the audience, the importance of the concept of innocent until proven guilty, and not an explanation of what the law is for those serving as jurors. If fortunate enough to be confirmed, I would continue, as I have for 14 years as a magistrate judge, to instruct jurors only on what the law is for each particular case.

4. **In the past, you've spoken about the appropriateness of the death penalty in the U.S., stating:**

   > **We should applaud actions such as those recently taken by the governor of Illinois to halt all execution's in his state in the face of evidence that the system isn't working, that innocent people have been sitting in death row, *that all white juries are responsible for convicting black defendants*, that exculpatory evidence is being kept from defendants. While one may believe in the death penalty as the ultimate sanction, or that life sentences are appropriate for certain offenders, demand that these sanctions be used only**

[9] "Sure, those remarks were in the context of some comments I was giving at my synagogue a few years ago, the broader context was trying to encourage people to participate in jury service and when people came up to me after and said they wanted to participate in jury service."

if we can believe that the results are fair, certain, and just, and that they are enforced evenhandedly.[10]

a. Placed in the context of your statements about the inherent unfairness and racism in the criminal justice system and your assertions that police and law enforcement officials engage in misconduct, do you believe that the death penalty is an inappropriate remedy?

Response: The Supreme Court has clearly held that the death penalty is constitutional. *Gregg v. Georgia*, 428 U.S. 153 (1976). *See also Glossip v. Gross*, 135 S. Ct. 2726, 2732-33 (2015) (noting that "it is settled that capital punishment is constitutional"). If confirmed, I would continue to faithfully apply all Supreme Court precedent, including in the implementation of the death penalty.

b. In the past you've highlighted the flaws in the criminal justice system, by observing, "look at the number of people on death row who through DNA testing have been found innocent of the charges."[11] Have your views on this changed?

Response: Several studies and articles have discussed DNA exoneration in the United States, including the exoneration of some individuals who have been on death row. As such, my views on this fact have not changed. Nevertheless, as in all cases, any views I have play no role in my judicial decision making.

5. In the hearing Senator Durbin spoke about the role as an advocate and noted that "I think we have a professional responsibility to advocate rigorously without misrepresenting the facts." Senator Vitter then asked if any of these statements you made were in Court or advocating on behalf of a specific client. You testified that they were not and went on to note, "in each of those instances, although—I'll have to go back and check—I was describing cases I was involved in as a public defender." A review of those instances, however, suggests that it does not appear you were speaking about individual cases. Please take this opportunity to clarify, if you believe appropriate.

Response: In my talk at my synagogue from December 1999, I described individuals I had represented as a Deputy Federal Public Defender, and in my talk from June 2000, I described a trial in which I had recently participated. I used those examples in an effort to draw a

[10] *Id*. at 30 (emphasis added).
[11] *Id*. at 31.

connection between the teaching contained in the Torah and the contemporary legal system. The bulk of the questions at the hearing, and in these Questions for the Record concerning my talks (with the exception of the questions concerning constitutional interpretation, which were based on a later speech), appear to have come from these two talks.

6. **Provide a list all judgments in criminal cases you've authored that required, after the term of imprisonment, the defendant to be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. Provide the judgments for all cases.**

   Response: As a magistrate judge, my jurisdiction in criminal matters extends only to misdemeanor offenses with six month maximum penalties, or one year maximum penalties if the defendant consents to my jurisdiction. I do not have a method of identifying all cases where removal following the service of the sentence was warranted. Rather, if removal is warranted following a period of custody, Immigration and Customs Enforcement ("I.C.E.") could place a detainer on the individual. As a result, I do not believe I have entered any judgments in criminal cases that required that the defendant be surrendered to the custody of I.C.E. for removal proceedings.

   a. **In these cases are there any judgements in which you did not include, as a condition of parole or supervised release, the defendant shall not reenter the U.S. without the prior written permission of the Undersecretary for the Border and Transportation Security? If so, why did you not include this condition?**

      Response: Approximately ten years ago, the United States Attorney's Office in Los Angeles instituted criminal proceedings against scores of individuals who had illegally entered the United States, some with prior criminal records, some with no record at all. As part of a "fast track" program, certain defendants were allowed to enter guilty pleas on an expedited basis with the magistrate judges in the district in exchange for an agreed-upon sentence of six months in custody. The parties in these cases (i.e., the United States Attorney's Office and the defendants) agreed to specific sentencing terms and conditions. To the best of my recollection, I do not believe that those agreements called for imposing language in the judgments that the defendants not reenter the United States without the appropriate permission. I do not believe I have been assigned a similar case in the last ten years, and I do not have a method of identifying all cases I have handled where removal following the service of the sentence was warranted.

   b. **In any of these cases did you fail to require as a condition of supervision or parole, if the defendant reenters the United States within the term of supervised release or parole, the defendant must report to the nearest U.S. Probation office or parole officer within 72 hours of the defendant's arrival? If not, please explain.**

Response: I believe I imposed the standard conditions of supervision in these cases, which included that the defendant must report to the nearest U.S. Probation office within 72 hours of release from custody. With the exception of the "fast track" cases referred to above, which specifically charged the defendant with being in the United States illegally, I do not have a method of identifying all cases where removal following the service of the sentence was warranted.

7. **As amended on December 1, 2015, Federal Rule of Civil Procedure 26(b)(1) defines the "scope of discovery" in litigation matters as "any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.*"**

   Chief Justice Roberts explained in his 2015 Year-End report that these amendments "make a significant change, for both lawyers and judges."

   a. **What is the effect of this amendment to Rule 26(b)(1)?**

      Response: The amendment moved proportionality from Rule 26(b)(2) to Rule 26(b)(1), expressly making proportionality part of the scope of discovery. It also deleted the former provision authorizing the Court, for good cause, to order discovery of any matter "relevant to the subject matter involved in the action." Generally, the amendment, together with the change to Rule 1 (requiring that the Federal Rules of Civil Procedure be "construed, administered and employed *by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding" (emphasis added)), and the Central District's Local Rules, encourages the parties to work together to resolve and narrow issues before bringing them to the Court. It also encourages parties propounding discovery to narrowly tailor their requests to more closely align them with the needs of the case, thereby reducing objections from the responding party, as well as the need for Court intervention.

   b. **If confirmed, how would you assess whether a discovery request is "proportional to the needs of the case"?**

      Response: If confirmed, I would continue to assess whether discovery is proportional to the needs of the case by examining the factors set out in Rule 26(b)(1) of the Federal Rules of Civil Procedure. As a magistrate judge responsible for resolving discovery disputes, I keep in mind that the rule itself states that in assessing whether a discovery request is "proportional to the needs of the case," the factors to consider include "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or

expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). In considering those factors, I also bear in mind that discovery need not be admissible in evidence to be discoverable. Id. Moreover, a court "must limit the frequency or extent of discovery otherwise allowed by [the Federal] rules" if "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C). Finally, in assessing proportionality, I am mindful of the imperative that the Federal Rules of Civil Procedure be "construed, administered, and employed *by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1 (as amended December 1, 2015) (emphasis added).

c. How, if at all, would your assessment of whether a discovery request is "proportional to the needs of the case" differ from your view of the scope of discovery under the prior version of the rule?

Response: One of the significant changes I have seen in assessing whether a discovery request is proportional to the needs of the case is the fact that whether the information sought is "relevant to the subject matter involved in the action," or "reasonably calculated to lead to the discovery of admissible evidence," are no longer factors to be considered in the scope of discovery. Instead, I must determine whether the information is relevant to any party's claim or defense and proportional to the needs of the case. Rule 26(b)(1) now includes consideration of the parties' relative access to relevant information as an explicit factor to be considered when determining proportionality. This factor, along with the other proportionality factors previously set forth in Rule 26(b)(2)(C)(iii) and now set forth in Rule 26(b)(1), continue to be the factors I consider in resolving discovery disputes.

8. The Chief Justice's 2015 Year-End report also noted reports from litigants that "[a] judge who is available for prompt resolution of pretrial disputes saves parties time and money."

As amended on December 1, 2015, Rule 16 requires a district judge to issue a scheduling order within "the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared." This amendment shortened both applicable deadlines by 30 days.

a. Please explain the approach you will take to case management and the tools you will use to manage cases in a just and efficient manner if you are confirmed.

Response: If confirmed, I would continue to manage cases by thoroughly discussing issues such as the scope of discovery at all scheduling conferences, so as to highlight and resolve any early disagreements the parties may have. This often allows for smoother progress of the case. I have also learned over the last 14 years how to manage a large caseload, how to prioritize matters so that cases are efficiently and timely resolved, and how to give my full attention to each matter so that all litigants are provided with due process. I have a system in place in my chambers to ensure that matters that are ready for resolution are promptly resolved, that deadlines are met by the parties so that cases can proceed forward, and that nothing slips through the cracks. I will continue to utilize my current case management system if fortunate enough to be confirmed as a district judge, and will also continue to tweak my system as needed to improve efficiency.

b. Please explain and describe any effect the 2015 amendments to the Federal Rules of Civil Procedure will have on your approach to case management if confirmed.

Response: My hands-on approach to case management has continued with implementation of the 2015 amendments, and has emphasized the requirement that proportionality be a major consideration in addressing discovery issues.

9. As you know, parties frequently propose protective orders for the approval of the district judge during the course of discovery. The 2015 amendments to the Federal Rules of Civil Procedure included a change to Rule 26(c)(1)(B) adding "allocation of expenses" to the list of items that may be included in a protective order.

a. How would you evaluate cost-allocation mechanisms included in proposed protective orders, if confirmed?

Response: If a cost-allocation mechanism has been included in a proposed protective order and is objected to by another party, I would review the positions of the parties to determine if there is good cause to issue a protective order allocating expenses "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1).

b. Under what circumstances, if any, would you consider ordering allocation of expenses pursuant to Rule 26(c)(1)(B) absent suggestion of the parties?

Response: Rule 26(c)(1)(B) specifies that the party responding to the discovery request may move for a protective order seeking allocation of costs. Absent a motion from the party, it would be the unusual circumstance that would lead me to consider suggesting that the parties allocate expenses pursuant to Rule 26(c)(1)(B) when they have not proposed it themselves. Additionally, I would not suggest allocation of expenses pursuant to Rule 26(c)(1)(B) without first providing the parties an opportunity to be heard on the issue.

c. Do you understand the 2015 amendment to Rule 26(c)(1)(B) to confer upon the district court a new authority or obligation to manage discovery costs through cost allocation?

Response: I understand the amendment to Rule 26(c)(1)(B) to merely state already existing authority to manage discovery costs through cost allocation where appropriate.

d. How, if at all, do you understand the cost-allocation provisions of Rule 26(c)(1)(B) to relate to those found in Rule 37?

Response: Rule 26(c) generally deals with those circumstances where a party against whom discovery is sought, after conferring with the other party to resolve the dispute without court action, believes there is good cause for a protective order to protect it from "annoyance, embarrassment, oppression, or undue burden or expense," and good cause for the allocation of expenses. Rule 37 generally deals with imposing sanctions, including attorney's fees, for the failure to make disclosures or to cooperate in discovery. There is no specific "cost-allocation provision" in Rule 37 similar to that in Rule 26(c). Nevertheless, if a party fails to take reasonable steps to preserve electronically stored information and the information is lost as a result, Rule 37(e) provides that the Court's initial inquiry is to determine whether that information can be restored or replaced through additional discovery as authorized under Rule 26(b)(2)(B). The Court must also consider whether the efforts to restore or replace the lost information is proportional to the apparent importance of the lost information to the claims or defenses in the litigation. If it is, the Court might then need to determine whether there is good cause to allocate the expenses for the additional discovery pursuant to Rule 26(c)(1)(B).

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

Response: I believe that integrity and humility are the most important attributes of a judge, and that both attributes are essential in a judicial officer. Integrity involves the dispensing of justice in an impartial manner, without regard to personal opinions or preferences; treating all litigants fairly without regard to their status, and treating all attorneys with courtesy and respect; and a commitment to uphold the law. Humility is equally important, and counsels that each time I put on my robe and take the bench, I remember that I am a public servant whose mission it is to serve those who appear in my courtroom. I believe that I have shown in my 14 years as a magistrate judge that I possess these attributes.

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

Response: Above all else, the appropriate temperament of a judge includes the exercise of patience and an unambiguous show of respect toward litigants, attorneys and staff. I believe

that I exhibit such a temperament, and if fortunate enough to be confirmed, I would continue to do so.

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

Response: As a magistrate judge, I apply the precedent established by the Supreme Court and Ninth Circuit on a daily basis, and follow such precedent without regard to any opinions or beliefs. I believe that the hundreds of opinions that I have authored reflect this commitment to following precedent, and I have no doubt that I would continue to do so if confirmed.

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

Response: If confronted with a matter of first impression where there is no controlling precedent, I would first look to the relevant statute or regulation to determine if the plain language allows for resolution of the issue. If it does, I would go no further. If not, I would determine if the Supreme Court or Ninth Circuit Court of Appeals has interpreted any analogous statutes or regulations that could afford me guidance. If not, I would then look to cases in other circuits for non-binding guidance.

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

Response: I am bound to follow the law as established by the Supreme Court and the Ninth Circuit, regardless of whether I believe one of those courts had erred. My duty as a judicial officer is to apply binding precedent, and I would continue to do so if confirmed.

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

Response: Statutes are presumed to be constitutional, and a judge should avoid ruling otherwise if at all possible. A statute should be declared unconstitutional only in the rare circumstance where Congress has clearly exceeded its authority in passing the law, or if it violates the constitutional rights of our citizens.

16. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution? Please explain.

Response: It is never proper for judges to rely on foreign law, or the views of the "world community" in determining the meaning of the Constitution.

17. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?

Response: During 14 years as a magistrate judge, I have based my decisions on precedent and the text of the law, and have not allowed any personal ideology or motivation to direct those decisions. If fortunate enough to be confirmed, I would continue to apply precedent in determining cases.

18. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?

Response: My record as a magistrate judge for the last 14 years shows that I administer justice fairly without regard to any personal views I may hold. I believe I have a reputation for being unbiased, and that I treat all who appear before me with dignity and patience. I offer the Committee my assurance that if confirmed, I will continue to comport myself in a manner that will bring respect to the bench and instill confidence in the system.

19. If confirmed, how do you intend to manage your caseload?

Response: As a magistrate judge, I handle a caseload that at any given time includes scores of writs for habeas corpus, social security appeals, civil rights matters, discovery disputes and settlement conferences. I also regularly handle all manner of civil cases with the consent of the parties, which can include jury trials. I have learned over the last 14 years how to manage a large caseload, how to prioritize matters so that cases are efficiently and timely resolved, and how to give my full attention to each matter so that all litigants are provided with due process. I have a system in place in my chambers to ensure that matters that are ready for resolution are promptly resolved, that deadlines are met by the parties so that cases can proceed forward, and that nothing slips through the cracks. I will continue to utilize my current case management system if fortunate enough to be confirmed as a district judge, and will also continue to tweak my system as needed to improve efficiency.

20. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Judges play a large role in controlling the pace and conduct of litigation, starting at the initial scheduling conference, through trial. As a magistrate judge, I attempt to identify early on any issues concerning discovery that could raise problems down the line if left unaddressed. I have a case management system in place that has served me well, and if confirmed I would continue to use that system with any adjustments necessary to account for an increased criminal case load.

21. President Obama said that deciding the "truly difficult" cases requires applying "one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy . . . the critical ingredient is supplied by what is in the judge's heart." Do you agree with this statement?

Response: If by empathy one means favoring one side over the other because of personal beliefs or preferences, then it has no place in deciding cases. Cases must be decided by applying the relevant law to the facts of the case. If empathy means having an understanding of the importance of the proceedings to the parties and what the parties and attorneys experience when dealing with their cases, and being flexible to the extent possible in scheduling, then it may have a place in the courtroom.

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

Response: On May 25, 2016, I received these Questions for the Record from the Office of Legal Policy. I drafted responses and then sent them to OLP for review, and then finalized my responses before submitting them to the Committee.

23. Do these answers reflect your true and personal views?

Response: Yes.

Written Questions of Senator Jeff Flake
U.S. Senate Committee on the Judiciary
Judicial Nominations
May 18, 2016

Answers of Paul L. Abrams

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1. **What is your approach to statutory interpretation? Under what circumstances, if any, should a judge look to legislative history in construing a statute?**

   Response: If confronted with a matter of first impression where there is no controlling precedent, I would first look to the relevant statute or regulation to determine if the plain language allows for resolution of the issue. If it does, I would go no further. If not, I would determine if the Supreme Court or Ninth Circuit Court of Appeals has interpreted any analogous statutes or regulations that could afford me guidance. If not, I would then look to cases in other circuits for non-binding guidance. If no guidance exists from any of these sources, I would follow any Supreme Court and Ninth Circuit precedent regarding the application of legislative history.

2. **What is the proper scope of the 10th Amendment to the Constitution? In what circumstances should a judge apply it?**

   Response: The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. In *Printz v. United States*, the Supreme Court held that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or their political subdivisions, to administer or enforce a federal regulatory program." *Printz*, 521 U.S. 898, 935 (1997). A judge should apply the Tenth Amendment in those cases in which it is implicated or raised, and if I am fortunate enough to be confirmed and am called upon to address this issue, I would follow Supreme Court and Ninth Circuit precedent.

3. **Does current standing doctrine foster or impede the ability of litigants to obtain relief in our legal system?**

   Response: A federal court lacks subject matter jurisdiction if a plaintiff fails to establish Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). To establish constitutional standing, a plaintiff must demonstrate each of three "irreducible" core elements: (1) injury-in-fact -- plaintiff must allege "concrete and particularized" and "actual or imminent" harm to a legally protected interest; (2) "causal connection between the injury and the conduct complained of;" and (3) it must be "likely" as opposed to merely "speculative," that the injury will be redressed by a

favorable decision. *Id.* at 560-61 (citations omitted). I have no opinion on whether the standing doctrine fosters or impedes the ability of litigants to obtain relief in our legal system, and I will continue to apply the doctrine to the matters before me.

Questions for the Record
Senate Judiciary Committee
Senator Thom Tillis

Questions for Judge Paul Lewis Abrams

1. **Some individuals have argued that the United States Constitution is a "living document," subject to different interpretations as society changes. Do you subscribe to this point of view?**

   Response: I do not believe that the words or meaning of the Constitution should be changed even as society changes, except by amendment. Rather, the document is such that it can be applied to new situations as they arise, applying the Constitution's plain language. All cases that I have handled during 14 years as a magistrate judge have been decided by applying legal precedent as established by the United States Supreme Court and the Ninth Circuit Court of Appeals. If fortunate enough to be confirmed as a District Judge, I would continue to apply legal precedent to all cases.

2. **What role, if any, should societal pressure or popular opinion play in interpreting statutes or the United States Constitution?**

   Response: Societal pressure or popular opinion play no role in interpreting statutes or the United States Constitution.

3. **Please define judicial activism. Is judicial activism ever appropriate?**

   Response: If judicial activism means to incorporate a judge's personal attitudes or opinions into the resolution of cases, then it is never appropriate.

4. **When, if ever, is it appropriate for a federal court to rule that a statute is unconstitutional?**

   Response: Statutes are presumed to be constitutional, and a judge should avoid ruling otherwise if at all possible. A statute should be declared unconstitutional only in the rare circumstance where Congress has clearly exceeded its authority in passing the law, or if it violates the constitutional rights of our citizens.

5. **What is a fundamental right? From where are these rights derived?**

Response: Fundamental rights, which derive from the Due Process Clause of the U.S. Constitution, are those "fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,'" and that are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations omitted).

6. **Do you believe the First Amendment or any other provision of the United States Constitution protects private citizens and businesses from being required to perform services that violate their sincerely held religious beliefs?**

Response: The Supreme Court has invalidated laws under the First Amendment that have infringed upon sincerely held religious beliefs. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). In addition, the Religious Freedom Restoration Act provides statutory protections for sincerely held religious beliefs. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). If confronted with a case regarding the scope of protections afforded to religious beliefs, I would continue to follow all Supreme Court and Ninth Circuit precedent.

7. **What level of scrutiny is constitutionally required when a statute or regulation related to firearms is challenged under the Second Amendment of the United States Constitution?**

Response: As the Ninth Circuit has recently noted, the Supreme Court has not dictated a specific standard of scrutiny for Second Amendment challenges. *Teixeira v. Cty. of Alameda*, No. 13-17132, 2016 WL 2849245, at *9 (9th Cir. May 16, 2016) (citing *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010)). The Ninth Circuit uses a two part test to determine the appropriate level of scrutiny: "'(1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right.'" *Id.* (quoting *Jackson v. City and Cnty. of S.F.*, 746 F.3d 953, 960 (9th Cir. 2014)). "Intermediate scrutiny is appropriate if the regulation at issue does not implicate the core Second Amendment right *or* does not place a substantial burden on that right." *Fyock v. Sunnyvale*, 779 F.3d 991, 998-999 (9th Cir. 2015). If confirmed, I would continue to strictly follow all binding precedent.

8. **Do you believe it is constitutional for states to require voters to show photo identification before being eligible to cast their vote?**

Response: The Supreme Court in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), upheld the state of Indiana's statute requiring government-issued photo identification to vote on the basis that the state's interests identified as justification for the statute (*e.g.*, deterring voter fraud, improving election procedures) were sufficiently weighty to justify any limitation imposed on voters. The Supreme Court decision is binding precedent that I would apply if confronted with such an issue, as I have applied all such precedents in my role as a magistrate judge.

9. **One challenge you will face as a federal judge is managing a demanding caseload. If confirmed, how will you balance competing priorities of judicial efficiency and due process to all litigants involved in the cases on your docket? Will you give certain cases priority over others? If so, please describe the process you will use to make these decisions.**

Response: As a magistrate judge, I handle a caseload that at any given time includes scores of writs for habeas corpus, social security appeals, civil rights matters, discovery disputes and settlement conferences. I also regularly handle all manner of civil cases with the consent of the parties, which can include jury trials. I have learned over the last 14 years how to manage a large caseload, how to prioritize my calendar so that all cases are efficiently and timely resolved, and how to give my full attention to each matter so that all litigants are provided with due process. I have a system in place in my chambers to ensure that matters that are ready for resolution are promptly resolved, that deadlines are met by the parties so that cases can proceed forward, and that nothing slips through the cracks. While, if confirmed, I would also have a significant criminal caseload that would be subject to the Speedy Trial Act, I am confident that the system I have established would enable me to continue to provide due process to all litigants in a prompt and equal manner.

10. **Do you believe the death penalty is constitutional? Would you have a problem imposing the death penalty?**

Response: The Supreme Court has clearly held that the death penalty is constitutional. *Gregg v. Georgia*, 428 U.S. 153 (1976). *See also Glossip v. Gross*, 135 S. Ct. 2726, 2732-33 (2015) (noting that "it is settled that capital punishment is constitutional"). If confirmed, I would continue to faithfully apply all Supreme Court precedent, including in the implementation of the death penalty.