Senator Grassley
Follow-up Questions for the Record

John Milton Younge
Nominee, U.S. District Judge for the Eastern District of Pennsylvania

1. **In my written questions, I asked you about comments you had previously made on access to legal abortion. You indicated on a judicial questionnaire when running for Superior Court judge that you believed abortion law was "settled law," and I asked for your understanding of current federal law with respect to abortion. You wrote that you have not interpreted or applied abortion case law as a state court jurist, you referenced *Casey* and *Carhart*, and committed to following legal precedent if presented with an abortion law related case.**

    a. **I asked for your current understanding of abortion law, which goes much further than *Casey* and *Carhart*. Please describe your understanding of current federal law surrounding abortion and the issues that are still unresolved. Please perform any necessary research to answer this question.**

    Response: As a candidate for the Pennsylvania Superior Court, I responded to a question on a questionnaire by stating "It is a matter of settled law that a woman has a right to choose and the ultimate right over what happens to her body, which I support". I consider an issue to be "settled" when the United States Supreme Court has ruled on a matter. What I meant by my statement is that to the extent that the United States Supreme Court has consistently ruled that a woman has a legal right to obtain an abortion, that issue is settled law. What is not settled is whether and under what circumstances the government may restrict access to abortion.

    In clarifying its ruling in *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court held in *Planned Parenthood v. Casey*, 505 U.S. 833, 878-879 (1992):

    (a) "…An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."
    (b) "…to promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion…"
    (c) "…Unnecessary regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."
    (d) "…Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability"; and
    (e) "…the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the United States Supreme Court considered a challenge to the Partial-Birth Abortion Act of 2003 (the "Act"). Congress passed the Act defining partial-birth abortion as any abortion in which the death of the fetus occurs when the entire head or any part of the fetal trunk past the naval is outside the body of the mother. Dr. Leroy Carhart sued arguing the Act would apply to what had been considered a common abortion procedure known as a "D and E" ("dilation and evacuation") procedure as well as a procedure known as "intact D and E" ("dilation and extraction").

The Plaintiff argued the Act would ban all late term abortions and would constitute an undue burden on the right to abortion, in violation of *Planned Parenthood v. Casey*. The Plaintiff also argued the Act was unconstitutional because it did not contain an exception for abortion necessary to protect the life of the mother, in violation of *Stenberg v. Carhart*, 530 U.S. 914 (2000), wherein the Supreme Court struck down a Nebraska statute that banned partial-birth abortion because it did not contain an exception for the preservation of the life of the mother. The Act had sought to avoid this result by legislatively finding that partial-birth abortions are never medically necessary.

The federal district court found the Act unconstitutional, and the Government appealed to the Eighth Circuit Court of Appeals, arguing the Act bars only a very narrow category of abortion procedures and that a health exception is not required for a procedure that Congress had defined as not medically necessary for the health of the mother. The Eighth Circuit affirmed the lower court.

On appeal, the United States Supreme Court considered the question of whether the Act was an unconstitutional violation of the personal liberty precluded by the Fifth Amendment because it lacked an exception for partial-birth abortion necessary to protect the health of the mother. The Supreme Court reversed, finding: "The Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception…". *Gonzales v. Carhart*, 550 U.S. at 159.

Because the Supreme Court has upheld the Act which places a restriction on access to abortion, it is unclear what position they will take on other cases presently being litigated across the country wherein the government has sought to restrict access to abortion in some manner. For example, since 2011, various states have passed more than 200 laws that have had the effect of restricting access to abortion. In 2014, Tennessee passed a law that restricts access to abortion. In North Dakota, a statute was passed that gives a fetus full legal rights under the state's constitution. In Colorado, voters considered and rejected a 2014 law that would have classified a fetus as a person in cases of violence against the mother. Finally, the Supreme Court has accepted certiorari and will rule in this term on a case emanating from the Fifth Circuit, entitled Whole Woman's Health v. Cole, Docket No. 15-274, wherein the Circuit Court upheld a Texas law that restricts abortion providers by

requiring them to have admitting privileges at nearby hospitals and that abortion clinics must meet certain standards of surgical centers. The specific questions the Supreme Court will consider are: "(1) Whether, when applying the 'undue burden' standard of *Planned Parenthood v. Casey*, a court errs by refusing to consider whether and to what extent laws that restrict abortion for the stated purpose of promoting health actually serve the government's interest in promoting health; and (2) whether the Fifth Circuit erred in concluding that this standard permits Texas to enforce, in nearly all circumstances, laws that would cause a significant reduction in the availability of abortion services while failing to advance the State's interest in promoting health- or any other valid interest."

Because the Supreme Court has not determined what, if any, additional restrictions, beyond those contained in the Act, it will allow on access to abortion, the state of the law is unsettled and it would be inappropriate for me to proffer an opinion as to the constitutionality of these cases.

b. While the Supreme Court has addressed this issue, and while you are bound to follow its judgments, do you still hold the position that abortion law is "settled?"

Response: Please see my response to Question 1a. above.

c. Senator Sessions asked a similar question in his written questions, but specifically asked you if your statement applied "in all instances where a woman seeks a late term or partial-birth abortion." You did not answer that question. Please study applicable law and answer the question here.

Response: Please see my response to Question 1a. above.

2. When you were running for Superior Court Judge, you sought endorsement from Planned Parenthood, an organization that is known for providing abortion on demand. Please explain *why* you sought endorsement from such an organization.

Response: As a Democratic candidate for the Pennsylvania Superior Court, I sought the support of all organizations that traditionally support Democratic candidates.

United States Senator Thom Tillis
Questions for the Record
Senate Judiciary Committee
On
Nominations

Questions for Judge John Milton Younge

1. **In my written questions to you, I asked the following question: "A number of states, including North Carolina, have passed or introduced laws to protect women's health. You have characterized *Roe v. Wade* and its progeny as settled law. Please address whether you consider the following settled law:**

    a. **That a state can require a consultation with a physician or qualified professional at least 24 hours prior to an abortion procedure,**
    b. **That a state can forbid an abortion if a significant factor in the woman's decision is related to the gender of the unborn child,**
    c. **That a state can require abortion facilities to meet the same standards as ambulatory surgical centers, and**
    d. **That a state can require an ultrasound be made available to the woman before permitting an abortion."**

    In response, you stated:

    > **"*This is an issue that is currently being debated in the courts throughout this land. It would be inappropriate for me to offer an opinion in response to this question."***

    Your answer was non-responsive, and I would like to give you an opportunity to provide a responsive answer. Because you have opined on and characterized *Roe v. Wade* and its progeny as settled law, I would like to have a more comprehensive understanding of your views in this area of law. If *Roe v. Wade* and its progeny are in fact settled constitutional law, please address and answer individually the question and subparts stated above.

    a. **That a state can require a consultation with a physician or qualified professional at least 24 hours prior to an abortion procedure,**

    Response: I consider an issue to be "settled" when the United States Supreme Court has ruled on a matter. In *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the United States Supreme Court upheld the right of woman to legally obtain an abortion. To that extent, the law on abortion is settled. What is not settled is the extent to which the Court will allow restrictions on access to abortion, as evidenced by its holding in *Gonzales v. Carhart*, 550 U.S. 124 (2007), wherein Congress's Partial-Birth Abortion Act was found to be constitutional. Since 2011, various states have promulgated more than 200 laws which restrict, in some form or fashion, access to abortion. It is, therefore, unclear whether or not the Supreme Court will consider the process described in the question as an unconstitutional restriction on access to abortion under *Planned Parenthood v. Casey*. It would also be inappropriate for me to proffer an opinion as to

whether the referenced procedure will pass constitutional muster because pursuant to the Pennsylvania Rules of Judicial Conduct, Rule 2.10 (A), "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in **any** court (emphasis added), or make any nonpublic statement that might substantially interfere with a fair trial or hearing".

b. That a state can forbid an abortion if a significant factor in the woman's decision is related to the gender of the unborn child,

Response: Please see my response to Question 1a.

c. That a state can require abortion facilities to meet the same standards as ambulatory surgical centers, and

Response: Please see my response to Question 1a.

d. That a state can require an ultrasound be made available to the woman before permitting an abortion."

Response: Please see my response for Question 1a.

2. In my written questions to you, I asked the following question:

When running for a judicial seat in Pennsylvania, you sought an endorsement from the Planned Parenthood Pennsylvania Political Action Committee. As you are aware, Planned Parenthood has been accused of illegally selling fetal tissue and organs at some of its facilities. Had you known this behavior was an alleged practice of Planned Parenthood when you were seeking election for a judicial seat in Pennsylvania, would you still have sought an endorsement from the Planned Parenthood Pennsylvania Political Action Committee"

In response, you stated:

"I have not studied this issue and can express no opinion as to how I would have responded if such accusations had been made in the past." **This answer was non-responsive, and I would like to give you an opportunity to provide a responsive answer. Please take sufficient time to study the issue and respond.**

Response: Had I known of this alleged controversy, before responding to the questionnaire, I would have studied the facts and the law regarding this issue to determine whether this practice was illegal, immoral or unethical. If I determined that it was any of those things, I would not have returned the questionnaire. I would note,

however, there is disagreement as to the facts and implications of the current controversy. Therefore, pursuant to the Pennsylvania Rules of Judicial Conduct, I believe it would be inappropriate for me to make definitive findings of fact and conclusions of law regarding this controversy now and state what I would have done in the past.