Nomination of David Stras to the U.S. Court of Appeals
for the Eighth Circuit
Questions for the Record
December 6, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. At a 2008 Federalist Society event, after you disagreed with an audience member's suggestion to repeal the Fourteenth Amendment, you said: "I have faith in our activist judiciary in that if we repealed the Fourteenth Amendment, I'm pretty sure they would find some other penumbra of rights that would do everything that the Fourteenth Amendment would do." ("Judicial Tenure: Life Tenure or Fixed Nonrenewable Terms?," Nov. 21, 2008.)

a. What did you mean by "our activist judiciary?"

RESPONSE: The panel required us to debate the merits of life tenure for judges and to evaluate a reform proposal to amend the United States Constitution to allow nonrenewable, fixed 18-year terms for Supreme Court Justices. My view of the issue was that life tenure during "good behaviour" under Article III, § 1 and the independence of the judiciary should be preserved, building on my co-authored article (with Ryan W. Scott) entitled, *Retaining Life Tenure: The Case for a Golden Parachute*, 83 WASH. U.L.Q. 1397 (2005). I do not recall the specific basis for this statement, which I made as a law professor, but it may have related to the point we made about the counter-majoritarian function of the judiciary in our tripartite system of government, a point we emphasized in the article. *Id.* at 1424.

b. What did you mean when you said "they would find some other penumbra of rights that would do everything the Fourteenth Amendment would do"?

RESPONSE: My reference was to the fact that the Supreme Court of the United States, beginning with *Griswold v. Connecticut*, 381 U.S. 479 (1965), has recognized certain rights as fundamental because "specific guarantees in the Bill of Rights have penumbras." *Id.* 484. These rights, to the extent that they do not arise out of the Fourteenth Amendment itself, are incorporated and applicable to the states through the Fourteenth Amendment.

c. Do you believe the Fourteenth Amendment protects a right to privacy?

RESPONSE: The Supreme Court has held in numerous cases that the Fourteenth Amendment protects privacy rights. If I am fortunate enough to be confirmed to the Eighth Circuit, I will faithfully follow all binding precedents of the Supreme Court and the Eighth Circuit on this issue and others.

2. In 2011, the Minnesota Supreme Court ruled 5-2 that trial courts can allow expert testimony on how rape victims behave after an assault. In that case, a victim reported a rape a few hours after the assault and had no physical injuries. The defendant claimed it was consensual. (*State v. Obeta*, 796 N.W.2d 282 (Minn. 2011).) Prosecutors were initially barred from presenting expert testimony showing that the rape victim's behavior and lack of injuries were common.

However, a majority of the Minnesota Supreme Court ruled that such testimony could be allowed,

and stated: "This record demonstrates that many jurors may wrongly believe that most sexual-assault victims will forcefully resist their assailant, suffer severe physical injuries…and immediately report the attack." You dissented on procedural grounds—you did not think the case was at the stage for the court to consider the issue.

a. Do you agree with the majority that expert testimony on typical rape victim behavior can help correct juror misimpressions and that trial courts should have the discretion to admit this testimony?

RESPONSE: In *Obeta*, I would have concluded, along with Justice Alan Page, that the Minnesota Supreme Court lacked appellate jurisdiction over the State's pretrial appeal. I did not address—and I have never directly addressed—whether expert testimony explaining the behavior of rape victims is admissible in a criminal case. It would be inappropriate to comment further, because *Obeta* is a majority opinion, applicable to future cases that may come before me as a Justice of the Minnesota Supreme Court, and litigants must be confident that I will keep an open mind if I am asked to interpret or apply *Obeta* in a future case. *See State v. Finch*, 865 N.W.2d 696, 705 (Minn. 2015) ("Judges must remain impartial by not prejudging; they must 'maintain[] an open mind."); *see also* Minnesota Code of Judicial Conduct, Rule 2.10(B) ("A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative activities of the office.").

And at your hearing, in response to Senator Tillis' questions, you described the issue in the case as one that "may be an interesting question of first impression, but ultimately it didn't follow the rule, and therefore we couldn't decide it." However, in your dissent, you wrote that the court could consider the case if "the interests of justice require review." You did not believe that "the interests of justice" were satisfied in the case.

b. Given the issue of expert testimony in sexual assault trials impacts many victims across Minnesota, why did you determine that "the interests of justice" did not require review in this case?

RESPONSE: My dissent in *State v. Obeta*, 796 N.W.2d 282, 297-98 (2011) (Stras, J., dissenting), explains the reasons for my conclusion that the appeal was not reviewable in the "interests of justice."

3. This year, for your presentation at a Federalist Society event, one of your presentation slides reads with respect to the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program: "Judge Gorsuch's commitment to reining in agency overreach may indicate that he would have been a fifth vote to deny DHS the authority to implement such a sweeping program." ("Gauging Gorsuch: What His Confirmation Could Mean for the Court," April, 19, 2017.)

a. What about the DAPA program do you believe makes it an example of "agency overreach"?

RESPONSE: This statement, based on the views expressed in then-Judge Gorsuch's opinions

while serving on the United States Court of Appeals for the Tenth Circuit, constituted commentary on his opinions; they were not a reflection or statement of my own views. If confirmed, I will evaluate any potential challenge to the DAPA program by reading the briefs, listening to the arguments of the parties, and applying any applicable precedent of the Supreme Court and the Eighth Circuit.

4. In a 2008 law review article about the judicial confirmation process, you asserted that "the [Supreme] Court's own ventures into contentious areas of social policy – such as school integration, abortion, and homosexual rights – have raised the stakes of confirmation battles even higher." You describe these areas as "social policy."

a. Do you believe the Supreme Court's decision in *Brown v. Board of Education* established a right?

RESPONSE: The Fourteenth Amendment established a right to equal protection of the law, and the Supreme Court's landmark decision in *Brown v. Board of Education* applied that right. It overruled the Supreme Court's detestable decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

b. Do you believe the Constitution allows states to maintain separate schools for black students and white students?

RESPONSE: As the Supreme Court ruled in *Brown v. Board of Education*, a state system of separate schools based on race violates the Equal Protection Clause of the Fourteenth Amendment.

c. Do you believe the Constitution protects a woman's privacy and right to choose?

RESPONSE: The Supreme Court held in *Roe v. Wade* that the Constitution protects a woman's right to an abortion. If I am fortunate enough to serve on the Eighth Circuit, I will faithfully follow all binding precedents of the Supreme Court and the Eighth Circuit.

d. What did you mean that these decisions "raised the stakes of confirmation battles"?

RESPONSE: When I wrote the referenced book review essay, I did so as a law professor, not as a judge. I was describing the factors that have increased political polarization surrounding the judicial nomination process over the past several decades. The statement was based on the historical analysis in BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES (2006), and JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007), the two books I reviewed in the essay.

5. In 2008, you co-authored a law journal article about the Supreme Court nominations process. (*Navigating the New Politics of Judicial Appointments*, 101 NW. L. REV. 1869 (2008).) In the article, you wrote, "a willingness to vindicate constitutional claims concerning 'such topics as marital privacy, abortion, and gay rights,' regardless of their support in the constitutional text, would seem to place a Justice to the left of the fault line in constitutional adjudication that is *Roe v. Wade*."

a. What did you mean "regardless of their support in the constitutional text," with

respect to contraception, women's reproductive rights, and LGBT rights?

RESPONSE: I wrote this article with a co-author (Ryan W. Scott) when I was a law professor, not a judge. The point of this statement was to recognize the continuing academic debate about the source of these rights, not to express my own views on any of these subjects. In fact, this statement was in part a recognition of the point made by the author of the book we were reviewing, CHRIS EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS (2007), that some constitutional provisions are written "in spare and short text" using "abstract phrases." *Id.* at 23-25.

b. Does the U.S. Constitution provide a textual basis for rights to contraception, women's access to abortion, and same-sex marriage?

RESPONSE: The Supreme Court has recognized these rights in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to contraception), *Roe v. Wade*, 410 U.S. 113 (1973) (right to an abortion), and *Obergefell v. Hodges*, 576 U.S. __ (2015) (right to same-sex marriage). If confirmed to the Eighth Circuit, I will follow all binding precedent, including each of these precedents.

6. In 2007, after the U.S. Supreme Court's decision in *Parents Involved v. Seattle School District No. 1*, you wrote a blog post about Justice Kennedy's concurrence in the case. You wrote: "I think that many in the media and blogosphere are putting way too much emphasis on Justice Kennedy's separate opinion."

One of the reasons why Justice Kennedy's concurrence was so important, however, was his position – shared by four other justices – that diversity in education is a compelling goal that public school districts may pursue. Justice Kennedy wrote: "Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue." 551 U.S. 701, 783 (2007).

a. Do you agree that five justices on the Supreme Court have determined that diversity can be a compelling educational goal for public school districts to pursue?

RESPONSE: This blog post, which I wrote just one week after the *Parents Involved* decision, was an application of my research on the "*Marks* rule," named after one of the holdings in *Marks v. United States*, 430 U.S. 188 (1977). According to *Marks*, "[w]hen a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Justices who concurred in the judgments on the narrowest grounds." *Id.* at 193. I have not considered which opinion reflects the holding of *Parents Involved* since I wrote that blog post, but if confirmed, I will follow any Supreme Court or Eighth Circuit precedent interpreting *Parents Involved* in answering that question, including *Marks*.

b. Does *Parents Involved* permit racially-conscious school integration programs that are narrowly tailored?

RESPONSE: I do not know the answer to this question, because I have not followed the subsequent case law interpreting and applying *Parents Involved*. Nor have I been presented with this question during my seven-year tenure as an Associate Justice on the Minnesota Supreme Court. The judicial canons also prevent me from providing my personal views on a subject of

controversy that may come before me in litigation. *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."); Minnesota Code of Judicial Conduct, Rule 2.10(B) ("A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative activities of the office."); *State v. Finch*, 865 N.W.2d 696, 705 (Minn. 2015) ("Judges must remain impartial by not prejudging; they must 'maintain[] an open mind.").

7. While in private practice, you represented a criminal defendant convicted of first-degree murder of a District of Columbia police officer. (*U.S. v. Dean*, No. 1997 FEL 001104 (D.C. Sup. Ct.).) You took on the case pro bono and listed it as one of your most significant litigated matters.

a. Why did you become involved in this case?

RESPONSE: During my time practicing law at Sidley Austin Brown & Wood LLP (now Sidley Austin LLP), every associate attorney was given the option of working on a pro-bono case. I asked to do so and requested assignment to a criminal case. I was assigned to work on the post-trial motions and to research some of the appellate issues in the *Dean* case. My commitment to the *Dean* case reflected my longstanding belief that, in our criminal-justice system, every individual, regardless of income, is entitled to a vigorous defense regardless of the crime alleged.

8. In 2009, you participated in a Federalist Society forum during Justice Sonia Sotomayor's confirmation hearings. ("The Sotomayor Nomination, Part III: An Online Debate," July 17, 2009.) At the forum you said that you disagreed with Justice Sotomayor's ideology and also said that "she does not reflect my approach to deciding cases."

a. How is your "ideology" different from Justice Sotomayor's?

RESPONSE: I wrote this statement as a law professor, not as a judge, as a participant in an online debate that required participants to respond to Justice Sotomayor's confirmation hearings in real time. In the debate, I gave specific examples of some cases on which, at that time, I may have taken a different approach. But reflecting back on the statement referenced above, I have no recollection of the specific reason for this statement.

b. How is your approach to deciding cases different from Justice Sotomayor's?

RESPONSE: Please see my response to Question 8a.

9. In 2009, you authored a law review article about the life and jurisprudence of Justice Pierce Butler. (*Pierce Butler: A Supreme Technician*, 62 VAND. L. REV. 695, 696-697 (2009).)

With reference to Justice Butler's dissent in a case in which the Supreme Court struck down Missouri's law denying Black students admission to the state's law school, you wrote the case showed Justice Butler's "broad deference to states in regulating the welfare of racial minorities."

a. Please explain why you described this case as one involving "welfare of racial minorities."

RESPONSE: I do not recall why I used the specific phrase "welfare of racial minorities" in describing Justice Butler's jurisprudence. I also used the phrase "the right of racial minorities to get an education" to describe the issue presented in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), the case referenced in the question. *See Pierce Butler: A Supreme Technician*, 62 VAND. L. REV. 695, 729 (2008).

b. Did you consider describing this case as evidence of Justice Butler's potential hostility to racial equality or to racial integration in education? If so, why did you decline to do so? If not, why not?

RESPONSE: I do not recall whether I considered different wording in describing Justice Butler's Fourteenth Amendment jurisprudence.

10. Senator Franken asked you several questions about your selection process. He asked you "Have you ever discussed the possibility that President Trump would nominate you to the Supreme Court with the Heritage Foundation or the Federalist Society? Have you discussed that possibility with Leonard Leo?" And you responded, "I don't believe so, no. Again, I've had informal conversations, but I never discussed that with Leonard Leo, and I don't recall discussing that with anyone from Heritage or the Federalist Society."

a. What do you mean by "informal conversations"?

RESPONSE: By informal conversations, I mean that, although I do not recall any specific conversations with the leadership of the Federalist Society, I cannot rule out the possibility that I may have discussed being on President Trump's list of potential Supreme Court nominees with one or more of the members of the Federalist Society in casual conversation.

b. Please specify what "informal conversations" you have had regarding—to quote Senator Franken's question—"the possibility that President Trump would nominate you to the Supreme Court." With whom did you have these "informal conversations"?

RESPONSE: Please see my response to Question 10a.

11. Senator Franken also asked you "[H]ave you at any time said to anyone that you have been told that you will be the first chosen for the Supreme Court if you become the circuit court judge, a federal circuit court judge on the Eighth Circuit?" You responded, "I have not. I have not had anyone discuss that with me, and I have made promises to no one on how I would rule. So, I've had no discussions of that kind, even as an Eighth Circuit judge."

a. You said "I have not had anyone discuss that with me." Just to be clear: have <u>you yourself</u> ever raised the prospect, with anyone, that you believe you will be appointed to the next Supreme Court vacancy?

RESPONSE: Not to my recollection.

b. Specifically, have you ever discussed, with Leonard Leo—or anyone else at the Federalist Society or the Heritage Foundation—the prospect of serving on the U.S.

Supreme Court, or your expectation or understanding that you would be appointed to the next Supreme Court vacancy? Have you ever told anyone you have had such discussions?

RESPONSE: Please see my response to Question 10a.

c. You stated that you "have made promises to no one on how I would rule." That was not Senator Franken's question, but it does imply you have had conversations. Please explain conversations you have had about possible elevation to the Supreme Court – who they were with, what was discussed, and when they occurred.

RESPONSE: Please see my response to Question 10a.

12. Your name appeared on President Trump's original list of eleven possible nominees to fill Justice Scalia's seat on the Supreme Court. During the campaign and even after he was elected, President Trump repeatedly stated that he had a litmus test for Supreme Court nominees – that he would only select nominees who would oppose a woman's right to choose and overturn *Roe v. Wade*.

a. The people who put together President Trump's Supreme Court shortlist believed that you would be a reliable vote to overturn *Roe*. Is that true?

RESPONSE: If I am fortunate enough to be confirmed to serve on the Eighth Circuit, I will follow all precedent of the Supreme Court, including *Roe v. Wade*. It would be improper for any lower-court judge to vote to overturn a Supreme Court precedent.

b. If your answer to the prior question is "no," then why do you think your name appeared on the shortlist, given what President Trump told us about his litmus test?

RESPONSE: I do not know why I was selected to be on the list of possible Supreme Court nominees released by President Trump during the campaign.

13. President Trump specifically thanked the Federalist Society and the Heritage Foundation for putting together his Supreme Court shortlist.

a. Were you ever contacted by anyone from the Federalist Society or the Heritage Foundation about a potential Supreme Court nomination or about your nomination to the Fifth Circuit? If so, when and by whom?

RESPONSE: Please see my response to Question 10a.

Why do you think the Federalist Society and Heritage Foundation selected your name to appear on President Trump's list?

RESPONSE: I do not know why I was selected to be on the list of possible Supreme Court nominees released by President Trump during the campaign.

14. It has been reported that Brett Talley, a Deputy Assistant Attorney General in the Office of

Legal Policy who is responsible for overseeing federal judicial nominations—and who himself has been nominated to a vacancy on the U.S. District Court for the Middle District of Alabama—did not disclose to the Committee many online posts he had made on public websites.

a. Did officials at the Department of Justice or the White House discuss with you generally what needed to be disclosed pursuant to Question 12 of the Senate Judiciary Questionnaire? If so, what general instructions were you given, and by whom?

RESPONSE: It is the candidate's responsibility to answer the questions in the Senate Judiciary Questionnaire fully and truthfully.

b. Did Mr. Talley or any other individuals at the Department of Justice or the White House advise you that you did <u>not</u> need to disclose certain material, including material "published only on the Internet," as required by Question 12A of the Senate Judiciary Questionnaire? If so, please detail what material you were told you did not need to disclose.

RESPONSE: My understanding is that material published only on the internet is encompassed within the material that must be disclosed in response to Question 12A of the Senate Judiciary Questionnaire. I have disclosed all such material, to the best of my ability.

c. Have you ever posted commentary—under your own name or a pseudonym—regarding legal, political, or social issues on public websites that you have not already disclosed to the Committee? If so, please provide copies of each post and describe why you did not previously provide it to the Committee.

RESPONSE: Please see my response to Question 14b.

d. Once you decided to seek a federal judicial nomination or became aware that you were under consideration for a federal judgeship, have you taken any steps to delete, edit, or restrict access to any statements previously available on the Internet or otherwise available to the public? If so, please provide the Committee with your original comments and indicate what edits were made.

RESPONSE: No.

15. Please respond with your views on the proper role of precedent.

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

RESPONSE: I am not aware of any circumstance in which a lower court can depart from binding Supreme Court precedent. Even in situations in which a precedent has been called into question by other rulings, the Supreme Court has instructed lower courts that they must follow controlling precedent. *See, e.g., Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Agostini v. Felton,*

521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. . . . Adherence to this teaching by the District Court and Court of Appeals in this litigation does not insulate a legal principle on which they relied from our review to determine its continued vitality. The trial court acted within its discretion in entertaining the motion with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent."). I have authored an opinion following this line of cases while on the Minnesota Supreme Court. *See State v. Brist*, 812 N.W.2d 51, 56 (Minn. 2012) (recognizing that "only the Supreme Court may overrule one of its own decisions").

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

RESPONSE: The Eighth Circuit has repeatedly held that "[i]t is a cardinal rule . . . that one panel is bound by the decision of a prior panel." *E.g.*, *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (quoting *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002)). An Eighth Circuit panel can only depart from the holding of another panel "when the earlier panel decision is cast into doubt by an intervening Supreme Court decision." *United States v. Anderson*, 771 F.3d 1064, 1067 (8th Cir. 2014) (citing *United States v. Williams*, 537 F.3d 969, 975 (8th Cir. 2008)). The Eighth Circuit may overrule its own precedent, however, when it sits en banc. *See United States v. White*, 863 F.3d 784, 787 n.4 (8th Cir. 2017). Under Federal Rule of Appellate Procedure 35(a), rehearing en banc should only occur if (1) it "is necessary to secure or maintain uniformity of the court's decisions" or (2) the case raises "a question of exceptional importance."

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

RESPONSE: As a sitting Minnesota Supreme Court justice, and as a nominee to the Eighth Circuit, it would be inappropriate for me to advise the Supreme Court on whether, or when, it should overturn its own precedent.

16. Many conservative judges and legal scholars believe that the Constitution should be interpreted consistent with its "original meaning"—in other words, the meaning it had at the time it was enacted.

a. With respect to constitutional interpretation, do you believe judges should rely on the "original meaning" of the constitution?

RESPONSE: If I am fortunate enough to serve on the Eighth Circuit, I will follow all binding precedent of the Supreme Court and the Eighth Circuit regarding the circumstances under which judges should rely on the original meaning of the Constitution.

b. How do you decide when the Constitution's "original meaning" should be controlling?

RESPONSE: As with all legal issues, I will carefully consider the arguments of the parties, the relevant legal texts, the binding precedents of the Supreme Court and the Eighth Circuit, and any other relevant authorities.

c. Does the "original meaning" of the Constitution justify a constitutional right to same-sex marriage?

RESPONSE: In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court held that the Fourteenth Amendment protects the right of same-sex couples to marry on the same terms and conditions as opposite-sex couples. *Obergefell* is a binding precedent of the Supreme Court, and I will follow it faithfully.

d. Does the "original meaning" of the Constitution explain the right to marry persons of a different race recognized by the Court in *Loving v. Virginia*?

RESPONSE: *Loving v. Virginia* is a binding precedent of the Supreme Court, and I will follow it faithfully.

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

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

RESPONSE: *Roe v. Wade* is a binding precedent of the Supreme Court, and I will follow it faithfully. From the perspective of any lower-court judge, every binding Supreme Court precedent must be faithfully followed and applied, regardless of whether someone might characterize it as "super" or "settled." *See State v. Brist*, 812 N.W.2d 51, 57-58 (Minn. 2012) (following *Bourjaily v. United States*, 483 U.S. 171 (1987), even though *Crawford v. Washington*, 541 U.S. 36 (2004), had cast doubt on *Bourjaily*'s reasoning)

b. Is it settled law?

RESPONSE: Please see my response to Question 17a.

18. 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?**

RESPONSE: *Obergefell v. Hodges* is a binding precedent of the Supreme Court, and I will follow it faithfully. From the perspective of a lower-court judge, every binding Supreme Court precedent must be faithfully followed and applied, regardless of whether someone might characterize it as "settled."

19. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing

army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

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

RESPONSE: The majority opinion in *District of Columbia v. Heller* is a binding precedent of the Supreme Court. I will follow it faithfully, if confirmed, as an Eighth Circuit judge. It would not be appropriate or relevant for me to discuss my personal opinions.

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

RESPONSE: In *Heller*, the Supreme Court noted that the "right secured by the Second Amendment is not unlimited" and "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626–27 (2008).

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

RESPONSE: Please see my response to Question 19a.

20. You indicate on your Senate Questionnaire that you have been a member of the Federalist Society since 2003 and have served on the organization's Executive Committee (2009- 2015). The Federalist Society's "About Us" webpage states that, "[l]aw 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." The same page states 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. Please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools.

RESPONSE: I am not familiar with the quoted language, and I do not know what the Federalist Society meant by this statement.

b. As a member of the Federalist Society, explain how exactly the organization seeks to "reorder priorities within the legal system."

RESPONSE: Please see my response to Question 20a.

c. As a member of the Federalist Society, explain what "traditional values" you understood the organization placed a premium on.

RESPONSE: Please see my response to Question 20a.

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

RESPONSE: I received the questions on the afternoon of December 6, 2017. I reviewed the questions, conducted research, and drafted answers. After sharing those answers with the Office of Legal Policy at the Department of Justice and speaking with them, I made revisions and authorized the submission of these responses.

Written Questions for David Ryan
Stras Submitted by Senator Patrick
Leahy December 6, 2017

1. In 2010, when you were a law professor, you joined an amicus brief in a Minnesota Supreme Court case, supporting Governor Tim Pawlenty's authority to reduce the amount of appropriated money that went to Minnesota's food assistance program. Less than four months later, Governor Pawlenty nominated you to the Minnesota Supreme Court.[1]

   Many of us are concerned that the only qualification for nominations that this administration deems essential is ideological loyalty. Last year, you appeared on then- candidate Trump's original list of possible Supreme Court nominees, and then on President Trump's expanded list. President Trump made clear his intention to appoint justices who would "automatically" overturn abortion rights.[2]

   a) What conversations have you had with the White House, or with groups like the Federalist Society to which the White House seems to have outsourced judicial selection, that would make President Trump so confident that you belong on his list of Supreme Court picks who would overturn abortion rights?

   RESPONSE: Please see my responses to Senator Feinstein's Questions 10, 11, 12, and 13.

2. Last year, you wrote the majority opinion in *KSTP-TV v. Metropolitan Council*, decided 3-2, in which a TV station requested video footage from two Metro Transit buses that were involved in traffic accidents.[3] Your opinion essentially found that public data could morph into private data, and thereby become immune from public disclosure requirements. This is a troubling attitude towards freedom of information, which is a cornerstone of the democratic legitimacy that comes from the informed consent of the governed.

   b) What, in your view, are the important factors when a court considers an assertion that information may legally be withheld from release due to a claim of executive privilege? What about deliberative privilege?

   RESPONSE: I have not had occasion to decide cases regarding executive privilege or "deliberative privilege" during my 7 years of service on the Minnesota Supreme Court, nor have I have separately studied those issues.

   c) <u>What about a claim by an executive branch official that information cannot be released because the President could claim executive privilege at some later date?</u>

   RESPONSE: Please see my response to Question 2b.

3. 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?'"**

(d) 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?

RESPONSE: As a Minnesota Supreme Court Justice, I have applied this rule. *See State v. Nelson*, 842 N.W.2d 433, 437 n.2 (Minn. 2014) ("[T]he relevant definition of a term depends on the context in which the term is used."); *see also Appeal of Krenik*, 903 N.W.2d 224, 229 (Minn. 2017) (explaining the whole-statute canon). Moreover, the referenced majority opinion in *King v. Burwell* is a precedent of the Supreme Court, and I will faithfully follow it and all other Supreme Court precedent, including the Supreme Court's guidance on interpreting statutes.

4. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them "disheartening" and "demoralizing."

(e) 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?

RESPONSE: Judges are subject to criticism by litigants and members of the public. It is part of the job. However, judges must impartially apply the law in every case that comes before them, regardless of any criticism. I cannot comment more specifically about the quotation you provide because it calls for my opinion on a political matter. *See* Canon 5, Code of Conduct for United States Judges ("A judge should refrain from political activity"); *id*. Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

(f) 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?**

RESPONSE: Please see my response to Question 4e.

5. 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.)

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

RESPONSE: The Supreme Court has held that courts, in appropriate circumstances, may review executive action involving national-security decisions. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). If a case comes before me challenging executive action, I will follow all relevant precedent of the Supreme Court and the Eighth Circuit.

6. **Does the First Amendment allow the use of a religious litmus test for entry into the United States? How did the drafters of the First Amendment view religious litmus tests?**

   RESPONSE: This question appears to ask for my personal views on a subject of controversy that may result in litigation. Accordingly, it would be improper for me to answer it. *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. . . ."); Minnesota Code of Judicial Conduct, Rule 2.10(B) ("A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative activities of the office."); *State v. Finch*, 865 N.W.2d 696, 705 (Minn. 2015) ("Judges must remain impartial by not prejudging; they must 'maintain[] an open mind.").

7. Many are concerned that the White House's denouncement earlier this year 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.

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

   RESPONSE: The constitutional separation of powers depends on each branch of government respecting the constitutionally conferred powers of the other branches. I take seriously the judiciary's independence from the other branches of government. If I were fortunate enough to be confirmed and such a case were to come before me, I would review the text of the Constitution and any relevant statutes, all applicable precedent, and the arguments and briefs of the parties before arriving at a decision.

8. 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."

   (i) 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?

RESPONSE: In *Hamdan*, the Supreme Court recognized that Congress may, in the proper exercise of its war powers, restrict the President in a time of war. *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in the proper exercise of its own war powers, placed on his powers." (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring))). If I am fortunate enough to be confirmed, I will faithfully apply *Hamdan*, *Youngstown*, and any other relevant precedent of the Supreme Court and the Eighth Circuit.

(j) 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?

RESPONSE: If I am fortunate enough to be confirmed and a case came before me requiring me to analyze these questions, I would review the text of the Constitution, any applicable statutes, and relevant precedents of the Supreme Court and the Eighth Circuit regarding the scope of executive authority. Because this asks for my personal views on a subject of controversy that may result in litigation, however, ethical rules prohibit me from responding further. *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. . . ."); Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

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

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

RESPONSE: Although I am not familiar with the cited interview, the Supreme Court has held that practices discriminating on the basis of gender are subject to a heightened level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135–36 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). Such scrutiny, often called "intermediate scrutiny," requires an "exceedingly persuasive justification" for gender-based classifications. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

10. Do you agree with Justice Scalia's characterization of the Voting Rights Act as a "perpetuation of racial entitlement?"

RESPONSE: I am not familiar with and do not know what Justice Scalia may have meant in the cited statement. If I am fortunate to be confirmed, I would faithfully apply

the Voting Rights Act and all Supreme Court and Eighth Circuit precedent interpreting it.

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

RESPONSE: The Constitution states that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. 1, § 9, cl. 8. Because the meaning of this clause is currently the subject of litigation, *see e.g.*, *Citizens for Responsibility & Ethics in Washington v. Trump*, No. 1:17-cv-00458-RA (S.D.N.Y. 2017), I believe it would be improper to comment further. *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."); Minnesota Code of Judicial Conduct, Rule 2.10(B) ("A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative activities of the office.").

12. 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."

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

RESPONSE: As a current Associate Justice of the Minnesota Supreme Court and a nominee to the Eighth Circuit, I believe it would be inappropriate for me to instruct the Supreme Court on how it should treat factual findings made by Congress or by lower courts. More broadly, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), is a binding precedent of the Supreme Court that I will faithfully apply if I am fortunate enough to be confirmed.

13. **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"?**

RESPONSE: The Thirteenth, Fourteenth, and Fifteenth Amendments each grant Congress the power of enforcement "by appropriate legislation." If a case came before me requiring me to evaluate Congress's authority in this area, I would review the text of

the Constitution, any relevant statutes, any applicable precedent, and the arguments and briefs of the parties before arriving at a decision. Because this question appears to ask that I comment on an issue that could arise in a case, either in my current role as an Associate Justice of the Minnesota Supreme Court or, if fortunate enough to be confirmed, as an Eighth Circuit judge, I believe it would be inappropriate for me to comment any further. *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. . . ."); Minnesota Code of Judicial Conduct, Rule 2.10(B) ("A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative activities of the office."); *State v. Finch*, 865 N.W.2d 696, 705 (Minn. 2015) ("Judges must remain impartial by not prejudging; they must 'maintain[] an open mind.").

14. 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."

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

RESPONSE: *Lawrence v. Texas*, 539 U.S. 558 (2003), is a binding precedent of the Supreme Court that I will follow faithfully.

15. In the confirmation hearing for Justice Gorsuch earlier this year, 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.

(n) 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?

RESPONSE: As I stated during my confirmation hearing, lower-court judges do not get to pick and choose which U.S. Supreme Court precedents they will follow, but rather must follow them all, and I would do so if I am confirmed. With regard to statutes, as I also stated at my hearing, stare decisis is a particularly strong norm.

16. 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.

(o) 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.

RESPONSE: If I am confirmed as a circuit judge, I would recuse myself from any matter decided by the Minnesota Supreme Court during my tenure. This could occur, for example, through a federal habeas corpus petition filed under 28 U.S.C. § 2254. I would evaluate any other real or potential conflict, or relationship that could give rise to appearance of conflict, on a case-by-case basis, following the Code of Conduct for United States Judges; the Ethics Reform Act of 1989, 28 U.S.C. § 455; and all other relevant recusal rules and guidelines. As necessary, I will seek advice from those designated to give it, both in the Eighth Circuit and at the Administrative Office of the United States Courts. Please see also my answer to Question 14 of my Senate Judiciary Questionnaire.

17. 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."

(p) 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?

RESPONSE: Courts have played an important role in protecting the rights of all people, including "discrete and insular" minorities, referenced in *Carolene Products* footnote 4. Judges must apply the law evenhandedly and without bias or favoritism and treat all parties that come before the court with dignity and respect. I adhere to these principles as a Justice on the Minnesota Supreme Court and I would continue to do so if confirmed to the Eighth Circuit. Indeed, if confirmed, the oath I would take would require me to, among other things, "administer justice without respect to persons, and do equal right to the poor and to the rich . . . ." 28 U.S.C. § 453.

18. 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, we make sure that we exercise our own power properly.

(q) Do you agree that Congressional oversight is an important means for creating

accountability in all branches of government?

RESPONSE: To answer this question, I would need to express a personal opinion about a political matter and state my viewpoint about a subject of controversy that may result in litigation, neither of which the judicial canons permit me to do. *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. . . ."); Canon 5, Code of Conduct for United States Judges ("A judge should refrain from political activity").

19. 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?

RESPONSE: Article I, Section 8, Clause 3 of the Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Supreme Court has held that Congress may use its authority under this Clause to regulate: (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, including persons or things moving in interstate commerce, and (3) economic activities that substantially affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005). Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment. If faced with a case that implicates the scope of congressional power, I will faithfully apply the Constitution and all applicable precedent of the Supreme Court and the Eighth Circuit.

Senator Dick Durbin
Written Questions for David Stras
December 6, 2017

For questions with subparts, please answer each subpart separately.

Questions for David Stras

1. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network. This organization then ran a comprehensive media campaign in support of the Gorsuch nomination. This flood of undisclosed dark money undermines faith in the impartiality of our judiciary, especially because it's likely that many of these secret contributors had an interest in cases coming before the Supreme Court.

   Justice Stras, that same group, the Judicial Crisis Network, announced on September 13th that they were launching TV and digital ads in support of your nomination. They ran a two-week media campaign in Minnesota and on national cable. It is unclear who has donated money to the Judicial Crisis Network to pay for these ads, or whether those donors have interest or involvement in cases before the Minnesota Supreme Court or the 8th Circuit.

   a. **Justice Stras, do you want outside groups or special interests to make undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited such donations, I am asking whether you find such undisclosed donations to be problematic.**

      RESPONSE: I did not ask any person or group to run the ads referenced by this question nor do I have any knowledge regarding donations— disclosed or undisclosed—that may have been made to the Judicial Crisis Network. I cannot respond further because ethical obligations require me to refrain from commenting on political matters. *See* Canon 5, Code of Conduct for United States Judges ("A Judge Should Refrain from Political Activity."); Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

   b. **Will you take this opportunity to ask the Judicial Crisis Network not to run any further ads in support of your nomination and to discourage any future undisclosed donations on behalf of your nomination?**

      RESPONSE: Please see my response to Question 1a.

   c. **Will you take this opportunity to call for donors to the Judicial Crisis Network to make their donations public, so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

RESPONSE: Please see my response to Question 1a. I have not studied the specific recusal circumstance presented by this question, but—if the issue arose—I would carefully consider 28 U.S.C. § 455, the Code of Conduct for United States Judges, and all other laws, rules, and practices governing recusal decisions.

2. In 2009, you were quoted in the ABA Journal commenting on the Senate Judiciary Committee's process for considering judicial nominees. You said that the process "was supposed to be a robust look at the integrity and judicial philosophy of the nominees," but that it has "become a media spectacle controlled by interest groups to get people on the court who will vote a certain way."

   a. **In your view, is the Judicial Crisis Network an interest group?**

      RESPONSE: Please see my response to Question 1a.

   b. **Do you believe the Judicial Crisis Network, which sponsors media campaigns in support of or in opposition to judicial nominations, has helped make the nomination process into a "media spectacle"?**

      RESPONSE: Please see my response to Question 1a.

3. In 2011 the Minnesota Supreme Court decided the case *State v. Obeta*. The case involved a defendant who was charged with raping a woman in a parking lot. The defendant claimed that the sex was consensual, arguing that the victim was not physically injured and that she had waited several hours before reporting the crime. A jury found the defendant guilty, but the conviction was reversed and remanded for a new trial due to cumulative trial errors. On remand, the prosecution sought to present expert opinion evidence about the typical behaviors of rape victims to rebut the defendant's claim, and the trial court blocked this testimony.

   The state Supreme Court reversed. The majority first determined that it had the supervisory power to hear a pretrial appeal on this matter to ensure the fair administration of justice, and then ruled that the trial court had misapplied precedent in barring the testimony and that the trial court had discretion to admit the evidence.

   You dissented and argued that the Supreme Court should not have taken up the appeal. You said that there was not a showing that the exclusion of this evidence would have a critical impact on the case, nor were there exceptional circumstances where the interests of justice required review. Your dissent would have let the trial court's blocking of the expert testimony stand.

   a. **Why do you think the majority disagreed with the views you expressed in your dissent?**

      RESPONSE: Please see my response to Senator Feinstein's Question 2. The majority opinion in *Obeta* describes the basis for the majority's disagreement with my dissenting opinion. *See State v. Obeta*, 796 N.W.2d 282, 286-88, n.1-2, 4 (Minn. 2011). I would not

presume to infer anything about the majority's motivations apart from the reasoning set forth in the majority opinion.

b. **In hindsight, do you stand by your dissent in this case?**

RESPONSE: Yes.

4. This past April, you joined a dissent in the age discrimination case *Peterson v. City of Minneapolis*. In this case, Minneapolis police officer Scott Peterson was transferred from his preferred unit, and he filed a complaint alleging that he was transferred because of age discrimination. The City's human resources department took more than a year to investigate this complaint and finally concluded that the transfer was not the result of age discrimination.

   Mr. Peterson sued the City, and the City argued that his suit was not filed within the one-year statute of limitations – although this was due to the City's own lengthy investigation. The Supreme Court majority held 5 to 2 that the statute of limitations should have been tolled under Minnesota law because Mr. Peterson was "voluntarily engaged in a dispute resolution process" while the City investigated his complaint.

   You joined a dissent that argued that the City's process for investigating discrimination claims was not a "dispute resolution process" under the statute. According to your dissent, Mr. Peterson's discrimination case should have been barred from going forward, leaving this public servant with no option for pursuing justice. **Why do you think the majority of the Court disagreed with the dissent that you joined?**

   RESPONSE: The majority opinion in *Peterson* describes the basis for the majority's disagreement with Justice G. Barry Anderson's dissenting opinion. *See Peterson v. City of Minneapolis*, 892 N.W.2d 824, 831–32, n. 5-9 (Minn. 2017). I would not presume to infer anything about the majority's motivations apart from the reasoning set forth in the majority opinion.

5. You wrote a dissent in the 2015 case *Sleiter v. American Family Mutual Insurance Company*. This case involved a traffic accident where a school bus was struck by an at-fault vehicle. Cody Sleiter, a child, was one of 19 people injured in the accident. He suffered extensive damage to his leg, hip and back. The insurance carriers for the bus and the other vehicle went to court, which appointed a special master to assess the victims' damages and claims.

   The special master found that Sleiter suffered $140,000 in damages and that the total damages for the 19 victims exceeded $5 million dollars. Because the school bus company had a $1 million policy, Sleiter was given a pro-rata share of damages, amounting to about $36,000. He then sought to recover about $64,000 from American Family, the company that insured the Sleiter family vehicle with a $100,000 policy. American Family denied his claim on the grounds that Minnesota law only allows recovery when the underinsured motorist policy held by the insured person "exceeds the limit of liability of the coverage available" from the other vehicle. Sleiter then sued for the amount that he was denied.

The Minnesota Supreme Court majority ruled for Sleiter, reasoning that the statute's term "coverage available" was ambiguous because it could either mean the total limit of the school bus's policy ($1 million) or the pro rata amount actually given to Sleiter ($36,000). To resolve the ambiguity, the majority looked to the purpose of the underinsured motorist statute, which was to compensate victims without allowing for duplicate recovery. The majority then ruled for Sleiter, finding that his proposed interpretation best furthered the statute's legislative purpose and that allowing Sleiter to recover from his personal insurance coverage gave him and his family "nothing more than access to the coverage that they have selected and purchased."

You wrote a dissent arguing that the majority "exalts policy over text" and that the text of the statute was plain and unambiguous. Under your dissent, Sleiter would have been limited to a recovery far less than the damages he suffered in the school bus accident.

This Committee has heard from a number of President Trump's nominees who claim to be textualists but who often find a way to interpret the text so it favors business interests over individuals and families. **Why do you think the majority in this case disagreed with you about whether the statute was ambiguous?**

RESPONSE: The majority opinion in *Sleiter* describes the basis for the majority's disagreement with my dissenting opinion. *See Sleiter v. Am. Family Mut. Ins. Co*., 868 N.W.2d 21, 23 (Minn. 2015). I would not presume to infer anything about the majority's motivations apart from the reasoning set forth in the majority opinion.

6. This past May, you were quoted in the *Minnesota Sun Sailor* responding to a high school student who asked you about how judges control personal biases. You said "[t]he judges that tend to be the most effective are the ones that understand their biases and can put them aside…It's something that I think we all struggle with every day that we do our very best to put aside." **Do you have personal biases that you do your best to put aside? If so, what are they?**

RESPONSE: All judges are a product of their background and life experiences. The job of a judge is to set aside all external considerations, including any strongly held viewpoints obtained from academia or practice, and decide only the case before the court. As I explained at my hearing, a judge must put aside his or her personal viewpoints, whatever they may be, and decide the case in accordance with the law, including any applicable precedent, even if the judge may personally favor a different outcome. To give a more specific explanation would violate the tradition of the Minnesota Supreme Court not to disclose the reasons for recusal to the parties, to each other, or to the court. *See In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, 438 N.W.2d 95, 96 (Minn. 1989) (order).

7.

a. **Is waterboarding torture?**

RESPONSE: I have not had occasion to study this specific legal question. Generally, under 18 U.S.C. § 2340, waterboarding would constitute torture if it were "intended to inflict severe physical or mental pain or suffering" upon a detainee. Waterboarding may also constitute "cruel, inhuman, or degrading treatment" within the meaning of Section 1003 of the Detainee Treatment Act of 2005. Beyond those broad statements, I must refrain from expressing a personal view on a subject of controversy that may result in litigation. 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. **Is waterboarding cruel, inhuman and degrading treatment?**

RESPONSE: Please see my response to Question 7a.

c. **Is waterboarding illegal under U.S. law?**

RESPONSE: Please see my response to Question 7a.

8. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions by claiming that such questions call for the nominee to opine on "political questions"?**

RESPONSE: This question calls for my opinion on a political matter. Therefore, I must refrain from answering the question under the Code of Conduct for United States Judges. *See* Canon 5, Code of Conduct for United States Judges ("A judge should refrain from political activity").

9. **Do you agree, as a factual matter, with President Trump's wholly unsubstantiated claim that 3 to 5 million people voted illegally in the 2016 election?**

RESPONSE: This question calls for my opinion on a political matter. Therefore, I must refrain from answering the question under the Code of Conduct for United States Judges. *See* Canon 5, Code of Conduct for United States Judges ("A judge should refrain from political activity").

10. In your questionnaire you list yourself as having been a member of the Federalist Society since 2003.

a. **Why did you join?**

RESPONSE: I joined the Federalist Society, like other legal organizations such as the American Law Institute and the American Bar Association, because of the high-quality legal programming that it provides. The debates and other programming sponsored by the Federalist Society usually involve a range of viewpoints and legal topics, much of it about the pressing legal issues of the day.

b. **Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with

Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

RESPONSE: This question calls for my opinion on a political matter. Therefore, I must refrain from answering the question under the Code of Conduct for United States Judges. *See* Canon 5, Code of Conduct for United States Judges ("A judge should refrain from political activity").

c. **Please list each year that you attended the Federalist Society's annual convention.**

RESPONSE: To the best of my recollection, I attended all or part of Federalist Society's annual convention during the following years: 2002 (before I became a member), 2008, 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.

d. On November 17, 2017, Attorney General Sessions spoke before the Federalist Society's convention. At the beginning of his speech, Attorney General Sessions attempted to joke with the crowd about his meetings with Russians. Video of the speech shows that the crowd laughed and applauded at these comments. (See https://www.reuters.com/video/2017/11/17/sessions-makes-russia-joke-at-speech?videoId=373001899) **Did you attend this speech, and if so, did you laugh or applaud when Attorney General Sessions attempted to joke about meeting with Russians?**

RESPONSE: I watched the speech of Attorney General Sessions in an overflow room and, because I did not begin viewing the speech until a few minutes after it had begun, I do not believe I saw this portion of the speech.

11.

a. **Can a president pardon himself?**

RESPONSE: I have not had occasion to study or consider this issue previously. In addition, this question is the subject of controversy that may result in litigation before federal courts. Accordingly, I cannot ethically respond to the question. Code of Conduct of U.S. Judges canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

b. **Can an originalist view of the Constitution provide the answer to this question?**

RESPONSE: Please see my response to Question 11a.

c. **If the original public meaning of the Constitution does not provide a clear answer, to what should a judge look to next?**

RESPONSE: If I am fortunate enough to be confirmed as a federal judge, I would follow the guidance and precedent of the U.S. Supreme Court and the Eighth Circuit in interpreting the Constitution.

12. **In your view, is there any role for empathy when a judge is considering a criminal case – empathy either for the victims of the alleged crime, for the defendant, or for their loved ones?**

RESPONSE: Judges should have empathy for all persons who come before the court, and should understand that their interactions with any particular individual may be that individual's only interaction with the judicial system. But a judge's empathy cannot influence the judge's fair and evenhanded application of the law. Judges should always apply the law, regardless of the judge's personal feelings. I agree with Justice Elena Kagan's response to a similar question: "I think it's law all the way down. When a case comes before the court, parties come before the court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause. The question is—and this is true of constitutional law and it's true of statutory law—the question is what the law requires." The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong., S. Hrg. 111–1044, at 103 (2010).

13.

a. **Was the Supreme Court's decision in *Obergefell* rightly decided?**

RESPONSE: As a nominee bound by the Code of Conduct for United State Judges, it would be improper for me to express my personal views on whether specific cases were correctly decided. As with any U.S. Supreme Court precedent, *Obergefell* is the law of the land, and as a judge on the Eighth Circuit, I would be bound by and would follow U.S. Supreme Court precedent.

b. **Do you pledge, if you are confirmed, that you will not take steps to undermine the Court's decision in *Obergefell*?**

RESPONSE: As with any U.S. Supreme Court precedent, *Obergefell* is the law of the land, and as a judge on the Eighth Circuit, I would be bound by and would follow U.S. Supreme Court precedent.

Nomination of David Stras to the United States Court of Appeals for the Eighth Circuit

Questions for the Record
Submitted December 6, 2017

QUESTIONS FROM SENATOR WHITEHOUSE

1. 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." In response to that metaphor, you wrote, "Though I am a subscriber to the school of thought that believes that judges, and particularly Supreme Court justices, are subject to political considerations in their decision-making, I do not begrudge Chief Justice Roberts for saying that judging is like calling 'balls and strikes.' To the contrary, it is my experience that many judges and justices honestly believe that they are deciding cases impartially and putting their own political preferences to the side."

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

      RESPONSE: I think the metaphor is appropriate in that a judge, like an umpire, should neutrally apply rules without bias toward any party.

   b. Do you believe that political preferences influence judicial decisions? To what extent have they influenced yours?

      RESPONSE: Under both the Code of Conduct for United States Judges and Minnesota's Canons of Judicial Conduct, a judge is required to act independently without regard for political relationships or political influence. *See* Code of Conduct for United States Judges, Canon 2(B); Minn. Code of Judicial Conduct, Rule 4.1, cmt. 1 ("[A] judge makes a decision based on the law and facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure."). I strive to decide cases objectively based on the law and facts of each case and without regard to any political preferences.

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

      RESPONSE: Generally speaking, judges should apply the law fairly without regard to outcome and should guard against taking on the role of lawmakers, who enact legislation aimed at certain practical consequences through a deliberative and democratic process. Apart from this general rule, I recognize there are some cases in which judges are required

to apply a legal standard that accounts for the practical consequences of a decision. *See, e.g., Griffin v. Oceanic Contractors, Inc*., 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

d. 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 judge to make a subjective determination?

RESPONSE: No. Under Federal Rule of Civil Procedure 56, "the court shall grant summary judgment if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The question of whether a case involves a genuine dispute of material fact is sometimes difficult, but the analysis is based on an objective assessment of analogous precedent, the evidence presented, and the arguments of the parties. It is not a subjective assessment based on the judge's personal feelings or intentions.

2. In response to Senator Klobuchar's question about examples of cases in which you applied a precedent that deviated from your personal policy preferences, you said, "It's happened with some frequency. I can't think of one off the top of my head, but I can say that it's happened probably two dozen times over the course of my career." Can you provide those examples now?

RESPONSE: One example is *Sleiter v. American Family Mut. Ins. Co.*, 868 N.W.2d 21 (Minn. 2015), a case involving a plaintiff who was seeking to recover underinsured motorist benefits under his family's insurance policy after suffering serious injuries in an automobile accident. I wrote a dissent and would have concluded that Sleiter was limited in the amount of uninsured motorist benefits he could recover by Minn. Stat. § 65B.49, subd. 3(a)(5). I reached my conclusion based on our definitive interpretation of the statute in *Schons v. State Farm Mutual Automobile Insurance Co.*, 621 N.W.2d 743, 747 & n.1 (Minn. 2001), even though the facts of the case were "tragic" and "there [wa]s no question . . . that Sleiter and his family did not receive the amount of excess UIM benefits that they expected." *Id*. at 28; *see also id.* at 31 (discussing the effect of the majority opinion on the Court's "definitive interpretation of Minn. Stat. § 65B.49, subd. 3a(5)" from *Schons*).

3. 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?

RESPONSE: Please see my response to Senator Durbin's Question 12.

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

RESPONSE: All judges are a product of their background and life experiences. But the job of a judge is to set aside any personal preferences and decide only the case before the court. This principle, which is an important aspect of impartiality, requires the judge to decide the case in accordance with the law, including any applicable precedent, even if the judge may personally favor a different outcome.

c. Do you believe you can empathize with "a young teenage mom," or understand what it is like to be "poor or African-American or gay or disabled or old"? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

RESPONSE: Please see my response to Question 3b.

4. 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?

RESPONSE: No.

5. In a 2012 per curiam opinion you joined, the court stressed the need for deference to the legislature, writing that, "[t]he proper role for the judiciary . . . is not to second-guess the wisdom of policy decisions that the constitution commits to one of the political branches. The people are the sole judge of the wisdom of such matters." When, if ever, is it proper for the court to override the decision of the legislature?

RESPONSE: The language quoted in this question is from the *per curiam* opinion in *League of Minnesota Voters et al. v. Ritchie*, 819 N.W.2d 636 (Minn. 2012). In that case, the petitioners challenged the Minnesota Legislature's authority to place a constitutional amendment on the ballot based on the argument that "the ballot question as framed [wa]s so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote." *Id.* at 644. Although the court rejected the constitutional challenge to the ballot question, we first acknowledged the fundamental principle that a court may overturn a statute enacted by the Legislature if the statute conflicts with the Minnesota Constitution. The same reasoning applies to any statute that conflicts with the United States Constitution or is preempted by federal law. In those circumstances, a judge's duty is to invalidate the statute.

6. Do you believe that diversity in higher education is a good thing? Do you believe it benefits students to learn in a diverse environment?

RESPONSE: Yes.

Senate Judiciary Committee
"Nominations"
Questions for the Record
November 29, 2017
Senator Amy Klobuchar

Questions for Justice Stras

In *Peterson v. Minneapolis,* you joined a dissent that would have prevented an age discrimination suit brought by a police officer because, in your view, the statute of limitations had expired when the City took more than a year to investigate the complaint. The majority found that the statute was tolled during that time, which would have allowed the officer's case to move forward.

- How did you reach your conclusion in that case?

  RESPONSE: As the dissent of Justice G. Barry Anderson fully explains, the statute in question suspended the statute of limitations for claims brought under the Minnesota Human Rights Act only while the parties are engaged in a "dispute resolution process." *Peterson v. City of Minneapolis*, 892 N.W.2d 824, 833-37 (Minn. 2017). The statute additionally lists arbitration, conciliation, mediation, and grievance procedures as examples of "dispute resolution process[es]." *Id.* at 834. The City of Minneapolis's Workplace Policy investigation did not contain any of the hallmarks of a dispute-resolution process, such as the use of a third-party neutral, the participation of both parties, or the possibility of relief for one or both of the parties. *Id.* at 834-37. Accordingly, the dissent would have concluded that the City's investigation did not constitute a "dispute resolution process."

The issue of voting rights is important to me, as our state has a tradition of high voter turnout. In *League of Women Voters v. Ritchie* in 2012, you joined an opinion rejecting a challenge to the wording of a ballot measure that would have implemented a voter ID requirement—which was later voted down by Minnesota voters. You voted to uphold that ballot question, even though – as Justices Page and Anderson pointed out – it was argued to be misleading, and the text of the amendment was significantly different than the measure that the Minnesota legislature had previously passed.

- How do you view the separation of powers implications of this decision?

  RESPONSE: As the per curiam opinion for the court points out, Article IX, Section 1 of the Minnesota Constitution vests the authority to submit constitutional amendments to the Legislature. In accordance with this textual commitment, Minnesota Supreme Court precedent required us to defer to the specific decisions of the Legislature on the wording of the ballot question. To be sure, the petitioners argued that the ballot question's language was misleading. But we held, in accordance with precedent, that the ballot question was "not so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law for a popular vote," even if others might have selected different language. *League of Women Voters v. Ritchie*, 819 N.W.2d 636, 647 (Minn. 2012). The question correctly points out, as the analysis above indicates, that the decision

is about the division of authority between the three branches of government over constitutional amendments, not the merits of the proposed voter ID requirement itself.

Nomination of Justice David Stras, to be United States Circuit Judge for the Eighth Circuit Questions for the Record

Submitted December 6, 2017

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?

   RESPONSE: If I am fortunate enough to be confirmed, I would look to the factors set forth by Supreme Court and Eighth Circuit precedent for determining whether an asserted right is fundamental and protected under the Fourteenth Amendment.

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

      RESPONSE: Please see my response to Question 1a.

   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?

      RESPONSE: Please see my response to Question 1a.

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

      RESPONSE: Please see my response to Question 1a. To the extent persuasive, I would also consider the precedent of other courts of appeal in arriving at a decision.

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

      RESPONSE: Please see my response to Question 1a.

   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*).

      RESPONSE: Both *Casey* and *Lawrence* are binding precedents, so I would faithfully follow these decisions as well as all other relevant Supreme Court and Eighth Circuit precedents if I am fortunate enough to be confirmed.

f. What other factors would you consider?

RESPONSE: Please see my response to Question 1a.

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

RESPONSE: The Supreme Court has held that the Fourteenth Amendment's guarantee of equal protection applies beyond race. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (same-sex couples); *United States v. Virginia*, 518 U.S. 515 (1996) (gender); *Graham v. Richardson*, 403 U.S. 365 (1971) (national origin). Because the scope of the Fourteenth Amendment's protections is the subject of pending litigation before federal courts and the issue could also come before me as an Associate Justice on the Minnesota Supreme Court, it would be unethical and improper for me to comment further. *See* Code of Conduct of United States Judges Canon 3(A)(6); *State v. Finch*, 865 N.W.2d 696, 705 (Minn. 2015) ("Judges must remain impartial by not prejudging; they must 'maintain[] an open mind."); *see also* Minnesota Code of Judicial Conduct, Rule 2.10(B) ("A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative activities of the office."). If I am fortunate enough to be confirmed and an equal-protection case came before me, I would apply all relevant precedent of the Supreme Court and the Eighth Circuit in this as well as all other areas of law.

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?

RESPONSE: Please see my response to Question 2 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?

RESPONSE: Please see my response to Question 2 above.

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

RESPONSE: Please see my response to Question 2 above.

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

RESPONSE: Please see my response to Question 2 above.

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

RESPONSE: The Supreme Court has held that the constitutional right to privacy protects a woman's right to use contraceptives. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). If I am fortunate enough to be confirmed, the Supreme Court's decisions will be binding on me, and I will apply them faithfully.

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

RESPONSE: The Supreme Court has held that the constitutional right to privacy protects a woman's right to an abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). If I am fortunate enough to be confirmed, the Supreme Court's decisions will be binding on me, and I will apply them faithfully.

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?

RESPONSE: The Supreme Court has held that the constitutional right to privacy protects intimate relations between two consenting adults, regardless of sex or gender. *Lawrence v. Texas*, 539 U.S. 558 (2003). If I am fortunate enough to be confirmed, the Supreme Court's decisions will be binding on me, and I will apply them faithfully.

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.

RESPONSE: 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, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), 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?

RESPONSE: Several recent decisions from the Supreme Court demonstrate how the United States Constitution may be applied to changing societal circumstances. *See, e.g.*, *Riley v. California*, 573 U.S. __ (2014) (holding that the warrantless search of a cellphone's contents incident to an arrest is unconstitutional). If I am fortunate enough to be confirmed and such a question came before me, I would apply all relevant precedent of the Supreme Court and the Eighth Circuit in this as well as all other areas of the law.

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

RESPONSE: I have not had occasion to study this question. If this question arose, I would carefully review, and faithfully apply, applicable Supreme Court and Eighth Circuit precedent.

5. You are a member of the Federalist Society, which advocates 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?

RESPONSE: The term "originalism" has been used differently by different people, and in different contexts. I have not personally assessed whether *Brown* is consistent with originalism, although some scholars have concluded that it is. *See, e.g.*, Michael W. McConnell, Originalism and the Desegregation Decisions, 81 VA. L. REV. 947 (1995). In any event, the question is purely academic because *Brown* is controlling Supreme Court precedent. If I am fortunate enough to be confirmed, *Brown* would be binding on me, and I would faithfully apply it and all other controlling Supreme Court precedent.

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-pages/democratic-constitutionalism (last visited December 5, 2017).

RESPONSE: I have not had occasion to study this specific legal question. If I am fortunate enough to be confirmed, I will faithfully apply all controlling Supreme Court and Eighth Circuit precedent.

6. In a 2008 article titled "Navigating the New Politics of Judicial Appointments," you referred to certain Supreme Court justices' "willingness to vindicate constitutional claims concerning 'such topics as marital privacy, abortion, and gay rights,' regardless of their support in the constitutional text."

   a. Do you believe marital privacy has no constitutional underpinnings?
   b. Do you believe the right to an abortion lacks constitutional support?
   c. Do you believe gay rights lack constitutional support?

   RESPONSE: Please see my response to Senator Feinstein's Question 5.

7. In a May 31, 2009 post on the blog *Balkinization*, you said you believed judges "are subject to political considerations in their decision-making" even though you noted that many judges believe they are acting impartially.

   a. Do you continue to have this belief?

   RESPONSE: When I wrote the blog post referenced by this question, I did so as an academic, not as a judge and I was commenting on an existing school of thought among academics, most commonly held by political scientists who study judicial decision making. I have not had an occasion to study the issue since that time and, therefore, I do not know if I would express the same position today.

   b. If your answer to (a) is no, what led you to state that belief in that 2009 blog post, and what since then has caused you to change your position?

RESPONSE: Please see my response to Question 7a.

   c. What personal political views might impact your impartiality when making judicial decisions?

   RESPONSE: Please see my response to Senator Durbin's Question 6.

   d. Do you believe that judges have a duty to minimize the impact of such political considerations on their judicial decision-making?

   RESPONSE: The job of a judge is to set aside all external considerations, and decide

only the case before the court. As I explained at my hearing, a judge must put aside his or her personal viewpoints, whatever they may be, and decide the case in accordance with the law, including any applicable precedent, even if the judge may personally favor a different outcome.

e. If your answer to (c) is yes, how will you work to minimize the impact of your political views on your judicial decision-making?

RESPONSE: As I explained at my hearing, a judge must put aside his or her personal viewpoints, whatever they may be, and decide the case in accordance with the law, including any applicable precedent, even if the judge may personally favor a different outcome. When called for by the applicable ethical rules, I have and will continue to recuse in any case "in which [my] impartiality might reasonably be questioned." Code of Conduct for United States Judges Canon 3(C); Minnesota Code of Judicial Conduct, Rule 2.11.

8. You moderated a November 18, 2010, panel discussing the constitutionality of the Affordable Care Act at a Federalist Society event. During that event, you asked the panel "if this law is allowed to stand, what about laws ordering people to buy Fruit Loops, and eat Fruit Loops? Because certainly that's economic activity, so where is the limit of Congress's power?"

a. In your view, what limits are there on Congress's ability to regulate economic activity?

RESPONSE: As the question notes, I posed this question during the 2010 panel as a moderator and did so to encourage discussion among the panelists. This was not a statement of my own personal views. I cannot respond any more specifically because such a question could arise in a case if I were fortunate enough to be confirmed as an Eighth Circuit judge. Accordingly, I cannot ethically respond to the question. Code of Conduct of United States Judges Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court."). If confirmed and such a question came before me, however, I would apply all relevant precedent of the Supreme Court and the Eighth Circuit in this as well as all other areas of the law.

b. Is it your view that the Affordable Care Act goes beyond that limit?

RESPONSE: The Supreme Court addressed this issue in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), in which the Supreme Court upheld the individual mandate under Congress's taxing power. If I am fortunate enough to be confirmed, the Supreme Court's decisions will be binding on me, and I will apply them faithfully.

c. If your answer to (b) is yes, what changes, if any, to the Affordable Care Act could make it constitutionally acceptable?

RESPONSE: Please see my response to Question 8b.

d. Do you believe that taxing individuals for failing to buy health insurance is beyond the power of Congress?

RESPONSE: Please see my response to Question 8b.

Questions for the Record for Justice David Ryan Stras
Submitted by Senator Richard Blumenthal
December 6, 2017

1. You are listed on President Trump's list for potential Supreme Court nominees. President Trump has repeatedly suggested that he has a litmus test for Supreme Court nominees, including whether they are "pro-life" and will "automatically" overturn *Roe v. Wade*.

   a. Why do you think President Trump believes you have passed his litmus test?

   RESPONSE: Please see my response to Senator Feinstein's Question 12a.

   b. Do you think that an observer would look at your record and think that you had passed President Trump's litmus test?

   RESPONSE: Please see my response to Senator Feinstein's Question 12a. I believe my record on the Minnesota Supreme Court reflects my commitment to fairly evaluating the arguments presented by the parties in each case and to following the applicable law and precedent.

   c. In your view, is it appropriate for a President to have a litmus test in nominating Supreme Court justices?

   RESPONSE: This question calls for my opinion on a political matter. Therefore, I must refrain from answering the question under the Code of Conduct for United States Judges. *See* Canon 5, Code of Conduct for United States Judges ("A judge should refrain from political activity"); *id*. Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

2. In 2008, at a Federalist Society event, you responded to a question about repealing the Fourteenth Amendment, saying that while you did not support repealing the Fourteenth Amendment, you "have faith in our activist judiciary in that if we repealed the Fourteenth Amendment, I'm pretty sure they would find some other penumbra of rights that would do everything that the Fourteenth Amendment would do – the Privileges and Immunities Clause, in particular!"

   a. What are some cases flowing from the Fourteenth Amendment that you disagree with?

   RESPONSE: Please see my response to Senator Feinstein's Question 1. I cannot be any more specific because it would require me to express a personal view on a subject of controversy that may result in litigation. *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."); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."); Minnesota Code of Judicial Conduct, Rule 2.10(B) ("A judge shall not, in connection with cases, controversies, or issues

that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative activities of the office."); *State v. Finch*, 865 N.W.2d 696, 705 (Minn. 2015) ("Judges must remain impartial by not prejudging; they must 'maintain[] an open mind.").

b. Do you believe that the Fourteenth Amendment penumbra of rights is the product of an "activist judiciary"?

RESPONSE: Please see my response to Senator Feinstein's Question 1.

3. In a 2009 interview, you criticized this Committee's vetting process, saying the process has "become a media spectacle controlled by interest groups to get people on the court who will vote a certain way. . . . It's less about judicial temperament" than it is about "senators getting their licks in." You argued that this process differs from "how the founders designed it" because "[i]t was supposed to be a robust look at the integrity and judicial philosophy of the nominees." The article concluded by noting, "[a]lthough he's reluctant to propose a change, Stras suggests giving the nominee five cases that were decided by the Supreme Court, and having the nominee read and comment on them. He would avoid 5-4 rulings so as not to suggest that one justice would alter the court."

a. Do you believe that your nomination process has become "a media spectacle controlled by interest groups to get people on the court who will vote a certain way"?
i. What interest groups support you?
ii. What way do they think you will vote?

RESPONSE: I made these statements as a law professor, not as a judge. Today, as a nominee, I am prohibited from commenting on the political aspects of my confirmation process under Canon 5 of the Code of Conduct for United States Judges. *See* Canon 5, Code of Conduct for United States Judges ("A judge should refrain from political activity").

b. Please comment on the following Supreme Court cases—none of which are 5-4 rulings—to the best of your ability. Do you support the majority in these cases? Were these cases decided correctly? Will you uphold these precedents?

i. *Griswold v. Connecticut*
ii. *Roe v. Wade*
iii. *Lawrence v. Texas*
iv. *Whole Women's Health v. Hellerstedt*
v. *Chevron U.S.A. v. Natural Resources Defense Council*

RESPONSE: If I am fortunate enough to be confirmed to serve on the Eighth Circuit, I will follow all binding precedent of the Supreme Court, including each of the cases you have listed. It would not be appropriate or relevant for me to discuss my personal opinions about these decisions, however, because it would require me to express a

personal view on a subject of controversy that may result in litigation. 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."); Minnesota Code of Judicial Conduct, Rule 2.10(B) ("A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative activities of the office."); *State v. Finch*, 865 N.W.2d 696, 705 (Minn. 2015) ("Judges must remain impartial by not prejudging; they must 'maintain[] an open mind.").

Questions for the Record for David Stras

Senator Mazie K. Hirono

1. At the hearing, I asked you about your previous criticism of the Supreme Court nominations process where you had stated that "for the most part, the hearings….really amount to futile questioning of the nominee about his/her jurisprudential views" and you challenged Senators to "ask more difficult legal questions." You responded that some of those statements were uninformed and that you now understand that judges are subject to canons regarding what they can and cannot say.

   a. To which canons were you referring at the hearing and how do they prevent judicial nominees from answering difficult questions? Please be specific.

   RESPONSE: There are at least two categories of canons that prevent me from answering certain types of questions. First, Canon 5 of the Code of Conduct for United States Judges prevents nominees from expressing opinions on political matters. *See* Canon 5, Code of Conduct for United States Judges ("A judge should refrain from political activity"); *id*. Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). Second, both the Code of Conduct for United States Judges and the Minnesota Code of Judicial Conduct, including applicable case law, prevent me from expressing a personal view on a subject of controversy that may result in litigation. 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."); Minnesota Code of Judicial Conduct, Rule 2.10(B) ("A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative activities of the office."); *State v. Finch*, 865 N.W.2d 696, 705 (Minn. 2015) ("Judges must remain impartial by not prejudging; they must 'maintain[] an open mind.").

   b. Do you believe that these canons prevent judicial nominees from answering all difficult question?

   RESPONSE: No.

   c. What are the types of difficult questions that you think judicial nominees should be answering at nominations hearings that do not conflict with these canons?

   RESPONSE: A nominee, for example, may answer difficult questions about past academic writings or opinions to the extent that the nature of the question does not require the nominee to violate any applicable canons.

   d. In light of these canons, how should judicial nominees provide information about

their legal views and approaches to legal issues so that Senators can meaningfully serve in their advice and consent roles?

RESPONSE: Please see my response to Question 1c.

2. During Justice Sotomayor's confirmation process, you argued at a Federalist Society online debate that "the futility of questioning" at judicial nominations hearings "is mostly attributable to Senators who are unwilling to vote against a nominee who refuses to answer questions." You recommended that "Senators should ask nominees questions about past Supreme Court decisions, perhaps limited to those decided over the past five years or so."

   a. Is that still your view?

   RESPONSE: As Question 1 acknowledges, there are certain statements that I made as an academic that I have now reconsidered after serving as a Minnesota Supreme Court Justice for the past 7 years. This is one of them. Although a nominee can answer questions about whether he or she would follow a Supreme Court decision, asking a nominee's personal views about the decision could require the nominee to express a personal view on a subject of controversy that could result in litigation.

   b. Do you believe there should be negative consequences for judicial nominees who refuse to answer questions at a judicial nominations hearing?

   RESPONSE: This question is tied to the constitutional advice-and-consent function of the Senate, and is a matter for each Senator to decide. As a nominee, I am prohibited from commenting further on the political aspects of my confirmation process under Canon 5 of the Code of Conduct for United States Judges.

   c. Do you believe Senators should vote against a nominee who refuses to answer such questions?

   RESPONSE: Please see my response to Question 2b.

3. One of the Supreme Court cases decided in the past five years is *Obergefell v. Hodges*, 576 U.S. (2015), which recognized a constitutional right for same-sex couples to marry.

   a. Do you agree with another judicial nominee, S. Kyle Duncan, who stated that *Obergefell* was wrongly decided?

   RESPONSE: Please also see my response to Senator Durbin's Question 13b. *Obergefell v. Hodges* is a binding precedent of the Supreme Court, and I will follow it faithfully. It would not be appropriate or relevant for me to discuss my personal opinions about it.

   b. What role do you think federal courts should play in addressing constitutional rights when there is disagreement about those rights among the States?

RESPONSE: Federal courts are obligated to decide all cases that come before them based on a careful consideration of the arguments of the parties, the relevant legal texts, the binding precedents of the Supreme Court, and any other relevant authorities.

c. Should federal courts give any weight to the fact that a State has refused to recognize a particular constitutional right in determining whether that right exists?

RESPONSE: This question asks me to provide my personal views on a question that I may be asked to decide, either in my current role as a Minnesota Supreme Court Justice or, if I am fortunate enough to be confirmed, as an Eighth Circuit judge. One way it could arise is if a party argues that a number of state courts have adopted a particular constitutional rule and that the federal courts should follow that rule. It could also arise in the context of a constitutional challenge to an established state practice. In either case, answering the question would require me to give my personal views on a subject of controversy that could result in litigation, which the canons prevent me from doing. 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.").