

**Nomination of Stephen P. McGlynn to the United States District Court for the
Southern District of Illinois
Questions for the Record
Submitted July 1, 2020**

QUESTIONS FROM SENATOR FEINSTEIN

1. In a 2016 interview, you claimed that Supreme Court decisions upholding the Affordable Care Act (ACA) (*NFIB v. Sebelius*) and recognizing a constitutional right to marriage equality (*Obergefell v. Hodges*) had been a “full-frontal assault on people’s religious liberties.” You also called the Affordable Care Act a “bad law.” You also stated you agreed with Justice Scalia’s dissent in *Obergefell*, stating that the Court’s majority opinion in the case was “not democracy.” (Lee Presser, *A Conversation with Judge Steve McGlynn*, YOUTUBE (Feb. 23, 2016))

- a. **In what ways were the Court’s decisions upholding the ACA and guaranteeing a right to marriage equality a “full-frontal assault on people’s religious liberties”?**

I did not express that opinion in the February 23, 2016 interview. Justice Antonin Scalia passed away on February 13, 2016, only 10 days earlier. The host of the show asked me to come on his show and discuss the legacy of Scalia and his judicial philosophy. Throughout the interview I remained neutral with respect to ACA, *Obergefell*, and any other statute or Supreme Court decision. My comments referred to what Justice Scalia set out in his dissents or what criticisms were leveled generally by those who opposed ACA or issues raised in *Obergefell*.

- b. **What specific aspects of the Court’s decisions in those cases interfered with religious liberties?**

See my answer to 1a.

- c. **How was the Court’s opinion in *Obergefell* “not democracy”?**

I did not express a personal opinion about *Obergefell*, I was merely describing Justice Scalia’ critique of it in his dissent.

- d. **In what way is the Affordable Care Act a “bad law”?**

I did not assert ACA was bad law. I did not express a personal opinion about ACA. I was beginning to explain how Chief Justice Roberts wrote for the majority that the individual mandate was enforceable, and not unconstitutional as four dissenting Justices concluded. The host interrupted and said “a bad law.”

2. According to press reports, during a 2012 fundraising event, you said: “You have to have judges who appreciate what it is to be an American.” (Christy Stewart, *GOP Honors*

Lincoln; Judge Stephen McGlynn keynotes banquet, HARRISBURG DAILY REGISTER (Feb. 27, 2012))

a. What does it mean for a judge to “appreciate what it is to be an American”?

I think the reporter conflated two different concepts I spoke about at that event. I made several points. The first was that the Constitution mandated that all men are created equal and are equal under the law. Second, that government is limited and exists to serve the people. Government powers are not superior to individual rights. We are a nation of laws and not of men. It is important that we all appreciate how radical and unique this was when the Constitution was ratified. Therefore, judges needed to appreciate that they were on the bench to uphold the rule of law and not impose their own will. Finally, judges, under our American system, were not to pick favorites or treat one group, class, race or sex as better or inferior. There are no elites, and there is no difference between rich or poor. I think in an effort to consolidate or condense those thoughts, the reporter came up with “appreciate what it is to be an American.

b. Which judges were you referencing in this comment?

All judges.

3. According to your Senate Judiciary Questionnaire, you were a member of the Illinois Federation Right to Life in 2007.

a. Why did you join the Illinois Federation Right to Life?

To vote for my brother who was running to be a member of the board.

b. What did your membership in the Illinois Federation Right to Life entail?

Paying the modest annual dues to join, attending a meeting and voting for my brother.

c. Are you currently a member of any anti-choice organizations? If so, which?

No.

4. 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?

Never.

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

A district court judge is required to fully and faithfully apply all Supreme Court precedent, and any order or opinion must be written in a manner consistent with that duty.

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

I will give considerable thought to any decision issued by a fellow district court judge in my District on the same question or issue. However, the Supreme Court has held that the decision of a “federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” *Camreta v. Greene*, 563 U.S. 692, 709 (2011).

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

This rests with the sole consideration and purview of the Supreme Court.

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

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

Yes, if confirmed, I will fully and faithfully apply *Roe* and all Supreme Court and Seventh Circuit precedent.

b. Is it settled law?

Yes.

6. 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?**

Yes, if confirmed, I will fully and faithfully apply *Obergefell* and all Supreme Court and Seventh Circuit precedent.

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?

It would not be proper for me to opine on the correctness of an opinion; majority, concurring, or dissenting of a Supreme Court Justice. If confirmed, I will fully and faithfully apply *Heller*.

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

The majority opinion in *Heller* contained the following language, “nothing in our 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?

I believe the Supreme Court addressed that very question in the majority opinion. “We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens.” *Heller*, 554 U.S. 570, 625 (2008).

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?

In *Citizens United* the Supreme Court held that First Amendment protection extends to corporations. 558 U.S. 310, 342 (2010). If confirmed, I will fully and faithfully apply this and all Supreme Court and Seventh Circuit precedent. Going further, the question does implicate matters pending or impending in litigation. I believe the

Code of Conduct for United States Judges prevents me from expressing any further views in response to this question.

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

Please see my response to 8a.

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

In several cases, the Supreme Court has protected the free exercise of religion of associations and organizations. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Additionally, In *Burwell v. Hobby Lobby*, the Supreme Court held that “person” under the Religious Freedom and Restoration Act included “corporations.” 573 U.S. 682, 707-08 (2014). If confirmed I will fully and faithfully follow these cases and any Supreme Court or Seventh Circuit precedent interpreting them.

9. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

The Fourteenth Amendment states, in relevant part, “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” This provision protects the free exercise of religion. See *Cantwell v. Connecticut*, 210 U.S. 296 (1940). I will faithfully apply this case and the precedents of both the Supreme Court and Seventh Circuit that further interpret the contours and reach of this protection. I believe any further discussion of this specific question, beyond this answer, would be improper under the Code of Conduct of United States Judges, given pending or impending litigation.

10. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk’s sincerely held religious beliefs?

The Supreme Court held that the freedom to marry is a fundamental right that may not be deprived on the basis of race, and that state laws prohibiting interracial marriage violates the Equal Protection Clause of the Fourteenth Amendment. See *Loving v. Virginia*, 388 U.S. 1 (1967). Other federal laws, including but not limited to 42 U.S.C. Sec. 1981, prohibit discrimination on the basis of race under color of State law.

11. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist’s sincerely held religious beliefs?

The question whether the First Amendment limits the permissible scope of public accommodation laws as applied to persons with sincerely held religious beliefs is the subject of pending and impending litigation. Thus, I believe it would be inappropriate for me to express a personal belief or opinion on this issue. If confirmed, I will fully and faithfully apply all Supreme Court and Seventh Circuit precedent.

12. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.

After my name was forwarded to the White House and I interviewed at the Executive Office Building, I was introduced by a mutual friend to a gentleman whose name I do not presently recall. I learned he had some formal role at or was otherwise employed by the Federalist Society. He had previously been a judicial clerk in Missouri and we discussed some of the judges we both knew. I told him I was in Washington pursuing an appointment to the Federal bench. I did not ask for the organization's support and he made no offer. I have no knowledge of the Federalist Society taking any position as to my candidacy. I have not met with or spoken to this gentlemen since then.

13. On your Senate Judiciary Questionnaire, you state that you have been a member of the National Rifle Association (NRA) since 2005.

a. Are you currently a member of the NRA?

Yes.

b. If confirmed to the District Court, will you remain a member or renew your membership with the NRA?

It is not my present intent to renew my membership should I be confirmed a Federal District Court Judge.

c. Do you commit to recusing yourself from any cases that come before you that present legal issues upon which the NRA has taken a position? If not, why not?

I will strictly follow the recusal standard of 28 U.S.C. Sec. 455 if confirmed. I will also seek insight and guidance from the Administrative Office if I think it is appropriate to do so.

d. Can you cite any issue areas where you disagree with the NRA's publicly stated positions?

I am not sufficiently familiar with all the publicly stated positions of the NRA, so I am unable to answer this question. If confirmed, that organization's political and policies positions would simply not be relevant to how I would treat parties

before me or rule on question before me. I will fully and faithfully follow the law and precedents of the Supreme Court and Seventh Circuit.

e. Why did you join the NRA?

When I ran for office in 2006, it was important to many of my campaign volunteers that I belong, and I wanted to learn more about hunting and wild game.

14. 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 different 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?

No.

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?

No.

c. What are your "views on administrative law"?

I do not have "views on administrative law" other than I have years of experience following the law governing review of administrative decisions by courts. Illinois has a very deferential standard of review that controls review by Circuit Judges and Appellate Justices of the decisions of administrative agencies. I have dutifully followed those standards in sitting as a Circuit Judge reviewing decisions of administrative agencies in State court. I have also faithfully followed those standards when reviewing such decisions as a Justice on an Illinois Appellate Court. I will fully and faithfully follow all Supreme Court and Seventh Circuit precedent which relate to administrative law.

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

My district is home to coal-mining operations and coal-fueled power plants. It also is home to fossil fuel and oil drilling, production and refining. This issue is certainly implicated by pending or impending litigation in my district, and throughout the country. Thus, I believe the Canons of the Code of Conduct for United States Judges prohibits me from expressing a view on this matter.

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

I would consider the legislative history in construing a statute when Supreme Court or the Seventh Circuit precedent instructs it is permissible to do so, such as when the language of a statute is ambiguous. In *Exxon Mobil Corp. v. Allapattah Servs. Inc.* 545 U.S. 546 (2005), the Court instructed, “the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.” *Id.* At 567-71. Judges should also consider all arguments raised by litigants, including arguments related to legislative history.

17. 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 any outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I read the articles, rules, proposed rules and cases various Senators requested I review. I then drafted answers to each question posed by each Senator. I then forwarded my answers to the Office of Legal Policy of the Department of Justice. After receiving input from the Office of Legal Policy, I drafted final responses to these questions to be tendered to the Senate. Each answer is my own.