

Nomination of Dani “Danielle” Jo Hunsaker to the U.S. Court of Appeals for the Ninth Circuit
Questions for the Record
Submitted October 2, 2019

QUESTIONS FROM SENATOR FEINSTEIN

1. According to your SJQ and a review of your court filings available on electronic databases, you have represented numerous financial institutions against claims that the institutions violated the Fair Credit Reporting Act, state mortgage laws, and other statutes.

Have you ever represented an individual plaintiff in an action against a financial institution? If so, please provide the name of the case, detail the nature of your representation, and provide information on the disposition of the case.

To the best of my recollection, I have not represented individuals in litigation against financial institutions. I have represented individuals against public and private organizations and against other individuals in numerous cases involving civil rights, real property, and business governance and torts.

2. Please respond with your views on the proper application of precedent by judges.
 - a. **When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?**

It is never appropriate for a lower court to depart from Supreme Court precedent.

- b. **Do you believe it is proper for a circuit court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?**

All lower court judges are obligated to apply binding precedent, but they are not prohibited from criticizing it. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). That said, I believe that a judge should criticize precedent only for a compelling reason so as not to undermine the integrity and legitimacy of the judiciary.

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

The Ninth Circuit can overturn one of its prior decisions when sitting en banc, *In re Complaint of Ross Is. Sand & Gravel*, 226 F.3d 1015, 1018 (9th Cir. 2000), or through a three-judge panel if an “intervening Supreme Court decision undermines” the prior decision, *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003). Absent these limited circumstances, the precedential decisions of the Ninth Circuit are binding on the court.

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

The Supreme Court has the authority to overrule its own decisions. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). As a lower court nominee it is not my place to comment on how the Supreme Court should decide its cases or apply the principle of *stare decisis*. I am aware that the Supreme Court generally is reluctant to overrule its prior decisions absent “special justification.” See *Gamble v. U.S.*, 139 S. Ct. 1960, 1969 (2019); see also *Rodriguez de Quijas*, 490 U.S. at 484.

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

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

Roe v. Wade is binding Supreme Court precedent that all lower courts are bound to faithfully apply. Lower courts are bound to apply all Supreme Court precedent regardless of whether it is referred to as “super-stare decisis” or “superprecedent.”

b. Is it settled law?

Roe v. Wade has been affirmed by the Supreme Court numerous times. It is binding precedent that I will faithfully apply if confirmed.

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

Obergefell is binding Supreme Court precedent that I will faithfully apply if confirmed.

5. From 2013 to 2015, you were a member of the Oregon State Bar’s Judicial Administration Committee. As part of your Senate Judiciary Questionnaire (SJQ), you provided minutes from several of the Committee’s meetings that you attended. According to minutes from the September 17, 2015 meeting, you discussed “recent items in the news related to OJD [the Oregon Judicial Department]: Judge Day in Salem and refusal to perform civil marriages on religious objections and another judge in Washington County who may be taking a similar position—question re: impact on issues of impartiality—matters are taken up in the Commission on Judicial Fitness—complaints and process is not open to the public unless a

decision is made to hold a public hearing. Public may get interested in this in the future.” (Minutes of Oregon State Bar Judicial Administration Committee Meeting (Sept. 17, 2015))

- a. In this meeting, did you express an opinion as to the propriety of a state court judge refusing “to perform civil marriages on religious objections”? If so, what was that opinion?**

No.

- b. Regardless of whether you expressed an opinion at the time of the meeting, is it appropriate for state officials—whether judges, clerks, or others—to refuse to perform civil marriages on the basis of religious objections?**

Judges are obligated to perform their duties consistent with the law and the Code of Judicial Conduct. The Oregon Supreme Court issued a decision in the case discussed in the Oregon State Bar Judicial Administration Committee meeting referenced above holding that a judge violates Rule 3.3 of the Oregon Code of Judicial Conduct if the judge agrees to perform marriages but declines to perform same-sex marriages.

Inquiry Concerning a Judge re: The Honorable Vance D. Day, 362 Or 547 (2018). If confirmed, I will apply binding Supreme Court and Ninth Circuit precedent addressing these issues. As a sitting judge and judicial nominee, it is inappropriate for me to comment further on this issue, which is likely to be the subject of pending or impending litigation.

6. According to the June 11, 2015 meeting minutes, which you also provided as part of your SJQ, you were at that time “working on a presentation for conference for court judges (state and federal)” that would “includ[e] a presentation on the neuroscience and implicit bias in decision-making.” (Minutes of Oregon State Bar Judicial Administration Committee Meeting (June 11, 2015))

- a. In this meeting, did you express an opinion as to whether implicit bias—racial or otherwise—impacts judicial decision-making? If so, what was that opinion?**

I did not express an opinion on the impact of implicit bias at this meeting. I informed the committee that an upcoming federal court event that I was helping to plan would include an implicit bias training session to which all Oregon federal and state court judges were invited to attend.

- b. Regardless of whether you expressed an opinion at the time of the meeting, do you believe now that implicit bias affects judicial decision-making?**

Scientific research has shown that implicit bias can impact a person’s decisionmaking, including decisionmaking by judges.

7. In Justice Stevens’s dissent in *District of Columbia v. Heller* he wrote: “The Second Amendment was adopted to protect the right of the people of each of the several States to

maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

a. Do you agree with Justice Stevens? Why or why not?

Heller is binding Supreme Court precedent that I will faithfully apply if confirmed. It is inappropriate for me to express an opinion about the Court's decision or any dissenting opinion in this case.

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

The Supreme Court's decision in *Heller* explained that "nothing in this opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626-27 (2008).

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

It is inappropriate for me to express an opinion about the *Heller* decision or the Supreme Court's reasoning in that case.

8. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

The Supreme Court held that "First Amendment protection extends to corporations." *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310, 342 (2010). It is inappropriate for me to express an opinion about this case. *Citizens United* is binding precedent that I will apply, if confirmed.

b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?

See response to Question 8(a).

c. Do you believe corporations also have a right to freedom of religion under the First Amendment?

The Supreme Court has held that the Religious Freedom Restoration Act applies to closely-held corporations. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707-08 (2014). *Hobby Lobby* is binding precedent that I will apply, if confirmed. It is inappropriate for me to comment further on this issue because it could come before the court in pending or impending litigation. Canon 3(A)(6), Code of Conduct for United States Judges; Rule 3.3(C), Oregon Code of Judicial Conduct.

9. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2017 and were previously a member from 2002 to 2006. You also indicated that you served as the Student Chapter Secretary from 2002 to 2004. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

a. Why did you join the Federalist Society in 2002?

I joined the Federalist Society as a law student because I was interested in the discussions and debates about constitutional law and Supreme Court cases that the Society sponsored.

b. Why did you rejoin the Federalist Society in 2017?

I rejoined the Federalist Society in 2017 because a friend of mine revitalized the Portland, Oregon chapter after it had been essentially dormant for a significant period.

c. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court?

I have not had contact with anyone at the national Federalist Society organization. I have spoken to friends within my local chapter in Oregon about my possible nomination to the federal bench.

d. Did anyone in the Trump Administration indicate to you that membership in the Federalist Society would impact the chances of being nominated to a federal judgeship?

No.

- e. **Could you please elaborate on the “form of orthodox liberal ideology which advocates a centralized and uniform society” that the Federalist Society claims dominates law schools?**

I am not familiar with this statement, and I do not know what the Federalist Society meant by it.

- f. **How exactly does the Federalist Society seek to “reorder priorities within the legal system”?**

I am not familiar with this statement, and I do not know what the Federalist Society meant by it.

- g. **What “traditional values” does the Federalist society seek to place a premium on?**

I am not familiar with this statement, and I do not know what the Federalist Society meant by it.

10. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration’s interview process for judicial nominees. He said: “On the judicial piece ... one of the things we interview on is their views on administrative law. And what you’re seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is difference than judicial selection in past years....”

- a. **Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your “views on administrative law?” If so, by whom, what was asked, and what was your response?**

Not to my recollection. I believe the subject of administrative law may have come up in my first interview at the White House after I applied for a district court position in Oregon, but I do not recall what was said.

- b. **Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your “views on administrative law”? If so, by whom, what was asked, and what was your response?**

Not to my recollection.

- c. **What are your “views on administrative law”?**

I am familiar with the Administrative Procedures Act and Supreme Court precedent concerning administrative authority, including *Auer v. Robbins*, 519 U.S. 452 (1997); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), among others. I will apply all Supreme Court precedent, if confirmed.

11. Do you believe that human activity is contributing to or causing climate change?

As a sitting judge and a judicial nominee, it is inappropriate for me to comment on this political issue that is likely to come before the court in pending or impending litigation.

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

The Supreme Court has held that legislative history should be considered only if the statutory text itself is ambiguous. *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (“Even those of us who sometimes consult legislative history will never allow it to be used to ‘muddy’ the meaning of ‘clear statutory language.’”); *Mohamad v. Palestinian Authority*, 566 U.S. 449, 458-59 (2012) (“[R]eliance on legislative history is unnecessary in light of the statute’s ambiguous language.”) (internal quotation marks and citation omitted). The Supreme Court has also held that only pre-enactment legislative material may be considered when determining the meaning of a statute. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011).

13. At any point during the process that led to your nomination, did you have any discussions with anyone — including but not limited to individuals at the White House, at the Justice Department, or at outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

After receiving the questions on October 2, 2019, I reviewed the questions, performed research, and drafted responses. After completing my draft answers, I shared my draft with the Office of Legal Policy at the Department of Justice, and, after receiving feedback, made edits that I deemed appropriate. After finalizing my responses, I approved submission of my responses.

Written Questions for Danielle Hunsaker
Submitted by Senator Patrick Leahy
October 2, 2019

1. You currently serve as a judge on the Washington County Circuit Court, a general jurisdiction trial court. After graduating law school, you clerked for Judge Paul J. Kelly, Jr. on the Tenth Circuit.

(a) Aside from your clerkship, what other experience do you have with appellate litigation?

In 2008, I served as a law clerk to Judge Diarmuid O'Scannlain on the Ninth Circuit Court of Appeals. As a practicing lawyer, I handled numerous appeals in federal and state court. I briefed appeals that were filed in Ninth Circuit Court of Appeals and the courts of appeal in Oregon, Washington, and Florida. I argued appeals in the Ninth Circuit Court of Appeals and Oregon Court of Appeals.

(b) What experience do you have in federal court?

In addition to my service as a law clerk at two federal circuit courts and a federal district court, I handled cases in federal courts during my entire time as a practicing lawyer. I estimate that during my time in practice, forty percent of the cases that I handled were filed in federal district or circuit court. My practice in federal court has included every stage of litigation from filing the initial complaint, to first-chairing a jury trial, to briefing and arguing an appeal.

2. Since 2012, you've been a member of the J. Reuben Clark Law Society, and you've been on your chapter's Board since 2015. All Americans, including sitting judges, have the right to pursue their own religious convictions. But our secular democracy is also rooted in the notion that church and state must remain separate – and that judges should not allow religious beliefs to impact their views of the law. The J. Reuben Clark Law Society's mission is, in part, to “affirm the strength brought to the law by a lawyer's personal religious conviction.”

(a) Do you intend to remain a member of this law society? If so, are you concerned that this membership could create an appearance you're your religious views will impact your thinking and decisions as a judge?

Yes. My experience with the J. Reuben Clark Law Society is that it seeks to strengthen the legal profession by building professional relationships within the Society and with other legal organizations and by promoting professional ethics and excellence and public service. These values benefit the legal profession regardless of a person's religious beliefs. As a judge, I

took an oath to uphold the law regardless of my personal views and beliefs. I believe in the importance of that oath and constantly strive to uphold it, and if confirmed to the federal bench I would continue to do so.

3. In 2018, the Supreme Court in *Carpenter v. United States* found that because cell-site location information (CSLI) “provides an intimate window into a person’s life, revealing not only his particular movements, but through them his ‘familial, political, professional, religious, and sexual associations,’” the collection of these records constitutes a search under the Fourth Amendment and thus is subject to constitutional scrutiny.

- (a) **Do you agree with this holding that the government needs a warrant to access a person’s CSLI?**

Carpenter is binding Supreme Court precedent that I will apply, if confirmed. As a sitting judge and judicial nominee it is inappropriate for me to express my agreement or disagreement with precedent.

- (b) **Do you believe that the privacy rights recognized by the Court in *Carpenter* should also apply to surveillance programs conducted by the U.S. intelligence community?**

It is inappropriate for me to comment on this issue because it is likely to be the subject of pending or impending litigation in the federal courts.

- (c) **Do you believe that Americans have a reasonable expectation of privacy in their Google searches and web browsing history?**

It is inappropriate for me to comment on this issue because it has and is likely to come before the courts in pending and impending litigation.

- (d) **Do you believe that there comes a point at which collection of data about a person becomes so pervasive that a warrant would be required? Even if collection of one bit of the same data would not?**

It is inappropriate for me to comment on this issue because it has and is likely to come before the courts in pending and impending litigation.

4. In 2016, the Supreme Court in *Whole Woman’s Health v. Hellerstedt* found that a Texas law violated the Constitution. Specifically, it held that regulations requiring physicians who perform abortions to have admitting privileges at a nearby hospital and requiring abortion clinics in the state to have facilities comparable to an ambulatory surgical center place a substantial obstacle in the path of women seeking an abortion, and, therefore, constitute an undue burden on abortion access.

- (a) **Do you agree with this holding?**

Whole Woman's Health is binding Supreme Court precedent that I would faithfully apply if confirmed. As a sitting judge and a judicial nominee, it is inappropriate for me to opine on the merits of the Supreme Court's decision in this case.

- (b) **Would you have applied this holding to a recent Louisiana law that also required doctors performing abortions to have admitting privileges at local hospitals?**

Whole Woman's Health is binding Supreme Court precedent that I will faithfully apply if confirmed. The Oregon and federal Code of Judicial Conduct prevent me from giving a general opinion on whether or how this precedent would apply to any given scenario or case. Moreover, I would be uncomfortable rendering any such opinion without the benefit of the adversary process.

- (c) **Do you think *stare decisis* dictated the Court's ruling in *June Medical Services v. Gee* to stay the Louisiana law?**

I am not familiar with the stay proceedings in this case. Moreover, it would be inappropriate for me to comment as this case currently is pending review in the Supreme Court and the matters at issue are likely to come before the courts in other pending or impending litigation.

5. Chief Justice Roberts wrote in *King v. Burwell* that “oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’ So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions?’”

- a) **Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?**

Analyzing the statutory context often is an important factor in interpreting a specific statutory provision, and it is considered a “fundamental canon of statutory construction.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). I will apply this cannon and other accepted cannons of statutory construction, if confirmed.

6. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch previously called them “disheartening” and “demoralizing.”

- (a) **Does that kind of rhetoric from a President – that a judge who rules against him is a “so-called judge” – erode respect for the rule of law?**

The Constitution establishes the judiciary as an independent third branch of government with protections, including life tenure, to ensure that federal judges are not swayed in the performance of their duties by public criticism. The Constitution also expressly protects the freedom to speak about public issues.

- (b) While anyone can criticize the merits of a court's decision, do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?**

See answer to Question 6(a).

7. President Trump praised one of his advisers after that adviser stated during a television interview that “the powers of the president to protect our country are very substantial *and will not be questioned*.” (Emphasis added.)

- (a) Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?**

I have not studied this issue previously. I am aware that there is Supreme Court precedent indicating deference is given to the executive branch in matters implicating national security, which may narrow the scope of judicial review depending on the issue presented. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008); *Dep't of Navy v. Egan*, 484 U.S. 518 (1988); *Mathews v. Diaz*, 426 U.S. 67 (1976).

8. Many are concerned that the White House's denouncement of “judicial supremacy” was an attempt to signal that the President can ignore judicial orders. And after the President's first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

- (a) If this President or any other executive branch official refuses to comply with a court order, how should the courts respond?**

As a general matter, courts have discretion in determining how to respond to a litigant's failure to comply with its orders. It is inappropriate for me to comment on this issue further because it could come before the courts in pending or impending litigation.

9. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President “may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers.”

- (a) Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?**

The Constitution expressly divides war-related powers between Congress and the President. *See* U.S. Const. Art. I, §8(1), (11)-(14), Art. II, § 2. In *Hamdi*

v. Rumsfeld, the Supreme Court stated: “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” 542 U.S. 507, 536 (2004); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“Even though ‘theater of war’ be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.”).

- (b) In a time of war, do you believe that the President has a “Commander-in-Chief” override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?**

See response to Question 9(a).

- 10. How should courts balance the President’s expertise in national security matters with the judicial branch’s constitutional duty to prevent abuse of power?**

In this and every other area of constitutional law, lower courts should faithfully apply the text and principles established in the Constitution, as interpreted by the Supreme Court. If confirmed, I will apply the Supreme Court’s separation of powers precedent, including the precedent referenced in response to Question 7(a). Otherwise, it is inappropriate for me to comment on this issue as it could come before the courts in pending and impending litigation.

- 11. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.**

- (a) Do you agree with that view? Does the Constitution permit discrimination against women?**

The Supreme Court has held that the Equal Protection clause in the Fourteenth Amendment applies to women. *United States v. Virginia*, 518 U.S. 515, 532 (1996). This is binding precedent on all lower courts that I will apply if confirmed.

- 12. Do you agree with Justice Scalia’s characterization of the Voting Rights Act as a “perpetuation of racial entitlement?”**

I am not familiar with this statement nor is it binding precedent. If confirmed, I will faithfully apply the Voting Rights Act and any binding Supreme Court precedent interpreting this Act.

- 13. What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?**

The Emoluments Clause in the Constitution states that “no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of an kind whatever, from any King, Prince, or foreign State.” U.S. Const. Art. I, § 9, cl. 8. The application of this clause is the subject of pending litigation and it is inappropriate for me to comment on this issue.

14. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress’s findings in reaching its decision. As Justice Ginsburg’s dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was “extraordinary” and the Court erred “egregiously by overriding Congress’ decision.”

(a) When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

Appellate courts are not factfinders but instead decide cases based on the factual record developed below.

15. **How would you describe Congress’s authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation’s “Second Founding”?**

The Reconstruction Amendments give Congress the power to counteract racial discrimination “by appropriate legislation.” U.S. Const., Amend. XIII, § 2; Amend. XIV, § 5; Amend. XV, § 2.

16. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and that “in our tradition, the State is not omnipresent in the home.”

(a) Do you believe the Constitution protects that personal autonomy as a fundamental right?

Lawrence v. Texas and other Supreme Court cases addressing the right of personal autonomy are binding precedent that I will apply if confirmed.

17. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

(a) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary

depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?

The doctrine of *stare decisis* is essential to the rule of law and ensuring stability and predictability within the law. The Supreme Court has held that there must be a “special justification,” beyond mere disagreement, to justify overturning a prior authoritative decision. *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2404 (2015).

If confirmed to the Ninth Circuit, I would apply Supreme Court precedent without reservation and without regard to any independent view I may have regarding its correctness. If faced with a prior Ninth Circuit decision that I believed was incorrectly decided, I would apply the precedent in reaching my decision and then consider whether to write a separate opinion calling for *en banc* review for the court to reconsider the issue. *See In re Complaint of Ross Is. Sand & Gravel*, 226 F.3d 1015, 1018 (9th Cir. 2000).

18. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

(a) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I’m interested in specific examples, not just a statement that you’ll follow applicable law.

A judge must recuse herself where she knows her impartiality is compromised and where her impartiality “might reasonably be questioned.” 28 U.S.C. § 455(a); Canon 3(C)(1), Code of Judicial Conduct for United States Judges. In my view, this is a subjective *and* objective standard and both aspects must be met for every case.

I will follow the statutory and ethical rules that apply to recusal if confirmed. I will recuse myself from any case involving a matter that I was involved with as a practicing lawyer or that involves a litigant or attorney which I have or had a business or personal relationship that undermines my ability to be impartial or the perception of my impartiality. For example, I will recuse myself from any case handled by an attorney that I worked with at my former firm where I was a partner. I will also recuse myself from any case in which an organization of which I am a member is a litigant. This is not an exhaustive list.

19. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in

stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”

- (a) **Can you discuss the importance of the courts’ responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?**

In the referenced footnote, the Supreme Court indicated that courts have a role in ensuring that democratic processes are open and work as intended and legislation does not undermine participation by citizens entitled to representation. The Supreme Court also introduced the idea of varied levels of scrutiny in assessing constitutionality depending on the constitutional issue presented. If confirmed, I will faithfully follow Supreme Court precedent on this and any other issue.

20. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens and politically motivated hiring and firing at the Justice Department during the Bush administration. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration’s conflicts of interest and the events discussed in the Mueller report we make sure that we exercise our own power properly.

- (a) **Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?**

Yes.

21. **Do you believe there are any discernible limits on a president’s pardon power? For example, President Trump claims he has an “absolute right” to pardon himself. Do you agree?**

I have not studied the scope of the presidential pardon power provided in Article II.

22. **What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

The Supreme Court has held that the Commerce Clause gives Congress the power to regulate activity that “substantially affects” interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559 (1995). The Supreme Court has further held that Congress has the power to enforce the Fourteenth Amendment where there is a “congruence between the means used and the ends to be achieved.” *City of Boerne v. Flores*, 521 U.S. 507, 519, 530 (1997).

23. In *Trump v. Hawaii*, the Supreme Court allowed President Trump's Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President's reason for the ban was animus towards Muslims. Chief Justice Roberts' opinion stated that "the Executive's evaluation of the underlying facts is entitled to appropriate weight" on issues of foreign affairs and national security.

(a) What do you believe is the "appropriate weight" that executive factual findings are entitled to on immigration issues? Does that weight shift when additional constitutional issues are presented, as in the Establishment Clause claims of *Trump v. Hawaii*? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?

Trump v. Hawaii is binding Supreme Court precedent that I will apply if confirmed. It is inappropriate for me to comment on the merits of that decision or how it should be applied in circumstances that may come before the courts in future cases.

24. **How would you describe the meaning and extent of the "undue burden" standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion? I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.**

The Supreme Court held that an "undue burden" exists where "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992). In *Whole Woman's Health v. Hellerstadt*, the Court further held that "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on that right." 136 S. Ct. 2292, 2309 (2016) I will apply *Casey* and all other Supreme Court precedent addressing abortion if confirmed.

25. Federal courts have used the doctrine of qualified immunity in increasingly broad ways, shielding police officers in particular whenever possible. In order to even get into court, a victim of police violence or other official abuse must show that an officer knowingly violated a clearly established constitutional right as specifically applied to the facts and that no reasonable officer would have acted that way. Qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many similar cases.

- (a) Do you think that the qualified immunity doctrine should be reined in? Has the “qualified” aspect of this doctrine ceased to have any practical meaning? Should there be rights without remedies?**

The doctrine of qualified immunity has repeatedly been applied by the Supreme Court. *See San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015). I will apply this and all other Supreme Court and Ninth Circuit precedent if confirmed. It is inappropriate for me to state a personal opinion on the merits of this doctrine as this issue routinely comes before the courts.

26. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because the Executive Branch bypassed the congressional approval generally needed for appropriations. As a member of the Appropriations Committee, I take seriously Congress’s constitutional duty to decide how the government spends money.

- (a) With the understanding that you cannot comment on pending cases, are there situations when you believe a president can legitimately allocate funds for a purpose previously rejected by Congress?**

I have not studied this issue previously. In any case concerning a conflict between legislative and executive power, I would apply Supreme Court precedent regarding the specific powers at issue and the separation of powers.

27. During Justice Kavanaugh’s confirmation hearing, he used partisan language to align himself with Senate Republicans. For instance, he accused Senate Democrats of exacting “revenge on behalf of the Clintons” and warned that “what goes around comes around.” The judiciary often considers questions that have a profound impact on different political groups. The Framers sought to address the potential danger of politically-minded judges making these decisions by including constitutional protections such as judicial appointments and life terms for Article III judges.

- (a) Do you agree that the Constitution contemplates an independent judiciary? Can you discuss the importance of judges being free from political influence?**

Yes, the Constitution creates an independent judiciary with protections to insulate judges from political influence. These protections and the obligation that judges act independently and impartially, without favor to any interest beyond fair application of the law, are essential to the rule of

law. If confirmed, I will perform my role with fidelity to the judicial oath of office and the fundamental values of independence and impartiality.

**Nomination of Danielle J. Hunsaker
to the United States Court of Appeals for the Ninth Circuit
Questions for the Record
Submitted October 2, 2019
QUESTIONS FROM SENATOR WHITEHOUSE**

1. Your questionnaire indicates that were a member of the Federalist Society from 2002 to 2005, and rejoined the organization in 2017.

- a. What was your primary motivation for joining the organization in 2002?

I joined the Federalist Society as a law student because I was interested in the discussions and debates about constitutional law and Supreme Court cases that the Society sponsored.

- b. What prompted you to leave the organization in 2006?

I let my membership lapse because I was busy raising two children and I stopped receiving announcements about the Portland, Oregon chapter events. The chapter also went largely dormant for several years.

- c. What was your primary motivation for rejoining the organization in 2017?

I rejoined the Federalist Society in 2017 because a friend of mine revitalized the Portland, Oregon chapter after it had been essentially dormant for a significant period.

- d. If confirmed, do you plan to remain an active participant in the Federalist Society?

Yes, I plan to continue to participate in my local chapter.

- e. If confirmed, do you plan to donate money to the Federalist Society?

I have never paid any money to the Federalist Society other than basic membership dues. I do not plan to change that if confirmed.

- f. Have you had contacts with representatives of the Federalist Society in preparation for your confirmation hearing? Please specify.

I have spoken to friends in my local chapter about my confirmation hearing and process. I have not had any contact with anyone else associated with the Federalist Society.

2. A Washington Post report from May 21, 2019 (“A conservative activist’s behind-the-scenes campaign to remake the nation’s courts”) documented that Federalist Society Executive Vice President Leonard Leo raised \$250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven’t already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.

- a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

Yes.

- b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary?

Judicial independence and impartiality are fundamental and essential principles underlying the American judicial system. Otherwise, it is inappropriate for me to comment because this is an issue that could come before the courts in pending or impending litigation.

- c. Mr. Leo was recorded as saying: “We’re going to have to understand that judicial confirmations these days are more like political campaigns.” Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

See response to Question 2(b), immediately above.

- d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

I have seen a report published by the Judicial Crisis Network that is supportive of my nomination. I did not solicit or have any input in that report.

- e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we “stand at the threshold of an exciting moment” marked by a “newfound embrace of limited constitutional government in our country [that hasn’t happened] since before the New Deal.” Do you share the beliefs espoused by Mr. Leo in that recording?

I believe that the federal judiciary has a defined role as one of the three branches of government established by the Constitution. Otherwise, this question poses a political issue on which it is inappropriate for me to comment.

3. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”

- a. Do you agree with Justice Roberts’ metaphor? Why or why not?

To the extent Chief Justice Roberts was using this analogy to indicate that the judge’s role is to resolve disputes presented by the parties based on the applicable law and not on the judges’ personal views or preferences, I do agree with this analogy.

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

Judges should understand the facts and circumstances of the cases brought before them so that they also understand the impact or consequences of their decisions.

However, judicial decisions should be dictated by the fair and reasonable application of governing law, not on a particular outcome.

4. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a trial judge to make a subjective determination?

No. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (“[T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.”).

5. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “to recognize what it’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African-American or gay or disabled or old.”

- a. What role, if any, should empathy play in a judge’s decision-making process?

Taking the time to understand the litigants’ perspectives is an important part of the judicial process. However, judges are obligated to treat all litigants with fairness and respect regardless of their circumstances. Judges cannot allow their personal feelings, preferences, or biases to interfere with a fair and impartial application of the law.

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

A judge’s life experience should not play a determinative role in the decision-making process because cases must be decided based only on the governing law. However, a judge’s life experiences can play a role in helping to understand the facts presented in a case. For example, a judge who has used a cell phone likely will understand the facts of a case involving a cell phone quicker or more easily than a judge that has not used a cell phone.

6. In her recent book, *The Chief*, Supreme Court reporter Joan Biskupic documents the Court’s decision-making process in *NFIB v. Sebelius*, the landmark case concerning the constitutionality of the Affordable Care Act’s individual mandate and Medicaid expansion plan. Biskupic reported that the final votes, 5-4 to uphold the individual mandate as a valid exercise of the taxing clause, and 7-2 to curtail the Medicaid plan, “came after weeks of negotiations and trade-offs among the justices.”

- a. In your view, what is the role of negotiating with other judges when deliberating on a case?

Appellate judges must discuss, and even debate, the legal issues presented in a case as part of the decision-making process as they reach agreement on the decision and the reasoning of the decision. These discussions must focus on governing law, including precedent, and not on outside considerations. Through this process, the panel members identify which judge will author the opinion for the court and whether any panel member will write a concurring or dissenting opinion.

- b. As a judge, under what circumstances would you consider conditioning your vote in one case or on one issue in a case on your vote, or the vote of a colleague's, in another?

Every case must be decided on its own merits. I would not condition or trade my vote in one case based on the outcome of any other case.

- c. Are there aspects or principles of your judicial philosophy that you consider non-negotiable? For example, if you consider yourself an originalist are there circumstances in which you might stray from the result dictated by that philosophy?

My judicial philosophy includes respect for *stare decisis*, and, if confirmed, I would view my obligation to apply binding precedent from the Supreme Court and the Ninth Circuit as non-negotiable.

7. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

8. The Seventh Amendment ensures the right to a jury "in suits at common law."

- a. What role does the jury play in our constitutional system?

The right to jury trial is a bedrock principle in the American judicial system. The Declaration of Independence listed denial of the right to jury trial as one of the grievances against England that justified separation, and the Constitution enshrines the right to jury trial in both criminal and civil cases. U.S. Const. Amend. V, VI, VII. The role of the jury is to decide the facts of the case and, in so doing, serve as a check on the power of government.

- b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

Preservation of the right to jury as provided under the Constitution should always be a concern for the courts. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury should be scrutinized with the utmost care."). I will apply Supreme Court and Ninth Circuit precedent regarding the scope of the Seventh Amendment right to a jury if confirmed.

- c. Should an individual's Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

See response to Question 8(b).

9. What do you believe is the proper role of an appellate court with respect to fact-finding?

Generally, federal appellate courts are not fact-finding bodies and are bound by the factual record developed in trial courts or administrative proceedings. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

10. Do you believe fact-finding, if done by appellate courts, has the potential to undermine the adversarial process?

Yes.

11. What deference do congressional fact-findings merit when they support legislation expanding or limiting individual rights?

The Supreme Court has addressed this issue in *Whole Woman's Health v. Hellerstedt* and other cases. In *Whole Woman's Health*, the Court held that courts "must review legislative 'factfinding under a deferential standard'" but not give them "'dispositive weight.'" 136 S. Ct. 2292, 2310 (2016). I will apply this and all other Supreme Court and Ninth Circuit precedent addressing this issue if confirmed.

12. The Federal Judiciary's Committee on the Codes of Conduct recently issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.

a. Have you read Advisory Opinion #116?

Yes.

b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

- i. Determining whether the seminar or conference specifically targets judges or judicial employees.
- ii. Determining whether the seminar is supported by private or otherwise anonymous sources.
- iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.
- iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.
- v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

If confirmed, I commit to comply with the Code of Judicial Conduct, including the obligation to avoid impropriety or the appearance of impropriety. I will evaluate my participation in any activity to ensure compliance with my ethical and legal obligations. If I have any question about whether an activity complies with the Code of Judicial Conduct I will consult with the ethics attorneys at the Administrative Office of the U.S. Courts.

c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

See response to Question 12(b).

Questions for Judge Danielle Hunsaker, Nominee to the Ninth Circuit Court of Appeals

During your hearing, you said that you consider yourself to be a textualist and believe it is important to “stick with what our understanding was of the formation of our government when we started.” In *McCulloch v. Maryland*, Justice Marshall argued that the Founders could not have anticipated every possibility, or “exigency,” when they drafted the Constitution, and that the Founders must have intended our Constitution “to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”

- What is your perspective on the point that Justice Marshall made in *McCulloch*?

In *McCulloch v. Maryland*, Justice Marshall discussed at length the uniqueness of the Constitution—a charter document—that by its nature establishes “great outlines” of government structure and power but does not “contain an accurate detail of all the subdivisions of which its great powers will admit, and all of the means by which they may be carried into execution.” 17 U.S. 316, 407 (1819). The issue in *McCulloch* was whether the federal government could establish a national bank. Recognizing the Constitution does not include an express banking power, the Court noted that numerous other express powers, including “to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war’ and to raise and support armies and navies,” were served by having a national bank. *Id.* at 407-08. Ultimately, the Court held that the Necessary and Proper Clause gives Congress the power to select the means for performing its express powers regardless of whether those means are expressed in the Constitution. The Court further explained: “This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the [Constitution], and give it the properties of a legal code.” *Id.* at 415.

In this passage, Justice Marshall is explaining the unique character and function of the Constitution and interpreting it as having built in flexibility through the Necessary and Proper Clause for Congress to respond to changing circumstance in how it chooses to perform its constitutional duties. The *McCulloch* decision also demonstrates, however, that the “great outlines” or foundational principles established in the Constitution do not themselves change as a result of changing circumstances.

**Nomination of Danielle J. Hunsaker, to be United States Circuit Judge
for the Ninth Circuit
Questions for the Record
Submitted October 2, 2019**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

I would apply the principles developed by the Supreme Court for evaluating whether a right is fundamental. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015).

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

Yes, a right expressly stated in the Constitution is protected from federal interference by the clause enumerating the right and may be protected from state interference under the Supreme Court's Fourteenth Amendment incorporation doctrine. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). I would apply all precedent relevant to the right at issue.

- b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Yes. In *Glucksberg*, the Supreme Court held that fundamental rights are those rights that are "deeply rooted in this Nation's history and tradition." I would apply this precedent and consider the sources relied on by the Supreme Court.

- c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of another court of appeals?

I would apply binding precedent from the Supreme Court and Ninth Circuit regarding the right at issue. I would also evaluate decisions from other circuits, and even district courts, for their persuasive value. *See Hart v. Massanari*, 266 F.3d 1155, 1170 (2001).

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

Yes.

- e. Would you consider whether the right is central to "the right to define one's own

concept of existence, of meaning, of the universe, and of the mystery of human life”? See *Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Yes, I would be bound by the Supreme Court’s decisions in *Casey* and *Lawrence*.

- f. What other factors would you consider?

I would consider all factors recognized by the Supreme Court and Ninth Circuit precedent.

2. Does the Fourteenth Amendment’s promise of “equal protection” guarantee equality across race and gender, or does it only require racial equality?

The Supreme Court has held that the Fourteenth Amendment’s Equal Protection Clause applies to gender as well as race. *United States v. Virginia*, 518 U.S. 515, 532 (1996).

- a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

If confirmed, I will apply Supreme Court precedent. Arguments that are contrary to binding precedent will not dictate my decisions.

- b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

Because the judiciary’s role is to interpret and apply existing law, judicial decisions are considered “an expression of pre-existing law.” *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 847 (1990). I do not know why this issue was not resolved until *United States v. Virginia*.

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

In *Obergefell v. Hodges*, the Supreme Court held that same-sex couples have a right to marry “on the same terms” as opposite sex couples. 135 S.Ct. 2584, 2607 (2015). I will faithfully apply *Obergefell* and all other relevant binding precedent.

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

Equal treatment under the law is a fundamental principle of our judicial system. As a

sitting judge and a judicial nominee, I cannot comment further on this issue because it is the subject of pending or impending litigation. Canon 3(A)(6), Code of Conduct for United States Judges; Rule 3.3(C), Oregon Code of Judicial Conduct.

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

The Supreme Court has recognized this right in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I will faithfully apply this precedent.

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

The Supreme Court has recognized this right in *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. If confirmed, I will faithfully apply this precedent.

- b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The Supreme Court has recognized this right in *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I will faithfully apply this precedent.

- c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

See responses to Questions 3, 3(a), and 3(b), above.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

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

The Supreme Court has held that societal changes can be relevant to a court's analysis in numerous contexts. If confirmed, I will follow the Supreme Court's holdings on this issue, including *Virginia* and *Obergefell*.

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

The types of information described may be considered when consistent with the Federal Rules of Evidence; *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993); and other controlling precedent. I would apply governing Supreme Court and Ninth Circuit precedent in determining what role these types of information should have in specific cases.

5. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."

- a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

I agree that the Supreme Court has held that same-sex couples have a right of privacy, *Lawrence v. Texas*, 539 U.S. 558 (2003), and a right to marry, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and that the Supreme Court has instructed that "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth," *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018). If confirmed, I will faithfully apply these and other relevant Supreme Court and Ninth Circuit precedent.

- b. When is it appropriate to apply Justice Kennedy's formulation of substantive due process?

As discussed in response to Question 1 and its subparts, the Supreme Court has developed several factors or considerations under its substantive due process doctrine. If confirmed, I will faithfully apply all binding Supreme Court and Ninth Circuit precedent related to this doctrine.

6. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93.

- a. Do you consider *Brown* to be consistent with originalism even though the Court in

Brown explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

As I testified at my hearing, I believe that *Brown v. Board of Education* was correctly decided and holds a unique place in American jurisprudence. As a lower court nominee, I would be bound by the Supreme Court's decision regardless of whether it is consistent with originalist philosophy. That said, originalism, or the search for original meaning, is focused on the public understanding of law at the time of enactment, not the subjective intent of the lawmakers. The *Brown* court recognized that "[i]n its first cases . . . construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations" against African Americans. 347 U.S. 483, 490 (1954).

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited Oct. 2, 2019).

Determining the original public meaning of constitutional language can be a difficult inquiry, but that does not undermine the validity of the effort or of the originalist philosophy. However, if confirmed, my duty as a lower court judge will be to faithfully apply Supreme Court and Ninth Circuit precedent interpreting these foundational principles regardless of the judicial philosophy utilized in those precedents.

- c. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

The Supreme Court's prevailing view of the Constitution is always dispositive. I will apply Supreme Court and Ninth Circuit precedent regardless of the judicial philosophy utilized in those precedents.

- d. Does the public's original understanding of the scope of a constitutional provision constrain its application decades later?

Yes, if dictated by Supreme Court precedent. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

- e. What sources would you employ to discern the contours of a constitutional provision?

I would follow Supreme Court and Ninth Circuit precedent regarding what sources are properly considered in applying constitutional provisions in cases brought before the court.

Questions for the Record for Danielle Jo Hunsaker
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

No.

b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?

No.

2. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

a. Do you agree that training on implicit bias is important for judges to have?

Judges are ethically and morally bound to decide cases without regard to bias, prejudice, or preference. I agree that training to help judges understand and fulfill this obligation is important.

b. Have you ever taken such training?

I helped plan and facilitate an implicit bias training that was presented to Oregon state and federal judges and lawyers in my role as a Ninth Circuit Attorney Representative. I attended in part of this training but was unable to participate fully because of my responsibilities planning and facilitating the event.

c. If confirmed, do you commit to taking training on implicit bias?

If confirmed, I will participate in any training opportunities offered to assist me in learning my role and performing it to the best of my ability.

3. When a Senator asks about a nominee's personal views on a topic, about their involvement in certain organizations or their decisions to advocate for certain points of view, they tell us that those parts of their records do not matter, that as judges they will simply "follow the law." Cases, however, are so infrequently decided by the direct application of legal precedent that at some point, as one nominee told us, "judging kicks in."

a. Do you acknowledge that there will be times on the bench, that a judge does bring personal experiences and views to bear on their decisions?

It cannot be denied that judges bring their experience and judicial philosophy to bear on their work, but they are obligated to decide cases based on the law enacted by the political branches, regardless of their personal preferences or views about the law. If confirmed, I will faithfully apply the law to the best of my ability without regard to any personal policy preferences as I do now as a state court trial judge.

b. What do you view as the work of “judging”? If cases were as easy and clear-cut as simply “following the law,” why would we need judges at all?

The work of judging is to analyze and interpret the law enacted by the political branches and faithfully apply binding precedent to specific cases and controversies presented by the litigants. This work requires the exercise of reason and judgment because enacted law and precedent can be ambiguous and often does not expressly address the specific circumstances or problem presented to the court. It is the judge’s role to analyze the governing law, come to a reasonable interpretation of that law, and then fairly apply it to the case presented.

4. Why do you want to be a federal judge? What in your personal or professional background has most motivated you to want to serve?

Serving as a judge is incredibly humbling and rewarding because, in simple terms, a judge’s job is to help litigants solve difficult problems. I believe that the rule of law depends on our justice system and its foundational principles of fairness, equal treatment under the law, and due process. I have seen the essential role our system and these values have in our society serving the federal judiciary as a law clerk, representing clients as a practicing attorney, and sitting as a state court judge. If confirmed, it would be an incredible privilege to uphold the Constitution and the laws of this nation by serving on the federal bench.

5. What do you believe is the fundamental role of a federal judge?

The fundamental role of any judges is to protect the rule of law by ensuring a fair and just application of the law to the specific cases brought before the court.

**Nomination of Danielle Hunsaker
United States Court of Appeals for the Ninth Circuit
Questions for the Record
Submitted October 2, 2019**

QUESTIONS FROM SENATOR BOOKER

1. The Eighth Amendment protects the American people against the imposition of “cruel and unusual punishments.”¹ Many scholars and judges have argued that “the death penalty is in all circumstances [a] cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.”² Your published work on capital punishment suggests that you have studied the issue of capital punishment in some detail.³

- a. In your article, did you express any position on whether you support or oppose the death penalty? If so, what was your position?

No, I did not express an opinion on the death penalty. The purpose of my article was to analyze the Supreme Court’s decisions leading up to and including *Ring v. Arizona* and Idaho’s statutory response to *Ring*.

- b. While conducting research, did you formulate a position on whether the imposition of capital punishment is a violation of the Eighth Amendment? If so, what was that position?

No, that was not the focus of my article or the research that I did.

2. From 2013 to 2015, you served on the Judicial Administration Committee of the Oregon State Bar. According to your Senate Judiciary Questionnaire (SJQ), you submitted the minutes from the Committee’s September 17, 2015, meeting indicating that the Committee discussed a judge’s refusal to perform civil marriages due to religious objections.⁴

- a. What was said at that meeting regarding the judge’s refusal to perform civil marriages?

I do not remember this specific meeting. Based on a review of the meeting minutes and my general recollection of this topic, I believe the issue was raised after there were news stories about an Oregon judge declining to perform same-sex weddings following recognition of same-sex marriage under Oregon law. Complaints were made against the judge, and the committee had questions about the nature of the complaints and the process for addressing those complaints. An Oregon State Bar staff person routinely attended the committee meetings and served as a liaison between the committee and the Bar. She answered the committee’s questions about this issue.

- b. Did you take any position on the judge’s refusal to perform civil marriages? If so, what was your position?

No.

3. You were a member of the Federalist Society from 2002 to 2006 and rejoined the organization in 2017.⁵

- a. Why did you join the Federalist Society in 2002?

I joined the Federalist Society as a law student because I was interested in the discussions and debates about constitutional law and Supreme Court cases that the Society sponsored.

- i. What did you know about the organization when you first joined?

I knew that the Federalist Society sponsored events and debates concerning constitutional law issues and Supreme Court cases and helped local chapters present national experts to speak about these issues. I also knew that Federalist Society members often hold conservative or libertarian views.

- b. Why did you leave the organization in 2006?

I let my membership lapse because I was busy raising two children and I stopped receiving announcements about the Portland, Oregon chapter events. The chapter was also largely dormant for several years.

¹ U.S. Const. amend. XIII.

² *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (Brennan, J., concurring).

³ See Danielle Hunsaker, *The Right to A Jury "Has Never Been Efficient; but It Has Always Been Free": Idaho Capital Juries After Ring v. Arizona.*, 39 Idaho L. Rev. 649 (2003) (SJQ Attachment 12(a) at pp. 90-103).

⁴ Minutes of Oregon State Bar Judicial Administration Committee Meeting (Sept. 17, 2015) (SJQ Attachment 12(c) at pp. 219-220).

⁵ SJQ at p. 6.

- c. Why did you rejoin the Federalist Society in 2017?

I rejoined the Federalist Society in 2017 because a friend of mine revitalized the Portland, Oregon chapter after it had been essentially dormant for a significant period.

- i. Did your decision to rejoin the Federalist Society have anything to do with your interest in serving as a federal judge? Please explain.

No.

4. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

Originalism is an interpretive theory that focuses on the words of a legal text and seeks to apply the public meaning or understanding of those words at the time they were enacted. I believe originalism is consistent with separation of powers established in the Constitution and the judiciary's role to say what the law is.

5. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

Textualism is an interpretative theory similar to originalism that is generally associated with statutory, as opposed to constitutional, interpretation. Textualism focuses on the public meaning or understanding of the statutory text when the statute was enacted. I believe textualism is consistent with separation of powers established in the Constitution and the judiciary's role to say what the law is.

6. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

- a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

The Supreme Court has held that legislative history should be considered only if the statutory text itself is ambiguous. *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'"); *Mohamad v. Palestinian Authority*, 566 U.S. 449, 458-59 (2012) ("[R]eliance on legislative history is unnecessary in light of the statute's ambiguous language.") (internal quotation marks and citation omitted). The Supreme Court has also held that only pre-enactment legislative material may be considered when determining the meaning of a statute. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011).

If confirmed, I will apply Supreme Court and Ninth Circuit precedent regarding the use of legislative history. There can be circumstances where pre-enactment legislative history provides context for determining the meaning and import of statutory text that may have persuasive value. However, the statutory text itself must be the primary focus, and, as I testified at my hearing, the legislative history often itself is ambiguous and contradictory. *Compare Bruesewitz*, 562 U.S. at 244-50 (Breyer, J., concurring), *with id.* at 250-76 (Sotomayor, J., dissenting).

- b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

See response to Question 6(a).

- 7. Do you believe that judicial restraint is an important value for a district judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

Yes. The principle of judicial restraint is related to the separation of powers and the recognition that it is Congress, not the courts, that enacts laws. Based on this principle, the Supreme Court has held, for example, that courts should "avoid reaching constitutional questions in advance of the necessity of deciding them," *Camreta v. Greene*, 563 U.S. 692, 705 (2011), and should consider non-constitutional arguments challenging a statute before reaching constitutional arguments, *Jean v. Nelson*, 472 U.S. 846, 854 (1985).

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.⁶ Was that decision guided by the principle of judicial restraint?

Heller is binding Supreme Court precedent that I will apply, if confirmed. As a sitting judge and a judicial nominee, it is inappropriate for me to state my agreement or disagreement with Supreme Court precedent.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁷ Was that decision guided by the principle of judicial restraint?

The majority opinion and some of the separate opinions in *Citizens United* addressed the issue of judicial restraint. *Citizens United* is binding Supreme Court precedent that I will apply, if confirmed. As a sitting judge and judicial nominee, it is inappropriate for me to state my agreement or disagreement with Supreme Court precedent.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.⁸ Was that decision guided by the principle of judicial restraint?

Shelby County is binding Supreme Court precedent that I will apply, if confirmed. As a sitting judge and judicial nominee, it is inappropriate for me to state my agreement or disagreement with Supreme Court precedent.

⁶ 554 U.S. 570 (2008).

⁷ 558 U.S. 310 (2010).

⁸ 570 U.S. 529 (2013).

8. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.⁹ In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.¹⁰

- a. Do you believe that in-person voter fraud is a widespread problem in American elections?

I have not studied or formed any informed beliefs on this issue.

- b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

I have not assessed this issue, and it would be inappropriate for me to state an opinion on this political topic that could come before the courts.

- c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

This is a political topic and it would be inappropriate for me to state an opinion on the issue. *See* Canons 2, 3 & 5, Code of Conduct for United States Judges; Rules 2.1, 3.3 & 5.1, Oregon Code of Judicial Conduct.

9. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹¹ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹² These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.¹³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹⁴

- a. Do you believe there is implicit racial bias in our criminal justice system?

Racial bias does exist in our society, contrary to the fundamental principle of equality under the law embodied in the Constitution. As a judge, I strive to ensure that every person who enters into my courtroom is treated with respect and receives fair treatment under the law.

- b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

Yes.

- c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

I have not formally studied this topic, but I have attended presentations and discussions related to these issues over the course of my career. I do not remember the specific presentations other than I have heard Bryan Stevenson speak on these topics on three separate occasions. I have also listened to numerous TED talks addressing issues of race and the criminal justice system.

⁹ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

¹⁰ *Id.*

¹¹ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

¹² *Id.*

¹³ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

¹⁴ *Id.*

- d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.¹⁵ Why do you think that is the case?

I am not familiar with this report, and I have not studied this issue sufficiently to form a judgment.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.¹⁶ Why do you think that is the case?

I am not familiar with this study, and I have not studied this issue sufficiently to form a judgment.

- f. What role do you think federal district judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

Federal district judges have an essential role to play in ensuring the fair administration of law to the cases brought before them. District judges must apply the law without regard to a person's race and take steps to eliminate any potential for implicit racial bias.

10. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.¹⁷ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁸

- a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied this question sufficiently to have an informed view.

- b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

I have not studied this question sufficiently to have an informed view.

11. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

12. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

Yes.

13. Do you believe that *Brown v. Board of Education*¹⁹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

As I testified at my hearing, I do believe that *Brown v. Board of Education* was correctly decided and holds a significant and unique place in American jurisprudence.

¹⁵ U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

¹⁶ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

¹⁷ Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

¹⁸ *Id.*

¹⁹ 347 U.S. 483 (1954).

14. Do you believe that *Plessy v. Ferguson*²⁰ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No.

15. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

The answers that I gave at my hearing and my answers to these written questions for the record are my own. Prior to my hearing I watched numerous prior judicial confirmation hearings, including hearings of nominees to the Supreme Court, and was familiar with the well-established practice of nominees declining to opine on Supreme Court cases and political issues. I also reviewed both the Oregon and federal judicial codes of conduct. I did receive general advice from attorneys at the Department of Justice regarding typical lines of questioning and the limitations imposed by the federal Code of Judicial Conduct.

16. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”²¹ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

A federal judge’s recusal obligation is governed by 28 U.S.C. § 455. I do not believe a judge’s race or ethnicity is a basis for recusal.

17. President Trump has stated on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”²² Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has held that due process protections apply to all “persons” in the United States, including aliens regardless of their entry status. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). I will apply this Supreme Court precedent, if confirmed.

²⁰ 163 U.S. 537 (1896).

²¹ Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

²² Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Questions for the Record from Senator Kamala D. Harris
Submitted October 2, 2019
For the Nomination of**

Danielle J. Hunsaker, to be United States Circuit Judge for the Ninth Circuit

1. At your nominations hearing, Senator Cruz asked you to describe your judicial philosophy. You responded that you consider yourself a textualist. In response to Senator Kennedy, you also said that judges may be informed by legislative history, but should exercise caution because it is easy to cherry-pick legislative history.

- a. **In your view, when is it appropriate for a judge to consider legislative history?**

The Supreme Court has held that legislative history should be considered only if the statutory text itself is ambiguous. *Food Marketing Institute v. Argus Leader Media*, __ U.S. __; 139 S. Ct. 2356, 2364 (2019) (“Even those of us who sometimes consult legislative history will never allow it to be used to ‘muddy’ the meaning of ‘clear statutory language.’”); *Mohamad v. Palestinian Authority*, 566 U.S. 449, 458-59 (2012) (“[R]eliance on legislative history is unnecessary in light of the statute’s ambiguous language.”) (internal quotation marks and citation omitted). The Supreme Court has also held that only pre-enactment legislative material may be considered when determining the meaning of a statute. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011).

- b. **If confirmed, would you remain open to considering legislative history when interpreting the meaning of a statute? If yes, under what circumstances?**

If confirmed, I will apply Supreme Court precedent regarding the use of legislative history, including the precedents discussed in response to Question 1(a). There can be circumstances where pre-enactment legislative history provides context for determining the meaning and import of statutory text that may have persuasive value. However, the statutory text itself must be the primary focus, and, as I testified at my hearing, the legislative history often itself is ambiguous and contradictory. *Compare Bruesewitz*, 562 U.S. at 244-50 (Breyer, J., concurring), *with id.* at 250-76 (Sotomayor, J., dissenting).

- c. **Do you believe it is ever appropriate for a judge to consider the impact of a potential ruling when deciding a case? Why or why not?**

Judges should understand the facts and circumstances of the cases brought before them so that they also understand the impact or consequences of their decisions. However, judicial decisions should be dictated by the fair and reasonable application of governing law, not on a particular outcome.

2. In 2013, Texas passed House Bill 2, which imposed restrictions on health care facilities that provided access to abortions. After the law passed, the number of those health care facilities dropped in half, from about 40 to about 20, severely limiting access to health care for the women of Texas. In *Whole Woman's Health*, the Supreme Court struck down two provisions of the Texas law based on its overall impact on abortion access in the state.

a. **Was *Whole Woman's Health* correctly decided?**

As a sitting judge and a judicial nominee it is inappropriate for me to comment on my personal views of Supreme Court precedent. I will faithfully apply *Whole Woman's Health* and all other relevant, binding precedent if confirmed.

b. **Did the Court in *Whole Woman's Health* change or clarify the “undue burden” test used to evaluate laws restricting access to abortion? If so, how?**

In *Whole Woman's Health*, the Supreme Court reaffirmed and applied the undue burden standard established in *Casey v. Planned Parenthood*.

c. **When determining whether a law places an undue burden on a woman's right to choose, do you agree that the analysis should consider whether the law would disproportionately affect poor women?**

The Supreme Court's decisions regarding the undue burden test, including *Casey* and *Whole Woman's Health*, are binding precedent that I will faithfully apply, if confirmed. It is inappropriate for me to opine on how that test should be applied beyond what the Supreme Court has established because these issues could come before the court in pending or impending litigation. Canon 3(A)(6), Code of Conduct for United States Judges; Rule 3.3(C), Oregon Code of Judicial Conduct.

d. **When determining whether a law places an undue burden on a woman's right to choose, do you agree that the analysis should consider whether the law has an overall impact of reducing abortion access statewide?**

See response to Question 2(c).

3. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

Judges have a direct responsibility to ensure that litigants are afforded due process and fair and equal treatment under the law. *See* 28 U.S.C. § 455; Code of Judicial Conduct for United States Judges.

- b. **If confirmed, what steps will you take to help ensure that our justice system is a fair and equitable one?**

If confirmed, I will perform my role consistent with the requirements imposed by law and the Code of Judicial Conduct. I also believe in the principles of procedural fairness, which seek to ensure fairness within the judicial system and promote public perception that the system is fair. These principles include demonstrating that the parties' positions have been heard and fairly considered, that the decisionmakers are neutral and transparent in their decisionmaking, and that all parties are treated with respect and courtesy.

- c. **Do you believe there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

Racial bias does exist in our society, contrary to the fundamental principle of equality under the law embodied in the Constitution. As a judge, I strive to ensure that every person who enters into my courtroom is treated with respect and receives fair treatment under the law.

Senator Ben Sasse
Senate Judiciary Committee Hearing: “Nominations”
September 25, 2019
Questions for the Record

For the Hon. Danielle Hunsaker:

1. Does a legal text—such as the Constitution, a statute, or a rule—have a fixed, static meaning?

As a general matter, words used in legal texts have a specific meaning that remains constant unless the text is amended or changed. If the Supreme Court interprets a text, its interpretation is binding on all lower courts. If the Supreme Court has not addressed the text at issue, lower courts interpret the text. As I testified at my hearing, my approach to interpretation is to start with the ordinary meaning of the words used at the time they were enacted.

2. How should a judge determine if a legal text is ambiguous?

The words of the text are the starting point for any interpretative analysis, and if the plain meaning of those words leads only to one reasonable result that is the end of the analysis. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). If the plain meaning of the words reasonably can be understood in more than one way, then courts should employ the canons of construction to resolve the ambiguity and identify the most reasonable interpretation. *See, e.g., Mohamad v. Palestinian Authority*, 566 U.S. 449, 457 (2012) (“Words that can have more than one meaning are given content . . . by their surroundings.”) (quoting *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 466 (2001)).

3. When is it appropriate for a judge to consider legislative history?

The Supreme Court has held that legislative history should be considered only if the statutory text itself is ambiguous. *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (“Even those of us who sometimes consult legislative history will never allow it to be used to ‘muddy’ the meaning of ‘clear statutory language.’”); *Mohamad v. Palestinian Authority*, 566 U.S. 449, 458-59 (2012) (“[R]eliance on legislative history is unnecessary in light of the statute’s unambiguous language.”) (internal quotation marks and citation omitted). The Supreme Court has also held that if legislative history is considered, only pre-enactment materials are relevant to determining the meaning of a statute. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011).

As I testified at my hearing, even if legislative history properly can be considered under Supreme Court or Ninth Circuit precedent, I have reservations about giving this information significant weight because often it contains materials that are inconsistent or even directly contradictory.

4. Under what circumstances is it appropriate for a judge to consider legislative intent, and if such circumstances exist, how does a judge go about determining it?

The Supreme Court has instructed that the words of a statute are the best indication of legislative intent. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). If the plain meaning of the words used lead to a result different than what was intended, Congress “should amend the statute to conform to its intent.” *Id.* at 542. It is not for the courts to legislate through interpretation. *Id.* If confirmed, I will follow this and all other Supreme Court precedent regarding the identification and application of legislative intent in interpreting texts.

5. When well-established historical practice with respect to a particular legal text and a judge’s best understanding of the original public meaning of that text conflict, does the original public meaning of the text control, or are there circumstances under which well-established historical practice should override the original public meaning of that text?

Assuming for purposes of this hypothetical that the issue is a matter of first impression where there is no binding authority establishing the meaning of the text based on original public meaning, well-established historical practice, or anything else, the ordinary rules of statutory interpretation, including focusing on the plain meaning of the enacted words, apply even where there is a prior well-established practice. *See, e.g., U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989).

6. If a federal court of appeals concludes that one of its own precedents conflicts with the best understanding of the original public meaning of a provision of the Constitution, are there factors that might legitimately persuade that court to consider preserving its existing precedent? If so, what might a list of those factors include? For the purposes of this question, please assume that there is no Supreme Court precedent on point.

In the Ninth Circuit, only the en banc court can overturn one of its prior precedential decisions unless the decision has already been undermined by intervening Supreme Court precedent. *Kohler v. Presidio Intern., Inc.*, 782 F.3d 1064, 1070 (9th Cir. 2015). When sitting en banc, it is the court’s “province and obligation . . . to review the current validity of challenged prior decisions.” *United States v. Aguon*, 851 F.2d 1158, 1167, n.5 (9th Cir. 1988), *overruled on other grounds by Evans v. United States*, 504 U.S. 255 (1992). The Supreme Court has identified factors that are relevant in considering whether to overrule a past decision. Relevant factors include the “antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.” *Montejo v. Louisiana*, 556 U.S. 778 (2009).

7. If a federal court of appeals concludes that a Supreme Court precedent conflicts with the best understanding of the original public meaning of a provision of the Constitution, is that court of appeals bound to apply that Supreme Court precedent to the full extent of its logic beyond the Supreme Court’s original holding, or should that court of appeals attempt to limit the reach of that Supreme Court precedent?

Lower courts are obligated to apply Supreme Court precedent regardless of their view of that precedent. As a general matter, the duty to apply precedent extends to the specific holding of the case, as well as the reasoning or legal rule that governed the holding. Whether precedent controls a future case with new circumstances is a common analysis that judges must conduct, and certainly it is not unique for courts to distinguish precedent based on different circumstances or issues presented in later cases. Sometimes the Supreme Court itself signals the intended scope of its decision.

8. Do federal courts derive legitimacy by reflecting contemporary values and social mores in their decisions?

As established in *Marbury v. Madison*, it is “emphatically the province and duty of the judicial department to say what the law is.” 1 Cranch 137, 177 (1803). Federal courts derive legitimacy by performing their defined role and interpreting and applying governing law, including precedent, to the specific cases and controversies presented to them.

9. How should judges determine what constitute contemporary values and social mores?

To the extent the law or precedent requires consideration of contemporary values and social mores, appellate judges must decide cases based on the factual record developed in the trial court.

10. In federal jurisprudence, which are preferable: rules or standards?

Predictability and stability are important in the law because litigants and the general citizenry need to know what the law requires so they can make decisions and conform their conduct accordingly. Predictability and stability promote both obedience to and respect for the law. The label assigned to a legal test is not determinative of these goals, it is the test’s clarity in explanation and application. That said, in my experience, legal tests framed as rules typically provide more clarity and certainty than legal tests framed as standards.