Hearing before the Senate Committee on the Judiciary
The Nomination of Neil M. Gorsuch to be an Associate Justice of the Supreme Court
Questions for the Record Submitted by Senator Al Franken

Questions for Judge Gorsuch:

Question 1: I'd like to discuss the use of class action waivers, which are often included in forced arbitration clauses. When companies pair forced arbitration clauses with class action bans, they close the courtroom doors to individuals with small claims and shield themselves from liability.

Between 2010 and 2014, the New York Times found that only 505 consumers went to arbitration over a dispute of $2,500 or less. Verizon, for example, which has more than 125 million subscribers, faced only 65 consumer arbitrations in those five years. Time Warner Cable, which – at the time – had 15 million customers, faced just seven.

It's not that there were so few arbitrations because customers were suddenly satisfied with their telecom providers. Rather, there are so few arbitrations because consumers probably realized that they would spend far more money pursuing an individual claim in arbitration than they could ever hope to recover – and that's only if they beat the odds and actually ended up winning.

In fact, I'd suggest that there is perhaps no industry that Americans are more dissatisfied with than their internet, TV, and cell phone providers. And that's not without reason. Here are two quick examples. Last month, the New York Attorney General filed a lawsuit against Charter and its subsidiary Time Warner Cable, claiming that the company quote "conducted a deliberate scheme to defraud and mislead New Yorkers by promising internet service that they knew they could not deliver" end quote. And last year, after it received 1,000 customer complaints, the FCC fined Comcast the largest penalty in agency history for charging its customers for services and equipment that they didn't ask for.

- Judge Gorsuch, is asking hundreds, or thousands, or millions of consumers who have all been impacted by the same illegal practice to each go it alone against a powerful corporation in arbitration really a viable alternative to class actions – especially when they have little to no hope of recovering enough to justify the costs of bringing the claim?

RESPONSE: As we discussed during the hearing, in passing the Federal Arbitration Act in 1925 Congress "expressed a preference that people should arbitrate their disputes. [Congress] made a judgment, [a] policy judgment, in favor of arbitration because it is quicker, cheaper, easier for people." And "[i]f Congress thinks that the courts are not applying the Federal Arbitration Act as it wishes or if it wishes to revise or eliminate the Federal Arbitration Act," it may of course do so.

- During the hearing, you openly discussed the expenses associated with litigation in the context of the article you wrote. Isn't one way to address the expenses through class actions? And haven't forced arbitration clauses that include class action bans eroded one critical method for individuals to achieve access to affordable justice?

RESPONSE: As we discussed during the hearing, and as I have recognized in my writings, access to affordable justice in this country is a serious problem. During the hearing, I mentioned findings suggesting that approximately 80 percent of the members of the American College of Trial Lawyers report that pretrial delays and costs keep injured parties from bringing valid claims to court and about 70 percent of members say that cases are settled on the basis of litigation costs rather than the merits. Class actions can serve a valuable function in protecting consumers and investors. Please see also the response to Question 20 of Senator Hirono's questions for the record.

Question 2: Judge Gorsuch, as an antitrust professor, I imagine you have an interesting perspective on the effect of the Supreme Court's decision in Italian Colors. This is the case of a group of small business owners – led by Italian Colors, a restaurant in Oakland, California – that sued American Express, alleging the company violated antitrust law when it charged excessive processing fees for its credit cards. Typically, vendors that accept American Express charge cards also must accept American Express credit cards. And because American Express has monopoly power with respect to charge cards, vendors have little choice but to accept those cards and, with them, American Express' credit cards. So Italian Colors alleged that American Express used this monopoly power to force small businesses into accepting American Express products they otherwise would not have.

It turns out that in addition to requiring that vendors accept its credit cards, American Express also required vendors to accept an arbitration agreement as part of doing business with them. This agreement not only prohibited vendors from taking any disputes to court but also preventing them from forming a class.

Nobody involved in this case disputed the fact that the cost of pursuing Italian Colors' individual claim far exceeded its possible recovery. So it was up to the Supreme Court to decide whether the arbitration clause preventing Italian Colors from forming a class was enforceable under the Federal Arbitration Act, given that enforcing it would effectively prevent Italian Colors – and the rest of the small businesses – from vindicating their rights under the nation's antitrust laws. The Court ultimately sided with American Express and essentially held that the Federal Arbitration Act, which favors enforcement of arbitration agreements, trumps the goals of all other federal statutes, including the antitrust laws.

- Judge Gorsuch, setting aside whether the Court made the right call in *Italian Colors,* how – in your view – has this decision impacted private antitrust enforcement?

- Or, put another way, do you agree that there is value in private antitrust enforcement – that it serves complementary role to federal and state efforts aimed at combatting anticompetitive conduct? And do you think the *Italian Colors* decision has made it harder for individuals – and for small businesses – to challenge monopolistic conduct under the nation's antitrust laws?

RESPONSE: In *American Express v. Italian Colors* (2013), the Supreme Court held that, under the terms of the Federal Arbitration Act, courts cannot invalidate a contractual waiver of class arbitration solely because the plaintiff's cost of individually arbitrating a federal statutory claim is greater than the plaintiff's potential recovery. As I noted during the hearing, Supreme Court precedents interpreting acts of Congress invariably have effects. It is for Congress to assess the nature of the effects of any particular judicial decision and to legislate if it deems appropriate.

Question 3: I have serious concerns about AT&T's proposed acquisition of Time Warner and how it could impact Americans' access to information. When the same company owns the programming and controls the pipes that bring us that programming, we have a problem – especially, I believe, when the programming in question is the news.

In this case, a combined AT&T-Time Warner would have both the ability and incentive to favor its own news network, CNN, over competing news networks – say Fox News, for example. And as a result, AT&T could control where its 25 million subscribers get their information and could ultimately restrict its viewers' access to alternative viewpoints.

We've seen this happen before. Soon after it purchased NBCUniversal, Comcast placed MSNBC and CNBC – its newly acquired channels – in favorable locations on the Comcast channel lineup while relegating competing networks – like Bloomberg News – to an undesirable location. It took two years – and a protracted battle at the FCC – for Comcast to finally end its anticompetitive treatment. And we may never know exactly how Bloomberg's viewership was impacted in the meantime.

I'm interested in the ways that the Supreme Court can impact Americans' access to information. 70 years ago, in United States v. Associated Press, the Supreme Court found that the First Amendment supported aggressive antitrust enforcement. Justice Black wrote, "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary." He then continued, "Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."

- Would you agree that one of the purposes of the First Amendment is to ensure that the government doesn't make decisions that silence citizens or restrict Americans' access to diverse viewpoints?

RESPONSE: Without expressing any views on the proposed acquisition, I agree that one of the purposes of the First Amendment, as interpreted by the Supreme Court, is to ensure free speech and access to diverse viewpoints.

- Would you agree that antitrust law should protect against mergers or other anticompetitive conduct that results in depriving citizens' access to news and the free expression of information?

RESPONSE: I agree that the antitrust laws serve to protect against mergers and other conduct with anticompetitive effects.

Question 4: In January, after AT&T and Time Warner confirmed that they would be structuring their proposed acquisition to circumvent FCC review, 12 of my colleagues and I asked the companies to send us the public interest statement that they would have been required to send to the FCC – a document that essentially demonstrates why they believe the deal promotes competition and benefits consumers.

While I'm glad they responded to me, their response does little to address my concerns and essentially asks American consumers to trust that the combined company won't engage in anticompetitive behavior, raise prices, violate the principles of net neutrality, or decrease access to diverse voices. The letter also suggested that the deal raises no competitive concerns because it is vertical in nature – meaning the companies don't currently compete head-to-head – and that the government rarely seeks to block vertical mergers. Top execs from AT&T and Time Warner wrote, "[the government] typically permits such mergers to proceed, imposes conditions to address any competitive risks, and narrowly tailors those conditions to avoid undermining the mergers' consumer benefits. Yet this merger presents no such risks at all."

We've seen the risks before, and we've seen just how successful these merger conditions have been the past. In the years since the Comcast-NBCUniversal deal was completed, the combined company has faced complaint after complaint for engaging in anticompetitive behavior and not complying with conditions that the FCC and DOJ imposed on the transaction.

- Judge Gorsuch, can vertical mergers violate antitrust law? Do you subscribe to the view that all or almost all vertical integration is efficient?

RESPONSE: There is limited case law regarding vertical mergers, but the Supreme Court has recognized that vertical mergers can violate antitrust law under certain circumstances in, for example, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), and *Ford Motor Co. v. United States*, 405 U.S. 562 (1972). To the extent your questions ask me to take a position that would implicate issues that may come before me as a judge, I respectfully cannot comment further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

- Do you agree that one company controlling both the programming and the pipes creates incentives for that company to engage in anticompetitive behavior? And if you'd rather not discuss the pending deal, you can reference Comcast-NBCUniversal – a deal that was completed six years ago.

RESPONSE: Your question implicates issues that remain in dispute and that may come before me as a judge, and therefore I respectfully cannot comment beyond what I have offered above.

Question 5: In Novell, you established a pretty high standard for plaintiffs to meet in refusal-to-deal cases – or cases where monopolists harm their rivals by cutting off or restricting their access to the market. You held that in order to find a violation of Section 2 of the Sherman Act, a plaintiff must prove that the monopolist's alleged misconduct resulted in short-term profit losses

and were irrational except for the anticompetitive effect. Meaning essentially that as long as the monopolist has a reasonable business rationale, they're totally off the hook regardless of how bad it is for competition.

In this decision, you relied heavily on the Supreme Court's decision in *Verizon v. Trinko*, in which Justice Scalia explained that there are very few exceptions from the proposition that there is no duty to aid competitors.

- Judge Gorsuch, today, Sherman Act Section 2 cases are rare – and successful ones are even rarer. Why do you think that is? Is it because there are no monopolies? Or is it just that they're all perfect actors?

RESPONSE: As a federal circuit court judge, I am bound by the precedent of my own court and the Supreme Court. In *Novell v. Microsoft*, I relied on applicable precedent, such as *Trinko*, in holding that Novell had not met its burden of proof that Microsoft's conduct was unlawful. Government officials and private parties decide whether to bring claims under Section 2 of the Sherman Act based on their assessment of the facts and law in particular cases. As a private lawyer and with colleagues I successfully pursued what was at the time, I am told, the largest sustained Section 2 verdict in U.S. history.

- I am increasingly concerned about internet giants that use their positions as dominant media platforms to stifle competition and inhibit the free flow of ideas. In recent years, we've heard countless allegations of online platforms exercising their market power to the detriment of content creators and innovative startups. Google has favored its own products and services in search results while downgrading competitors' products and services. I've also heard from photographers in Minnesota that Google may be taking original content from their distributors' websites without appropriate compensation or attribution. Apple is preventing its competitors in the music streaming market from promoting lower prices to consumers on Apple iOS. And Amazon is using its dominance in the book market to impose unfair contractual terms on publishers and authors.

  Judge Gorsuch, in your view, should courts ever consider how the unilateral behavior of a monopolist might affect the free flow of ideas and content?

RESPONSE: Section 2 of the Sherman Act seeks to address anticompetitive conduct by monopolists, including unilateral conduct. Respectfully, I cannot comment on the particular disputes you discuss for they or similar matters may come before me as a judge.

Question 6: During the hearing, you repeatedly said that you simply read the law as it is written. But *how* you read the law is of utmost important. For example, in antitrust law, there are at least two different philosophies as to how to read the laws. Senator Sherman and Justice Brandeis as well as many others believed the goals of antitrust should be fundamentally political – such as the preservation of individual liberty and the protection of democratic institutions from concentrated power. Robert Bork and many other members of the "Chicago School" of economics believe we should view antitrust as a sort of scientific endeavor, the main goal of which should be economic efficiency, even if the result is extreme concentration of power.

- How would you describe your own philosophy on antitrust law?

RESPONSE: As we discussed at the hearing, in deciding cases that come before me, including antitrust cases, I make an effort to apply the law to the facts as impartially as I can, without respect to persons, affording equal right to the poor and rich based on the particular law and the facts applicable to the case at hand.

Question 7: I strongly disagree with the Supreme Court's ruling in *Citizens United*, which I mentioned to you in our meeting. Recent polling suggests that the decision is deeply unpopular with the American people as well. Part of the reason I think this opinion is held in such low regard is because in several important respects, the Court fundamentally misunderstood how the American public perceives our politics.

One of the conclusions that the Court came to in *Citizens United* was that outside money simply does not, quote "give rise to corruption or the appearance of corruption." I understand that polls and public opinion don't factor into a court's decision-making process, but I think by acknowledging that the appearance of corruption is something to be avoided, the Court also acknowledged that the public's perception really does matter.

It matters because even just the *appearance* of corruption could cause people to lose faith in our democracy. The majority in *Citizens United* recognized that this was something to be concerned about. But the majority maintained that even with outside money pouring into our elections, the public would still have faith in our system because they would *know* where the money was coming from. Here's what Justice Kennedy said, writing for the majority, quote:

"With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests."

Part of the reason I find this so galling is that it simply does not reflect the reality that we experience in the wake of this decision. According to the Brennan Center for Justice, groups that hide the identities of their donors spent more than $800 million on federal races in 2016 alone. Let me say that again: $800 million.

- Do you agree that the election-related spending made possible by the *Citizens United* decision is capable of creating the appearance of corruption?

Money is pouring into our elections. We don't know where a lot of it is coming from. And the public thinks it stinks—Republicans and Democrats alike. As I said in my opening statement, our country is confronting a critical moment in our history. The American people's trust in our government and our institutions is in a freefall. I firmly believe that *Citizens United* is one of the

root causes of that deepening distrust. I believe that *Citizens United* had a very real effect on the ability of the people's representatives to do their jobs.

One example is especially relevant today to your nomination. In March of last year, less than a week after Merrick Garland had been nominated to the Supreme Court, one of my Republican colleagues told a group of constituents that he thought the Senate should move forward and hold a hearing on Merrick Garland's nomination. Speaking at a town hall, he said, quote "I would rather have you complaining to me that I voted wrong on nominating somebody than saying I'm not doing my job. I can't imagine the president has or will nominate somebody that meets my criteria, but I have my job to do. I think the process ought to go forward."

That quote was later published in a local newspaper. This senator never committed to voting for Garland. He merely said that the Senate should do its job and hold a hearing. But that was all it took to draw the attention of well-funded groups willing to dump millions of dollars into his next race. The groups threatened to run ads against him and fund a candidate to challenge him in the primary. As a result, he changed his position. The episode sent a clear signal to every member of the Senate, and it prevented the Senate from fulfilling one of its core functions. When people say the system is rigged, this is exactly what they are talking about.

I think the courts have an important role to play in ensuring the integrity of our democracy. I think that a big part of their job is making sure that our elections are free and fair. But in order to do that, courts need a clear-eyed view of the facts on the ground. The *Citizens United* majority didn't have that.

- In your view, what should a judge do when it becomes clear that the assumptions supporting a case like *Citizens United* prove wrong?
- You've said that a judge is supposed to decide cases on the facts and the law alone—what do the facts available now tell you about the majority's reasoning in *Citizens United*?

RESPONSE: In *Citizens United v. FEC* (2010), the Court held that certain restrictions on corporate and union independent expenditures could not be justified by reference to the Government's interest in preventing *quid pro quo* corruption, or the appearance of such corruption, which had been recognized as a sufficient interest to justify previous restrictions on certain types of political speech. *See Buckley v. Valeo* (1976). In approaching a case that might seek to revisit precedent, the Court would look to the various factors we discussed at the hearing. A judge would also examine the details of the case before him or her, looking at the record with deference to the fact-finder, examining the briefs, and carefully considering the arguments of the parties. I respectfully cannot comment beyond that because the matters discussed in this question may come before me as a judge. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

Question 8: I would like to better understand your views of the disparate impact standard. Generally speaking, disparate-impact claims allow a plaintiff to establish liability in a discrimination case where it can be established that a certain practice has a disproportionate

impact on individuals who belong to a protected class, such as sex, race, color, national origin, or other characteristics. In other words, where a practice has a discriminatory *effect*, even if such a practice was not motivated by a discriminatory *intent*, a plaintiff bringing a discrimination claim may nonetheless establish liability.

- In your view, do our federal civil rights laws, including but not limited to Title VII and the Fair Housing Act, permit disparate impact claims?

RESPONSE: In *Ricci v. DeStefano* (2009), the Supreme Court confirmed that Title VII of the Civil Rights Act, as amended in 1991, which prohibits discrimination because of race, color, religion, sex, or national origin, provides a disparate-impact cause of action. In *Smith v. City of Jackson* (2005), the Supreme Court held that disparate-impact claims are cognizable under the Age Discrimination in Employment Act. More recently, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* (2015), the Supreme Court held that the Fair Housing Act—Title VIII of the Civil Rights Act of 1968—prohibits certain actions that have a disparate impact on a protected class.

- Do you agree with the reasoning in Justice Scalia's *Ricci v. DeStefano* concurrence? If so, how?

- In your view, are civil rights statutes that prohibit disparate impact discrimination, including but not limited to Title VII and the Fair Housing Act, in tension with the Equal Protection Clause? If so, how?

RESPONSE: Respectfully, the holding of the majority opinion in *Ricci v. DeStefano* is the controlling precedent of the United States Supreme Court, not the concurrence. And to express a personal view agreeing or disagreeing with the concurrence or commenting further would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

Question 9: I would like to better understand your views on federal Indian law and tribal sovereignty. I am one of only two members of the Judiciary Committee who also serves on the Indian Affairs Committee.

One case that reached the Supreme Court in the last term involved a Native American boy who was sexually assaulted by a non-Indian, who managed a store owned by non-Indians on Indian land. There is also a serious problem of non-Indians perpetuating domestic violence and sexual assault against Native American women on reservations. Additionally, there are numerous jurisdictional disputes that arise around business transactions, regulatory authority, and non-violent criminal offenders that involve non-Indians in Indian Country.

- What is the appropriate legal framework for determining whether a tribe has jurisdiction over a non-Indian in Indian Country, both in the civil and criminal context?

- What has been your impression of tribal court systems in general? Do you think that litigants in tribal courts, both Indians and non-Indians, have their rights adequately protected?

- What, if any, Constitutional limitations do you think there are on a tribe's civil or criminal jurisdiction over non-Indians?

RESPONSE: Respectfully, I refer you to my record as a judge in the Tenth Circuit, including *Fletcher v. United States*, *Ute Indian Tribe of the Uintah & Ouray Reservation v. Myton*, and *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*.