

**Nomination of Richard Ernest Myers II to the United States District Court for the
Eastern District of North Carolina
Questions for the Record
Submitted September 18, 2019**

QUESTIONS FROM SENATOR FEINSTEIN

1. 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 lower court judges to depart from controlling Supreme Court precedent.

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 must faithfully apply Supreme Court precedent.

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

A district court decision is not binding. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). As such, a district court is not bound by another district court's ruling. In addition, Federal Rules of Civil Procedure 59(e) and 60 provide standards for a district court to set aside its prior rulings in a specific case. A district court should revisit or set aside its own decisions when they conflict with the precedent of the Supreme Court or the court of appeals where the district court is located.

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

Only the Supreme Court may overrule one of its own prior opinions. *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). As a judicial nominee, I do not believe it appropriate to comment on a role unrelated to my nomination to the federal district court bench. *See* Code of Conduct for United States Judges, Canons 2 and 5. If confirmed, I will faithfully apply all Supreme Court precedent.

2. In a 2013 radio interview, you discussed North Carolina's voter ID law, and said that there is a "significant state interest" in passing such laws. (July 16, 2013 NPR Interview)

a. Are you aware of any evidence showing that in-person voter fraud regularly occurs in the United States?

No.

- b. Please identify the evidence supporting your statement that there is a “significant state interest” in passing voter ID laws, in light of the fact that in-person voter fraud is extremely rare and evidence shows that voter ID laws disenfranchise large numbers of Americans, especially minorities.**

Voter confidence in the accuracy and fairness of election procedures and outcomes is critical in a democracy. I stated or agreed during the panel discussion that it was essential to support the rights of all citizens who wanted to vote, to apply any such laws in a non-discriminatory fashion and to do so in accordance with federal law. If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent and federal law concerning voter rights and election law. As a judicial nominee, I do not believe it appropriate to comment further on subject matter which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

3. 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”?**

Each and every Supreme Court decision is binding on all district courts. If confirmed, I will fully and faithfully apply *Roe v. Wade* and its successor cases.

- b. Is it settled law?**

Yes.

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?**

Yes. If confirmed, I will fully and faithfully apply *Obergefell v. Hodges*.

5. 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?

As a judicial nominee, I do not believe it appropriate to comment on the merits of or otherwise "grade" a dissenting opinion of the Supreme Court. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C). If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *District of Columbia v. Heller*.

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

In *District of Columbia v. Heller*, the Supreme Court stated that "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). If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Heller*. As a judicial nominee, I do not believe it appropriate to comment further on a question which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *District of Columbia v. Heller*. As a judicial nominee, I do not believe it appropriate to comment further on or otherwise "grade" the merits of an opinion of the Supreme Court. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

6. 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?

If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent concerning First Amendment rights and campaign finance law, including *Citizens United v. FEC*. As a judicial nominee, I do not believe it appropriate to comment further on a question which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

Please see my response to question 6(a).

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court provided some guidance regarding the rights of closely held corporations under the Religious Freedom Restoration Act of 1993. If confirmed, I will fully and faithfully follow all Supreme Court and Fourth Circuit precedent, including *Hobby Lobby*. As a judicial nominee, I do not believe it appropriate to comment further on a question which is or may be the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

7. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 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. 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 did not draft this statement and was previously unfamiliar with it. As such, I cannot comment on its meaning. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical topic of political and academic debate. See Code of Conduct for United States Judges, Canons 2(A) and 5(C).

b. How exactly does the Federalist Society seek to "reorder priorities within the legal system"?

I did not draft this statement and was previously unfamiliar with it. As such, I cannot comment on its meaning. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical topic of political and academic debate. See Code of Conduct for United States Judges, Canons 2(A) and 5(C).

c. What "traditional values" does the Federalist society seek to place a

premium on?

I did not draft this statement and was previously unfamiliar with it. As such, I cannot comment on its meaning. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical topic of political and academic debate. *See* Code of Conduct for United States Judges, Canons 2(A) and 5(C).

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

No.

8. On your Senate Judiciary Questionnaire, you state that you have been a member of the National Rifle Association (NRA) since 2010.

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?

I will not renew my membership.

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?

The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. *See* Code of Conduct for United States Judges, Canons 2 and 3. If confirmed, I will carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as any other applicable rules or guidance. As necessary and appropriate, I will also consult with colleagues and ethics officials within the court system. In every case, I will carefully consider whether recusal is necessary.

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

I am not generally familiar with the NRA's publicly stated positions. It is my understanding that there is currently pending or impending litigation which involve firearms laws. Because there may be litigation related to these questions, it would not be appropriate for me to opine on this issue. *See* Canon 3(A)(6), 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.").

e. Why did you join the National Rifle Association?

The Durham Pistol and Rifle Club requires its members to obtain NRA membership to have access to safety training and insurance.

9. 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?

My interview with White House counsel took place April 23, 2018. During the interview we discussed a variety of legal topics. Although I may have been asked about my knowledge of current issues related to administrative law, I do not recall any specific questions or answers on the topic.

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?

To the best of my recollection, no. I teach about the role of regulations and regulatory agencies in my criminal law, criminal procedure, and white collar crime courses.

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

If confirmed, I will faithfully apply all Supreme Court and Fourth Circuit precedent concerning administrative law and the Administrative Procedure Act.

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

It is my understanding that there is currently pending or impending litigation which involves theories based on the allegation of injuries caused by climate change. Because there may be litigation related to this question, it would not be appropriate for me to opine on this issue. *See* Canon 3(A)(6), 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.”).

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

The Supreme Court has generally instructed that judges may consider legislative history in certain limited circumstances when a statute is ambiguous, but where a statute is unambiguous, resort to legislative history is not appropriate. *See, e.g., Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). I will faithfully apply Supreme Court and other applicable precedent on the use of legislative history and, where appropriate, will carefully consider any arguments that the parties may advance on this issue.

12. 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.

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

I received these questions on Wednesday, September 18, 2019. I read them and prepared draft responses. I received comments on my draft responses, including from attorneys at the Department of Justice, Office of Legal Policy, and I considered those comments in making final revisions on Monday, September 23, 2019. The answers to these questions are my own.

Written Questions for Richard E. Myers II
Submitted by Senator Patrick Leahy
September 18, 2019

1. You have experience as an Assistant United States Attorney and have previously written about the need to ensure prosecutors remain impartial, particularly in public corruption cases.

(a) How important is it in your view that judges remain impartial and apolitical?

Our constitutional design creates a divided government with a system of checks and balances whereby each branch assumes specific responsibilities. Canon 1 of the Code of Conduct for United States Judges states that “[a]n independent and honorable judiciary is indispensable to justice in our society.” In protection of judicial independence, Article III provides that judges will serve for a period of good behavior and that judicial compensation will not be diminished during their continuation in office. This frees judges to follow and apply the constitution and laws. In this respect, I find the judicial oath of office particularly informative. *See* 28 U.S.C. § 453. If confirmed, I will uphold my judicial oath to “administer justice without respect to persons,” to “do equal right to the poor and to the rich,” and to decide cases “faithfully and impartially” under the laws of our nation.

2. In 2011, you authored an essay entitled “Complex Times Don’t Call for Complex Crimes” in which you expressed concern over the number of criminal regulations, Congress’ delegations of rulemaking authority to regulatory agencies, and the Supreme Court’s deferment to regulatory expertise under the *Chevron* regime.

(a) Do you have concerns with the administrative state generally or just criminally enforceable regulations?

If confirmed, I will faithfully apply all Supreme Court and Fourth Circuit precedent, including *Chevron U.S.A. Inc. v. Natural Resources Defense Council* and the Administrative Procedure Act. Because there is pending or impending litigation related to this question, it would not be appropriate for me to opine further on this issue. *See* Canon 3(A)(6), 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.”).

(b) In the same essay you wrote that criminal laws should reflect society’s moral judgments, rather than rely on the expertise of regulatory agencies. Do you maintain your belief that criminally enforceable regulations should not reflect the judgment of regulatory experts? Are you suggesting abandoning the *Chevron* regime?

In the article, I discussed criminal laws. I did not state that regulations should not reflect the judgment of experts. If confirmed, I will faithfully apply all Supreme Court and Fourth Circuit precedent, including *Chevron U.S.A. Inc. v. Natural Resources Defense Council* and the Administrative Procedure Act. Because there is pending or impending

litigation related to this question, it would not be appropriate for me to opine further on this issue. *See* Canon 3(A)(6), 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.”).

3. In 2013, you expressed in an interview regarding North Carolina’s voter ID law that you “support the idea in the abstract” but that the state should “do its absolute utmost to ensure that folks who don’t have these IDs can get them for free.” The Fourth Circuit later overturned that law, finding that the ID law targeted “African Americans with almost surgical precision.”

(a) Did you support North Carolina’s voter ID law as enacted? If not, would you have supported the law had the state made greater efforts to promote access to IDs?

Voter confidence in the accuracy and fairness of election procedures and outcomes is critical in a democracy. I stated or agreed during the panel discussion that it was essential to support the rights of all citizens who wanted to vote, to apply any such laws in a non-discriminatory fashion and to do so in accordance with federal law. If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent and federal law concerning voter rights and election law. As a judicial nominee, I do not believe it appropriate to comment further on subject matter which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

4. In 2013, you criticized North Carolina’s Racial Justice Act, which allowed capital defendants to challenge their death sentences if they could prove race was a significant factor in seeking or imposing the death penalty, as a “flank attack on the death penalty.”

(a) Do you maintain your support of the death penalty today?

I did not take a personal position for or against the death penalty. As a judicial nominee, I do not believe it appropriate to comment further on subject matter which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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.’”

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?

Determining the meaning of a statute requires examination of the text and structure of the statute, with consideration given as to how statutory provisions work together to form a consistent whole. The Supreme Court has instructed that in interpreting statutory text, it is proper to consider the words of a provision within the broader context of the statute as a whole. *See, e.g., Sturgeon v. Frost*, 139 S. Ct. 1066, 1084 (2019); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent concerning the methods for interpreting statutes.

6. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch 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?

Canon 1 of the Code of Conduct for United States Judges states that “[a]n independent and honorable judiciary is indispensable to justice in our society.” In protection of judicial independence, Article III provides that judges will serve for a period of good behavior and that judicial compensation will not be diminished during their continuation in office. This frees judges to follow and apply the constitution and laws. In this respect, I find the judicial oath of office particularly informative. *See* 28 U.S.C. § 453. If confirmed, I will uphold my judicial oath to “administer justice without respect to persons,” to “do equal right to the poor and to the rich,” and to decide cases “faithfully and impartially” under the laws of our nation. I do not believe it appropriate to comment further on a subject of current political debate, or on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

(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?

Please see my 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?

Under Supreme Court precedent, courts can review decisions by the President, including during times of war or other armed conflict. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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?

Separation-of-powers principles rely in part on comity and respect among the three co-equal branches of government. Accordingly, each branch should exhibit respect and deference to each other. If a party does not comply with a court order, the opposing party may seek injunctive relief or other remedies from the court to enforce that order.

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 states that Congress has the power to declare war as well as the power of the purse to make or deny appropriations, and assigns powers over war and foreign affairs to the President and Congress.

Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "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."

(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?

Under Supreme Court precedent, courts can review decisions by the President, including during times of war or other armed conflict. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent as well as any constitutional or statutory authority in this area.

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?

The Supreme Court has addressed the Executive Branch’s expertise in national security. *See, e.g., Clapper v. Amnesty Int’l*, 568 U.S. 398 (2013). As an inferior court judge, I will fully and faithfully apply all binding Supreme Court and Fourth Circuit precedent. Because there may be ongoing litigation implicating this issue, I cannot further comment.

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 of the Fourteenth Amendment applies to laws that make distinctions on the basis of gender, and that the government must demonstrate an “exceedingly persuasive justification” for such gender-based classifications. *United States v. Virginia*, 518 U.S. 515, 531 (1996). If confirmed, I will fully and faithfully follow all Supreme Court precedent, including *United States v. Virginia*.

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

If confirmed, I will fully and faithfully apply Supreme Court and Fourth Circuit precedent interpreting the Voting Rights Act.

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

Article I, section 9, clause 8 states: “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatsoever, from any King, Prince, or foreign State.”

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?

As a general matter, a district court relies on the parties to discover and place before the court the appropriate factual record under the rules of evidence, and an appellate

court then considers the record that has been developed in the court below. Established standards of review govern an appellate court's review of factual findings made in the district court. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Shelby County v. Holder*. As a judicial nominee, I do not believe it appropriate to comment further on a question which is or may be the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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"?

Each of these Amendments specifically provides that Congress has the power to enforce them "by appropriate legislation." U.S. Const., art. XIII, § 2; U.S. Const., art. XIV, § 5; U.S. Const., art. 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?

The Supreme Court established a fundamental right to personal autonomy as expressed in *Lawrence v. Texas* and other decisions. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Lawrence v. Texas*.

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 Supreme Court has stated that "the doctrine of stare decisis is of fundamental importance to the rule of law." *Hilton v. South Carolina Public Ry. Comm'n*, 502 U.S. 197, 202 (1991) (citation omitted). Adhering to prior precedent, while not an "inexorable command," constitutes "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tenn.*, 501 U.S. 808, 827 (1991). In determining whether to deviate from that preferred course of adhering to precedent, the Supreme Court may consider the unworkability of the prior decision, the antiquity of the precedent, the reliance interests at stake, and the quality of the prior reasoning. See *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009). It is never appropriate for lower courts to depart from Supreme Court precedent. See, e.g., *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Fourth Circuit precedent states that panel opinions are binding on lower courts, and that "[w]hen panel opinions are in direct conflict on a given

issue, the earliest opinion controls, unless the prior opinion has been overruled by an intervening opinion from this court sitting en banc, or the Supreme Court. *See McMellon v. United States*, 387 F.3d 329 (4th Cir. 2004).

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.

The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. *See* Code of Conduct for United States Judges, Canons 2 and 3. If confirmed, I will carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as any other applicable rules or guidance. As necessary and appropriate, I will also consult with colleagues and ethics officials within the court system, including ethics counsel. In every case, I will carefully consider whether recusal is necessary. I would recuse myself from any case in which I or a member of my family would be a party, a witness, or have a financial interest. I would recuse from cases involving institutions with which I have a financial account. I will also recuse myself from any cases where I may have served as an attorney or as a participant in a contested proceeding on behalf of former employers.

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?

Courts play a central role in protecting constitutional rights under the rule of law through the impartial application of the law. If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent, including precedent considering and applying footnote 4 of *United States v. Carolene Products* to protect “discrete and insular minorities.” As a judicial nominee, I do not believe it appropriate to comment further on questions which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C). For context, the full sentence quoted above from footnote 4 states, “It is unnecessary to consider now whether 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.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

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?**

If confirmed, and were such a matter to come before me, I will research and fully and faithfully apply all applicable Supreme Court and Fourth Circuit precedent regarding the presidential pardon power. As a judicial nominee, I do not believe it appropriate to comment further on questions which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

- 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 Constitution confers on the federal government certain enumerated powers, including Article I, Section 8, Clause 3 (the Commerce Clause) and Section 5 of the Fourteenth Amendment. The reach of those powers with respect to such provisions has been the subject of litigation and debate, with the Supreme Court deciding a number of cases in these areas. *See, e.g., Wickard v. Filburn*, 317 U.S. 11 (1942) (Commerce Clause); *United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Section 5 of the Fourteenth Amendment). If confirmed, I will fully and faithfully apply Supreme Court and Fourth Circuit precedent concerning the scope of congressional powers, including those addressing the Commerce Clause and Section 5 of the Fourteenth Amendment.

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?**

In *Trump v. Hawaii*, the Supreme Court held, among other things, that the challenged Proclamation was lawfully issued under the statutory authority granted by Congress in 8 U.S.C. § 1182(f). The Court held that "even assuming that some form of review is appropriate, plaintiffs' attacks on the sufficiency of the President's findings cannot be sustained" because the Proclamation "thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions." 138 S.Ct. 2392, 2409. The Court also held that "plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere." *Id.* The decision in *Trump v. Hawaii* is binding Supreme Court precedent. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Trump v. Hawaii*. As a judicial nominee, I do not believe it appropriate to comment further on questions which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

- 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 has held that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quotations omitted). If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent, including *Planned Parenthood v. Casey* and *Whole Woman's Health v. Hellerstedt*. As a judicial nominee, I do not believe it appropriate to comment further on specific examples which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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 Supreme Court developed the modern doctrine of qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and has refined it over time in cases such as *Pearson v. Callahan*, 555 U.S. 223 (2009). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent on qualified immunity. As a judicial nominee, I do not believe it appropriate to comment further on specific questions which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

26. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted “seismic shifts in digital technology”, such as the “exhaustive chronicle of location information casually collected by wireless carriers today.”

- (a) In light of *Carpenter* 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?

The Supreme Court in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), recognized that “[a]s technology has enhanced the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to ‘assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” *Id.* at 2214 (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). *See also, e.g., Riley v. California*, 573 U.S. 373, 402 (2014) (examining Fourth Amendment concerns involving modern cell phones). Congress has enacted the Electronic Communications Privacy Act, which imposes several statutory restrictions above and beyond those required by the Fourth Amendment on searches involving certain types of electronic communications. *See* 18 U.S.C. § 2518. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent on the Fourth Amendment’s protections against unreasonable search and seizure. As a judicial nominee, I do not believe it appropriate to comment further on specific questions which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

27. 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 previously researched this question and do not presently have considered views on it. If confirmed, and were such a matter to come before me, I will discern and fully and faithfully apply all applicable Supreme Court and Fourth Circuit precedent regarding presidential power in this respect. As a judicial nominee, I do not believe it appropriate to comment further on questions which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

28. 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?

An independent judiciary is an essential part of the design of the U.S. Constitution, as explained by Alexander Hamilton in Federalist No. 78, and as reflected in the text and design of the Constitution. Our constitutional design creates a divided government with a system of checks and balances whereby each branch assumes specific responsibilities. Canon 1 of the Code of Conduct for United States Judges states that “[a]n independent and honorable judiciary is indispensable to justice in our society.” In protection of judicial independence, Article III provides that judges will serve for a period of good behavior and that judicial compensation will not be diminished during their continuation in office. This frees judges to follow and apply the constitution and laws. I find the judicial oath of office, in 28 U.S.C. § 453, to reflect a commitment by all branches to that proposition. If confirmed, I will uphold my judicial oath to “administer justice without respect to persons,” to “do equal right to the poor and to the rich,” and to decide cases “faithfully and impartially” under the laws of our nation.

Nomination of Richard E. Myers II
to the United States District Court for the Eastern District of North Carolina
Questions for the Record
Submitted September 18, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

1. Your questionnaire indicates that you have been a member of the National Rifle Association (NRA) since 2010.

- a. What has your level of involvement with the NRA been over the last 9 years?

I have attended a hunter safety training course and range safety training courses taught by NRA-trained instructors.

- b. If confirmed, do you plan to remain an active member of the NRA?

No.

- c. If confirmed, do you plan to donate money to the NRA?

No.

2. Your questionnaire indicates that you have been a member of the Federalist Society since 2004, and the University of North Carolina Federalist Society Faculty Advisor since 2005.

- a. What has your level of involvement with The Federalist Society been over the last 15 years?

As faculty advisor, I have helped students sponsor speakers on a wide range of subjects related to the law. The significant preference has been for debates which present smart people discussing differing interpretation of the Constitution or laws of the United States, and I have occasionally served as a debater or as a debate moderator. I have also recorded podcasts for the Federalist Society previewing and describing Supreme Court decision interpreting criminal law provisions, drawing on my expertise as a professor of criminal law. I have attended four Supreme Court roundup presentations, where speakers described the cases decided in the prior term, and previewed the docket for the upcoming October term.

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

If appropriate and consistent with the rules on judicial presentations, I may accept invitations to speak regarding legal issues or court procedures.

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

No.

- d. Have you had contacts with representatives of the Federalist Society, in either their official or unofficial capacities, in preparation for your confirmation hearing? Please specify.

No.

3. 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?

I had not previously read or reviewed this material. I have done so, as requested.

- 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? Please explain your answer.

I am unfamiliar with the facts and circumstances reported in the Washington Post story. I believe that the inclusion of spending limits and disclosure requirements is a political question reserved in the first instance to Congress’s judgment. As a judicial nominee, I do not believe it appropriate to comment further on policy matters that are the subject of legislative consideration by Congress, or questions which are or may be the subject pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

Canon 1 of the Code of Conduct for United States Judges states that “an independent and honorable judiciary is indispensable to justice in our society.” I read the judicial oath of office, in 28 U.S.C. § 453, to reflect a commitment by all branches to that proposition. If confirmed, I will uphold my judicial oath to “administer justice without respect to persons,” to “do equal right to the poor and to the rich,” and to decide cases “faithfully and impartially” under the laws of our nation.

- 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?

I am unfamiliar with the facts and circumstances related to that statement. As such, I cannot comment on his meaning. Beyond this, please also see my response to Question 2(b).

- 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.

No.

- 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 am unfamiliar with the facts and circumstances related to that statement. As such, I cannot comment on his meaning. Beyond this, please also see my response to Question 2(b).

4. 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 that the metaphor means that umpires are bound to impartially learn, follow and administer the rules, I agree. The role of a judge is to fairly and impartially adjudicate cases within the constitutional boundaries of the judicial branch. Simply stated, judges should fairly and neutrally apply predetermined rules without favor or preference to one side or the other, and without placing himself or herself in the role of an adversary.

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

Practical considerations help guide a judge in cases where achieving an outcome is part of the statutory or constitutional scheme. To the extent that Supreme Court and Fourth Circuit precedent and applicable rules and statutes permit a judge to consider the practical consequences in rendering a decision on a particular issue, a judge may do so.

5. 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?

I believe that the question is intended to be an objective one, and is amenable to review on appeal.

6. 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?

A judge has a duty to treat all participants in the justice system fairly. Empathy permits a trial judge to ensure that the parties, witnesses and other participants are given the opportunity to be heard. Ultimately, a judge’s decisions must be based on applicable law and relevant facts, and not on personal feelings. If confirmed, I will uphold the judicial oath of office, which requires judges to “administer justice without respect to persons,” to “do equal right to the poor and to the rich,” and to decide cases “faithfully and impartially” under the laws of our nation. 28 U.S.C. § 453.

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

Judges may use reason and their experiences to inform their role in determining the issues of fact that come before them. Ultimately, a judges' decisions must be based on applicable law and relevant facts, and not on personal feelings. If confirmed, I will uphold the judicial oath of office, which requires judges to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to decide cases "faithfully and impartially" under the laws of our nation. 28 U.S.C. § 453.

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?

A judge is bound to follow all lawful orders from a superior court.

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?

Article III, the Sixth and the Seventh Amendments all reflect a constitutional commitment to having members of the community serve as factfinders in our system of law.

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

All commitments in the Bill of Rights should be considered by judges when adjudicating cases. If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent, including precedent with respect to the Seventh Amendment. As a judicial nominee, I do not believe it appropriate to comment further on a question which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

- 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?

Please see my response to question 8(b).

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

The Supreme Court has issued several opinions analyzing the level of deference that should be given to fact-findings by Congress in situations where they support expanding or limiting individual rights, including *City of Boerne v. Flores*, 521 U.S. 507 (1977). If confirmed, I will fully and faithfully follow Supreme Court and Fourth Circuit precedent with respect to this issue.

10. 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.

Advisory Opinion #116 appears to summarize and emphasize particular aspects of the Code of Conduct for United States Judges and the Code of Conduct for Judicial Employees with respect to educational seminars. I commit to abide by and consider both Codes in the execution of my judicial duties, including with respect to participation in educational seminars.

- 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?

Please see my response to question 10(c). I commit to taking appropriate action whenever I become aware of the possibility that sponsoring organizations of educational programs might attempt to gain influence with participating judges, including conferring with ethics counsel as appropriate.

**Nomination of Richard E. Myers II, to be United States District Court Judge
for the Eastern District of North Carolina
Questions for the Record
Submitted September 18, 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?

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

Yes, in accord with Supreme Court and Fourth Circuit precedent.

- 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, as directed by Supreme Court and Fourth Circuit precedent. The Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997), set forth the analysis for whether a right is deeply rooted in the nation's history and tradition, stating that it involves "examining our Nation's history, legal traditions, and practices." The Court directed inquiry to historical practice under the common law, the practice in the American colonies, historical state statutes, judicial decisions, and long-established traditions.

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

Yes. I will consider whether Supreme Court and circuit precedent, and will consider out of circuit precedent as persuasive authority.

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

Yes. I will consider whether Supreme Court and circuit precedent previously recognizing any similar right constitutes persuasive authority.

- 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*).

Both *Planned Parenthood v. Casey* and *Lawrence v. Texas* are binding Supreme Court precedent. If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent.

f. What other factors would you consider?

I will research and apply any factors that the Supreme Court and the Fourth Circuit deem appropriate.

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

Binding Supreme Court precedent holds that the Equal Protection Clause of the Fourteenth Amendment applies to both race-based classifications and gender-based classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

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?

Any abstract debate about the intent of the individuals who passed the Fourteenth Amendment does not affect the binding nature of Supreme Court precedent. If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent, including the precedent cited above.

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?

I am unaware why *United States v. Virginia* was filed at the time it was, instead of earlier. Regardless, please see my response to Question 2(a).

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*, 135 S. Ct. 2584, 2607 (2015), the Supreme Court held that the Fourteenth Amendment requires that same-sex couples be afforded the right to marry "on the same terms as accorded to couples of the opposite sex." If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent, including *Obergefell*. As a judicial nominee, I do not believe it appropriate to comment further on questions which are or may be the subject of pending or impending litigation. *See Code of Conduct for United States Judges*, Canons 2(A), 3(A)(6), and 5(C).

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

Equal protection of the laws is a core commitment of the Fourteenth Amendment, and is an essential component of the rule of law. As a judicial nominee, I do not believe it appropriate to comment further on questions which are or may be the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

The Supreme Court established a constitutional right to privacy protecting a woman's right to use contraceptives in a series of cases, in cases including *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent, including *Griswold* and *Eisenstadt*.

- 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 established a constitutional right to privacy protecting a woman's right to obtain an abortion in a series of cases, including *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent, including these decisions.

- 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 established a constitutional right to privacy protecting intimate relations between two consenting adults, regardless of their sexes or genders, in a series of cases, including *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent, including *Lawrence* and *Obergefell*.

- 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.

Please see my responses 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 to consider evidence that sheds light on our changing understanding of society?

If confirmed, I will apply all Supreme Court and Fourth Circuit precedent that states when it is appropriate to consider such evidence.

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

Sociology, scientific evidence, and data may all be appropriate tools for judicial decision making, depending on the nature of the particular issue within a particular case. Under Rule 702 of the Federal Rules of Evidence as well as precedent in the *Daubert / Joiner / Kumho Tire* line of cases, expert opinions from these disciplines may be admissible into evidence. If confirmed, I will fully and faithfully apply Supreme Court and Fourth Circuit precedent establishing what role these sources should play in a given case, including precedent with respect to judicial notice and admissibility of expert opinion.

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?

Obergefell is binding Supreme Court precedent. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court stated, “Our 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.” 138 S. Ct. 1719, 1727 (2018). If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent, including *Obergefell* and *Masterpiece Cakeshop*.

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

Please see my response to question 5(a).

6. You are a member of the Federalist Society, a group whose members often advocate an “originalist” interpretation of the Constitution.

- a. 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. 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?

I am aware of the academic debate regarding originalism and the Supreme Court’s decision enforcing the Fourteenth Amendment in *Brown v. Board of Education*, including scholars who have argued for and against the proposition. Debate notwithstanding, the Supreme Court has made clear in numerous decisions that racial discrimination has no place under our Constitution. If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent, including *Brown* and successor cases.

- 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 Sept. 18, 2019).

I am not familiar with this article or these authors’ argument. I am aware that determining the original public meaning of a constitutional provision can be difficult, and that precedent reflects that. Beyond this, if confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent, including instructions to lower courts on the factors to be considered in deciding the scope of constitutional rights.

- 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?

As a district judge, the original public meaning of a constitutional provision is dispositive when the Supreme Court has decided that it is dispositive. Where the Supreme Court or Fourth Circuit has decided that some other mode of interpretation is the proper mode of interpreting a constitutional provision, that decision is binding. If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent, regardless of methodology.

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

See my response to 6(c) above.

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

If confirmed, I will fully and faithfully apply all relevant Supreme Court and Fourth Circuit precedent that identifies the appropriate sources to use in discerning the contours of a constitutional provision.

7. In your 2008 article titled “Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment,” you stated that the majority in *Roe v. Wade* improperly substituted their “own sense that times have changed” for the will of the citizenry and thereby, “exacerbated a critical social and political divide and politicized the selection of Supreme Court justices in *Roe v. Wade* and subsequent abortion cases.”

- a. What is the distinction between a constitutional right articulated by the Supreme Court and a constitutional right established by the citizenry?

I have never drawn a distinction between a constitutional right articulated by the Supreme Court and a constitutional right established by the citizenry. As an academic, my role was to consider and critique legal doctrine. In the article, I discussed the political effect of the *Roe* decision. As a judge on an inferior court, my duty will be to faithfully apply all precedent of the United States Supreme Court and the Fourth Circuit, including *Roe v. Wade* and its progeny. If confirmed, I will fully and faithfully apply all relevant Supreme Court and Fourth Circuit precedent.

- b. Is this an instance when it is appropriate to consider evidence that sheds light on our changing understanding of society?

Please see my answer to question 6(c) above.

8. In your 2011 article titled “Complex Times Don’t Call for Complex Crimes,” you stated that “[r]egulation has exploded, in part because Congress has ceded significant portions of the lawmaking field to regulators with massive delegations of rulemaking authority, and the Supreme Court has concurred, with the virtual death of the non-delegation doctrine and the birth of the *Chevron* regime.” You outlined the purpose of the article as addressing “concerns that arise when the legislature passes statutes that will render as yet undefined conduct criminal, on the basis of forthcoming regulations, especially when it gives that power through multiple statutes to multiple agencies in overlapping fields.”

- a. Do you agree that *Chevron* remains good law?

Yes.

- b. Are existing limits on the application of *Chevron* deference sufficient to prevent agencies from overstepping their interpretative authority?

Because there may be pending or impending litigation implicating this issue, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” See also Canons 2 and 5, Code of Conduct for United States Judges.

- c. If a statute is ambiguous, what is the appropriate level of deference that should be afforded to an administrative agency's interpretation?

If confirmed, I will faithfully apply all Supreme Court and Fourth Circuit precedent, including *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Adams Fruit Co. v. Barrett*, 494 U.S. 638, (1990), *Smith v. Berryhill*, 587 U.S. __ (2019), laying out standards for review of administrative agency action, and the Administrative Procedure Act. Because there is pending or impending litigation related to this question, it would not be appropriate for me to opine further on this issue. *See* Canon 3(A)(6), 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.”).

**Questions for Richard Myers
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.

Nomination of Richard E. Myers II
United States District Court for the Eastern District of North Carolina
Questions for the Record
Submitted September 18, 2019

QUESTIONS FROM SENATOR BOOKER

1. In a September 2015 article, you said that, “the death penalty remains an effective bargaining chip in investigations, particularly in persuading defendants to provide more information about criminal organizations and their leaders.”¹

- a. Your comments suggest that you support the death penalty. Is that accurate?

I have never taken a public position on the death penalty. As a criminal law professor, I discussed the arguments on both sides of the debate in response to questions from a reporter. If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent and federal law concerning the death penalty. As a judicial nominee, I do not believe it appropriate to comment further on subject matter which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

- b. Do you believe the death penalty deters crime? If so, please cite the evidence you rely upon to support your assertion.

I am aware of the academic debate regarding the potential deterrent effects, pro and con. I have never taken a public position on the efficacy of the death penalty as a deterrent. If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent and federal law concerning the death penalty. As a judicial nominee, I do not believe it appropriate to comment further on subject matter which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

- c. Do you believe the death penalty is applied equally across racial and ethnic lines?

I am aware of the academic debate regarding the application of the death penalty across racial and ethnic lines. I have never taken a public position. If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent and federal law concerning the death penalty. As a judicial nominee, I do not believe it appropriate to comment further on subject matter which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

- d. If confirmed, what would you do to ensure that the death penalty is not disproportionately applied to people of color?

If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent and federal law concerning the death penalty, including precedent that bars invidious discrimination in charging and punishment. As a

judicial nominee, I do not believe it appropriate to comment further on subject matter which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

2. In 2018, you authored a law review article entitled “Police-Generated Digital Video: Five Key Questions, Multiple Audiences, and a Range of Answers.”² In this article you express concerns about the growing use of body-worn cameras by law enforcement and argued that the use of always-on cameras “materially alters the privacy balance for the officers themselves.”³

- a. Do you believe that the negative aspects of continually recording body-worn cameras outweigh the benefits?

In the article, I stated that “given the tradeoffs inherent in public policy, I propose no correct answers. Instead, I suggest that having all of the interested voices at the table when these questions are translated into policy will lead to a wide range of different choices that reflect the values and compromises appropriate for the polity that makes them.”

- b. What do you believe are some of the benefits of always-on body-worn cameras?

In the article, I stated that “the always-on option creates the fewest opportunities for manipulation by the officer. It means the video will reflect the full range of the encounters in which the officer engages. It also raises the highest risk for privacy and implicates the privacy of the public as well as the privacy of the officers.”

3. In a 2013 article entitled “Fourth Amendment Small Claims Court” you present a new remedy for fourth amendment violations.⁴

- a. Do you believe that the exclusionary rule effectively deters Fourth Amendment violations? Please explain your answer.

In the article, I noted that suppression does not apply in cases where no evidence is found, and may insulate many cases from judicial review.

4. *Miranda v. Arizona* is a longstanding pillar of Fifth Amendment jurisprudence and established foundational protections for persons who find themselves in the inherently

¹Michael Gordon, “New death penalty cases could be brought in suspected gang killings of Lake Wylie couple,” *The Charlotte Observer* (Sept. 21, 2015), available at <https://www.charlotteobserver.com/news/local/crime/article35966040.html>.

²Richard E. Myers II, *Police-Generated Digital Video: Five Key Questions, Multiple Audiences, and a Range of Answers*, 96 N.C. L. Rev. 1237 (2018).

³SJQ attachments at p. 1124.

⁴Richard E. Myers II, *Fourth Amendment Small Claims Court*, 10 Ohio St. J. Crim. L. 571 (2013).

coercive setting of a police interrogation. You listed two speeches in your Senate Judiciary Questionnaire that seem to suggest that you believe that *Miranda* was incorrectly decided.

- a. Is it accurate to say that in those speeches you questioned whether *Miranda* was correctly decided? If not, please explain the content of those two speeches and why that characterization is inaccurate.

I have discussed the differing opinions in *Miranda v Arizona* and *United States v. Dickerson*, and the extent to which the Court discussed the justification for prophylactic rules. In the *Dickerson* opinion, the Court stated, “*Miranda* announced a constitutional rule that Congress may not supersede legislatively. We decline to overrule *Miranda* ourselves.” It also stated: “Whether or not we would agree with *Miranda’s* reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.”

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

I do not consider myself as exclusively an originalist or textualist, terms which have contested meanings. I do believe that the original public meaning of constitutional and statutory texts must be considered when interpreting and applying any such text. The Supreme Court has looked to the original public meaning of texts and considered that meaning relevant when interpreting those texts in certain contexts. The Supreme Court has also repeatedly stated that statutory interpretation begins with the text, and where the text is clear, that is the end of the inquiry. If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent, including precedent concerning the appropriate modes of constitutional and statutory interpretation.

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

Please see my response to question 5.

7. 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 stated that consideration of legislative history may be appropriate when the text of a statute is ambiguous. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). When the text of a statute is ambiguous, parties often cite legislative history in their briefs in aid of their textual

analysis. If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent, including precedent concerning statutory interpretation and the use of legislative history.

- 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?

Please see my response to question 7(a).

8. 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?

Judges have a duty to decide the case before them, subject to constitutional, legal and jurisdictional limitations and the case or controversy requirement. The Supreme Court has referred to set of canons of construction that guide the appropriate scope of judicial decisionmaking, such as the doctrines of stare decisis, respect for precedent, constitutional avoidance and respect for coordinate branches of government. Collectively, these doctrines comprise judicial restraint.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.⁵ Was that decision guided by the principle of judicial restraint?

If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent including *District of Columbia v. Heller*. As a judicial nominee, I do not believe it appropriate to comment further on a question which is or may be the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁶ Was that decision guided by the principle of judicial restraint?

If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent concerning First Amendment rights and campaign finance law, including *Citizens United v. FEC*. As a judicial nominee, I do not believe it appropriate to comment further on a question which is or may be the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.⁷ Was that decision guided by the principle of judicial restraint?

If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent including *Shelby County v. Holder*. As a judicial nominee, I do not believe it appropriate to comment further on a question which is or may be the subject of pending or impending litigation. See Code of Conduct for United States Judges,

Canons 2(A), 3(A)(6), and 5(C).

⁵ 554 U.S. 570 (2008).

⁶ 558 U.S. 310 (2010).

⁷ 570 U.S. 529 (2013).

9. In a 2013 interview with NPR, you spoke about a North Carolina's voter ID law.⁸ In the interview you seem to suggest that you supported the law as long as it was implemented correctly. 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. Did you support North Carolina's 2013 voter ID law? If so, please explain why you supported the law.

I have never taken public position on the voter ID law. As a judicial nominee, I do not believe it appropriate to comment further on a question which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

I have not personally studied or written about this issue. As a judicial nominee, I do not believe it appropriate to comment further on a question which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

I have not personally studied or written about this issue. As a judicial nominee, I do not believe it appropriate to comment further on a question which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

Please see my response to question 9(d).

10. 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?

I am aware of the literature which asserts that this is the case, and the scope of the debate. Racial bias is unacceptable in our criminal justice system, and it is the duty of every judge to do what they can to keep our system free from invidious bias.

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

Yes.

⁸ NPR, *supra* note 6.

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.*

- 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.

Michelle Alexander, *THE NEW JIM CROW*; Justin Levinson and Robert J. Smith, *Systemic Implicit Bias*, 126 *Yale L.J. F.* 406; *IMPLICIT RACIAL BIAS ACROSS THE LAW*, Justin D. Levinson and Robert J. Smith; Joshua Dressler and Steven Garvey, *CRIMINAL LAW*, Joshua Dressler and Alan Michaels, *UNDERSTANDING CRIMINAL PROCEDURE*, Joshua Dressler and George Thomas, *CRIMINAL PROCEDURE: INVESTIGATING CRIME*; 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.

- 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 aware of the multivariate analyses considered by the United States Sentencing Commission, as well as gaps in the data. I think there are a combination of factors at play, some of which are within the control of judges and require a commitment to fair outcomes for individuals of all races. As a judicial nominee, I do not believe it appropriate to comment further on a question which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

- 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 think there are a combination of factors at play, some of which are within the control of judges and require a commitment to fair outcomes for individuals of all races. I am aware of the court's decision in *United States v. Armstrong*, 517 U.S. 456 (1996), which bars selective prosecution on the basis of race. As a judicial nominee, I do not believe it appropriate to comment further on a question which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

- 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?

Each judge has a responsibility to attend to their decisions under the United States Sentencing Guidelines; the federal sentencing statute, 18 U.S.C. 3553; *United States v. Booker*, *United States v. Gall*, and succeeding cases and policies regarding departure from the sentencing guidelines. If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent including *Booker* and *Gall*. As a judicial nominee, I do not believe it appropriate to comment further on a

question which is or may be the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

11. 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 am not aware of this literature and do not have sufficient information to reach a conclusion.

- 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 am not aware of this literature and do not have sufficient information to reach a conclusion.

12. 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.

13. 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.

14. 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.

Yes. I have taken this position publicly in my role as a professor.

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).

15. 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. I have taken this position publicly in my role as a professor.

16. 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?

No.

17. 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?

As a judicial nominee, it would not be appropriate for me to opine on political comments regarding particular cases. *See* Canons 3(A)(6) and 5, Code of Conduct of United States Judges.

18. 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 “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). I will faithfully apply the applicable Supreme Court and Fourth Circuit precedent in this area. As a judicial nominee, I do not believe it appropriate to comment further on an question which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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 September 18, 2019
For the Nomination of**

Richard E. Myers II, to the U.S. District Court for the Eastern District of North Carolina

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

- a. **What is the process you would follow before you sentenced a defendant?**

Every defendant has a right to individualized attention to the appropriate sentence in their case, consistent with fair application of the law. As a judge, I would seek to ensure that any sentence is “sufficient, but not greater than necessary, to comply with the purposes” of federal sentencing set forth by Congress. *See* 18 U.S.C. § 3553(a). To meet that goal, I would consult the indictment, the governing statutes, and applicable precedent. I would also carefully review the presentence report of the probation officer pursuant to 18 U.S.C. § 3552, along with the advisory Sentencing Guidelines and other factors set forth in § 3553(a). I would also consider the arguments and objections of the parties, motions for upward or downward departure, as well as any statements from the defendant, victims, and witnesses.

- b. **As a new judge, how do you plan to determine what constitutes a fair and proportional sentence?**

In addition to the factors stated above, I would seek statistics from the administrative office of the courts regarding my own cases and the extent to which they tracked national practice.

- c. **When is it appropriate to depart from the Sentencing Guidelines?**

Supreme Court precedent and the advisory Sentencing Guidelines explain the circumstances and considerations that can justify a departure or variance from the Guidelines. Part K of Section 5 of the Guidelines lists specific circumstances that can justify a departure from the advisory Guidelines range. Under Supreme Court precedent, the factors listed in 18 U.S.C. § 3553(a) may also call for varying from the advisory Guidelines range. In addition, the Supreme Court and the Fourth Circuit have provided guidance to district courts regarding appropriate departures. If confirmed, I would fully and faithfully follow all applicable law and precedent when considering departures from the Sentencing Guidelines.

- d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or

indeterminate sentencing.¹

i. **Do you agree with Judge Reeves?**

I believe that the inclusion of mandatory minimum sentences in criminal statutes is reserved to Congress's judgment. As a judicial nominee, I do not believe it appropriate to comment further on policy matters that are the subject of legislative consideration and debate by Congress. *See* Code of Conduct for United States Judges, Canons 2(A) and 5(C). If confirmed, I would fully and faithfully apply federal sentencing laws as determined by Congress and as required by Supreme Court and Fourth Circuit precedent.

ii. **Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?**

Please see my answer to Question 1(d)i above.

iii. **Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.**

Please see my answer to Question 1(d)i above.

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.² **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

1. **Describing the injustice in your opinions?**

I am aware that mandatory minimum sentences have generated significant controversy and debate. I am also aware of the debate regarding judges using judicial opinions to publicize their disagreement with a law, as opposed to acting through other channels. If I am confirmed, I would evaluate each case individually and would carefully consider the law and my ethical obligations, consistent with my duty to apply federal sentencing laws as determined by Congress and as required by Supreme Court and Fourth Circuit precedent.

¹ <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>

² *See, e.g.*, "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

2. Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?

The separation of powers among the coordinate branches of federal government places charging policies and decisions exclusively with the Executive Branch. If confirmed, I would be bound to respect the separation of powers built into the constitutional framework, and the rules regarding ex parte contact. However, if I am aware of ethical violations by prosecutors, I would not hesitate to consider and take appropriate action consistent with my oath of office.

3. Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?

The separation of powers among the coordinate branches of federal government places the clemency power exclusively with the Executive Branch. If confirmed, I would be bound to respect the separation of powers built into the constitutional framework.

- e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are “generally appropriate for first offenders not convicted of a violent or otherwise serious offense.” **If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent and federal law concerning sentencing.

2. 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?**

Yes.

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

I am aware of the literature suggesting racial disparities in charging and sentencing. I am aware of the multivariate analyses considered by the United States Sentencing Commission, as well as gaps in the data. I think there are a combination of factors at play which may lead to these outcomes, some of which are within the control of judges and all of which require a commitment to fair outcomes for individuals of all races. As a judicial nominee, I do not believe it appropriate to comment further on a question which is or may be the

subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

3. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

a. **Do you believe it is important to have a diverse staff and law clerks?**

Yes.

b. **Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

If confirmed, I will encourage qualified candidates from all backgrounds, including qualified minorities and women, to apply for a position in my chambers, and to any position over which I as a judge might have hiring authority. I will give serious and equal consideration to every individual who applies.