

**Nomination of Brian Buescher to the United States District Court for  
the District of Nebraska  
Questions for the  
Record December 5,  
2018**

**QUESTIONS FROM SENATOR FEINSTEIN**

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

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

It is not appropriate for lower courts to depart from United States Supreme Court precedent.

**b. Do you believe it is proper for a district court judge to question Supreme Court precedent in an opinion?**

A district court judge is required to apply all binding United States Supreme Court precedent in all decisions. However, a district judge may address matters where there are gaps in the law, where there is no binding circuit court precedent, or in cases that do not fall strictly within the requirements of controlling Supreme Court precedent.

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

The United States District Court for the District of Nebraska has held that district courts are not bound by decisions on the same legal issue made by other district court judges. *Melichar v. Blue Cross and Blue Shield of Kansas, Inc.*, 309 F. Supp. 3d 719, n. 6 (D. Neb. 2018) (J. Kopf) (“While I reach the same result as Judge Bataillon in *Stumpf* [*v. Medical Benefits Adm’rs.*, No. 8:99CV185, 2001 WL 1397326 (D. Neb. Mar. 14, 2001)], I am not bound by that decision”, quoting *Camreta v. Greene*, 563 U.S. 692, 709 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.”)).

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

The United States Supreme Court has the authority under the United States Constitution and previous Supreme Court precedent to revisit or overturn its own precedent as it sees fit. As an inferior court nominee, it would be inappropriate for me to opine as to whether and when it would be appropriate for the United States Supreme Court to overturn its own precedent.

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

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

*Roe v. Wade*, 410 U.S. 113 (1973) is a landmark decision of the United States Supreme Court that has been repeatedly reviewed and affirmed by the United States Supreme Court. If confirmed as a District Court judge, I will apply all United States Supreme Court precedent, including *Roe v. Wade*.

**b. Is it settled law?**

All United States Supreme Court precedent, including *Roe v. Wade*, is settled law.

3. 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?**

From the perspective of a United States District Court, all United States Supreme Court precedent, including *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), is settled law.

4. 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?**

The United States Supreme Court disagreed with Justice Stevens in *Heller*. If confirmed, I would be bound as a lower court judge to apply the Supreme Court’s decision in *Heller*, along with all other United States Supreme Court precedent.

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

In *Heller*, the United States Supreme Court held that “the right secured by the Second

Amendment is not unlimited.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). The Court went on to address certain categories of permissible limitations.

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

The United States Supreme Court majority in *Heller* held that “nothing in [Supreme Court] precedents forecloses [the Court’s] adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved.” *Heller*, 554 U.S. at 625. As a nominee for a lower court, I will be bound by the Supreme Court’s reading of its precedents, including its reading of its own precedent in *Heller*.

5. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations’ independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

**a. Do you believe that corporations have First Amendment rights that are equal to individuals’ First Amendment rights?**

The United States Supreme Court held in *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 342 (2010) “that First Amendment protection extends to corporations.” The Court went on to hold that “political speech does not lose First Amendment protection ‘simply because its source is a corporation.’” *Id.* (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)). As a nominee to a lower court, I am bound by United States Supreme Court precedent on this issue.

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

The *Citizens United* Court rejected the “antidistortion rationale.” In rejecting the “antidistortion rationale,” the Court noted that acceptance of such rationale “would permit [the] Government to ban political speech simply because the speaker is an association that has taken on the corporate form.” *Id.* at 349. If confirmed, I will follow all United States Supreme Court precedent, including *Citizens United*.

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

The United States Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014), that owners of a closely held corporation did not forfeit all Religious Freedom Restoration Act protection “when they decided to organize their business as corporations rather than sole proprietorships or general partnerships.” Any extent to which the Hobby Lobby case protects corporations’ religious freedom rights is currently the subject of litigation around the country. Pursuant to Canon 3 of the Code of Conduct for United States Judges, I do not believe it would be appropriate for me to opine further.

6. In 2014, you ran for the Republican nomination for Nebraska Attorney General. In the

course of that campaign, you made a number of statements demonstrating your opposition to women’s reproductive rights. In an interview with the Nebraska Family Alliance, for instance, you said that “unfortunately, under *Roe v. Wade*, it is not possible to ban abortion right now.” During the same interview, you called yourself “an avidly pro-life person” and said that you would “not compromise on that issue,” noting it was “simply [your] moral fabric.” (Nebraska Family Alliance 2014 Video Voter Guide (Mar. 24, 2014))

**a. Do you believe that *Roe v. Wade* was correctly decided?**

*Roe v. Wade* is a landmark decision of the United States Supreme Court that has been repeatedly reviewed and affirmed by the United States Supreme Court. If confirmed as a District Court judge, I will apply all United States Supreme Court precedent, including *Roe v. Wade*.

**b. What did you mean when you said that you would refuse to “compromise” on your anti-choice views?**

As a candidate for Nebraska Attorney General in 2014, I took political positions and made statements in an effort to gain support and be elected Nebraska Attorney General. I made statements regarding what political or advocacy positions I would consider taking if elected. Such political statements were not made to suggest an intended action as a federal judge, because at that time I was not being considered as a federal judge. I believe a judge’s role and obligation is to apply the law without regard to any personal beliefs regarding the law. It is the role of the legislative and executive branch to make the law, and it is the judicial branch’s obligation to apply the law, not seek to make law. If confirmed, I will I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Roe v. Wade*. As a lower court judge, I will have no discretion to ignore Supreme Court precedent.

**c. What does it mean for your opposition to women’s reproductive rights to be part of your “moral fabric”?**

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

7. During your nominations hearing before the Judiciary Committee, you emphasized that you took these anti-choice positions as a candidate running for office, yet as noted above, you also said that your anti-choice views were part of your “moral fabric.”

**a. If confirmed, would you set aside the entirety of your “moral fabric” when issuing rulings?**

Every person, including every federal judge, has personal morals and beliefs that a person develops in life and over a career. All judges and nominees also develop certain views on political matters prior to being nominated to the bench. I believe a judge’s role and obligation is to apply the law and the United States Constitution without regard to any personal beliefs regarding the law. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of

Appeals precedent on all issues, without regard to any personal beliefs I may have.

**b. If not, how can you assure litigants your moral opposition to reproductive rights would not affect your rulings if you are confirmed?**

The Judicial Oath in 28 U.S.C § 453 requires judges to swear or affirm that they “will administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent . . . under the Constitution and laws of the United States.” If confirmed, I will abide by this oath. I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues.

8. In a questionnaire from the Nebraska Right to Life PAC that you filled out as a candidate for Nebraska Attorney General, you responded in the affirmative that you would “support and endorse legislation that provides conscience protection to health-care providers so they are free from statutory and regulatory mandates that would otherwise require them to provide, participate in or make referral for services that conflict with their moral values.” (Nebraska Right to Life PAC Voter Guide 2014 Survey for State Candidates)

**a. Did you understand “services that conflict with their moral values” to extend to prescribing or filling prescriptions for contraceptives like birth control pills?**

As a candidate for Nebraska Attorney General in 2014, I filled out the Nebraska Right to Life Survey as a candidate in an effort to obtain support for my candidacy for public office. There is a difference between filling out surveys and taking political positions as a candidate to try to earn support for elective office and serving as a judge. A judge’s role and obligation is to apply the law without regard to any personal beliefs. This question asks that I enter into a political discussion regarding an issue that is and is likely to be further litigated in Federal Courts. Thus I do not believe it is appropriate for me to provide commentary on this question. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Roe v. Wade*.

**b. What did you understand the questionnaire to mean when it referred to “services that conflict with their moral values”?**

Please refer to my answer to question 8(a) above.

9. During the same 2014 campaign for Nebraska Attorney General, you wrote the following: “I believe marriage is a union between a man and a woman. I do not believe homosexuality should be considered the same way race or ethnicity is considered with regard to anti-discrimination laws which currently apply to race or ethnicity.” (Response to State Attorney General—Republican Questionnaire (Mar. 2014))

**a. Do you believe that it is legally permissible to discriminate against LGBT Americans on the basis of their sexual orientation?**

As a candidate for Nebraska Attorney General in 2014, I did what candidates for any major state or federal office do which is to take political positions on a variety of issues of the day. After my 2014 run for Nebraska Attorney General, the United States Supreme Court issued its decision in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), recognizing marriages of same-sex couples. Currently there is litigation pending around the country regarding whether certain anti-discrimination laws apply to claims of discrimination due to sexual orientation. As a nominee for a federal judgeship, I do not believe it is appropriate for me to comment on this issue which is the subject of Federal Court litigation. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Obergefell*.

**b. If you do believe so, what is the legal justification for allowing such discrimination?**

Please refer to my answer to question 9(b) above.

**c. If not, why did you make that statement in 2014 and what prompted a change in your views?**

Please refer to my answer to question 9(b) above.

10. Your campaign for Nebraska Attorney General also focused on your efforts to fight regulations implemented by what you called the “overreaching federal government.” You specifically pledged to “push back” against the EPA and regulations that the agency adopted under the Clean Water Act.

**Please provide specific examples of regulations indicative of an “overreaching federal government.” For each example, please explain why that regulation indicates federal government overreach.**

Canon 5 of the Code of Conduct for United States Judges states that a judge should not engage in political activity. As a nominee to a Federal Court, I believe it would be inappropriate to enter into a public discussion regarding what might constitute “overreaching” federal regulations. In addition, questions of federal regulation are currently being litigated in courts around the country, and as a judicial nominee, I believe it would be inappropriate to opine on issues that may come in front of the Court at some point.

11. On your Senate Questionnaire, you indicate that you have intermittently been a member of the Federalist Society since 1997. The Federalist Society’s “About Us” webpage explains the purpose of the organization as follows: “Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.” It says that the Federalist Society seeks to “reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the

Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

- a. Could you please elaborate on the “form of orthodox liberal ideology which advocates a centralized and uniform society” that the Federalist Society claims dominates law schools?**

I did not write the Federalist Society’s website. I do not know who wrote this statement and am not aware of the understanding of the quote you reference.

- b. How exactly does the Federalist Society seek to “reorder priorities within the legal system”?**

I did not write the Federalist Society’s website. I do not know who wrote this statement and do not know how the Federalist Society seeks to “reorder priorities within the legal system,” if it indeed does so at all.

- c. What “traditional values” does the Federalist society seek to place a premium on?**

I did not write the Federalist Society’s website. I do not know precisely what the Federalist Society is referring to when it makes reference to “traditional values.”

12. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), White House Counsel Don McGahn told the audience about the Administration’s interview process for judicial nominees. He said: “On the judicial piece ... one of the things we interview on is their views on administrative law. And what you’re seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years...”

- a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your “views on administrative law”? If so, by whom, what was asked, and what was your response?**

During my June, 2018 interview with representatives of the White House Counsel’s Office and the United States Department of Justice, we discussed a variety of topics. I do not recall whether we had a specific discussion as to any views I might have on administrative law.

- b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your “views on administrative law”? If so, by whom, what was asked, and what was your response?**

I do not recall anyone affiliated with these groups asking me about my “views on

administrative law.” As outlined in background information submitted, I do have considerable experience advising clients with regard to state and federal regulation.

**c. What are your “views on administrative law”?**

As a nominee to a lower court, I will abide by all binding Supreme Court and Eighth Circuit Court of Appeals precedent, including those applicable to administrative law.

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

The United States Supreme Court has held that legislative history can be referenced in certain circumstances when the text of the statute is ambiguous. I will follow United States Supreme Court and Eighth Circuit Court of Appeals precedent on this issue if confirmed.

14. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

I do not recall having any discussions with anyone in the process that led to my nomination regarding any purported loyalty to President Trump.

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

I was provided these questions on December 5, 2018, which was one week after my confirmation hearing in front of the United States Senate Judiciary Committee. I reviewed the questions, drafted answers to the questions, and then sent drafts to the United States Department of Justice, requesting feedback on the answers. I then revised my answers where I deemed appropriate and authorized the Department of Justice to submit my answers on my behalf. All of my answers are my own.



**Senator Dick Durbin**  
**Written Questions for Brian Buescher**  
**December 5, 2018**

For questions with subparts, please answer each subpart separately.

**Questions for Brian Buescher**

1. In 2014 you were a candidate in the Republican primary to be the Attorney General of Nebraska. You filled out a candidate questionnaire ([http://www.voterinformation.org/media/pdf/state\\_attorney\\_general.pdf](http://www.voterinformation.org/media/pdf/state_attorney_general.pdf)) in which you made a number of provocative statements. These statements raise questions about your impartiality if you were to be confirmed as a federal judge.

- a. **You said “I will focus on fighting Obamacare.” What in your career have you done to fight Obamacare?**

As a candidate for Nebraska Attorney General in 2014, I took political positions and made statements in an effort to gain support and be elected Nebraska Attorney General. I also made statements regarding what political or advocacy positions I would consider taking if elected. I was not elected Nebraska Attorney General, and thus did not act on advocacy positions I proposed when running for office.

- b. **If you are confirmed as a federal judge, would you commit to recuse yourself from cases involving Obamacare, given your public statement that you were committed to fighting it?**

I believe the role of a judge is much different than that of an advocate or candidate for public office. If confirmed, I will apply all provisions of the Code of Conduct for United States Judges, including Canon 3(C), addressing recusal and disqualification.

- c. **You said “I do not believe homosexuality should be considered the same way race or ethnicity is considered with regard to anti-discrimination laws which currently apply to race or ethnicity.” Do you still hold this view?**

After my 2014 run for Nebraska Attorney General, the United States Supreme Court issued its decision in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), recognizing marriages of same-sex couples. The law has changed since I ran for Nebraska Attorney General and took political positions on these issues.

The question of how homosexuality should be considered with regard to anti-discrimination laws is the subject of extensive litigation in numerous jurisdictions around the country. As a nominee to a Federal Court, it would be inappropriate for me to comment on matters that may or are likely to come in front of the Court if confirmed. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Obergefell*.

**d. Do you think it should be legal to fire a person for being gay or transgender?**

Please refer to my answer to question 1(c) above.

**e. You said “I will also protect Nebraska’s agriculture and business interests from overreaching governmental regulations that will not serve to protect our environment but only further agendas of certain activist organizations.” To what governmental regulations were you referring in this statement?**

As a candidate for Nebraska Attorney General in 2014, I took political positions on a variety of issues of the day in an effort to obtain support and get elected. I also made statements regarding what political or advocacy positions I would consider taking if elected.

Canon 5 of the Code of Conduct for United States Judges states that a judge should not engage in political activity. As a nominee to a Federal Court, I believe it would be inappropriate to enter into a public discussion regarding political issues such as the question of whether the federal government has exceeded its legal authority with regard to certain federal regulations. In addition, questions of federal regulation are currently being litigated in courts around the country, and as a judicial nominee, I believe it would be inappropriate to opine on issues that may come in front of the Court at some point.

I believe a judge’s role and obligation is to apply the law without regard to his or her personal beliefs or prior political positions. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent.

**f. Would you recuse yourself from cases involving the regulations to which you referred in subpart (e), given your stated position on them?**

If confirmed, I will apply all provisions of the Code of Conduct for United States Judges, including Canon 3(C), addressing recusal and disqualification.

2.

**a. Do you believe that judges should be “originalist” and adhere to the original public meaning of constitutional provisions when applying those provisions today?**

When considering constitutional provisions, I believe interpretation should begin with the language of the constitutional provision. A lower court judge should then adhere to the meaning that the United States Supreme Court has assigned such a provision. United States District Court judges rarely have the opportunity to interpret United States Constitution provisions where there is no United States Supreme Court precedent.

**b. If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause**

**today?** To the extent you may be unfamiliar with the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution, please familiarize yourself with the Clause before answering. The Clause provides 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.

Please refer to my answer to question 2(a) above.

2. You say in your questionnaire that you have been a member of the Federalist Society intermittently since 1997.

- a. **Why did you join the Federalist Society?**

I joined the Federalist Society during law school at Georgetown University Law Center because I appreciated the activities and discussion of legal issues by the Georgetown chapter of the organization.

- 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."

As a judicial nominee, I do not believe it is appropriate to comment on political matters, including comments made by the President. See Canon 5 of the Code of Conduct for United States Judges.

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

I have never attended the Federalist Society annual convention.

- d. On November 17, 2017, then-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?**

I did not attend this speech.

3.

**a. Is waterboarding torture?**

I have not fully reviewed this issue. My understanding is that Federal law considers an act torture if a person acting under color of law “specifically intend[s] to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” 18 U.S.C. § 2340(1).

**b. Is waterboarding cruel, inhuman and degrading treatment?**

Although I have not fully reviewed this issue, after conducting limited research, my understanding is that waterboarding is not an authorized interrogation technique pursuant to the Army Field Manual, 42 U.S.C. § 2000dd-2(a)(2). Further, my understanding is that nobody in the custody or control of the United States may be subject to an interrogation technique not approved by the Army Field Manual.

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

I have not fully reviewed this matter and come to any legal conclusion on this question. Please see my answers to questions 3(a) and (b) above.

**4. Was President Trump factually accurate in his claim that three to five million people voted illegally in the 2016 election?**

I am not able to assess the accuracy of this statement. Further, Canon 5 of the Code of Conduct for United States Judges prohibits judicial nominees from commenting on political matters, which I believe includes commenting on statements made by the President of the United States.

**5. Do you think the American people are well served when judicial nominees decline to answer simple factual questions?**

I believe judicial nominees should answer questions to the best of their ability within the confines of the Code of Conduct for United States Judges and other legal limitations, including attorney-client privilege.

6.

**a. Do you have any concerns about outside groups or special interests making 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 any such donations, I am asking whether you would find such donations to be problematic.**

I am not aware of any outside groups or special interests making donations to support my nomination. The question of whether such donations are problematic is a political issue that I

believe would be inappropriate for me to comment on pursuant to Canon 5 of the Code of Conduct for United States Judges.

- b. **If you learn of any such donations, will you commit to call for the undisclosed donors 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?**

If confirmed, I will apply all provisions of the Code of Conduct for United States Judges, including Canon 3(C), addressing recusal and disqualification.

- c. **Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

Please see my answers to questions 6(a) and (b) above.

7.

- a. **Do you interpret the Constitution to authorize a president to pardon himself?**

I have not researched this question and have not come to any legal conclusion as to this issue.

- b. **What answer does an originalist view of the Constitution provide to this question?**

I have not researched this question and have not come to any legal conclusion as to this issue.

**Nomination of Brian C. Buescher, to be United States District Court  
Judge for the District of Nebraska  
Questions for the Record  
Submitted December 5,  
2018**

**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?

The United States Supreme Court has provided these factors in decisions such as *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). I would apply the factors outlined in United States Supreme Court precedent along with precedent from the Eighth Circuit Court of Appeals.

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

Yes, as directed by the United States Supreme Court.

b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Yes, as directed by the United States Supreme Court. *See Washington v. Glucksberg*, 521 U.S. 702 (1997).

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

Yes. I would be bound by United States Supreme Court and Eighth Circuit Court of Appeals precedent. I would consider precedent of another court of appeals as persuasive authority.

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

Yes.

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, 851 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

*Casey* and *Lawrence* are binding precedents. I would apply them along with other binding

precedents.

f. What other factors would you consider?

I would consider any other factors deemed appropriate by United States Supreme Court and Eighth Circuit Court of Appeals precedent.

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

The United States Supreme Court has applied heightened scrutiny under the Fourteenth Amendment of the United States Constitution in cases involving race and gender. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

The United States Supreme Court has held that the Fourteenth Amendment of the United States Constitution requires heightened scrutiny for cases involving gender. This is binding precedent that I would apply without regard to any arguments regarding the intent of the individuals who passed the Fourteenth Amendment.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

I do not know why the United States Supreme Court did not previously address this issue. *United States v. Virginia* is controlling United States Supreme Court precedent and I will faithfully apply such authority.

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

In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015), the United States Supreme Court held that same-sex couples must be afforded the right to marry "on the same terms as accorded to couples of the opposite sex."

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

Equality under the law is of extreme importance in our legal system. However, I believe this issue is the subject of current litigation. Therefore, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting.

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

Yes. The United States Supreme Court has recognized this in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

Yes. The United States Supreme Court recognized this right in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeast. Pa. v. Casey*, 505 U.S. 833 (1992).

- 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?

Yes. The United States Supreme Court has recognized this right in *Lawrence v. Texas*, 539 U.S. 558 (2003).

- c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Please see my answers to questions 3(a) through 3(c) above.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “[h]igher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

- a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

The United States Supreme Court has considered such evidence previously, including in *Obergefell* and *Virginia*. If confirmed, I would follow all binding United States Supreme Court and Eighth Circuit Court of Appeals precedent.

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

Federal Rule of Evidence 702 lists the factors a United States District Court is to consider when determining whether to admit testimony from a “witness who is qualified as an expert by knowledge, skill, experience, training, or education . . . .” Fed. R. Evid. 702. *See also Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). One factor for the Court to consider is whether “the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue[.]” Fed. R. Evid. 702(a).



5. In the Supreme Court’s *Obergefell* opinion, Justice Kennedy explained, “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.”
  - a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

In *Obergefell*, the United States Supreme Court ruled that same-sex individuals have a right to marry under the Fourteenth Amendment of the United States Constitution. As a lower court judge, I will faithfully apply the holding of *Obergefell* and all United States Supreme Court and Eighth Circuit Court of Appeals precedent.

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

Please see my response to question 5(a) above. If confirmed, I will apply all binding case law to each and every case I handle.

6. You are a member of the Federalist Society, a group whose members often advocate an “originalist” interpretation of the Constitution.
  - a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I am not currently a member of the Federalist Society, although I have previously been a member. I am aware this issue has been the subject of scholarly discussion and debate. I have not studied this question in detail. *Brown* is a landmark decision of the United States Supreme Court and I would faithfully apply this binding precedent if confirmed.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited Dec. 4, 2018).

I am not familiar with the article referenced in this question. If confirmed, I will be bound to follow all United States Supreme Court precedent, whether or not the decisions were based upon an analysis of original public meaning of the provision being interpreted.

- c. Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

If confirmed, I will be bound by United States Supreme Court precedent. In cases where the United States Supreme Court conducted an analysis of the original public meaning of the Constitution, I will be bound by such analysis and holding. In circumstances the United States Supreme Court utilized some other method of interpretation, I will be bound by such analysis and holding as well.

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

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

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

I would begin with the text of the provision, and then apply all relevant United States Supreme Court and Eighth Circuit Court of Appeals precedent to discern the contours of a constitutional provision.

7. In a 2014 interview with the Nebraska Family Alliance, you advocated for eroding abortion rights “bit by bit” and enacting laws that go “as far as they can.” In 2016, the Supreme Court decided *Whole Woman’s Health v. Hellerstedt*, 135 S. Ct. 2292 (2016).
- a. Do you agree that the dispositive issue in that case was whether the actions of the Texas legislature amounted to an undue burden on a women’s right to choose?

As a candidate for Nebraska Attorney General in 2014, I took political positions and made statements in an effort to gain support and be elected Nebraska Attorney General. I made statements regarding what political or advocacy positions I would consider taking if elected. Such political statements were not made to suggest an intended action as a federal judge, because at that time I was not being considered as a federal judge.

The case of *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), is United States Supreme Court precedent. The Court specifically addressed the undue burden standard in detail and applied the standard in the case. *See, e.g., Hellerstedt*, 136 S. Ct. at 2309-2320. If confirmed, I will faithfully apply all United States Supreme Court precedent, including *Hellerstedt*.

- b. Do you agree that, under this legal standard, a court must consider whether a legislature’s stated rationale to enact legislation that restricts abortion access is a pretextual justification for the legislation?

Please see my answer to question 7(a) above. As a lower court judge, I will be bound to apply the precedent of *Hellerstedt* and other United States Supreme Court and Eighth Circuit Court of Appeals cases.

8. You have previously expressed opposition to provisions of the Affordable Care Act, asserting your view that it punishes doctors and medical professionals for their religious

beliefs, and you indicated support for challenging the Affordable Care Act on that basis.

- a. Please explain what you meant when you asserted that the ACA punishes doctors and medical professionals for their religious beliefs.

As a candidate for Nebraska Attorney General in 2014, I took many political positions as a part of my campaign. I believe it is appropriate for a candidate for political office to discuss political positions and views in an effort to seek votes. The role of a federal judge is different. A federal judge does not make political statements or act as an advocate, but rather is required to apply the law and binding precedent in a fair and impartial manner.

Pursuant to Canon 5 of the Code of Conduct for United States Judges, a judge should not engage in political activity. I believe it is inappropriate pursuant to the Code of Conduct for United States Judges for a judicial candidate to publically opine on this political issue. If confirmed, I will faithfully apply all constitutional federal law, including the Affordable Care Act. I will likewise apply United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues.

- b. Given your prior statements, would you recuse from legal challenges to the Affordable Care Act if confirmed?

If confirmed, I will apply all provisions of the Code of Conduct for United States Judges, including Canon 3(C), addressing recusal and disqualification.

- c. When does the law require deference to a service provider's religious beliefs that conflict with generally applicable laws protecting others' fundamental rights?

I believe this question is the subject of continued litigation. As a nominee to a Federal Court, it would be inappropriate for me to comment on matters that may or are likely to come in front of the Court. If confirmed, I will apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent as to the Affordable Care Act.

9. Do you agree that the Supreme Court's analysis in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), holding that treating employees differently in the workplace on the basis of whether they conform to stereotypes constitutes sex discrimination under Title VII of the Civil Rights Act of 1964, remains binding precedent?

*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), was superseded in part by federal statute, as outlined in *Landgraf v. USI Film Prod.*, 511 U.S. 244, 250-51 (1994) (expressly identifying "one of the [Civil Rights Act of 1991's] purposes 'to respond to recent decisions of the Supreme Court'" and further noting § 107 [of the 1991 Act] responds to [*Price Waterhouse v. Hopkins*] by setting forth standards applicable in 'mixed motive' cases"). See also *Burrage v. United States*, 571 U.S. 204, 213 n. 4 (2014). *Price Waterhouse* remains binding precedent in part subject to subsequent Federal statute and United States Supreme Court decisions.

10. After *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), can states deny married same-sex couples certain benefits or protections offered to married opposite-sex couples?

I believe this question is the subject of continued litigation. As a nominee to a Federal Court, it would be inappropriate for me to comment on matters that may or are likely to come in front of the Court. If confirmed, I will apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent.

**Questions for the Record for Brian C. Buescher  
From Senator Mazie K. Hirono**

1. You have described yourself as “an avidly pro-life person” and called the Supreme Court’s decision recognizing a constitutional right to abortion “unfortunate[.]”

- a. **Why did you consider the Supreme Court’s decision in *Roe v. Wade* to be unfortunate?**

As a candidate for Nebraska Attorney General in 2014, I did what candidates for any major state or federal office typically do, which is to take political positions on a variety of issues of the day. There is a difference between taking political positions as a candidate for elective office and serving as a federal judge. I believe a judge’s role and obligation is to apply the law and the United States Constitution without regard to his or her own personal beliefs. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Roe v. Wade*.

- b. **Do you still consider the Supreme Court’s decision in *Roe v. Wade* to be unfortunate? Why or why not?**

As a candidate for Nebraska Attorney General in 2014, I took many political positions as a part of my campaign. I believe it is appropriate for a candidate for political office to discuss political positions and views. The role of a federal judge is different. I believe it is inappropriate pursuant to the Code of Conduct for United States Judges for a judicial candidate to opine on the correctness of certain Supreme Court precedent. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Roe v. Wade*.

2. During your 2014 campaign for Nebraska Attorney General, you called abortion “immoral” and stated unequivocally that you “will not compromise” on abortion based on your “moral fabric.” When confronted with these statements during your confirmation hearing, you testified that “[t]here is a difference between running for office and taking positions on issues of the day . . . and serving as a judge in a federal court.”

- a. **Does a federal judge have to ignore his or her morals when ruling in a case?**

Every person, including every federal judge, has personal morals and beliefs that are developed over a career in life and in the law. All judges and nominees also develop certain views on political matters prior to being nominated to the bench. I believe a judge’s role and obligation is to apply the law and the United States Constitution without regard to any personal beliefs regarding the law. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Roe v. Wade*.

- b. **Is it still in your “moral fabric” that you “will not compromise” on abortion? If not, when did this change?**

As a candidate for Nebraska Attorney General in 2014, I took political positions and

made statements in an effort to gain support and be elected Nebraska Attorney General. I made statements regarding what political or advocacy positions I would consider taking if elected. Such political statements were not made to suggest an intended action as a federal judge, because at that time I was not being considered as a federal judge. I believe a judge's role and obligation is to apply the law without regard to any personal beliefs regarding the law. It is the role of the legislative and executive branches to make the law; it is the judicial branch's obligation to apply the law. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Roe v. Wade*. As a lower court judge, I will have no discretion to ignore Supreme Court precedent.

**c. If it remains in your “moral fabric” that you “will not compromise” on abortion, please explain why a woman looking to enforce her constitutional right to an abortion should have confidence that you will treat her fairly if you are confirmed as a judge.**

Please see my answer to question 2(b) above.

**d. Should you be confirmed, will you recuse yourself from any case relating to abortion rights?**

If confirmed, I will apply all provisions of the Code of Conduct for United States Judges, including Canon 3(C), addressing recusal and disqualification.

3. You have said that the federal government should recognize marriage as between a man and a woman. In *Obergefell v. Hodges*, the Supreme Court held that there is a constitutional right to gay marriage.

**Do you believe Obergefell was wrongly decided?**

*Obergefell v. Hodges* is a landmark decision of the United States Supreme Court. As a nominee to an inferior court, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Obergefell v. Hodges*.

4. When you ran for Nebraska Attorney General in 2014, you said: “I do not believe homosexuality should be considered the same way as race or ethnicity is considered with regard to anti-discrimination laws which currently apply to race or ethnicity.”

**a. What was the legal basis of your statement?**

The law has changed since I ran for Nebraska Attorney General and took political positions on these issues. Specifically, in 2015, the United States Supreme Court issued its decision in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), recognizing marriages of same-sex couples. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Obergefell*.

**b. Do you still believe that homosexuality should not be considered the same way as race or ethnicity is considered with regard to anti-discrimination laws which currently apply to race or ethnicity? Why or why not?**

The question of how homosexuality should be considered with regard to anti-discrimination laws is the subject of extensive litigation in numerous jurisdictions around the country. As a nominee to a the United States District Court, it would be inappropriate for me to comment on matters that may or are likely to come in front of the court if confirmed. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Obergefell*.

**c. Do you believe discrimination against LGBTQ individuals should be prohibited by the law in the same way racial and ethnic discrimination is prohibited by law?**

Please see my answer to question 4(b) above.

**d. In view of your statement, please explain why LGBTQ individuals should feel confident that you will treat them fairly if you are confirmed as a judge.**

The Judicial Oath in 28 U.S.C § 453 requires judges to swear or affirm that they “will administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent . . . under the Constitution and laws of the United States.” If confirmed, I will abide by this oath. I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Obergefell*.

**e. Should you be confirmed, will you recuse yourself from any case relating to discrimination on the basis of sexual orientation or sexual identity?**

If confirmed, I will apply all provisions of the Code of Conduct for United States Judges, including Canon 3(C), regarding recusal and disqualification. It would be inappropriate under the Judicial Canons to state now whether or not I would recuse myself on any certain line of cases.

5. During your campaign for Nebraska Attorney General, you said that you would “push back” on the federal government’s purported push to infringe on religious liberty.

**a. How has the federal government pushed to infringe on religious liberty?**

Questions of religious liberty are currently being litigated around the country, and as a judicial nominee, I believe it would be inappropriate to opine on issues that may come in front of the Court at some point.

**b. During your campaign, you singled out the Affordable Care Act, which you described as punishing doctors and medical professionals for their valid religious beliefs. How did the Affordable Care Act punish doctors and medical professionals for their valid religious beliefs?**

As a candidate for Nebraska Attorney General in 2014, I did what candidates for any major state or federal office do, which is to take political positions on a variety of

issues. However, as stated above, there is a difference between taking political positions as a candidate for elective office and serving as a federal judge. I believe a judge's role and obligation is to apply the law without regard to any personal beliefs or prior political positions regarding the law. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent, including cases involving the Affordable Care Act, such as *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), and *King v. Burwell*, 135 S. Ct. 2480 (2015).

**c. If you are confirmed as a federal judge, would you see it as your duty to “push back” on these types of actions?**

The Nebraska Attorney General is charged with serving as an advocate for the State of Nebraska in a variety of cases. The Nebraska Attorney General also takes political positions and advocates for changes in law, while also being obligated to enforce the law. As a candidate for Nebraska Attorney General in 2014, I took political positions on various issues and suggested a variety of advocacy strategies that I would consider if elected.

The role of a judge is different than that of a political candidate, attorney, or advocate. A judge must decide cases and apply the law, not advocate for one side or the other in a legal proceeding. If confirmed, I would not be acting as an advocate, but as an impartial judge.

**d. There are times when one person's constitutional right to freely exercise her religion conflicts with another person's constitutional right to equal protection under the law. If you were confirmed as a federal judge, how would you approach such a case?**

When serving the public as a federal judge, a judge must carefully review and analyze all binding authority. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, and perform the duties of a Federal judge with the care and attention required.

6. During your campaign for Nebraska Attorney General, you also said you would “push back” on what you referred to as “overreaching federal government,” particularly in the agricultural sector. You continued this theme in a number of presentations. In one presentation you made clear your preference for business over the environment when you complained of “federal over-reach that will hamper economic growth and drive up costs for farmers and chemical producers.”

**a. Please list examples of what you viewed as “federal overreach” that you believed would hamper economic growth and drive up costs for businesses.**

As a candidate for Nebraska Attorney General in 2014, I took political positions on a variety of issues of the day in an effort to obtain support and get elected.

Canon 5 of the Code of Conduct for United States Judges states that a judge should not engage in political activities. As a nominee to a Federal Court, I believe it would be inappropriate to enter into a public discussion regarding political issues



such as the question of whether the federal government has exceeded its legal authority with regard to certain federal regulations. In addition, questions of federal regulation are currently being litigated in courts around the country, and as a judicial nominee, I believe it would be inappropriate to opine on issues that may come in front of the Court at some point.

I believe a judge's role and obligation is to apply the law without regard to any personal beliefs or prior political positions regarding the law. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent.

**b. What was the factual basis for your conclusion that federal overreach will hamper economic growth and drive up costs for farmers and chemical producers?**

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

**c. Please explain why, in view of your clear position, a party looking to enforce federal laws or regulations against farmers or chemical producers should have confidence that you will treat them fairly if you are confirmed as a judge.**

The Judicial Oath in 28 U.S.C § 453 requires judges to swear or affirm that they “will administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent . . . under the Constitution and laws of the United States.” If confirmed, I will abide by this oath. I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues.

7. You reported that you have been a member of the Knights of Columbus since 1993. The Knights of Columbus has taken a number of extreme positions. For example, it was reportedly one of the top contributors to California's Proposition 8 campaign to ban same-sex marriage.

**a. If confirmed, do you intend to end your membership with this organization to avoid any appearance of bias?**

The Knights of Columbus is a Roman Catholic service organization with approximately two million members world-wide. I have not drafted any policies or positions for the national organization. If confirmed, I will abide by the Code of Conduct of United States Judges and will not affiliate with any organization in violation of the Code.

**b. If confirmed, will you recuse yourself from all cases in which the Knights of Columbus has taken a position?**

The Knights of Columbus does not have the authority to take personal political positions on behalf of all of its approximately two million members. If confirmed, I will apply all provisions of the Code of Conduct for United States Judges, including Canon 3(C), regarding recusal and disqualification.

8. In May of this year, the Knight of Columbus issued a statement in support of the Trump administration's efforts to bar clinics that provide abortion services or referrals

from receiving federal family-planning funds under Title X funds. In 2016, the Knights of Columbus online magazine published an article claiming that contraceptives have “potentially dangerous side effects related to women’s health” and that “[a] growing body of research indicates that contraception even alters a woman’s ability to choose a more genetically suited spouse” because “contraception suppresses fertility and its corresponding hormones.”

- a. You were a member of the Knights of Columbus when they published these statements. Reproductive health providers who receive Title X funds provide a critical service to women. Do you believe federal funds should not be given to these providers who support abortion services?**

As a nominee to a Federal Court, I believe it would be inappropriate to enter into a public discussion regarding political issues such as Title X funds. In addition, questions of such funds are or likely will be the subject of additional federal litigation. I believe it would be inappropriate to opine on issues that may come in front of the Court at some point.

- b. Do you believe contraceptives may be dangerous to a woman’s health and may “even alters a woman’s ability to choose a more genetically suited spouse”?**

I am not familiar with the article referenced in this question and its subparts. The statements referenced in the question were not made by me. Any author in a Knights of Columbus publication does not have authority to bind the organization or any of its two million members on any given political issue. Canon 5 of the Code of Conduct for United States Judges further states that a judge should not engage in political activity. As a nominee to a Federal Court, I believe it would be inappropriate to enter into a public discussion regarding political issues such as those addressed in this question.

- c. If these are not your views, what steps have you taken to make clear that you do not hold these views?**

Please refer to my answer to question 8(b) above.

- d. Given your membership in this organization, what assurances can litigants have that you will deal with reproductive rights and abortion issues fairly and impartially?**

The Judicial Oath in 28 U.S.C § 453 requires judges to swear or affirm that they “will administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent . . . under the Constitution and laws of the United States.” If confirmed, I will abide by this oath. I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues.

9. An ethical consideration under Canon 2 of the American Bar Association’s Code of Professional Responsibility calls for “every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantages.” The only pro bono work you included on your Senate Judiciary Questionnaire was your service on the Nebraska State Records Board and work as

volunteer legal counsel for the Douglas County Republican Party and the Nebraska Republican Party.

**Have you provided any pro bono legal services to the disadvantaged among us? If so, please describe that work.**

As lawyers, we are all called to utilize our skills and knowledge in different ways to benefit the public or those who are disadvantaged. I have donated my time to political candidates to assist them in complying with state and federal election law. My law firm on numerous occasions has provided financial assistance to organizations that provide legal services to the disadvantaged. Further, I served as a full-time domestic violence prosecutor for a three-month time period as a pro-bono offering of my law firm with no extra payment to me or my firm from the city or county attorney's office.

10. You have a Twitter account with over 300 followers that is locked from public access.

**a. Will you disclose the tweets in your Twitter account to the Committee? If not, why not?**

I am an infrequent user of Twitter. Now that I have been nominated for the federal bench, I have chosen to make my Twitter account private. I have done so for the sake of my own and my family's privacy, given that my Twitter feed contains semi-private information and personal photographs of family and friends.

**b. Have you tweeted about LGBTQ people or LGBTQ issues from your Twitter account?**

Please see my response to 10(a).

**c. Have you tweeted about reproductive rights issues, abortions, or Roe v. Wade from your Twitter account?**

Please see my response to 10(a).

**Nomination of Brian C. Buescher**  
**United States District Court for the District of**  
**Nebraska Questions for the Record**  
**Submitted December 5, 2018**

**QUESTIONS FROM SENATOR BOOKER**

1. Impartiality is a fundamental part of a federal judge’s duties. Impartiality is central to the rule of law and judicial independence. Canon 3 of the Code of Conduct for United States Judges instructs: “A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently.” Canon 3(C), moreover, specifically provides: “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”

When you ran for Attorney General of Nebraska in 2014, you made a number of deeply troubling statements that place your impartiality in question on several important issues. One of these issues is abortion.

In a video interview with the Nebraska Family Alliance during your 2014 campaign, for example, you said:

I am an avidly pro-life person, and I will not compromise on that issue. That’s just simply my moral fabric, and that’s what I’ll do as Attorney General. When regulating abortion, my view is this: we should regulate abortion as much as we possibly can. I’m in favor of banning abortion. Unfortunately, under the *Roe v. Wade* law, or case, and its prodigy, that is not possible to ban abortion right now. So what I believe we should do is we should assess the situation and try to enact laws that go as far as we can without being invalidated. So in other words, we need to make sure our laws have a chance of being upheld by the courts, because, if not, we’re really kind of wasting our time, because, if it’s invalidated, then the law doesn’t ever get enacted. So what we do is we go after abortion bit by bit, and we try to make sure that we have laws that’ll withhold judicial scrutiny.<sup>1</sup>

- a. If you are confirmed, why should a litigant in your courtroom expect to get a fair hearing from an impartial judge in a case involving abortion rights, in light of statements like this one?

As a candidate for Nebraska Attorney General in 2014, I did what candidates for any major state or federal office do, which is to take political positions on a variety of issues of the day. However, there is a difference between taking political positions as a candidate for elective office and serving as a Federal judge. I believe a judge’s role and obligation is to apply the law without regard to any personal

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<sup>1</sup> Interview with Brian Buescher, Nebraska Family Alliance 2014 Video Voter Guide, at 4:37 (Mar. 24, 2014).

beliefs regarding the law. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Roe v. Wade*.

- b. You said that you wanted to “go after abortion bit by bit” and “try to enact laws that go as far as we can without being invalidated.” If you are confirmed, why shouldn’t a litigant in your courtroom be concerned that you will favor this litigation strategy to undermine *Roe v. Wade* and other important precedents?

The Nebraska Attorney General is charged with serving as an advocate for the State of Nebraska in a variety of cases. The Nebraska Attorney General also takes political positions and advocates for changes in law, while also being obligated to enforce the law. As a candidate for Nebraska Attorney General in 2014, I took political positions on various issues and suggested a variety of advocacy strategies that I would consider if elected.

The role of a judge is different than that of a political candidate, attorney, or advocate. A judge must decide cases and apply the law, not advocate for one side or the other in a legal proceeding. Just as a former prosecutor who becomes a judge is able to set aside his or her prior advocacy against criminal defendants to act as a fair and impartial judge in criminal proceedings, if confirmed, I will faithfully apply all United States Supreme Court precedent and set aside any personal beliefs I might have when facing litigants in court.

- c. If you are confirmed, and a case involving abortion rights comes before you that in your view is not squarely controlled by Supreme Court or Eighth Circuit precedent, why shouldn’t a litigant in your courtroom be concerned that you would issue a ruling that aims to “go after abortion bit by bit”?

Please see my responses to questions (a) and (b) above.

- d. In a 2014 questionnaire for the Nebraska Right to Life PAC, you indicated that you “support[ed] reversing or changing the *Roe v. Wade* and *Doe v. Bolton* decisions so that elected legislative bodies (State Legislatures and U.S. Congress) may once again protect unborn children by limiting and/or prohibiting abortion.”<sup>2</sup> In a survey from 2009, when you were running for another office, you indicated that you “support[ed] the complete reversal of *Roe v. Wade* and *Doe v. Bolton*, thereby allowing state legislatures and Congress to once again protect unborn children.”<sup>3</sup> Given your previously expressed support for a “complete reversal” of *Roe*, why should litigants in your courtroom expect you to be able to apply *Roe* and its progeny fairly and impartially?

As a candidate for Nebraska Attorney General in 2014 and for Omaha City Council in 2009, I filled out the Nebraska Right to Life Survey as a candidate in an effort to

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<sup>2</sup> SJQ Attachments at 833 (Neb. Right to Life PAC, Voter Guide: 2014 Survey for State Candidates).

<sup>3</sup> 2009 Voter Guide and Candidate Survey, NEB. RIGHT TO LIFE PAC, <http://nebraskarighttolife.org/wp-content/uploads/2013/06/2009primaryelectionvg.pdf>.

obtain support for each candidacy for public office. In 2014, all four Republican candidates filled out the survey similarly. In 2009, the top three vote-getting candidates in the nonpartisan primary election (two Republicans and one Democratic candidate), who collectively earned over 65% of the primary vote cast, all filled out the survey similarly. In particular, all three top vote-earning candidates provided the same answer with regard to the 2009 question referenced above. The Democratic candidate, who eventually won the election, remains in office today.

There is a difference between filling out surveys and taking political positions as a candidate to try to earn support for elective office and serving as a judge. A judge's role and obligation is to apply the law without regard to any personal beliefs the judge might have or have previously expressed regarding the law. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Roe v. Wade*.

- e. Do you believe that *Roe v. Wade* was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation. Please explain any discrepancy between your response here and your past support for a “complete reversal” of *Roe*.

*Roe v. Wade* is a landmark decision of the United States Supreme Court that has been repeatedly reviewed and affirmed by the United States Supreme Court. If confirmed as a District Court judge, I will apply all United States Supreme Court precedent, including *Roe v. Wade*.

- f. As noted, the Code of Conduct for United States Judges requires a judge to “disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.” Given your statements about, for example, favoring “banning abortion” and being unwilling to “compromise,” wouldn't your impartiality on this issue reasonably be questioned?

If confirmed, I will apply all provisions of the Code of Conduct for United States Judges, including Canon 3(C), addressing recusal and disqualification. It would be inappropriate under the Judicial Canons to state now whether or not I would recuse myself on any certain line of cases.

- g. Given the positions you've taken, would you recuse yourself from any cases involving abortion rights if you are confirmed as a federal judge?

Please see my answer to question 1(f) above.

- 2. You have also made troubling statements with regard to LGBTQ rights. In the same 2014 video interview with the Nebraska Family Alliance, you said: “I believe marriage is between a man and a woman, and that's the way the government should recognize

marriage.”<sup>4</sup> In a campaign questionnaire, you stated: “I believe marriage is between a man and a woman. I do not believe homosexuality should be considered the same way race or ethnicity is considered with regard to anti-discrimination laws which currently apply to race or ethnicity.”<sup>5</sup>

- a. If you are confirmed, why should a same-sex couple arguing their case in your courtroom expect to have a fair and impartial judge, in light of statements like these?

As a candidate for Nebraska Attorney General in 2014, I did what candidates for any major state or federal office do which is to take political positions on a variety of issues of the day. However, there is a difference between taking political positions as a candidate for elective office and serving as a Federal judge. I believe a judge’s role and obligation is apply to the law without regard to any personal beliefs or prior political positions regarding the law.

After my 2014 run for Nebraska Attorney General, the United States Supreme Court issued its decision in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), recognizing marriages of same-sex couples. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Obergefell*.

- b. If you are confirmed, why should LGBTQ people in your courtroom who allege that their employer discriminated against them because of their sexual orientation or their gender identity expect to have a fair and impartial judge, in light of statements like these?

The role of a judge is different than that of a political candidate. A judge must decide cases and apply the law. Just as a former prosecutor who becomes a judge is able to set aside his or her prior advocacy against criminal defendants to act as a fair and impartial judge in criminal proceedings, if confirmed, I will faithfully apply all United States Supreme Court precedent, including *Obergefell*, and set aside any personal beliefs I might have when facing litigants in court.

- c. As noted, the Code of Conduct for United States Judges requires a judge to “disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” Given your statements about marriage equality and LGBTQ rights, wouldn’t your impartiality in this area reasonably be questioned?

If confirmed, I will apply all provisions of the Code of Conduct for United States Judges, including Canon 3(C) regarding recusal and disqualification. It would be inappropriate under the Judicial Canons to state now whether or not I would recuse myself on any certain line of cases.

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<sup>4</sup> Interview with Brian Buescher, Nebraska Family Alliance 2014 Video Voter Guide, at 2:00 (Mar. 24, 2014).

<sup>5</sup> SJQ Attachments at 832 (State Attorney General—Republican Questionnaire).

- d. Given the positions you have taken on same-sex marriage, would you recuse yourself from any cases involving the rights of same-sex couples if you are confirmed as a federal judge?

Please see my answer to question (c) above.

- e. Given the positions you have taken on LGBTQ discrimination, would you recuse yourself from any cases involving the rights of LGBTQ people if you are confirmed as a federal judge?

Please see my answer to question (c) above.

- f. If you are confirmed, and a case involving the rights of LGBTQ people comes before you that in your view is not squarely controlled by Supreme Court or Eighth Circuit precedent, why shouldn't a litigant in your courtroom be concerned that you would issue a ruling that aligns with your statements about same-sex marriages and LGBTQ discrimination?

Please see my answer to question (c) above.

3. In a television advertisement for your Attorney General campaign, you said, "As Attorney General, I'll stand up to the Obama Administration, continue the fight against Obamacare, and protect the rights of the unborn."<sup>6</sup>

- a. If you are confirmed, and a case involving the Affordable Care Act comes to your courtroom, why should litigants expect you to be able to approach this case fairly and impartially, given your prior promise to "continue the fight against Obamacare"?

As a candidate for Nebraska Attorney General in 2014, I took political positions on a variety of issues of concern to Nebraska voters. However, there is a difference between taking political positions as a candidate for elective office and serving as a federal judge. I believe a judge's role and obligation is to apply the law without regard to any personal beliefs or prior political positions regarding the law. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent, including cases involving the Affordable Care Act, such as *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), and *King v. Burwell*, 135 S. Ct. 2480 (2015).

- b. As noted, the Code of Conduct for United States Judges requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Given your stated opposition to the Affordable Care Act, wouldn't your impartiality in a case involving this law reasonably be questioned?

If confirmed, I will apply all provisions of the Code of Conduct for United States

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<sup>6</sup> Brian Buescher for Att'y Gen. TV Commercial (Apr. 30, 2014), [https://www.youtube.com/watch?v=SOW\\_dbaPv6s](https://www.youtube.com/watch?v=SOW_dbaPv6s).



Judges, including the provisions regarding disqualification and recusal. It would be inappropriate under the Judicial Canons to state now whether or not I would recuse myself on any certain line of cases.

- c. Given your stated opposition to the Affordable Care Act, would you recuse yourself from any cases involving the interpretation or application of this law?

If confirmed, I will apply all provisions of the Code of Conduct for United States Judges, including the provisions regarding recusal. It would be inappropriate under the Judicial Canons to state now whether or not I would recuse myself on any certain line of cases.

- d. If you are confirmed, and a case involving the Affordable Care Act comes before you that in your view is not squarely controlled by Supreme Court or Eighth Circuit precedent, why shouldn't a litigant in your courtroom be concerned that you would issue a ruling that aligns with your promise to "continue the fight against Obamacare"?

Please see my response to question (c) above.

4. At your hearing last week, you said: "If I am so fortunate to be confirmed to the bench, my personal views no longer matter. What matter is enforcing or applying the law, as in federal statute, and also applying or enforcing the United States Constitution as written. And my personal beliefs are checked at the door, and that's what I will do if I am so fortunate to be confirmed to the United States District Court for the District of Nebraska." What is a specific example of a significant moment in your legal career when you have had to ensure that your "personal beliefs" were "checked at the door" because the law compelled otherwise?

In 2004, I served as a domestic violence prosecutor on a full-time basis for three months for the Douglas County, Nebraska County Attorney's office and for the City of Omaha. At one point, I was prosecuting a defendant who had been convicted of assaulting women over five times. The woman the defendant allegedly assaulted – who was the subject of the prosecution I was handling – was scared and refused to show up to testify against the defendant on his most recent charge. My personal belief at the time was that the defendant should be convicted and charged again because based upon the evidence available I believed he was guilty and his alleged conduct was abhorrent. However, there was insufficient evidence to prosecute the case. Despite my personal beliefs and desires, the law required the case to be dropped.

5. As you are no doubt aware, the agriculture sector has become increasingly highly concentrated, favoring the interests of major corporations and squeezing small family farmers. Today 65 percent of all pork, 53 percent of all chicken, and 84 percent of all beef is slaughtered by just four companies.<sup>7</sup> Small family farmers often confront a hard choice:

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<sup>7</sup> Leah Douglas, *Consolidation Is Eating Our Food Economy*, NEW AM. (May 5, 2016), <https://www.newamerica.org/weekly/122/consolidation-is-eating-our-food-economy>.

try to compete with huge corporations, or work for them through starkly one-sided contracts.

In your legal practice at your law firm, you've represented some of the nation's largest and most powerful agribusinesses. You've also strongly criticized the impact of federal regulations on agribusinesses.

As a candidate for Attorney General in 2014, you were quoted in the *Scottsbluff Star-Herald* as saying: "I'm the only one who has fought the federal government in its overreach in farming and ranching and more will be required going forward."<sup>8</sup>

In a campaign radio commercial, you stated: "As an agribusiness attorney, I've personally fought the overreaches of the Obama Administration and defended Nebraskans from Washington bureaucrats. . . . I'll defend our agribusinesses, and our way of life, against intrusions from the federal government."<sup>9</sup>

And in a *Falls City Journal* article, you were quoted as saying: "We need to push back on regulations now. . . . I'm the only candidate who's sued the federal government. I've represented farmers, ranchers, and ag interests in matters that relate directly to what the attorney general does when it comes to regulation and over regulation. I have been up against the EPA, I have been up against the National Park Service and the interior department and the soil conservation service. I understand what Nebraska faces."<sup>10</sup>

- a. Based on your work experience, do you think that corporate concentration is a problem in American agriculture today?

As an agribusiness attorney, I have represented large agribusinesses in legal disputes. I have also represented, and, in fact, currently represent, smaller family farming operations in legal matters. I have also represented a variety of clients in disputes regarding federal or state regulations, with specific experience representing clients in the area of Federal government regulation. I have specific experience in agriculture and currently serve as the chair of the agribusiness litigation group for a large law firm.

I believe, however, that this question asks me to provide an answer to a political question on an issue of agricultural policy. Although I have extensive experience in agricultural law, Canon 5 of the Code of Conduct for United States Judges provides that a judge should not engage in political activity. I believe it would be inappropriate for me to provide commentary in response to this question under Canon 5 now that I have been nominated to be a Judge on the United States District Court for the District of Nebraska.

- b. Based on your work experience, do you think that rising corporate concentration in agriculture has caused serious hardship for small family farmers?

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<sup>8</sup> SJQ Attachments at 725.

<sup>9</sup> Brian Buescher for Att'y Gen. Radio Commercial (Apr. 2014).

<sup>10</sup> SJQ Attachments at 735-36.

Please see my answer to question (a) above.

- c. What kinds of efforts were you anticipating when you said that “more will be required going forward” to “[i]ght the federal government in its overreach in farming and ranching”?

As a candidate for Nebraska Attorney General in 2014, I took certain political positions regarding federal regulation during my campaign. As I stated above, however, there is a difference between taking political positions as a candidate for elective office and serving as a federal judge. A judge’s role is to apply the law without regard to his or her own personal beliefs. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including on cases involving Federal regulation.

- d. If you are confirmed, and a case involving federal efforts to rein in powerful agribusinesses and support small family farmers comes before your court, why should litigants expect you to be a fair and impartial judge?

If confirmed, I will apply all provisions of the Code of Conduct for United States Judges, including the provisions regarding recusal. It would be inappropriate under the Judicial Canons to state now whether or not I would recuse myself on any certain line of cases.

6. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.<sup>11</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>12</sup> These shocking statistics are reflected in our nation’s prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.<sup>13</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>14</sup>

- a. Do you believe there is implicit racial bias in our criminal justice system?

Yes.

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

I am aware that there exists statistics which illustrate disparate representation of

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<sup>11</sup> Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

<sup>12</sup> *Id.*

<sup>13</sup> Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

<sup>14</sup> *Id.*

certain racial groups in America's jails and prisons.

- c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

I have not studied this issue.

7. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.<sup>15</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>16</sup>

- a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not reached any particular conclusion regarding any statistical relationship between incarceration and crime rates.

- b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

I have not reached any particular conclusion regarding any statistical relationship between incarceration and crime rates.

8. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

9. Do you believe that *Brown v. Board of Education*<sup>17</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

*Brown v. Board of Education* is a landmark decision from the United States Supreme Court that has had extraordinary importance in the jurisprudence of our country. As a nominee to the United States District Court for the District of Nebraska, I will faithfully apply this decision and all United States Supreme Court precedent.

10. Do you believe that *Plessy v. Ferguson*<sup>18</sup> was correctly decided? If you cannot give a direct

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<sup>15</sup> Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

<sup>16</sup> *Id.*

<sup>17</sup> 347 U.S. 483 (1954).

<sup>18</sup> 163 U.S. 537 (1896).

answer, please explain why and provide at least one supportive citation.

The *Plessy v. Ferguson* decision caused great pain and harm in our society and was overruled by *Brown v. Board of Education* and decisions following it. If confirmed, I will faithfully apply all United States Supreme Court precedent, and give no deference to *Plessy v. Ferguson* or any other case that has been overruled by the United States Supreme Court.

11. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

The responses I provide here are my own. As a nominee to a lower court, I believe that Canons 1 and 3 of the Code of Conduct for United States Judges suggest it would be inappropriate to opine as to whether a list of United States Supreme Court cases were decided correctly. The role of a district court judge is to follow and apply United States Supreme Court precedent, not debate whether this or that case was correctly decided.

12. President Trump has stated on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”<sup>19</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Code of Conduct for United States Judges prohibits judges from making political statements. I believe it would be inappropriate under the Judicial Canons to opine as to a statement made by the President of the United States. Cases involving federal immigration policy are likewise pending in courts around the county, and Canon 3 prohibits me from commenting.

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<sup>19</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Questions for the Record from Senator Kamala D. Harris**  
**Submitted December 5, 2018**  
**For the Nomination of**

Brian Craig Buescher, to the U.S. District Court for the District of Nebraska

1. In 2014, as a candidate for Attorney General of Nebraska, you conducted an interview with the Nebraska Family Alliance. In that interview, you said you favored a complete ban on abortion, but that, “unfortunately, under *Roe v. Wade*, it is not possible to ban abortion right now.” In place of a complete abortion ban, you advocated for restricting abortion access “bit by bit” and enacting laws that go “as far as they can” without being overturned.

- a. **Do you stand by these statements today?**

As a candidate for Nebraska Attorney General in 2014, I took political positions and made statements in an effort to gain support and be elected Nebraska Attorney General. I made statements regarding what political or advocacy positions I would consider taking if elected. Such political statements were not made to suggest an intended action as a federal judge, because at that time I was not being considered as a federal judge. I believe a judge’s role and obligation is to apply the law without regard to any personal beliefs regarding the law. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Roe v. Wade*, 410 U.S. 959 (1973). As a lower court judge, I will have no discretion to ignore Supreme Court precedent.

2. In *Whole Woman’s Health* in 2016, the U.S. Supreme Court considered Texas House Bill 2, which imposed new restrictions on health care facilities that provided abortions. After the law passed, the number of those facilities in Texas dropped in half, severely limiting access to health care for the women of Texas. The Supreme Court invalidated two provisions of the Texas law, holding that Texas House Bill 2 imposed an undue burden on women seeking an abortion.

- a. **Do you agree that Texas House Bill 2 was an attempt to restrict abortion access “bit by bit”?**

I was not a part of the passage of Texas House Bill 2, and am therefore unaware of the strategy or motivations in passing such a law. I am thus unaware of the intent of Texas House Bill 2.

- b. **Did the Court in *Whole Woman’s Health* change or clarify the “undue burden” test used to evaluate laws restricting access to abortion? If so, how?**

*Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), affirmed the undue burden standard as outlined in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Whole Woman’s Health* and *Casey* are United States

Supreme Court precedent that are binding as to decisions by lower court judges. I have not studied in detail the intricacies of the undue burden test the United States Supreme Court applied in *Whole Woman's Health*. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including the holdings of *Whole Woman's Health* and *Casey*.

- c. **When determining whether a law places an undue burden on a woman's right to choose, do you agree that the analysis should consider whether the law would disproportionately affect poor women?**

Please see my answer to question 2(b) above. If confirmed, I will be bound to follow *Whole Woman's Health* and other binding United States Supreme Court precedent regarding the undue burden standard and analysis.

3. Since 1993, you have been a member of the Knights of Columbus, an all-male society comprised primarily of Catholic men. In 2016, Carl Anderson, leader of the Knights of Columbus, described abortion as "a legal regime that has resulted in more than 40 million deaths." Mr. Anderson went on to say that "abortion is the killing of the innocent on a massive scale."<sup>1</sup>

- a. **Were you aware that the Knights of Columbus opposed a woman's right to choose when you joined the organization?**

The Knights of Columbus is a Roman Catholic service organization with approximately two million members worldwide. The organization has a religious and charitable purpose. I joined the Knights of Columbus when I was 18 years old and have been a member ever since. My membership has involved participation in charitable and community events in local Catholic parishes. I do not recall if I was aware whether the Knights of Columbus had taken a position on the abortion issue when I joined at the age of eighteen.

- b. **Do you agree with Mr. Anderson that abortion is "the killing of the innocent on a massive scale"?**

Please see my answer to question 3(a) above. I did not draft this language. If confirmed, I would be bound by precedent of the United States Supreme Court and the Eighth Circuit Court of Appeals and would not be guided by statements made by others. See Canon 1 of the Code of Conduct for United States Judges (requiring judges to preserve the independence of the judiciary).

- c. **Do you agree with Mr. Anderson that legal abortion in the United States has "resulted in more than 40 million deaths"?**

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<sup>1</sup> David Gibson, "Knights of Columbus Head Says Catholics Cannot Vote for Abortion Advocates," Religious News Services, Aug. 4, 2016, <https://religionnews.com/2016/08/02/knights-of-columbus-leader-says-catholics-cannot-vote-for-abortion-advocates/>.

Please refer to my answers to question 3(a) and (b) above.

- d. **Have you ever, in any way, assisted with or contributed to advocacy against women’s reproductive rights? If the answer is “yes,” please explain the nature and scope of your assistance.**

As noted in my Judiciary Committee hearing, I previously ran for political office and ran as a pro-life candidate. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Roe v. Wade*.

4. In 2008, the Knight of Columbus spent \$1,000,000 to support Proposition 8, a California ballot initiative that defined marriage as between a man and a woman.<sup>2</sup>
- a. **Were you aware that the Knights of Columbus opposed marriage equality when you joined the organization?**

I do not recall if I was aware whether the Knights of Columbus had taken a position on same-sex marriage at the time I joined at the age of 18.

- b. **Were you aware that the Knights of Columbus supported Proposition 8 in California?**

Please see my response to question 4(a). I have not been involved with drafting policies or positions on behalf of the Knights of Columbus, nor have I been involved in making decisions regarding the activities of the national or international organization.

- c. **Do you believe the right to marry carries an implicit guarantee that everyone should be able to exercise that right equally?**

The United States Supreme Court held in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), that same-sex couples have a right to marry under the Fourteenth Amendment of the United States Constitution. To the extent this question implicates pending or impending litigation, Canon 3 of the Code of Conduct for United States Judges prohibits me from commenting.

- d. **If a state or county makes it harder for same-sex couples to marry than for straight couples to marry, are those additional hurdles constitutional?**

Please see my response to question 4(c) above.

- e. **If a state or county makes it harder for same-sex couples to adopt children, are those additional hurdles constitutional?**

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<sup>2</sup> Veronique de Turenne, “Knights of Columbus Tip the Balance with Big Anti-Gay Marriage Donation,” Los Angeles Times, Aug. 20, 2008, <https://latimesblogs.latimes.com/lanow/2008/08/prop-8-post.html>.



Please see my response to question 4(c) above.

- f. **Have you ever, in any way, assisted with or contributed to advocacy against LGBTQ rights? If the answer is “yes,” please explain the nature and scope of your assistance.**

As noted at my Judiciary Committee hearing, I previously ran for political office. As a candidate for political office, I took political positions on a variety of issues of the day. If confirmed, I will faithfully apply all United States Supreme Court and Eighth Circuit Court of Appeals precedent on all issues, including *Obergefell*.

5. In deciding how closely to look at discriminatory laws, the U.S. Supreme Court often considers two things: (1) is the group being discriminated against defined by immutable characteristics, and (2) has the group faced discrimination in the past. If a group has those characteristics, the Court has said it should be more suspicious of laws that harm them.

- a. **Is being gay or lesbian an immutable characteristic?**

The legal question of what level of scrutiny should apply to classifications based upon sexual orientation is currently the subject of litigation around the country. I do not believe it is appropriate for me to comment pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges.

- b. **Have gay and lesbian Americans been subject to discrimination in the past?**

Please see my response to question 5(a) above.

- c. **Is being transgender an immutable characteristic?**

Please see my response to question 5(a) above.

- d. **Have transgender Americans been subject to discrimination in the past?**

Please see my response to question 5(a) above.

- e. **If you agree that LGBTQ Americans have faced discrimination in the past, do you believe they should be protected by federal anti-discrimination laws?**

Please see my response to question 5(a) above.

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

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

If confirmed, I would approach sentencing defendants with the utmost attention and care. The job of sentencing is one of the most important and difficult jobs of a United States District Court Judge. When sentencing a defendant, I would first review and apply applicable procedure, rules, and precedent regarding sentencing from the United States Supreme Court and the Eighth Circuit Court of Appeals. I would then review the charging documents, the presentence report, any victim impact statements, any statements by the defendant's family or friends, arguments of counsel for both sides, the statements of the defendant, and any other relevant or required documentation the parties would bring to my attention. I would then carefully consider the individual factors enumerated in 18 U.S.C. § 3553(a), and calculate the proper sentence range as outlined in the Sentencing Guidelines. I would then determine whether there was any basis for a departure from the Sentencing Guidelines range.

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

Please refer to my answer to question 6(a) above. In addition, I would review publications of the United States Sentencing Commission, as well as sentencing decisions rendered by the United States Supreme Court, the Eighth Circuit Court of appeals, and other information provided by the United States Judiciary.

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

The United States Supreme Court has held that the Sentencing Guidelines are not binding on trial judges, but rather are advisory. *See United States v. Booker*, 543 U.S. 220, 246 (2005). The Sentencing Guidelines provide guidance as to when a judge may depart from the advisory Sentencing Guidelines range. Case law interpreting 18 U.S.C. § 3553(a) further includes factors and considerations that I would consider before departing from the Sentencing Guidelines.

d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.<sup>3</sup>

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

I am not familiar with Judge Reeves' views as to mandatory minimum sentences and deterrence.

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

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<sup>3</sup> <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>

The question as to the equity of mandatory minimum sentences is properly addressed by the legislative branch of government. As a nominee for the United States District Court for the District of Nebraska, it would be inappropriate for me to comment on the policy decisions of Congress on this issue. See Canons 2, 3(a), and 5 of the Code of Conduct for United States Judges. If confirmed, I am obliged to follow the law on mandatory minimum sentences.

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

Please see my answers to Question 6(d)(i) and (ii) above.

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.<sup>4</sup> **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

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

If confirmed, I would faithfully apply all mandatory minimum sentences to the extent that the statute requiring such sentence is constitutional. I would also plan to outline in writing or on the record reasons for the imposition of a particular sentence and any comments I have to such sentence in circumstances I deemed warranted, and to the extent required by applicable law.

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

Pursuant to the United States Constitution and applicable law, charging decisions are left to the Executive Branch. Federal Judges are required to impose all mandatory minimum sentences if constitutional. I would raise charging decisions made by Federal prosecutors in appropriate situations as permitted by law and consistent with the Code of Conduct for United States Judges.

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

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<sup>4</sup> See, e.g., “Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose,” New York Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

The United States Constitution leaves questions of clemency to the executive branch. If confirmed, I do not believe it would be appropriate to get involved in the clemency process.

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

Yes.

- 7. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

- a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

Yes.

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

I am aware that there exist statistics that demonstrate that certain racial minorities comprise a higher percentage of incarcerated individuals than they do in the population generally.

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

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

Yes.

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

If confirmed, I would ensure that qualified minorities and women are given serious consideration for all positions that I am in a position to hire.