Senator Mazie K. Hirono

Questions for the Record following hearing on March 20-23, 2017 entitled:

"On the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States"

The Honorable Neil M. Gorsuch

1. During the hearing, I asked you if the Supreme Court were to assess special restrictions on U.S. citizens of Iranian, Yemeni, Somalian, Syrian, Libyan and Sudanese ancestry, whether you believed *Korematsu* would be applicable precedent. You answered "no".

    a. Does *Korematsu* have any precedential value in any case that may come before the Supreme Court?

RESPONSE: As we discussed, no. When he was Acting Solicitor General, Neal Katyal confessed error by the United States in *Korematsu*.

    b. Are there other Supreme Court decisions that have not been overruled that you believe lack precentral value? And if so, which ones?

        i. For the cases listed, please explain why those cases lack precedential value.

RESPONSE: If I were to list my least favorite or most favorite precedents, I would be suggesting to litigants that I have already made up my mind about these cases and suggest how that would impact theirs. 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.

    c. What characteristics disqualify a case from having precedential value? And who makes the determination of what those characteristics are?

RESPONSE: As we discussed, in the *Law of Judicial Precedent*, my colleagues and I expressed a mainstream consensus view, representing the work of judges from around the country appointed by Presidents of both parties, about the application of judicial precedent. As outlined in that book, judges consider a number of factors in analyzing precedent.

2. During the hearing, you cited *Loving v. Virginia* as a seminal case. What other cases do you consider "seminal"?

    a. For cases considered "seminal" do such cases hold more precedential value than those that are not considered seminal? Why or why not?

b. Do certain cases hold more precedential value than others? What are the qualities of a case that give it more or less precedential weight?

RESPONSE: As I stated at the hearing when asked about them, *Gideon v. Wainwright*, *Brown v. Board of Education*, and *Loving v. Virginia* were seminal decisions. This is not to say these are the only seminal decisions, just an example of a few. In analyzing the precedential value of a decision, I would apply the law of judicial precedent.

3. What remedies are available should the President or Executive Branch disregard a ruling of the Supreme Court or a lower federal court?

RESPONSE: As we discussed at the hearing, one test of the rule of law is whether the government can lose in its own courts and accept the judgment of those courts. The refusal of the other two branches to comply with a court order implicates the Constitution's scheme of separate and diffuse power and authorities. It also implicates the independence of the judiciary. I expect the coordinate branches of government to respect the independent judiciary, and I have not hesitated and will not hesitate to rule accordingly as a judge and defend the independent judiciary.

4. Do you believe that when analyzing a statute, and choosing to use the constructional construction of original public meaning, such a choice reflects your values?

    a. Why choose to discern the original meaning rather than considering tradition, current norms, and precedent as baseline or foundation of your constitutional analysis?

RESPONSE: When Justice Elena Kagan appeared before this Committee, she explained, "[S]ometimes [the Framers] laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that way, we are all originalists." All judges are trying to discern what the words in the Constitution mean and apply them faithfully to our current circumstances. The same applies to interpreting statutes. It is a choice rooted not in personal values but in the rule of law.

    b. Why do you believe that you are able to separate ideological and partisan views when judging?

RESPONSE: I took an oath to administer justice without respect to persons, to do equal right to the poor and to the rich, and to perform faithfully and impartially all of the duties incumbent upon me as a judge under the Constitution and laws of the United States. I take that oath seriously, and respectfully suggest my record demonstrates that fact. My record shows that, according to my clerks, 97 percent of the 2,700 cases I have decided as a judge were decided unanimously, and I have been in the majority 99 percent of the time. In those rare cases where I

have dissented, my clerks report that I was about as likely to dissent from a judge appointed by a Republican as I was to dissent from a judge appointed by a Democrat. According to the Congressional Research Service, I understand that my opinions have attracted the fewest dissents of any Tenth Circuit judge it studied. That is my record as a judge based on ten years on the bench.

c. Do you believe that life experiences and unconscious biases play a role in judging?

RESPONSE: I am a strong believer in the federal judiciary. I know many of the men and women of the federal judiciary, and I have witnessed first-hand how hard they work to perform their responsibilities with integrity every day. Those judges come from different walks of life, different experiences, but they agree overwhelmingly on the disposition of cases. They decide cases based on the facts and law and not based on their personal beliefs. Only a tiny fraction of cases heard in the federal courts ever go to the Supreme Court because the lower courts agree on the legal principles that apply. Even at the Supreme Court, the Justices agree unanimously about 40 percent of the time. The overwhelming unanimity in the federal courts—indeed, the strength of the rule of law in this country—is something of which we should all be proud.

5. Do you believe in the validity of laws that address not only specific problems known at the time of the legislation, but that can also arm an agency with broader remedial authority to address new problems of a similar category that arise later?

    a. Specifically, do you agree that the Clean Air Act or the Clean Water Act address not only the specific pollution problems known at the time of passage, but also provide authority for an agency to regulate additional pollutants if it agency determines they are harmful based on later-arising scientific data?

RESPONSE: The scope of the Clean Air Act and the Clean Water Act, and their application to a variety of contexts, is a matter of continuing litigation in the lower courts. As these issues may well come before me, it would not be appropriate for me to comment on them 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.

6. Do you regard the decision in *Massachusetts v. EPA* – that greenhouse gases are air pollutants under the Clean Air Act, and that EPA must regulate their emissions if it determines (as it has) that they endanger public health and welfare – as settled law?

RESPONSE: *Massachusetts v. EPA* is a precedent of the Supreme Court, and its interpretation of the provisions and requirements of the Clean Air Act is entitled to all the weight such precedent is due.

7. Do you regard the decision in *American Electric Power v. Connecticut* – that federal common law suits over power plants' greenhouse gas emissions are displaced because EPA has the authority to regulate those emissions under Section 111(d) of the Clean Air Act – as settled law?

    a. Do you agree that if the courts determined that EPA *does not* have authority to curb power plants' greenhouse gas emissions under Section 111(d), then there would no longer be a basis for displacing federal common law remedies?
    b. Can you explain what Supreme Court precedent says about the constitutionality of citizen suits, and the significance of citizen suits in enforcing our environmental laws?

RESPONSE: *American Electric Power v. Connecticut* is a precedent of the Supreme Court, and it is entitled to all the weight such precedent is due. For another recent discussion of standing doctrine in environmental cases, please see *Massachusetts v. EPA*. Beyond that, because these issues may well come before me, it would not be proper for me to 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.

8. If President Trump were to direct Administrator Pruitt to end the Clean Power Plan, as is widely reported he plans to do, would you regard the EPA as having an obligation to develop a replacement plan to reduce greenhouse gas emissions sufficient to protect the public health and welfare?

RESPONSE: The Clean Power Plan is currently the subject of an active case or controversy. As these and related issues may well come before me, it would not be appropriate for me to comment on them. 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.

9. How do you incorporate scientific findings into your decisions and how do you resolve the discrepancy if an agency is making decisions based on conclusions that are contrary to the weight of scientific evidence?

RESPONSE: Under the Administrative Procedure Act (APA), courts defer to an agency's findings of fact so long as they are supported by substantial evidence, and accordingly the courts ascribe great weight to the factual findings of agency experts, including those with scientific expertise. The APA permits the courts, however, to "set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Although this is a high standard, it provides relief from an agency action where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

10. Do you hold the view that state governments, not EPA, should principally regulate environmental protection, and, if so, how do you reconcile this view with the fact that the perceived failure of states by the 1970s to protect their air and water was the genesis of the EPA, the Clean Water and Clean Air Acts, and other foundations of federal environmental law?

RESPONSE: Under the statutory environmental protection regime currently designed by Congress, both the federal government and the states have important roles to play. The question whether a federal or a state regulatory agency has authority in a particular instance will depend on the relevant facts and law in each case.

11. In *Gonzales v. Raich*, the Supreme Court held that the Commerce Clause, in conjunction with the Necessary and Proper Clause, permits the federal government to control intrastate activities when necessary as part of a "more comprehensive scheme" of economic regulation. Do you agree with the principle that Congress may regulate intrastate, non-economic activities if doing so is necessary to a broader effort to regulate commercial activity?

    a. Do you believe that environmental and land use regulations are commercial activities?

RESPONSE: In *Gonzales v. Raich*, the Supreme Court held that Congress may regulate activities "that have a substantial effect on interstate commerce." 545 U.S. 1, 17 (2005). Whether particular environmental and land use regulations qualify as such are questions that may come before me and depend on the particular facts of the case, and it would not be proper for me to comment on them.

12. Several times in your testimony, you asserted that the standard you set out in the *Luke P.* case was based on precedent from the Tenth Circuit. You testified: "*Luke P.* was a unanimous decision . . . . There was no dispute in my court about the applicable law, and because we were bound by circuit precedent in a case called Urban versus Jefferson from 1996 that said that the appropriate standard was *de minimis* and the educational standard had to be more than d*e minimis*, and that is the law of my circuit, Senator . . . . But the fact of the matter is I was bound by circuit precedent and so was the panel of my court, and they had been bound for 10 years by the standard in Urban versus Jefferson County." When Senator Durbin asked why you added the word "merely" to the *de minimis* standard, you replied: "Senator, all I can say to you is what I've said to you before, it was a unanimous panel of the 10th Circuit following ten-year-old circuit precedent . . . . We followed our circuit precedent . . . ." When Senator Klobuchar also asked you about the addition of the word "merely" to the *de minimis* standard, you testified: "My recollection is that the 10th Circuit precedent was very clear, that 'some' meant 'more than *de minimis*.' Some meaningful educational benefit in *Rowley* was the Supreme Court precedent and our court interpreted that to mean more than *de minimis*." However, the word "merely" is found nowhere in the Urban case. See *Urban v. Jefferson County School District*, 89 F.3d 720 (10th Cir. 1996). In fact, even the phrase *de minimis* is

mentioned only once: "In the context of a severely disabled child such as Gregory, 'the "benefit" conferred by the [IDEA] and interpreted by Rowley must be more than *de minimis*.'" 89 F.3d at 726-27 (quoting *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988)). In Luke P., you wrote: "we have concluded that the educational benefit mandated by IDEA must merely be 'more than *de minimis*.'" *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008) (quoting *Urban v. Jefferson Cty. Sch. Dist. R–1*, 89 F.3d 720, 727 (10th Cir. 1996)). You also characterized this standard as "not an onerous one." *Luke P.*, 540 F.3d at 1149. Do you agree that your opinion in *Luke P.* was the first in the Tenth Circuit to add the word "merely" before the *de minimis* standard? Do you also agree that your opinion in *Luke P.* was the first in the Tenth Circuit to characterize the standard as "not onerous"?

a. Do you also agree that your opinion in *Luke P.* was the first in any Circuit to characterize the standard as "not onerous"?

RESPONSE: In *Thompson R2-J School District v. Luke P*, a unanimous panel of the Tenth Circuit was bound to and did follow circuit precedent in *Urban v. Jefferson County*. The Supreme Court denied certiorari in *Luke P.* As the controlling decision in *Urban* stated:

> Gregory's IEP was reasonably calculated to enable him to receive educational benefits. In the context of a severely disabled child such as Gregory, "the 'benefit' conferred by the [IDEA] and interpreted by *Rowley* must be more than *de minimis.*" *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988) . . . . The IDEA only entitles Gregory to an appropriate education, and the state "satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. Gregory received and benefitted from such personalized instruction. The IDEA does not entitle him to more.

This standard was widely employed. Approximately seven other circuits to address the question reached the same conclusion the Tenth Circuit reached in *Urban*. As I explained at the hearing:

> "There was no dispute in my court about the applicable law, and there was not because we were bound by circuit precedent, a case called Urban v. Jefferson County, 1996, that said that the appropriate standard was de minimis. The educational standard had to be more than de minimis.
>
> "My recollection is that the Tenth Circuit precedent was very clear, that 'some' meant more than 'de minimis.' 'Some meaningful educational benefit' in Rowley was a Supreme Court precedent and that our court had interpreted that to mean more than de minimis, and that a number of circuits had come to the same conclusion.
>
> "And so, Senator, all I can say is I was trying faithfully, to the best of my ability, to follow Supreme Court precedent in Rowley, the Tenth Circuit opinion, as I understood it in Urban,

and a number of other circuits had interpreted Rowley in the same way. And my colleagues subsequently after me interpreted it in the same way."

Chief Judge Tacha, the author of *Urban*, agreed, stating in her testimony at the hearing that "in the Luke P. case, Judge Gorsuch was following very longstanding precedent. . . . Let me also say it was not just our circuit. I believe it was all but two circuits. All the rest of the circuits in the Nation were following the same standard in interpreting the IDEA. Further, I can say with some authority that he was following not as dicta, but as a holding in his case what I wrote in the Urban case, which he was following."

13. In May 2016, the U.S. Departments of Justice and Education released a joint guidance stating that anatomy at birth should not be the only factor considered when placing transgender inmates into men's or women's units. The guidance also stated that schools receiving federal funding may not discriminate based on a student's sex, including transgender students under the Patsy T. Mink Equal Opportunity in Education Act also known as Title IX. Do you interpret Title IX of the Education Amendments of 1972 to ensure that transgendered students do not face discrimination in school?

RESPONSE: This question implicates cases likely to come before the Supreme Court. Accordingly, it would not be proper for me to comment. 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.

14. Does the Constitution define what a "person" is?

    a. Has the Supreme Court ever ruled that the 14th Amendment confers personhood on a fetus?

    b. If a state were to enact a personhood measure by redefining a fetus as a legal person, would that not be in direct contradiction to the Supreme Court's holding in *Roe?*

RESPONSE: In *Roe v. Wade*, the Supreme Court held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. 113, 158 (1973). Your question regarding the propriety of a hypothetical state law implicates issues that may come before me as a judge, and therefore it would not be proper for me to comment.

15. Did *Whole Woman's Health* fully answer the remaining questions about the permissible breadth of pre-viability regulations allowed under *Casey*?

RESPONSE: In *Whole Woman's Health v. Hellerstedt*, the Court held that certain abortion regulations violated the Fourteenth Amendment and thus were to be enjoined. It would not be

proper for me to comment further, as the question raises issues that may come before me as a judge.

16. As you know, the 14th Amendment's Equal Protection Clause states:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Please explain your understanding of the current constitutional prohibitions against sex discrimination. Does the Equal Protection Clause of the 14th Amendment to the U.S. Constitution prohibit discrimination on the basis of gender or sexual orientation?

RESPONSE: By way of example, in *Mississippi Univ. for Women v. Hogan* (1982) and *J.E.B. v. Alabama ex rel. T.B.* (1994), the Supreme Court held that state practices discriminating on the basis of sex are subject to a heightened level of scrutiny under the Equal Protection Clause. This scrutiny is often referred to as "intermediate scrutiny." In *United States v. Virginia (VMI)* (1996), the Court emphasized that heightened scrutiny requires an "exceedingly persuasive justification" for sex-based classification. In addition, in *Lawrence v. Texas* (2003) and *Obergefell v. Hodges* (2015), the Supreme Court invalidated state laws implicating sexual orientation.

17. In a 2005 National Review piece, you criticized liberals for using the courts instead going through elected officials to advance their social agenda. In *Hobby Lobby*, the court gave closely held corporations the same rights as individuals in relying on RFRA. Please example why this was not a case of conservative overreach through the courts to affect an expansion of RFRA without legislative action?

RESPONSE: Congress passed the Religious Freedom Restoration Act (RFRA) because it determined that the Supreme Court's interpretation of the First Amendment was insufficiently protective of religious exercise. In a bipartisan bill sponsored by Senator Orrin Hatch, Senator Ted Kennedy, and then-Representative Charles Schumer, Congress prohibited the federal government from substantially burdening the exercise of a sincerely held religious belief unless the government can show it is pursuing the least restrictive means to achieve a compelling governmental interest.

Hobby Lobby brought a claim under this law, and courts had to decide what Congress meant when it included the word "person" in the statute. RFRA requires that "a person" be engaged in the "exercise of religion." The Dictionary Act, which courts must look to when a term is otherwise undefined, defines a "person" to include corporations, and Hobby Lobby is a family-

held corporation that openly exhibits its religious affiliation. For example, as I recall, it plays Christian music in its stores. It refuses to sell alcohol or things that hold alcohol. It closes on Sundays. The Supreme Court concluded that, under the law Congress wrote, Hobby Lobby had a meritorious claim.

a. Your expansion of religious protections to a corporation in *Hobby Lobby* now creates a potential conflict between the religious freedom of the corporation and that of the individual employee. In applying RFRA, how will you address a conflict between two differing religions? Is it for the courts to rule when one religion trumps another?

RESPONSE: Respectfully, the Tenth Circuit sitting en banc in *Hobby Lobby* applied the law Congress passed as best it could. Congress is free to change the law anytime. Beyond that, respectfully, these questions seek views about matters that might come before me as a judge and it would be improper for me to 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.

18. Please what role the courts have in determining whether a burden is substantial? Is it just a rubber stamp?

a. Is there any time when a court can make a determination that a federal law is objectively not a substantial burden on someone's religious beliefs? Under what circumstances?

RESPONSE: The substantial burden test was expressly adopted by Congress in RFRA. The Supreme Court has discussed the history and scope of that test in *Hobby Lobby* and many other cases. *See* 134 S. Ct. at 2775-79. As a judge, I cannot prejudge when that test will or will not be satisfied. Such a decision will depend on the facts and circumstances of each case.

19. In *Allstate Sweeping v. Black* you joined an opinion rejecting *inter alia* a claim of hostile work environment. The court wrote:

> But Allstate cites to no cases, nor can we find any, holding that the harassment endured by the principals of an artificial entity can give rise to a racial- or gender-discrimination claim on behalf of the entity itself, absent independent injury to the entity. Indeed, it is not clear to us that an artificial entity could ever prevail on a hostile-work-environment claim. Such a claim has a subjective, as well as an objective, component; there must be proof that 'the plaintiff was offended by the work environment.'"

In *Hobby Lobby*, you joined the holding that an artificial entity like a for-profit corporation can exercise religion, independently of its owners. But in *Allstate*, you say the opposite, the Court said "[b]eing offended presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience." How can an artificial entity such as Hobby Lobby assert a religious belief without having the thoughts or feelings necessary in *Allstate?*

RESPONSE*: Allstate* involved a hostile-work-environment claim brought under 42 U.S.C. § 1981 and the Equal Protection Clause, whereas *Hobby Lobby* involved a claim under the Religious Freedom Restoration Act (RFRA). A hostile-work-environment claim requires proof that the "plaintiff was *offended*." A claim under RFRA has no such element. Rather, RFRA requires that "a person" be engaged in the "exercise of religion," and the Dictionary Act, which courts must look to, defines a "person" to include corporations. In *Hobby Lobby* the government conceded and the Supreme Court ultimately found that the corporate form alone does not prevent such exercise. For example, many churches and religious groups are organized as corporations.

20. During the hearing, you in an exchange with Senator Cornyn that, "Too few people can get lawyers to help them with their problem," and later that, "I do think access to justice in large part means access to a lawyer. Lawyers make a difference. I believe that firmly. My grandpa showed that to me—what a difference a lawyer can make in a life." At the 40th anniversary celebration of the Legal Services Corporation, Justice Scalia's said,

> "I'm here principally to show the flag, to represent the support of the Supreme Court and I'm sure all of my colleagues for the LSC… The American ideal is not for some justice, it is, as the Pledge of Allegiance says, 'Liberty and justice for all' or as the Supreme Court pediment has it, 'Equal Justice.' I've always thought that's somewhat redundant. Can there be justice if it is not equal? Can there be a just society when some do not have justice? Equality, equal treatment is perhaps the most fundamental element of justice. So, this organization pursues the most fundamental of American ideals, and it pursues equal justice in those areas of life most important to the lives of our citizens."

Do you agree with Justice Scalia's statement?

RESPONSE: As discussed at the hearing, I believe that access to justice is a serious problem. Together with my colleagues, I have worked to improve access to justice while on the Standing Committee for Rules of Practice and Procedure and the Appellate Rules Advisory Committee. During my time as a judge, I have also worked alongside my colleagues, Chief Judge Tymkovich and Judge Lucero, and many others in our circuit, to promote the quality of representation of death row inmates. Together with the judges in Oklahoma, we provided training sessions, recruited additional lawyers, and sought and obtained more funds for federal public defenders. I have also written and spoken on ways to encourage greater access to justice and legal services. A good example of this work is *Access to Affordable Justice: A Challenge to the Bench, Bar, and Academy,* 100 Judicature, no. 3, Aug. 2016, at 46. I have also spoken and written about

problems in the legal system that affect ordinary people, including the complexity and expense of modern civil litigation. A good example of this work is *Law's Irony*, 37 Harv. J.L. & Pub. Pol'y 743 (2014).