

**Nomination of Ralph Erickson to the U.S. Court of Appeals for the Eighth Circuit
Questions for the Record
Submitted August 1, 2017**

QUESTIONS FROM SENATOR FEINSTEIN

1. You have served as a federal district court judge for 14 years. **What are some of the most important lessons you've learned as a district court judge that you will bring to the Eighth Circuit, if you are confirmed?**

Response: The most important lessons I learned during my time on the bench are to treat all parties and counsel with respect, to be as well prepared for every hearing as humanly possible, and to decide every case consistent with the facts and law to the utmost of my ability.

2. You gave an interview for a book called "The Promise Fulfilled: A Portrait of Norwegian Americans Today." Based on your interview, the book states the following: "District Court Judge Ralph Erickson in Fargo, a fourth-generation Norwegian-American . . . made the observation that Scandinavians who appeared in front of his bench did not commit violent crimes; such felonies were more commonly associated with other ethnicities in the community."

- a. **Please provide some additional context for this statement. Why did you make this statement? And what did you mean by this statement?**

Response: While I have a vague recollection of being interviewed by the author, I have no recollection of ever making such a statement. On its face, the comment is completely unfounded and does not represent a belief I have ever held. I believe that whatever I may have said was misunderstood by the author or taken out of context.

- b. **Criminal defendants who come before you—especially defendants who do not have Scandinavian heritage—may be concerned that this statement indicates that you have biases about their likelihood of committing violent felonies, and that these biases may prevent them from getting a fair trial. Is that a fair concern? If not, why not?**

Response: To the best of my knowledge, I never made the statement attributed to me in the book and whatever comment I made was taken out of context by the author. As a state and federal trial court judge, I have presided over hundreds of cases involving litigants with different backgrounds, national origin, sex, religion, and race. These cases demonstrate a long record, over the course of more than two decades on the bench, of my strong commitment to equal justice before the law.

3. During your hearing, you offered to provide a copy of the sealed orders in *North Dakota v. Burwell* and *Catholic Benefits Association v. Burwell*, in which you entered a stay of the Health and Human Services rule interpreting section 1557 of the Affordable Care Act. **Please provide those orders to the Committee.**

Response: Please see attached order.

4. In 2015, you entered an injunction that blocked a regulation by the Environmental Protection Agency from taking effect. That regulation, known as the “Waters of the United States” rule, enlarged the number of bodies of water that the EPA can protect under the Clean Water Act.

- a. **It’s my understanding that part of your decision rested on your conclusion that the EPA’s decision was not supported by adequate evidence. How did you reach that conclusion?**

Response: *North Dakota v. U.S. Environmental Protection Agency*, Case No. 3:15-cv-00059 (D.N.D.) remains open on my docket, and I am precluded from publicly commenting on any pending case. See Canon 3, Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”). Please note, however, that my order granting the plaintiffs’ motion for injunction can be found at 127 F. Supp. 3d 1047 (N.D. 2015). In that order, I explained why I granted the motion.

- b. **As a general matter, when do you think it is appropriate for a court to defer to agency expertise and when do you think it’s appropriate for a court to second-guess an agency’s conclusions?**

Response: The Administrative Procedure Act (APA) states that a “reviewing court shall decide all relevant questions of law” and may set aside an agency’s decision only if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court explained how courts should treat an agency’s interpretation of an ambiguous statute that requires the agency to take some action. Courts should defer to an agency’s interpretation of such statutes unless it is unreasonable. I will faithfully apply *Chevron*, the APA, and all other binding administrative law precedent.

5. Please respond with your views on the proper application of precedent by judges.

- a. **Are you committed to following circuit court precedent if confirmed?**

Response: Yes, as a Circuit Judge, I am bound by all controlling circuit precedent. See, e.g., *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002) (“It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.”). I will apply such precedent faithfully and to the best of my ability.

- b. **When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?**

Response: All lower courts are bound by controlling Supreme Court precedent. Only the Supreme Court has “the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

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

Response: Lower court judges, and the courts they sit on, are bound by controlling Supreme Court precedent. In the past, I have commented on Supreme Court precedent. *See, e.g., Twombly v. City of Fargo*, 388 F.Supp. 2d 983, 986 (D.N.D. 2005) (noting that Supreme Court Establishment Clause jurisprudence is widely debated and incapable of succinct analysis). Even so, in all cases, I as well as all lower court judges are bound to follow Supreme Court precedent. I will apply such precedent faithfully and to the best of my ability.

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

Response: In the Eighth Circuit, the holding of a prior panel is binding on all subsequent panels unless it is overruled, undermined or abrogated by the Supreme Court or the Court of Appeals sitting *en banc*. *See Mader v. United States*, 654 F.3d 794, 798–800 (8th Cir. 2011) (*en banc*).

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

Response: As a sitting lower court judge, it is not appropriate for me to opine on what circumstances might be sufficient for the Supreme Court to overturn its own precedent. The Supreme Court determines when it is appropriate to overturn its precedent. *See Rodriguez de Quijas*, 490 U.S. at 484.

6. 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 textbook 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 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”?

Response: *Roe* is binding precedent on all lower courts. I am bound to apply binding precedent to all cases which come before me, both in my capacity as a District Judge and, if confirmed, as a Circuit Judge. Labelling a decision “super-stare decisis” or “superprecedent” is simply not a relevant concept for lower courts. Judges on lower courts are bound by their oaths to apply all controlling precedent. If I am fortunate enough to be confirmed, I will faithfully and to the best of my ability apply all controlling precedent.

b. Is it settled law?

Response: Please see the response to Question 6(a) above.

7. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry.

a. Is the holding in *Obergefell* settled law?

Response: *Obergefell* is binding precedent on all lower courts. I am bound to apply binding precedent to all cases that come before me, both as a District Judge and, if confirmed, as a Circuit Judge. I will faithfully and to the best of my ability apply all controlling precedent.

b. On June 30, the Texas Supreme Court issued a decision in *Pidgeon v. Turner* which narrowly interpreted *Obergefell* and questioned whether states were required to treat same-sex couples equally to opposite-sex couples outside the context of marriage licenses. The Texas Supreme Court stated that “The Supreme Court held in *Obergefell* that the Constitution requires states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but it did not hold that states must provide the same publicly funded benefits to all married persons, and... it did not hold that the Texas DOMAs are unconstitutional.” Is this your understanding of *Obergefell*?

Response: I am unfamiliar with *Pidgeon v. Turner* and have not studied the facts nor the law undergirding the decision. That said, *Obergefell* is binding precedent and must be applied by lower courts. I will faithfully, and to the best of my ability, apply all binding precedent whether serving as a District Judge or, if confirmed, as a Circuit Judge.

8. 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?

Response: Litigants frequently raise Second Amendment claims in criminal prosecutions in my court, a number of which are currently pending before me on my existing docket. Other such cases will invariably be presented to me. Under Canon 3 of the Code of Conduct for United States Judges, I “should not make public comment on the merits of a matter pending or impending in any court.” Having said that, *Heller* is binding on lower courts, and I will apply it—like all Supreme Court decisions—faithfully and to the best of my ability.

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

Response: Please see the response to Question 8(a) above.

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

Response: Please see the response to Question 8(a) above.

9. 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?**

Response: *Citizens United v. FEC* is precedent that binds all lower courts. My personal views are unrelated to my duty to apply all binding precedent to the best of my ability, which I promise faithfully to do.

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

Response: Please see the response to Question 9(a) above.

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

Response: Please see the response to Question 9(a) above.

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

Response: I received the questions on the evening of Tuesday, August 1, 2017. I reviewed the questions, drafted answers, and (as necessary) conducted research. I shared the answers with the Office of Legal Policy at the Department of Justice. After conferring with the lawyers there, I made revisions and authorized them to submit the responses on my behalf.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

The Religious Sisters of Mercy; Sacred Heart Mercy Health Care Center (Jackson, MN); Sacred Heart Mercy Health Care Center (Alma, MI); Alma, MI); SMP Health System; University of Mary;

and

State of North Dakota,

Plaintiffs,

vs.

Sylvia Burwell, Secretary of the United States Department of Health and Human Services; and United States Department of Health and Human Services,

Defendants.

Catholic Benefits Association, Diocese of Fargo, and Catholic Charities North America,

Plaintiffs,

vs.

Sylvia M. Burwell, Secretary of the United States Department of Health and Human Services; United States Department of Health and Human Services; Jenny R. Yang, Chair of the United States Equal Employment Opportunity Commission; and United States Equal Employment Opportunity Commission,

Defendants.

Civil File No. 3:16-cv-386

Civil File No. 3:16-cv-432

SEALED ORDER STAYING ENFORCEMENT

The above-captioned cases contain issues related to Section 1557 of the Affordable Care Act. Some of the rules at issue are set to take effect on January 1, 2017. Pending

before the court are the following motions in Case No. 3:16-cr-386: motion for preliminary injunction;¹ emergency motion for remittal of disqualification;² motion to expedite the plaintiffs' motion for preliminary injunction;³ and motion for a hearing.⁴ In Case No. 3:16-cr-432, there is a pending motion for a temporary restraining order⁵ that was filed on December 28, 2016, and in which a decision is sought before January 1, 2017.

On December 29, 2016, the undersigned sent to the parties a notice concerning waiver of judicial disqualification. Issues surrounding disqualification were not intended to be made public at this time. However, the plaintiffs in Case No. 3:16-cv-386 have filed "emergency" motions regarding the notice. In addition, the defendants in Case No. 3:16-cv-432 have stated they will need seven days to file a response to the notice.

In light of the uncertainty regarding which judge will address the merits of the case and the imminent deadline of January 1, 2017, the court **HEREBY ORDERS** that enforcement of Rule 1557 as against the named plaintiffs in these two cases be **STAYED** pending a determination on the recusal issues and until such time as a hearing can be held on the pending motions.

IT IS SO ORDERED.

Dated this 30th day of December, 2016.

/s/ Ralph R. Erickson
Ralph R. Erickson, District Judge
United States District Court

¹ Doc. #5.

² Doc. #21.

³ Doc. #21.

⁴ Doc. #22.

⁵ Doc. #3