

**Senator Chuck Grassley
Questions for the Record**

**Pamela Harris
Nominee, United States Circuit Judge for the Fourth Circuit**

1. In your response to question 2(b) of my questions for the record, you said that you “believe that the Supreme Court appropriately may exercise restraint in a prudential sense, deciding cases narrowly – what I referred to as ‘tak[ing] small steps, not [] big steps’ – so that contentious social issues are resolved to the greatest extent possible by the democratic process.”¹ But in the same response, you also said that “in issuing a decision, whether narrow or broad, the role of any court is to apply law and precedent to the facts, without regard to public opinion on the underlying issue or whether that decision will be popularly received.”²

You stated that it is appropriate for courts to ensure “that contentious social issues are resolved to the greatest extent possible by the democratic process” by “deciding cases narrowly.” How should courts determine whether cases implicate “contentious social issues” if they are to decide cases “without regard to public opinion”?

Response: The Supreme Court has described itself as exercising restraint in cases involving matters of significant “public concern” that are the subject of substantial “democratic action,” allowing such issues to be decided by the democratic process. *Washington v. Glucksberg*, 521 U.S. 702, 716 (1997). In *Glucksberg*, for example, in declining to recognize a constitutional right to physician-assisted suicide, the Supreme Court reviewed an extensive series of state-level ballot initiatives and legislative changes, *id.* at 716-19, concluding that “[t]hroughout the Nation, Americans are engaged in an earnest and profound debate” over physician-assisted suicide, and that its holding would “permit[] this debate to continue, as it should in a democratic society,” *id.* at 735. I do not believe that the Supreme Court understands itself, in such cases, to be rendering decisions based on public opinion, but rather to be applying constitutional law and precedent in a way that defers to an actively engaged democratic process. *Id.* at 716. More specifically, I do not believe the Supreme Court, in such cases or any others, bases its decisions on what it perceives to be the weight of public opinion on an issue or on whether it believes its ruling will be well received by the public. If confirmed as a circuit judge, I would follow Supreme Court and Fourth Circuit precedent on any question regarding deference to the political process, and base decisions on impartial application of law and precedent to fact without regard to whether they would enjoy popular support.

¹ Pamela Harris, Response to Sen. Grassley’s Questions for the Record, at 2(b).

² *Id.*

2. In your response to question 4(b) of my questions for the record, you said that “the preferences’ to which [you] w[ere] referring” were “principles like equality and liberty and individual dignity.”³ While on an ACS panel, you stated that “[p]eople often ask: show me, prove to me that you’re doing this honestly, show me where your *personal policy preferences* diverge from the Constitution. Show me that you’re not just reading them to be the same thing”⁴ (emphasis added).

- a. Were you suggesting that people ask you to show where “principles like equality and liberty and individual dignity,” which “virtually all of us” agree with, “diverge from the Constitution”?**

Response: No. To the contrary, I was suggesting that general principles like equality, liberty and individual dignity are both embraced by virtually all Americans, myself included, and reflected in the Constitution. I made that observation in the course of explaining why I rejected the suggestion that there is a need for a “better” Constitution.

- b. Where do your personal beliefs as to what government ought to do diverge from “[your] own best reading of [what] the Constitution” requires, permits, or prohibits?**

Response: Thank you for the opportunity to clarify. The point of my original comments was that the Constitution was a forward-thinking document for its day, given the general principles – such as liberty and equality – contained therein, and that I generally embraced those principles personally, as well. In other words, I did not suggest then – nor am I suggesting now – that my personal beliefs diverge from the general principles reflected in the Constitution. But most importantly, if I were confirmed as a judge, I would assume a role in which my commitment to the Constitution would become a matter of solemn obligation: As a circuit judge, it would be my duty to decide cases arising under the Constitution according to that document’s text and Supreme Court and Fourth Circuit precedent construing it, regardless of any personal beliefs I might have, and I would faithfully carry out that duty.

³ Pamela Harris, Response to Sen. Grassley’s Questions for the Record, at 4(b).

⁴ Pamela Harris, Panelist, “The ACS National Convention: Keeping Faith with the Constitution,” American Constitution Society, June 19, 2009 (“People often ask (in panels like this): Show me, prove to me that you’re doing this honestly, show me where your personal policy preferences diverge from the Constitution. Show me that you’re not just reading them to be the same thing. And I always feel unapologetically, you know, left to my own devices, my own best reading of the Constitution, it’s pretty close to where I am. Because I think the Constitution is a profoundly progressive document. I think it’s born of a progressive impulse. I think particularly, as amended in the Reconstruction era, it is committed to principles like equality and liberty and individual dignity, and I’m a profoundly liberal person so we [the Constitution and I] match up pretty well. I make no apologies for that. I think it’s a great document. And I think as amended, and as interpreted, and the method, with the people of good will, applying the methodology that’s talked about in this book, it is something we can all be really proud of.”).

3. Do you believe that “social movements reconstitute what it is we’re talking about when we talk about American constitutional tradition”?⁵ Or is “the only sense in which [you] believe that constitutional provisions or principles evolve” is when “[c]ourts are sometimes called upon to apply those original provisions to new facts or circumstances, and in that sense, their application may change over time”?⁶ Please explain.

Response: I believe that constitutional provisions or principles “evolve” only in the sense that courts may apply those original provisions to new facts or circumstances over time. This understanding was the foundation of my work as a Supreme Court and appellate litigator. My arguments always were premised on the interpretive approaches employed and endorsed by the Supreme Court and appellate courts.

On the academic panel from which the first quoted remark is taken, I was suggesting that social movements play a role in shaping popular discussion and public understandings of general constitutional principles like equality. My comment was not focused on judicial decision-making, and I did not mean to suggest that judges do or should base their decisions on social movements or their agendas. I understand decisions like *Brown v. Board of Education*, 347 U.S. 483, 492-94 (1954), for instance, which I had been discussing earlier on the panel, to be based only on the original equal protection principle of the Fourteenth Amendment, applied by the Supreme Court in 1954 to the contemporary circumstances then before it. I can assure the Committee that if confirmed as a judge, I would faithfully follow the methodological precedents of the Supreme Court and the Fourth Circuit, basing decisions only on the interpretive sources used by those courts, and doing so without regard to any comments I might have made on a panel.

⁵ Pamela Harris, Panelist, “Our Enduring Constitution: Applications and Interpretations,” American Constitution Society, June 14, 2008.

⁶ Pamela Harris, Response to Sen. Grassley’s Questions for the Record, at 6(a).

**Senator Chuck Grassley
Questions for the Record**

**Pamela Harris
Nominee, United States Circuit Judge for the Fourth Circuit**

1. At your hearing, I asked you the following:

“On same-sex marriage issues, you are quoted as saying ‘Justice Kennedy should be changing the same way the whole country is changing regarding same-sex marriage.’ First question: Why do you believe a Supreme Court justice should change his or her views and therefore judicial interpretation based upon public sentiment if we have a judiciary that’s supposed to do, as you just said, apply precedent and fact to deciding the case?”¹

You responded:

“Senator, thank you for that question, I am happy to have an opportunity to clarify. That was a comment I made to a journalist, I’m often asked as a Supreme Court litigator to sort of opine and speculate about issues before the Court. I would never suggest that a Justice of the Supreme Court, or any judge, should change his or her opinions based on public opinion. That is not the way I view the role of the judge. I am confident that is not the way that Justice Kennedy views his role, any other judge views his or her role. When we talk as commentators about the individual views of justices we are usually talking about their written record as it has developed through their majority opinions, their separate writings. And what I was doing in that comment is likely – I had been talking about Justice Kennedy’s distinct record on issues involving classifications based on sexual orientation, and predicting where those legal views might bring him on future cases.”²

But the original context strongly suggests that you were referring to evolving public sentiment. The full context of the question is as follows:

“Whatever the case, given Justice Kennedy’s track record on gay rights, it won’t be surprising if he eventually caps his career with a landmark decision ensuring that gay couples throughout the nation can wed, Harris said. ‘Justice Kennedy should be changing the same way the whole country is changing,’ she said.” (emphasis added)³

You said in the hearing that you had been “talking about Justice Kennedy’s distinct record on issues involving classifications based on sexual orientation, and predicting where those legal views might bring him on future cases.” But, if that were the case, and you would not base your decisions on changes in public opinion, why did you make the normative claim that Justice Kennedy “should” be changing in the same way?

¹ *Judicial Nominations Hearing Before the S. Comm. on the Judiciary*, 113th Cong. _ (2014) (statement of Sen. Charles E. Grassley, Ranking Member, S. Comm. on Judiciary).

² *Judicial Nominations Hearing Before the S. Comm. on the Judiciary*, 113th Cong. _ (2014) (statement of Pamela Harris, Nominee).

³ Jeff Overley, *Dubbed ‘first gay justice,’ Kennedy may not be done yet*, Law 360, June 26, 2013, available at <http://www.law360.com/articles/453184/dubbed-first-gay-justice-kennedy-may-not-be-done-yet>.

Response: In this interview with a journalist, I discussed what the article refers to as Justice Kennedy’s “track record” on issues regarding sexual orientation. By that, I mean the record of Justice Kennedy’s legal views, as they are set forth in opinions Justice Kennedy has authored for the Supreme Court in cases involving classifications based on sexual orientation. See *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). Based on that record of Justice Kennedy’s application of constitutional law and precedent, I made a prediction about how Justice Kennedy might approach another case in the same area. I used the word “should” not in a normative sense, but in that predictive sense, anticipating the future direction of Justice Kennedy’s jurisprudence.

It is inappropriate for any judge or Justice to base his or her decisions on their own personal views or on public opinion. I have the greatest respect for Justice Kennedy, as I do for all of the Justices of the Supreme Court, and I would never presume to direct him to adopt any view, nor suggest that Justice Kennedy’s decisions are determined by any personal views he might have or by public opinion.

2. At your hearing, I asked you:

*“You also stated that you thought that ‘the tide of history is going one way,’ and that you didn’t think (well that’s the end of that part of the quote) – and that you didn’t think that the Justices ‘wanted to be on the wrong side of that.’ Do you believe it’s appropriate for a judge to take into consideration what ‘side of history’ their judicial interpretations should be?”*⁴

You responded:

*“Again, no, Senator, I do not, and I did not mean to suggest that. I think there is another sentence in the article that makes clear that – the context makes clear that – what I was talking about was the notion of judicial restraint, that courts, the Supreme Court, might want to be especially cautious on social issues when the political branches and political institutions sort of deeply and rapidly engaged in those issues, that the courts might want to take small steps, not take big steps, and leave as much as possible to the democratic process.”*⁵

Printed below is the full context of your quotation:

*“She [Harris] thinks Chief Justice John G. Roberts Jr. will want to be cautious about the court taking a bold stand on an issue in which public opinion seems to shift quickly. Harris is hardly disinterested, she noted: She spent the past month working to see same-sex marriage approved in Maryland. ‘I think the tide of history is going one way,’ she said. ‘I don’t think the justices want to be on the wrong side of that.’”*⁶

⁴ Grassley, *supra* note 1 (quoting Robert Barnes, What did Supreme Court hear about same-sex marriage on Election Day?, WASH. POST, November 13, 2012.)

⁵ Harris, *supra* note 2.

⁶ Robert Barnes, What did Supreme Court hear about same-sex marriage on Election Day?, WASH. POST, November 13, 2012.

You said in the hearing that in your comments to the *Washington Post*, printed on November 13, 2012, that you were talking about “the notion of judicial restraint, that courts, the Supreme Court, might want to be especially cautious on social issues when the political branches and political institutions sort of deeply and rapidly engaged in those issues, that the courts might want to take small steps, not take big steps, and leave as much as possible to the democratic process.” You also said in response to my first question that you “would never suggest that a justice of the Supreme Court, or any judge, should change his or her opinions based on public opinion.”

- a. Do you believe that when courts are “especially cautious on social issues when the political branches and political institutions sort of deeply and rapidly engaged in those issues,” they are considering public opinion as they arrive at a judicial decision?**

Response: No.

- b. If not, why not?**

Response: As I said at my hearing, I believe that the Supreme Court appropriately may exercise restraint in a prudential sense, deciding cases narrowly – what I referred to as “tak[ing] small steps, not [] big steps” – so that contentious social issues are resolved to the greatest extent possible by the democratic process. But in issuing a decision, whether narrow or broad, the role of any court is to apply law and precedent to the facts, without regard to public opinion on the underlying issue or whether that decision will be popularly received.

- c. Do you believe it is ever appropriate for judges to adjust the deference they provide to the political branches according to changes in the public salience of particular issues?**

Response: No.

- 3. At your hearing, I asked you:**

*“You moderated a panel on the Supreme Court’s upcoming term during which you said ‘the Constitution evolves, it has to keep pace with changes in the factual predicates, and yes, our readings of constitutional provisions ought to change and evolve in light of circumstances on the ground like that.’ ... I’d like to know how you intend to decide what changed particular societal circumstances you will consider if confirmed. Let me say it this way, it’s clear from your writings and speeches that you’re talking about shifting public opinion rather than simply technological advances. For example, in the introduction of a book, *It Is a Constitution We Are Expounding*, you wrote, ‘Justice Brennan explores the importance of the judge’s obligation to speak for the community—the current community—in interpreting the Constitution.’ You’ve also discussed what you call ‘constitutional legitimacy’ coming from social movements. The problem with this view is that it leads to a judge’s imposing personal views into cases. Justice Scalia expressed it this way well in dissent in regarding the 8th Amendment, writing ‘Of course the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one’s own views.’ Once you start considering shifting public opinion, you’re essentially reducing*

constitutional interpretation to public poll. So assuming you will interpret the Constitution the way that all of your writings suggest – and I know the answers to Senator Coons suggest otherwise – how do you intend to guard against imposing your own views as opposed to what you view as shifting public opinion?”⁷

You responded:

“Senator, let me start by saying that as a Supreme Court litigator, an appellate litigator, as someone who has specialized in preparing other advocates for their arguments before the Court, I always have been keenly aware of the boundaries of judicial decision-making. And as a litigator, every argument I ever advanced took as its starting point the methodologies that have been used by the Supreme Court and the lower courts and the methodologies that have been approved by those courts. That is how I’ve conducted my career. In terms of some of the other comments you have raised, I do not believe it is the role of a judge, ever, to import his or her own personal values into judicial decision-making. In cases in which the Court has looked to things – to social conditions, things like that – what the Court – and again, I would follow the Court’s precedent on this – what they have looked to is objective indicia of such things. They’ve looked to state laws, they’ve looked to common law. They’ve looked to practices in the states. I’m aware of no account of legitimate judicial decision-making that has judges taking public opinion polls or using their own personal preferences to decide cases.”⁸

Printed below is the full context of your quotations:

“...at crucial moments for the Constitution, the original framing, the amendments, the Reconstruction period, the history behind the Constitution was very progressive in very important ways. It’s important that the discussion over interpretive method account for this. So I think we do start at a point of some agreement with originalists, in the importance of text and history. But that said, I also think there very badly needs to be a fuller discussion about where you go after that, or in addition to that. About other valid sources of constitutional meaning, things discussed in the excerpts of the volume like constitutional structure, constitutional precedent, the consequences of constitutional rulings, both on the ground and for continuity of legal discourse, and things like values and norms that are rooted in the Constitution or part of constitutional heritage, but whose meaning may change over time, whose application may change over time in response to changed understandings about what a word like equality really means. That’s the kind of discussion that we’re hoping to promote with this volume.”⁹

“The collection next turns to two excerpts that address the importance of interpreting the Constitution in light of the evolving values of American society. Chapter Eleven, an excerpt from Justice Thurgood Marshall’s “Reflection on the Bicentennial of the U.S.

⁷ Grassley, *supra* note 1 (quoting Pamela Harris, Panelist, “Book Discussion: ‘Keeping Faith with the Constitution’ and ‘It is a Constitution We are Expounding: Collected Writings on Interpreting Our Founding Document,’ ” American Constitution Society, May 1, 2009.)

⁸ Harris, *supra* note 2.

⁹ Pamela Harris, Panelist, “Book Discussion: ‘Keeping Faith with the Constitution’ and ‘It is a Constitution We are Expounding: Collected Writings on Interpreting Our Founding Document,’ ” American Constitution Society, May 1, 2009.

Constitution,” emphasizes the degree to which the Constitution as we know it today has been altered and changed not simply by amendment, but by social movements and the evolution of societal mores since its enactment. His article underscores the importance of a society’s ethical and moral commitments in the development of the Constitution to date, and the importance of continuing to recognize the relevance of such considerations in the future. Similarly in Chapter Twelve, Justice Brennan, discussing his own method of constitutional interpretation, emphasizes the importance of the relationship between the values of contemporary society and the Constitution. While it is important for current Justices to ‘look to the history of the time of framing and to the intervening history of interpretation’ in interpreting the Constitution, ‘the ultimate question must be: What do the words of the text mean in our time?’ This approach is consistent, he asserts, with the ‘transformative purpose of the text:’ ‘Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized.’”¹⁰

You said in the hearing that you “do not believe it is the role of a judge, ever, to import his or her own personal values into judicial decisionmaking. In cases in which the Court has looked to things – to social conditions, things like that . . . what they have looked to is objective indicia of such things. They’ve looked to state laws, they’ve looked to common law. They’ve looked to practices in the states. I’m aware of no account of legitimate judicial decisionmaking that has judges taking public opinion polls or using their own personal preferences to decide cases.”¹¹

Yet, in your Introduction to *It Is a Constitution We Are Expounding*, you described the excerpt of Justice Thurgood Marshall’s essay contained therein as “emphasiz[ing] the degree to which the Constitution as we know it today has been altered and changed not simply by amendment, but by social movements and the evolution of societal mores since its enactment. His article underscores the importance of a society’s ethical and moral commitments in the development of the Constitution to date, and the importance of continuing to recognize the relevance of such considerations in the future.”¹² You also described the excerpt of Justice Brennan’s essay as “emphasiz[ing] the importance of the relationship between the values of contemporary society and the Constitution.”¹³

a. How would you characterize the accounts of judicial decisionmaking described by Justices Brennan and Marshall in *It Is a Constitution We Are Expounding*?

Response: The introduction to *It Is a Constitution We Are Expounding* characterizes those two excerpts as “address[ing] the importance of interpreting the Constitution in light of the evolving values of American society.” See *It Is A Constitution We Are Expounding* at 15. The book in question is a collection of writings by various authors, taking multiple and sometimes contradictory approaches to constitutional interpretation – in addition to the excerpts from Justices Brennan and Marshall, there are excerpts

¹⁰ IT IS A CONSTITUTION WE ARE EXPOUNDING 11 (Pamela Harris and Karl Thompson, eds.), available at https://www.acslaw.org/pdf/ACS_Expounding_FNL.pdf.

¹¹ Harris, *supra* note 2.

¹² IT IS A CONSTITUTION WE ARE EXPOUNDING, *supra* note 10.

¹³ *Id.*

from pieces by Judge Robert Bork, Judge Richard Posner, Professor Akhil Reed Amar, and many others. The collection, produced by the American Constitution Society for Law and Policy, is intended to capture the broad and often academic debate around constitutional interpretation, including theories that are novel or contested.

I would like to clarify my role in this project. The American Constitution Society for Law and Policy was a client of my law firm, O'Melveny & Myers. It sought to compile a book of materials related to constitutional interpretation, and already had selected items for inclusion. My role, working with other O'Melveny lawyers and at the direction of American Constitution Society staff, was limited to assisting in excerpting and organizing the pieces and drafting an introduction that would capture the range of views included. It was that project and that range of views that I was discussing in the remarks quoted above.

b. In what sense are the “indicia” they look to “objective”?

Response: At my hearing, I referred to the degree to which the Supreme Court, in considering “social conditions” in the course of deciding cases, anchors its reasoning in “objective indicia” such as statutory or common law. In the Fourth Amendment context, for instance, the Court often looks to such sources in considering whether “society is prepared to accept” an expectation of privacy as objectively reasonable. *See California v. Greenwood*, 486 U.S. 35, 39-40 (1988); *id.* at 52 (Justices Brennan and Marshall, dissenting, relying on local laws to show societal acceptance of an expectation of privacy); *see also, e.g., Florida v. Riley*, 488 U.S. 445, 451 (1989) (relying on Federal Aviation Administration regulations); *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) (relying on common law of property). My comment was describing the decisions of the Supreme Court, and not intended to capture any personal views that might have been expressed by individual Justices. However, the introduction to *It Is a Constitution We Are Expounding* characterizes all of the approaches to interpretation represented in the volume, including those of Justices Brennan and Marshall, as “objective” in the sense that valid interpretive methods “will lead judges to conclusions about constitutional interpretation that are independent of, and may well differ from, their own policy preferences.” *It Is A Constitution We Are Expounding* at 12.

c. Would you model your own jurisprudence on these accounts?

Response: No. As a Supreme Court and appellate litigator, I based my arguments on the methodologies adopted and approved by the Supreme Court and the appellate courts. If confirmed as a circuit judge, I would faithfully follow the methodological precedents of the Supreme Court and the Fourth Circuit, applying the interpretive approaches and only the interpretive approaches used by those courts.

4. At your hearing, Senator Cruz asked you:

“In 2009, at an American Constitution Society panel, you described yourself as “a profoundly liberal person” who sees the Constitution as “a profoundly progressive document.” And you went onto say, “I always feel, unapologetically, you know, left to my

*own devices, my own best reading of the Constitution, it's pretty close to where I am." Now, given the definition you've just given of judicial activism, those public comments raise some concern. How would you respond to those concerns?"*¹⁴

You responded:

*"Well, Senator, I would respond first, I think, by pointing to my entire professional career, where as Supreme Court and appellate advocate at O'Melveny and Meyers, running the Supreme Court Institute on an entirely non-partisan basis. I have never let any personal views I have, political views I may have affect the discharge of my professional responsibilities. And I would not do that if I were confirmed as a judge."*¹⁵

*"With respect to those specific comments, if I can just give you a little bit of context, they came when I was arguing, basically arguing against audience members who thought that the Constitution should be amended to address certain Supreme Court decisions that they found too conservative. And my point was that commitment to the Constitution actually ought to transcend that kind of political difference—and that was not an appropriate reason for amending the Constitution. I describe myself as liberal just as a matter of context to suggest that even though I might share some of their political commitments, I did not believe the Constitution should be amended for that reason, and that I did believe that commitment to the Constitution transcends politics."*¹⁶

The quote to which Senator Cruz's question referred was preceded by this question from Tom Goldstein:

*"Pam Harris, one of the questions is about social movements, and asks, in essence, is the problem here the failure to produce a just society—one that is inherent in the document of the Constitution that we have. And by trying to create a way of looking at the Constitution that will produce more just results, are we actually distracting social movements away from something that would be better, which is making a better Constitution—whether through constitutional amendment or through projects that involve changing legislation, and the like; how much is there a legitimate concern that we're trying to make the best of a bad situation rather than say, much more radically changing society at its core?"*¹⁷

In response to Mr. Goldstein's question, you said the following:

"People often ask (in panels like this): Show me, prove to me that you're doing this honestly, show me where your personal policy preferences diverge from the Constitution. Show me that you're not just reading them to be the same thing. And I always feel unapologetically, you know, left to my own devices, my own best reading of the Constitution, it's pretty close to where I am. Because I think the Constitution is a

¹⁴ *Judicial Nominations Hearing Before the S. Comm. on the Judiciary*, 113th Cong. _ (2014) (statement of Sen. Ted Cruz, Ranking Member, S. Comm. on Judiciary) (quoting Pamela Harris, "The ACS National Convention: Keeping Faith with the Constitution," American Constitution Society, June 19, 2009).

¹⁵ Harris, *supra* note 2.

¹⁶ *Id.*

¹⁷ Thomas Goldstein, Moderator, "The ACS National Convention: Keeping Faith with the Constitution," American Constitution Society, June 19, 2009.

*profoundly progressive document. I think it's born of a progressive impulse. I think particularly, as amended in the Reconstruction era, it is committed to principles like equality and liberty and individual dignity, and I'm a profoundly liberal person so we [the Constitution and I] match up pretty well. I make no apologies for that. I think it's a great document. And I think as amended, and as interpreted, and the method, with the people of good will, applying the methodology that's talked about in this book, it is something we can all be really proud of."*¹⁸

In the hearing, you characterized your previous comments as standing for the proposition that “commitment to the Constitution transcends politics.” Further, you characterized your previous comments as “describ[ing] myself as liberal just as a matter of context.”

However, on the panel, you said that in response to people who ask you to show “where your personal policy preferences diverge from the Constitution,” you “feel unapologetically, you know, left to my own devices, my own best reading of the Constitution, it's pretty close to where I am.” You concluded, “I'm a profoundly liberal person, so we [the Constitution and I] match up pretty well.”

- a. Was your point on the panel that the Constitution is a progressive document and coincidentally happens to align with your personal policy preferences, or was your point, as you said at the hearing, that commitment to the Constitution transcends politics?**

Response: My point was that I did not see, in Mr. Goldstein's words, a need for a “better Constitution,” because I believe in the one that we are privileged to have already. My commitment to the Constitution transcends any disagreement over particular “results,” again in Mr. Goldstein's words, of our Constitution or Supreme Court decisions construing it.

- b. Why did you state that the Constitution and your “personal policy preferences” “match up pretty well”?**

Response: As I sought to explain on the panel, I believe that the Constitution is a forward-thinking document for its day, “committed to principles like equality and liberty and individual dignity.” I embrace those general principles personally, as well, as I expect virtually all of us do, and those are the “preferences” to which I was referring.

- c. What are some of the “personal policy preferences” that you were referring to?**

Response: Please see response to 4b.

- d. Why does your own best reading of the Constitution align with those “personal policy preferences”?**

¹⁸ Pamela Harris, Panelist, “The ACS National Convention: Keeping Faith with the Constitution,” American Constitution Society, June 19, 2009.

Response: Please see response to 4b.

5. At your hearing, Senator Cruz asked:

“Well, I appreciate your comments clarifying that. Let me ask an additional question. Also in 2009, you criticized liberals for believing that the Warren Court’s decisions were “as liberal as it gets.” And you responded saying “that’s not right.” And you went onto say “we’ve stunted the spectrum of legal thought in a way that removes the possibility that there could’ve been more progressive readings of the Fourth and Fifth Amendments.” Now, as you know, the reaction to the Warren Court’s criminal procedure rulings—widely perceived as creating loopholes allowing dangerous criminals back onto the street—was fairly dramatic. And it is unusual for judicial nominees to have taken positions suggesting that the Warren Court was not nearly liberal enough, and it should have been more liberal. Is that your view? I want to understand what your view is on that question.”¹⁹

You responded:

“Senator, that’s not my view, and it’s also really not what I said. Again, if I can just give you a context on that. I was responding on that panel to an argument that justices perceived as liberal, like Chief Justice Warren, never—and I think the phrase was “had never felt the pain of reaching a constitutional decision that disagreed with liberal views.” And the only point that I was making was that several of Chief Justice Warren’s criminal procedure decisions had not, in fact, adopted what was being presented as the liberal view. I believe I talked about the Terry case, and that was the only point I was making—that sometimes people assume that because Chief Justice Warren wrote an opinion, it must have been terribly liberal. I was simply pointing out that in the criminal procedure context, Chief Justice Warren wrote opinions that did not adopt what was being advanced as the most pro-defendant or liberal position. It’s just a descriptive point about certain criminal procedure decisions.”²⁰

Printed below is the full context of your quotation:

“I sometimes wonder whether when we think about someone like Chief Justice Warren . . . whether we almost have, by now, a stunted sense of what the legal choices really are, what really is a liberal legal outcome, whether we sometimes almost think circularly: Well, if Chief Justice Warren came out that way, that must be as liberal as it gets, whether we’re reasoning backwards a little bit, because I think of Chief Justice Warren’s work mostly in the criminal procedure area, and I think of some of his biggest decisions like Miranda and Terry, there’s pain all over those pages. I think we now think of Miranda as an extremely liberal opinion, but it fell well short of what was being argued in that case, which is not that you have a waivable . . . right to counsel when you’re being interrogated, but that there can be no station house interrogation without a lawyer. The Court didn’t go there, and I think the pain of that is actually pretty clear on the face of that opinion, same with Terry . . . the argument was, you want to seize someone, frisk someone, throw them up against a wall, you have to have probable cause . . . Court said, no that’s

¹⁹ Cruz, *supra* note 14 (quoting Harris, *supra* note 9).

²⁰ Harris, *supra* note 2.

*okay, reasonable suspicion can be enough, and the pain of that is all over the pages in Terry. And so I worry that sometimes when we look back, particularly at the work of the justices in the 1960s and 1970s, there's almost an inclination to assume that must be as liberal as it gets. That's not right! I think that we've stunted the spectrum of legal thought in a way that removes the possibility that there could have been more progressive readings of the Fourth Amendment and the Fifth Amendment. And I know this area best, but I would assume that the same is true in other areas that are covered in your book."*²¹

Your response does not address the normative positions that you took—above and beyond a mere “descriptive point.” Please describe, in detail, the “more progressive readings of the Fourth and Fifth Amendments” that, in your view, would properly remedy the “stunted . . . spectrum of legal thought.”

Response: Thank you for the opportunity to clarify my remarks. The outcome of a decision should not be characterized by its author's reputation, and in an academic setting, legal discussion should include the full range of positions that have been argued in the case. In studying decisions such as *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Terry v. Ohio*, 392 U.S. 1 (1968), that range includes positions that would have provided more protection to defendants than those ultimately adopted by the Supreme Court. While such positions may be part of the “spectrum” of legal thought, they are not precedent. As a Supreme Court and appellate litigator, I based my arguments on precedent, and if confirmed as a circuit judge, I would faithfully follow the precedents of the Supreme Court and the Fourth Circuit.

6. In response to the first question I asked at your nomination hearing, you stated:

*“I would never suggest that a justice of the Supreme Court, or any judge, should change his or her opinions based on public opinion. That is not the way I view the role of the judge.”*²²

Yet, your record appears to make clear your view that, in your words, “changing public understanding” “drives that evolving understanding” of the Constitution. For instance:

On a panel discussing *It is a Constitution We Are Expounding*, you claimed that, as an editor, you “hope[d] to promote” a “discussion” about sources of constitutional meaning:

*“I also think there very badly needs to be a fuller discussion about where you go after [constitutional text and history], or in addition to [constitutional text and history]. About other valid sources of constitutional meaning, things discussed in the excerpts of the volume like constitutional structure, constitutional precedent, the consequences of constitutional rulings, both on the ground and for continuity of legal discourse, and things like values and norms that are rooted in the Constitution or part of constitutional heritage, but whose meaning may change over time, whose application may change over time in response to changed understandings about what a word like equality really means.”*²³

²¹ Harris, *supra* note 9.

²² Harris, *supra* note 2.

²³ *Id.*

While on a panel on “The Living Constitution,” you asserted:

“They [constitutional provisions] take their meaning—and they should take their meaning—from what comes after . . . and this is my source of legitimacy . . . from what the People do at these critical junctures—the civil rights movement, the women’s movement, the gay rights movement—when they reconstitute what it is we’re talking about when we talk about American constitutional tradition, when we say words like equality and liberty, when we change what they mean because what the people themselves have done.”²⁴

And while on a 2009 ACS panel, you stated:

“Through the commitment and sacrifice of members of the public, it both expresses an evolving and changing public understanding of a constitutional principle—something from the Constitution, like equality—it both expresses that evolving understanding and drives that evolving understanding.”²⁵

- a. Please explain how you distinguish social movements as a source of constitutional change that “drives evolving understanding,” which you have repeatedly embraced, from changes in “public opinion,” that you expressly rejected at your hearing.**

Response: I do not believe that the Constitution’s provisions and principles change or evolve, other than by the amendment process of Article V; they are fixed and enduring, and judges are not free to change them, whether by incorporating public preferences or their own policy views. Courts are sometimes called upon to apply those original provisions to new facts or circumstances, and in that sense, their application may change over time. *See, e.g., United States v. Lopez*, 514 U.S. 549, 556 (1995) (discussing changed application of constitutional provision as brought to bear on changed economic circumstances). But that is the only sense in which I believe that constitutional provisions or principles “evolve.”

On a few occasions during my time in private practice, I was asked to appear on more academic panels on constitutional interpretation, featuring give-and-take on a wide range of theories. In that context, and after earlier discussing *Brown v. Board of Education*, 347 U.S. 483 (1954), and other Supreme Court desegregation decisions, I remarked upon the degree to which the Court may have relied on contemporary understandings in applying the original principle of the Equal Protection Clause to current circumstances. In *Brown* itself, for instance, in overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court distinguished prior knowledge of the effects of segregation from more modern understandings. *Brown*, 347 U.S. at 494; *see also Planned Parenthood v. Casey*, 505 U.S. 833, 862-64 (1992) (describing *Brown* as responsive to “facts that the country could understand, or had come to understand already, but which the Court of an earlier day . . . had not been able to perceive”). Similarly, though the Equal Protection Clause formerly had not been thought to protect women, in applying that provision over time to new understandings of women’s

²⁴ Pamela Harris, Panelist, “Our Enduring Constitution: Applications and Interpretations,” American Constitution Society, June 14, 2008.

²⁵ Harris, *supra* note 18.

capabilities and gender stereotypes, the Supreme Court has held that gender discrimination is subject to heightened scrutiny under the Equal Protection Clause. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 682-88 (1973) (plurality opinion). In other contexts, as well, the Supreme Court has considered contemporary understandings in applying original constitutional principles. In certain Fourth Amendment cases, for instance, the Court has considered whether “society is prepared to accept” as reasonable an expectation of privacy, *see, e.g., California v. Greenwood*, 486 U.S. 35, 40 (1988) (Fourth Amendment does not prohibit the warrantless inspection of trash outside a home), and in considering certain Eighth Amendment questions, the Court has looked to “evolving standards of decency,” *see, e.g., Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (Eighth Amendment prohibits the revocation of citizenship as a punishment). In none of these cases do I understand the Supreme Court to be changing the nature of underlying constitutional principles or making decisions based on public preferences; instead, the Court is applying enduring constitutional principles to contemporary circumstances. *See Casey*, 505 U.S. at 864. If confirmed, I would consult such factors only in following Supreme Court or Fourth Circuit precedent.

b. If confirmed, how would you identify which social movements “reconstitute what it is we’re talking about when we talk about American constitutional tradition”?

Response: If confirmed as a circuit judge, I would faithfully follow Supreme Court and Fourth Circuit precedent on all methodological questions, as described above. The best evidence of my fidelity to precedent and text is my career as both a litigator and the Executive Director of Georgetown’s Supreme Court Institute, where my advocacy on behalf of clients and the assistance I provided to other advocates through moot courts was based entirely in Supreme Court and appellate precedents.

You have also strongly rejected “originalism” as a method of constitutional interpretation:

“I just don’t think that any account of the Constitution that even seems to—even seems to—privilege the Constitution as it was originally ratified, or even what people remember as it was amended particularly during the Reconstruction period, I don’t think it’s consistent with the way most people do—and they way we should—think about the Constitution. . . . And that’s why I’m not an originalist, even now.”²⁶

c. Please explain why you reject originalism as an interpretive method.

Response: I do not reject originalism as an interpretive method. As I discussed earlier on the same panel, I always have adhered to the interpretive approaches adopted by the courts in litigating constitutional questions. However, the term “originalism” is used by different people to mean different things. If confirmed as a circuit judge, I would have no difficulty following Supreme Court and Fourth Circuit precedent on methodology, including methodologies generally described as originalist, in construing constitutional provisions.

²⁶ Harris, *supra* note 24.

For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court employed a form of originalism often described as “original public meaning” to interpret the text of the Second Amendment, construing the words as they would have been understood in common usage when the Second Amendment was drafted and adopted. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court relied on the historical background of the Sixth Amendment Confrontation Clause in English common law and colonial history to correctly interpret its meaning. In other cases, however, the Supreme Court has relied principally or additionally on its own precedent in deciding constitutional cases, or on other interpretive approaches. In *Printz v. United States*, 521 U.S. 898 (1997), for instance, in considering a federalism-based challenge to federal action, the Court examined not only original understandings as reflected in the Constitution’s historical background, but also the Constitution’s structure and the general purposes or “essential postulates” it reflects, *id.* at 918-22, historical practice, *id.* at 905-09, and the Court’s own precedent, *id.* at 925-33. If confirmed as a circuit judge, I would be bound by and would follow all of the Supreme Court’s precedent on interpretive methodologies, as well as relevant Fourth Circuit precedent, without regard to any observations I might have made as a commentator on a panel.

d. Please identify cases where the Supreme Court used originalism as an interpretive method with which you disagree.

Response: The duty of a circuit judge is to follow those interpretive methods dictated by precedent, and if confirmed, I would faithfully apply all Supreme Court precedent, as well as Fourth Circuit precedent, regarding the use of originalist methodologies.

7. You represented *Sumnum* in *Pleasant Grove City v. Sumnum*²⁷, and the Supreme Court rejected the argument you advanced 9-0. After the Supreme Court rejected your argument, you wrote that the case was an “Establishment Clause ‘victory,’” and “should provide significant assistance to plaintiffs challenging religious displays under the Establishment Clause.”²⁸ In the same article, you also argued that “there is an important distinction between the mere display of a Ten Commandments monument [which the Supreme Court upheld in *Van Orden v. Perry*²⁹], and the denial of a request by another religious group for ‘equal access’ for its own religious message.”³⁰

a. After the Supreme Court’s holding in *Salazar v. Buono*³¹ and other Establishment Clause cases decided since *Sumnum*, do you still believe *Sumnum* increased plaintiffs’ ability to challenge religious displays under the Establishment Clause?

Response: To provide context for these remarks, I was invited to speak on a panel about my representation of a law firm client in *Pleasant Grove v. Sumnum* and the

²⁷ 555 U.S. 460 (2009).

²⁸ Pamela Harris, *Pleasant Grove v. Sumnum and the Establishment Clause: Giving with One Hand, Taking with the Other?*, 46 WILLAMETTE L. REV. 677, 680 (2010).

²⁹ 545 U.S. 677 (2005).

³⁰ Harris, *supra* note 28, at 684.

³¹ 559 U.S. 700 (2010).

strategy I pursued on behalf of our client, and those remarks later were published in the *Willamette Law Review*. In that capacity, I discussed the potential effect of *Pleasant Grove v. Summum*, 555 U.S. 460 (2009), a case which was litigated entirely under the Free Speech Clause, on Establishment Clause litigation. In some prior Establishment Clause cases, courts had questioned whether privately donated religious monuments displayed on public land could be attributed to the government, as is necessary to show an Establishment Clause violation. In *Pleasant Grove*, however, the Supreme Court held that even a privately financed and donated monument, once accepted by the government and displayed on government land, constitutes “government speech.” *Id.* at 470-71. My suggestion was that the “government speech” holding of *Pleasant Grove* would simplify the question of government attribution in Establishment Clause cases, as well, making clear that religious monuments displayed by the government on public land speak for the government. Additionally, I would note that my remarks were given before the Supreme Court had issued its decision in *Salazar v. Buono*, 559 U.S. 700 (2010).

- b. Under current Supreme Court precedent, do you believe that a city which displayed a Ten Commandments memorial and did not allow all other religious groups to erect whatever religious displays they might like would be in violation of the Establishment Clause? If not, is that a change in the position you articulated in your law review article?**

Response: The Supreme Court upheld the display of the Ten Commandments in *Van Orden v. Perry*, 545 U.S. 677 (2005), and the Court has not held that a city that displays the Ten Commandments must also allow for the display of other religious monuments, on Establishment Clause or any other grounds. My comments about *Pleasant Grove* highlighted some of the ways that the holding of the case possibly could help future Establishment Clause plaintiffs, and then discussed ways that the holding of the case possibly could hurt future Establishment Clause plaintiffs. If confirmed as a circuit judge, I would faithfully apply all relevant Supreme Court and Fourth Circuit precedent to any case involving a government display of the Ten Commandments, as I would in all cases before me, without regard to any prior client representations or discussions of those representations.

- c. What do you believe the Establishment Clause is in place to protect?**

Response: In *Van Orden v. Perry*, 545 U.S. 677, 683 (2005), the Supreme Court stated that the Establishment Clause protects religious liberty, embodying the principle that “governmental intervention in religious matters can itself endanger religious freedom.” The Court in *Van Orden* also recognized the “strong role played by religion and religious traditions throughout our Nation's history,” and the need to respect that principle, as well, in Establishment Clause cases. *Id.* at 683-84. If confirmed, I would follow the understanding of the Establishment Clause adopted by Supreme Court and Fourth Circuit precedent.

- 8. In an ACSBlog post, you wrote:**

*“Will the Court stop protecting women from anti-choice politicians, and leave women’s decisions about whether or not to have an abortion subject to ever-greater government restriction and control? These questions undoubtedly will be (and should be) front and center as the Senate and the Nation debate who should replace Justice O’Connor.”*³²

a. What restrictions on abortion are constitutional?

Response: In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court, “reject[ing] the trimester framework” of *Roe v. Wade*, 410 U.S. 113 (1973), held that the government has a profound interest in protecting and promoting fetal life, as well as pregnant women’s health, from the very start of pregnancy, *id.* at 875-76, 878, and that it may regulate abortion even in the earliest stages of pregnancy to advance those interests. Such restrictions on abortion are constitutional under *Casey* so long as they do not impose an “undue burden” on a woman seeking an abortion, which the Court defined as having “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Id.* at 876-77. Subsequent to viability, the government “in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Id.* at 879 (internal quotation and citation omitted). If confirmed, I would apply *Casey* and all other relevant Supreme Court and Fourth Circuit precedent to any case involving abortion, as I would follow Supreme Court and circuit precedent in all matters.

b. Should abortion be front and center as the Senate and the Nation debate whether to confirm you to the Fourth Circuit?

Response: I would not presume to dictate the terms under which my nomination should be considered. I would hope, of course, that my long career would be evaluated as a whole. My career has been spent primarily as a litigator in private practice, representing a wide range of clients without regard to any personal views I might have had about their positions; preparing other advocates for their Supreme Court arguments at the Supreme Court Institute at Georgetown University Law Center, without regard to their clients or the positions being advanced; and as a teacher, dedicated to presenting all sides of each issue to my class. If confirmed as a circuit judge, I would be bound to follow and would have no difficulty following Supreme Court precedent, as well as Fourth Circuit precedent, without regard to any personal observations I might have made as a commentator.

c. You critiqued the Supreme Court in *Gonzales v. Carhart*³³ for essentially saying “you could find one guy to say ‘I don’t know if it’s safe’ . . . to create medical

³² Pamela Harris and Dawn Johnsen, *What O’Connor’s Retirement Means for Reproductive Liberty*, ACSBLOG (July 5, 2005), <http://www.acslaw.org/acsblog/guest-bloggers-what-oconnors-retirement-means-for-reproductive-liberty>.

³³ 550 U.S. 124 (2007).

uncertainty that will allow state regulation.”³⁴ You also described that decision, which addressed a ban on partial birth abortion, as involving “late-ish” term abortion.³⁵ Do you believe the Court wrongly decided *Gonzales v. Carhart*, as your comments appear to make clear?

Response: These remarks were made on a 2013 panel held at Georgetown University Law Center discussing cases then pending at the Supreme Court, including *Cline v. Oklahoma Coalition for Reproductive Justice*, 134 S. Ct. 550 (2013) (cert. dismissed). In connection with that case, which involved state restrictions on medically induced abortions obtained in the first weeks of pregnancy, and in response to comments from others, I considered how the standards set forth in both *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), might apply. If confirmed as a circuit judge, when the Supreme Court rules, that is the end of the matter, and I would faithfully follow and apply the Court’s decision in *Gonzales v. Carhart*, as I would all Supreme Court and Fourth Circuit precedent. I would do so without regard to any predictions or observations I might have made as a commentator on a panel.

- 9. In *Stenberg*, the Court held that a Nebraska law criminalizing partial-birth abortion violated the Due Process clause. Congress then responded by passing the Partial-Birth Abortion Ban which fixed the deficiencies the Supreme Court had found with the Nebraska law in *Stenberg*. In *Gonzales*, the Court distinguished the Nebraska law with the new federal law and upheld the Partial-Birth Abortion Ban.**
- a. The ban on partial-birth abortion – a procedure Congress determined had a “disturbing similarity to the killing of a newborn infant” (*Gonzales v. Carhart*, quoting Congressional Findings³⁶) – was upheld by the Supreme Court in *Gonzales v. Carhart*. Have your views on partial-birth abortion evolved at all since the time you criticized the Court’s *Gonzales* decision?**

Response: If confirmed as a circuit judge, I would faithfully follow and apply the Supreme Court’s decision in *Gonzales v. Carhart*, 550 U.S. 124, 132 (2007), as I would all Supreme Court and Fourth Circuit precedent, regardless of any observations I had made about the case in my capacity as a commentator in a blog post or any other context.

- b. What are the differences in the two laws, the Nebraska law and the federal law?**

Response: In *Gonzales v. Carhart*, the Supreme Court held that as compared to the Nebraska law it had invalidated in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the federal Partial-Birth Abortion Ban Act was “more specific concerning the instances to

³⁴ Pamela Harris, Moderator, “2013-2014 Supreme Court Term Preview,” American Constitution Society, September 16, 2013, available at <http://www.c-span.org/video/?315036-1/supreme-court-20132014-term-preview/> (discussing the pending contraceptive mandate cases).

³⁵ *Id.*

³⁶ 550 U.S. 124, 158 (2007) (quoting Congressional Findings ¶ (14)(L)).

which it applies and in this respect more precise in its coverage.” The Court in *Gonzales* thoroughly considered and explained the differences between the two statutes in this regard in rejecting claims that the federal statute was void for vagueness or impermissibly broad in its reach. *Id.* at 148-54.

- c. **In your blog post on this topic, you wrote that “the Court may have an institutional interest in standing by its prior decision and protecting its prerogatives against what it likely will see as encroachment by Congress.”³⁷ What did you view as the Court’s prerogatives in this case?**

Response: The prerogative referred to in this blog post is the Supreme Court’s duty and authority to “say what the law is.” See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (citing *Marbury v. Madison*, 1 Cranch 137 (1803)). In *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Supreme Court held unconstitutional a state ban on partial-birth abortion in part because it lacked a health exception, in light of what the Court found to be substantial medical authority showing that the procedure could be necessary to protect women’s health. One of the questions raised by *Gonzales v. Carhart*, 550 U.S. 124 (2007), was whether Congress could make factual findings to the contrary of what the Court had found in *Stenberg* with regard to medical necessity, and so obviate the constitutional need for a health exception. In the federalism context, for example, the Supreme Court has held that it is ultimately for the Court and not Congress, through congressional findings, to determine whether activity Congress seeks to regulate has the substantial effects on interstate commerce necessary to bring it within the scope of the Commerce Clause. See *United States v. Morrison*, 529 U.S. 598, 614 (2000) (“[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court”) (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995) (Chief Justice Rehnquist, concurring)). Similarly, in *Gonzales v. Carhart*, 550 U.S. at 165, the Court ultimately concluded that it “retains an independent constitutional duty to review factual findings where constitutional rights are at stake.” If confirmed, I would follow Supreme Court and Fourth Circuit precedent in cases involving the review of congressional findings, as in all matters.

10. **David Fontana wrote an editorial in the *New Republic* on your nomination, “Liberals should rally behind Harris’s nomination, because she embodies, more than any other Obama judicial nominee, all three of the important qualities I previously described for federal judges: She will be a sympathetic vote to liberal causes; she has a great professional network that will give rise to the next generation of liberal legal elites; and she will be an eloquent and inspiring champion of liberal jurisprudence.”³⁸ How do you respond to this characterization of your nomination?**

³⁷ Pamela Harris and Dawn Johnsen, *Supreme Court Preview: Abortion and the “Health Exception,”* ACSBLOG (February 20, 2007), <http://www.acslaw.org/acsblog/supreme-court-preview-abortion-and-the-health-exception/>.

³⁸ David Fontana, *Obama Has Started Making Major Progress on Nominating Judges—and This Is His Most Important One Yet*, NEW REPUBLIC (May 13, 2014), <http://www.newrepublic.com/article/117747/pamela-harris-fourth-circuit-court-why-liberals-should-cheer-her>.

Response: I do not know the author of the article quoted here, and I do not recall ever meeting or speaking with him. To the extent that he is suggesting that I understand the role of a judge to be anything other than coming to cases with an open mind and deciding them based on neutral application of law and precedent to fact, he clearly does not know me and is wholly incorrect. Indeed, my long professional record demonstrates that I fulfill professional obligations without regard to any personal views I might have. I have not given this author or anyone else reason to doubt my deep commitment to the fundamental judicial obligation of impartiality, and I am proud and grateful that those who do know me, including lawyers from diverse backgrounds and varying affiliations, have attested to my integrity, intellect, judgment and fair-mindedness.

11. Every nominee who comes before this Committee assures me that he or she will follow all applicable precedent and give them full force and effect, regardless of whether he or she personally agrees or disagrees with that precedent. With this in mind, I have several questions regarding your commitment to the precedent established in *United States v. Windsor*. Please take any time you need to familiarize yourself with the case before providing your answers. Please provide separate answers to each subpart.

a. In the penultimate sentence of the Court’s opinion, Justice Kennedy wrote, “This opinion and its holding are confined to those lawful marriages.”³⁹

i. Do you understand this statement to be part of the holding in *Windsor*? If not, please explain.

Response: Yes. The Court expressly confines its holding “to those lawful marriages.”

ii. What is your understanding of the set of marriages to which Justice Kennedy refers when he writes “lawful marriages”?

Response: I believe the Court was referring to same-sex marriages made legal by the operation of state law.

iii. Is it your understanding that this holding and precedent is limited only to those circumstances in which states have legalized or permitted same-sex marriage?

Response: Yes.

iv. Are you committed to upholding this precedent?

Response: Yes. If confirmed, I would be committed to faithfully following the *Windsor* precedent and all other precedent of the Supreme Court and the Fourth Circuit.

³⁹ *United States v. Windsor*, 133 S.Ct. 2675, 2696 (2013).

b. Throughout the Majority opinion, Justice Kennedy went to great lengths to recite the history and precedent establishing the authority of the separate States to regulate marriage. For instance, near the beginning, he wrote, “By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States.”

i. Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes.

ii. Will you commit to give this portion of the Court’s opinion full force and effect?

Response: Yes. If confirmed, I would faithfully apply all portions of the *Windsor* decision and all other decisions of the Supreme Court and Fourth Circuit.

c. Justice Kennedy also wrote, “The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens.”

i. Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes.

ii. Will you commit to give this portion of the Court’s opinion full force and effect?

Response: Yes. If confirmed, I would faithfully apply all portions of the *Windsor* decision and all other decisions of the Supreme Court and Fourth Circuit.

d. Justice Kennedy wrote, “The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the ‘[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.’”

i. Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes.

ii. Will you commit to give this portion of the Court’s opinion full force and effect?

Response: Yes. If confirmed, I would faithfully apply all portions of the *Windsor* decision and all other decisions of the Supreme Court and Fourth Circuit.

e. **Justice Kennedy wrote, “The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for ‘when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.’”**

i. **Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.**

Response: Yes.

ii. **Will you commit to give this portion of the Court’s opinion full force and effect?**

Response: Yes. If confirmed, I would faithfully apply all portions of the *Windsor* decision and all other decisions of the Supreme Court and Fourth Circuit.

12. **At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: The starting point for decision is the plain meaning of the text, whether constitutional, statutory or regulatory. In the absence of precedent directly on point, I would look to precedents of the Supreme Court and Fourth Circuit interpreting related or analogous provisions, or providing general guidance on the interpretive question at issue. If other federal or state courts had addressed the same question, then that precedent might be persuasive authority, as well.

13. **What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?**

Response: A judge’s duty is to render decisions based on law and precedent, rather than any political beliefs. As a litigator in private practice, I approached every case with full confidence that the Justices or judges hearing it would be fair and impartial, and would attend carefully and with open minds to the briefs and arguments of the parties. I can assure the Committee that I have a deep and personal understanding of how important that judicial impartiality was to my clients and is to all litigants. I also believe that my record shows that I carry out my professional responsibilities without regard to any political or personal views I may have. In private practice, I represented a broad range of clients – from large corporations to non-profit organizations to indigent individuals – without regard

to any personal views I might have had about their positions. As Executive Director of the Supreme Court Institute at Georgetown University Law Center, I prepared dozens of advocates for their Supreme Court arguments on a first-come, first-served basis, without regard to the position being advanced. And as a teacher, I believed my highest duty was to ensure that all sides of every issue were presented to my class, again apart from any personal views I might have held.

14. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?

Response: I want to assure the Committee that I would take with the gravest seriousness judicial responsibility to decide cases without respect to any personal views and to be fair to all who came before me. I believe I have demonstrated this capacity, in my work as a litigator in private practice, as the Executive Director of the Supreme Court Institute at Georgetown University Law Center, and as a teacher.

15. Do you think judges should consider the “current preferences of the society” when ruling on a constitutional challenge? What about when seeking to overrule longstanding Supreme Court or circuit precedent?

Response: No. A judge’s role is to resolve disputes through impartial application of law and precedent, regardless of whether the outcome is popular or consistent with “current preferences of the society.”

16. What is your understanding of the current state of the law with regard to the interplay between the establishment and free exercise clause of the First Amendment?

Response: The Supreme Court has held that there is room for “play in the joints” between the Free Exercise and Establishment Clauses. As a result, the government may grant permissive accommodations for religious exercise or conscience, even when not required by the Free Exercise Clause, without in so doing violating the Establishment Clause. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 713-14 (2005). If confirmed as a judge, I would follow that precedent in considering questions arising under the religion clauses of the First Amendment.

17. Do you believe that the death penalty is an acceptable form of punishment?

Response: The Supreme Court has held that the death penalty is an acceptable form of punishment, under certain circumstances and so long as proper procedures are followed. *See Gregg v. Georgia*, 428 U.S. 153 (1976). If confirmed as a circuit judge, I would follow Supreme Court and Fourth Circuit precedent in any case involving the death penalty, as in all matters.

18. In *Brown v. Entertainment Merchants Association*, Justice Breyer supplemented his opinion with appendices comprising scientific articles on the sociological and psychological harm of playing violent video games.

a. When, if ever, do you think it is appropriate for appellate judges to conduct research outside the record of the case?

Response: Appellate judges should confine themselves to the record on appeal, as developed by the parties to the case. If I were confirmed and an issue arose regarding the possible consideration of evidence outside the record, I would follow the precedent of the Supreme Court and the Fourth Circuit in resolving the issue.

b. When, if ever, do you think it is appropriate for appellate judges to base their opinions psychological and sociological scientific studies?

Response: In resolving any issue that arose regarding reliance on such studies, I would follow the Federal Rules of Evidence and relevant precedent of the Supreme Court and the Fourth Circuit. The Supreme Court has held, for instance, that academic studies and writings may be considered in determining the admissibility of expert testimony. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

19. What is the most important attribute of a judge, and do you possess it?

Response: A judge must be fair and impartial, approaching all questions with an open mind, and committed to applying law and precedent to resolve concrete disputes, based on the briefs and arguments of the parties. I believe I possess those attributes.

20. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: I think the most important elements of appropriate judicial temperament are respectful and courteous treatment of all litigants, diligence and care in the work of the court, and collegiality with respect to all colleagues and court staff. I believe I would meet that standard as a judge.

21. In general, Supreme Court precedents are binding on all lower federal courts, and Federal Circuit precedents are binding on the Court of International Trade. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

22. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?

Response: I would be bound to follow and would follow the precedent of the Supreme Court or the Fourth Circuit, even if I believed it erroneous.

23. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: A federal court should declare a congressional statute unconstitutional if Congress, in enacting the statute, exceeded the constitutional limits on its authority or if the statute violates constitutional rights. Congressional statutes are entitled to a presumption of constitutionality, and federal courts should take care to avoid the unnecessary resolution of constitutional questions. But in a properly presented case, it is the duty of the federal courts to ensure that Congress has acted within its constitutional authority.

24. Please describe your understanding of the workload of the Fourth Circuit. If confirmed, how do you intend to manage your caseload?

Response: My understanding is that the Fourth Circuit has a large and diverse docket, and that the court's judges work hard to decide cases in a timely manner. If confirmed, I would manage my caseload through hard and diligent work, and by consulting with my colleagues as to the best way to organize my chambers in order to expeditiously and carefully resolve cases.

25. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?

Response: A circuit judge may not overrule circuit precedent while sitting on a panel; such precedent may be reviewed only *en banc* and in the limited circumstances identified by Rule 35(a) of the Federal Rules of Appellate Procedure. Even in such a case, adherence to precedent is so important to the stability of the law that mere disagreement with a particular decision would not be sufficient grounds for overruling it. If confirmed, in the limited instances where these preconditions for reconsidering a circuit precedent were met, I would follow *stare decisis* principles set out in Supreme Court and Fourth Circuit precedent.

26. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Response: I fully recognize that the role of a judge is entirely different from the role of an advocate. If confirmed as a judge, my role would be to apply governing law and precedent impartially to the facts of a particular case. In order to do that, I would come to each case with an open mind, and start by studying the decision below, the record on appeal, and the constitutional, statutory or regulatory text at issue. I would analyze the relevant precedent and carefully consider the briefs and arguments of the parties and the

views of my colleagues. On that basis, I would reach the decision that correctly applies the law to the facts of the case.

I expect that if I were confirmed, the transition to the work of a Fourth Circuit judge would bring certain challenges, such as organizing a chambers to facilitate the careful but prompt resolution of cases, learning the distinct procedures of the Fourth Circuit, and better familiarizing myself with Fourth Circuit case law. I would expect to devote substantial time and effort to meeting those challenges, and to draw on the wisdom and generosity of my colleagues in doing so.

27. Do you think that collegiality is an important element of the work of a Circuit Court? If so, how would you approach your work and interaction with colleagues on the Court?

Response: I believe that collegiality is an important element of the work of a Circuit Court, and if confirmed, I would look forward to working respectfully and collaboratively with my colleagues. At the end of the day, my decisions would be based on my own best view of the correct application of governing law and precedent to the facts of a case. But I would give very careful consideration to the views of the other judges who had heard the same case and studied the same materials as I had. Being open to my colleagues' views has benefitted my work throughout my career, and I would expect it to do the same if I were confirmed as a judge.

28. What standard of scrutiny do you believe is appropriate in a Second Amendment challenge against a Federal or State gun law?

Response: The Supreme Court did not decide what standard of scrutiny would apply to Second Amendment challenges to federal or state gun laws in *District of Columbia v. Heller*, 554 U.S. 570 (2008), or *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), though it did indicate in *Heller* that rational-basis review was not appropriate, 554 U.S. at 628 n.27. The Fourth Circuit has adopted a two-part approach to Second Amendment claims under *Heller*, first conducting a "historical inquiry" into "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantees," and second, if so, "applying an appropriate form of means-end scrutiny." *Woollard v. Gallagher*, 712 F.3d 865, 874-75 (4th Cir. 2013) (quoting *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)). The Fourth Circuit has "assume[d] that any law that would burden the fundamental, core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny," *id.* at 876 (internal citation omitted), and has applied intermediate scrutiny to restrictions on possession by domestic violence misdemeanants, *see Chester*, 628 F.3d at 682-83, and on laws restricting conduct outside the home, *see Woollard*, 712 F.3d at 876. If confirmed, I would follow Supreme Court and Fourth Circuit precedent in any case raising a Second Amendment challenge.

29. According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: "To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice bias,

increase the number of trial lawyers serving on individual Senator’s judicial selection committees”.

- a. Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the subject matter of the communications.**

Response: No.

- b. Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.**

Response: No.

- 30. Please describe with particularity the process by which these questions were answered.**

Response: I read the questions with care, consulted my records and undertook legal research as necessary, and drafted answers. I discussed my answers with a Justice Department attorney in the Office of Legal Policy. I made subsequent revisions and finalized my answers for submission.

- 31. Do these answers reflect your true and personal views?**

Response: Yes.

**Questions for the Record
Senator Ted Cruz**

**Pamela Harris
Nominee, United States Circuit Judge for the Fourth Circuit**

Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice’s judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response: The only judicial philosophy that I would bring to the bench if confirmed is that judges should reach decisions through impartial application of law and precedent to the facts before them. Judges have a limited but important role to play in our system of government. They do not make law. They serve the public and advance the rule of law by faithfully applying law and precedent to resolve the concrete disputes before them, based on the particular facts of a case and the briefs and arguments of the parties. If confirmed, I would not expect the substance of my decisions to accord with those of any particular Justice, as I would be applying the precedent of the Supreme Court as a whole. I was privileged to clerk for Justice John Paul Stevens, however, and I would seek to emulate his commitment to precedent, which he understood to reflect the wisdom of judges who had come before him; the degree to which he grounded his opinions in the facts of each case; and the respect and courtesy he showed all parties before him as well as his colleagues and Supreme Court staff.

Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Response: If confirmed as a circuit court judge, I would follow Supreme Court and Fourth Circuit precedent in applying originalist methodologies to constitutional provisions. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), for instance, the Supreme Court relied principally on the text of the Second Amendment as those words would have been understood in ordinary usage at the time of the amendment’s adoption. In other cases, the Supreme Court has relied on the historical background of a constitutional provision to better discern its meaning, as reflected in sources like The Federalist Papers, English common law or colonial history. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *Crawford v. Washington*, 541 U.S. 36 (2004). I would follow this and other relevant Supreme Court and Fourth Circuit precedent in using originalism in any constitutional case that came before me.

If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Response: If confirmed as a circuit court judge, I would have no authority to overrule Supreme Court precedent, and faithfully would apply such precedent in all circumstances. Nor could I overrule Fourth Circuit precedent while sitting on a panel; such precedent may be reviewed only *en banc* and in the limited circumstances identified by Rule 35(a) of the Federal Rules of Appellate Procedure. Even in such a case, adherence to precedent is so important to the stability

of the law that mere disagreement with a particular decision would not be sufficient grounds for overruling it. In the limited instances where these preconditions for reconsidering a circuit precedent were met, I would follow *stare decisis* principles set out in Supreme Court and Fourth Circuit precedent.

Explain whether you agree that “State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).

Response: If confirmed as a circuit judge, I would be bound to follow *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528 (1985), as I would all Supreme Court precedent. In cases decided subsequent to *Garcia*, the Supreme Court has held that the Constitution protects state sovereignty interests through judicially enforceable limits on federal power. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 488 U.S. 1041 (1992). I would faithfully apply all relevant Supreme Court and Fourth Circuit precedent in any case seeking to enforce federalism-based limits on the federal government.

Do you believe that Congress’ Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: The Supreme Court has identified three “categories of activity” that Congress may regulate under the Commerce Clause and Necessary and Proper Clause: “the use of the channels of interstate commerce,” “the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and “those activities that substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). In *United States v. Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court invalidated federal statutes as exceeding Congress’ Commerce Clause authority, and in both cases it emphasized the non-economic nature of the activity in question in holding that it lacked the requisite “substantial effects” on interstate commerce. *Lopez*, 514 U.S. at 560-61, 566-67; *Morrison*, 529 U.S. at 610-11, 613. Neither case held that Congress never could regulate non-economic activity under the Commerce Clause, and in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court held that Congress could regulate the local possession and use of marijuana because “failure to regulate that class of activity would undercut” a larger regulatory regime directed at economic activity. *See* 545 U.S. at 18, 26; *id.* at 37 (Justice Scalia, concurring) (“Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”). If confirmed, I would faithfully apply all relevant Supreme Court and Fourth Circuit precedent to the particular facts of any case involving Congress’ power under the Commerce Clause.

What are the judicially enforceable limits on the President’s ability to issue executive orders or executive actions?

Response: The Supreme Court has held that the President’s ability to issue executive orders “must stem either from an act of Congress or from the Constitution itself.” *Youngstown Sheet &*

Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952). Whether the President has acted within such authority is evaluated by the Supreme Court under the “tripartite scheme” laid out in Justice Jackson’s concurring opinion in the *Youngstown* case. See *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)). If confirmed, I would faithfully apply all relevant Supreme Court and Fourth Circuit precedent in evaluating the legality of executive orders or actions.

When do you believe a right is “fundamental” for purposes of the substantive due process doctrine?

Response: The Supreme Court has held that a right is “fundamental” for purposes of the substantive due process doctrine if as an “objective[]” matter it is “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotations and citations omitted). In applying that standard, the Supreme Court has required a “careful description” of the asserted fundamental right, and used “[o]ur Nation’s history, legal traditions, and practices” as the “crucial guideposts for responsible decisionmaking.” *Id.* (internal quotations and citations omitted). If confirmed as a circuit judge, I would follow this approach, and all relevant Supreme Court and Fourth Circuit precedent, in any case involving asserted fundamental rights.

When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: The Supreme Court has held that a limited set of classifications are subject to heightened scrutiny under the Equal Protection Clause. Classifications that are “so seldom relevant to the achievement of any legitimate state interest” that they are deemed to reflect impermissible discrimination, such as those based on race, are subject to strict scrutiny. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Classifications that “frequently bear[] no relation to ability to perform or contribute to society,” such as those based on gender, are subject to intermediate scrutiny. *Id.* (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)). If confirmed, I would follow Supreme Court and Fourth Circuit precedent regarding application of heightened scrutiny under the Equal Protection Clause.

Do you “expect that [15] years from now, the use of racial preferences will no longer be necessary” in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: In *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), the Supreme Court stated its expectation that twenty-five years from the time of its decision, racial preferences would no longer be necessary in public higher education. If confirmed, I would apply that precedent, along with *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), and any other relevant Supreme Court or Fourth Circuit precedent in evaluating the constitutionality of such preferences. As in any case I heard as a judge, I would follow that precedent and apply it to the specific facts before me without regard to any personal expectations I might or might not have.