

Senator Chuck Grassley
Questions for the Record

Judge Ketanji Brown Jackson
Nominee, Associate Justice of the Supreme Court of the United States

1. During the hearings, you were asked about your approach to deciding cases. If you do not have a judicial philosophy, do you think that having a judicial philosophy is improper?

RESPONSE: Over the course of my almost decade on the bench, I have developed a methodology that I use to ensure that I am ruling impartially and adhering to the limits on my judicial authority. I first ensure that I am proceeding from a position of neutrality by setting aside any personal views and clearing my mind of any preconceived notions about how the case might come out. Next, I consider the parties’ arguments and the record, to understand all of the facts, claims, and arguments. The final step is interpretation and application of the law to the facts in the case, where I am particularly mindful of the constraints on judicial authority. I assess the question of jurisdiction, and ask whether I even have the power to hear the case. If I do have jurisdiction, I look at the relevant provision of the Constitution, statute, or other applicable legal authority. I work to discern those words’ meaning as intended by the people who wrote them. I focus on original public meaning; I look at history and practice at the time the document was created to understand what those who created the text intended; I also look at precedent to understand how the text has been previously interpreted and applied. As a lower court judge, I am bound by precedent. If I am fortunate enough to be confirmed to the Supreme Court, I would be bound by *stare decisis*. I do not decide cases based on my personal views or policy preferences. I observe these limits in recognition of the fact that judges have limited authority, and I must always stay in my limited, judicial lane.

2. Do you disagree with Justice Breyer’s idea that the Constitution is “living?”

RESPONSE: Courts must apply established constitutional principles to new circumstances, but the meaning of the Constitution itself is fixed and does not change or evolve.

3. Please cite your decisions that determine the “original public meaning” of a regulation, rule, contract, statute, or the Constitution.

RESPONSE: In my more than 570 written opinions, I have frequently interpreted the language of legal provisions; in each case that required interpretation of legal language, I began with the text of the provision at issue and adhered to precedent to determine the meaning of that language. For example, I have decided more than 45 cases in which I adhered to precedent to determine the meaning of a statute. *See, e.g., Osvatics v. Lyft*, 535 F. Supp. 3d 1 (D.D.C. 2021); *Equal Rights Center v. Uber Technologies, Inc.*, 2021 WL 981011 (D.D.C. Mar. 15, 2021); *Las Americas Immigrant Advocacy Center v. Wolf*, 2020 WL 7039516 (D.D.C. Nov. 30, 2020); *United States v. Lee*, 451 F. Supp. 3d 1 (D.D.C. 2020); *Government of Guam v. United States*, 341 F. Supp. 3d 74 (D.D.C. 2018); *Otay Mesa Property, L.P. v. Department of the Interior*, 344 F. Supp. 3d 355 (D.D.C. 2018); *Alliance of Artists & Recording Companies, Inc. v. General Motors Co.*, 306 F. Supp. 3d 422 (D.D.C. 2018); *R.J. Reynolds Tobacco Co. v. Department of Agriculture*, 130 F.

Supp. 3d 356 (D.D.C. 2015); *Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127 (D.D.C. 2015); *Z Street, Inc. v. Koskinen*, 44 F. Supp. 3d 48 (D.D.C. 2014).

4. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

- a. Should the Eighth Amendment’s prohibition on cruel and unusual punishment be evaluated based on contemporary understanding of what criminal sanctions are cruel and unusual?

RESPONSE: The Supreme Court has repeatedly stated that the Eighth Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

- b. If your answer to (a) is yes, what factors or sources of law is it appropriate for a court to consider in discerning such a contemporary understanding?

RESPONSE: In identifying “the evolving standards of decency,” the Supreme Court has looked to sources like states’ laws and the opinions of medical and mental health professionals. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). Should I be confirmed to serve as an Associate Justice on the Supreme Court, I would respect Eighth Amendment precedents as I would all binding Supreme Court precedents.

- c. In your view, what constitutes an “unusual” punishment for purposes of the Eighth Amendment?

RESPONSE: The Supreme Court has found unconstitutional as “cruel and unusual punishment” the application of the death penalty to: defendants under age 18, *Roper v. Simmons*, 543 U.S. 551 (2005); the intellectually disabled, *Atkins v. Virginia*, 536 U.S. 304 (2002); a defendant convicted of rape, *Coker v. Georgia*, 433 U.S. 584 (1977); a defendant convicted of the rape of a child in cases where the victim did not die and death was not intended, *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008). The Court has also found unconstitutional the imposition of a sentence of life without parole to a juvenile convicted of a non-homicide crime, *Graham v. Florida*, 130 S. Ct. 2011 (2010). In *In re Kemmler*, 136 U.S. 436 (1890), the Supreme Court upheld a method of execution—death by electrocution—while observing that it could be considered “unusual” because it was new at the time. See *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (discussing *Kemmler*). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on what constitutes an “unusual” punishment for purposes of the Eighth Amendment because that question could be the subject of future litigation.

- d. In your view, would the Eighth Amendment require state prisons to hold biological males who claim to identify as females in female prisons?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial

nominee and a sitting federal judge, to comment on a hypothetical dispute or matter that could be the subject of future litigation.

5. Do you believe that this country's death penalty jurisprudence can continue to "evolve"?

RESPONSE: The Supreme Court has repeatedly stated that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). Should I be confirmed to serve as an Associate Justice on the Supreme Court, I would faithfully apply Supreme Court precedents.

- a. If so, what kind of objective measures would you use to make that determination? Can you give us some examples of death penalty topics which might reflect "progress of a maturing society" in the future?

RESPONSE: In determining whether a particular criminal sanction violates the Eighth Amendment, the Court considers "the existence of objective indicia of consensus against" the sanction, including the sentencing practices of the States and the federal government. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651 (2008). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on hypothetical death penalty cases that might come before me in the future.

- b. What is your view about the relevance of the laws of other countries in developing our Eighth Amendment jurisprudence?

RESPONSE: In considering whether a particular punishment violates the Eighth Amendment, the Supreme Court has stated, "[t]he judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But the climate of international opinion concerning the acceptability of a particular punishment is also not irrelevant. The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual." *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010). Should I be confirmed to serve as an Associate Justice on the Supreme Court, I would faithfully apply Supreme Court precedents.

6. Have you ever worked on a death penalty case?

RESPONSE: I have never represented a client in a case involving the death penalty nor considered a case involving the death penalty in my time as a judge.

7. Do you have any personal objections to the death penalty?

RESPONSE: As a federal judge, I resolve each case on an individual basis by assessing the parties' legal arguments based on the factual record and applicable law, including relevant statutes and binding precedent. Regardless of the issues in the case, any personal views I may have are irrelevant to my decision-making process. As a sitting federal circuit court judge, I am required to apply all of the Supreme Court's binding precedents—including those regarding the

death penalty—and I would respect those precedents should I be confirmed to the Supreme Court.

8. Do you think that international law and norms, specifically the treaties and other international laws the United States has signed, have any role to play in interpreting our own constitutional standards, for example in connection with exempting minors from the death penalty or prohibiting torture?

RESPONSE: There are very few cases in which international law plays any role in our judicial system, and I do not believe international law plays a determinative role in interpreting our Constitution. In considering whether a particular punishment violates the Eighth Amendment, the Supreme Court has stated, “[t]he judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But the climate of international opinion concerning the acceptability of a particular punishment is also not irrelevant. The Court has looked beyond our Nation’s borders for support for its independent conclusion that a particular punishment is cruel and unusual.” *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010). Should I be confirmed to serve as an Associate Justice on the Supreme Court, I would faithfully apply Supreme Court precedents.

9. Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court, that you believe can or should be identified in the future?

RESPONSE: The Supreme Court has determined that the Constitution protects certain rights that are not specifically enumerated in the Constitution. According to the Supreme Court, the due process clauses of the Fifth and Fourteenth Amendments are the primary sources for the recognition of unenumerated rights, and the Court has held that, as a general matter, due process protects “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty[.]” *Washington v. Glucksberg*, 521 U.S. 702 at 720–21 (internal quotation marks and citations omitted). I would adhere to the Supreme Court’s precedent.

10. Does the Constitution have a liberty clause? If yes, please identify the rights protected by that clause.

RESPONSE: The Due Process Clauses of the Fifth and the Fourteenth Amendments protect against government deprivation “of life, liberty, or property, without due process of law.” According to the Supreme Court, these Due Process Clauses provide both procedural and substantive rights. Cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), recognize an unenumerated right to privacy that encompasses the right to marital privacy and to use contraception. *Obergefell v. Hodges*, 576 U.S. 644 (2015), and *Loving v. Virginia*, 388 U.S. 1 (1967), affirm a constitutional right to marry, and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), recognize the right to have children and to direct their education. In *Saenz v. Roe*, 526 U.S. 489 (1999), the Supreme Court affirmed a right to travel, and *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), articulate a limited right to terminate a pregnancy, particularly before viability, *Casey*, 505 U.S. at 870.

11. In his book, *Active Liberty*, Justice Breyer states that, “since law is connected to life, judges, in applying a text in light of its purpose, should look to consequences, including ‘contemporary conditions, social, industrial, and political, of the community to be affected.’” Do you agree with Justice Breyer?

RESPONSE: I am not certain what Justice Breyer meant by that statement. I follow the methods of statutory and constitutional interpretation that the Supreme Court has employed. I look at the relevant provision of the Constitution, statute, or other applicable legal authority. I work to discern those words’ meaning as intended by the people who wrote them. I focus on original public meaning; I look at history and practice at the time the document was created to understand what those who created the text intended. I also look at precedent to understand how the text has been previously interpreted and applied. As a lower court judge, I am bound by precedent. If I am fortunate enough to be confirmed to the Supreme Court, I would be bound by *stare decisis*. I do not decide cases based on my personal views or policy preferences.

12. Since you graduated from law school, what in your view are the most significant cases the Supreme Court has decided and why do you consider them the most significant?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a sitting judge and a pending judicial nominee, to opine on this question. As Justices Kagan and Barrett explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

13. In the last 100 years, which Justice’s judicial philosophy has been most influential on the Court?

RESPONSE: Every Justice has made their mark on Supreme Court jurisprudence, as I would hope to if confirmed. The value of our appellate system is that a panel of judges evaluate any disputed provision of the law from different perspectives, which ensures any binding precedent is thorough and well-reasoned. That said, Justice Scalia has been especially influential insofar as he is widely credited as a founder of the originalist approach to constitutional interpretation, which has become a primary tool for interpreting provisions of the Constitution. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

14. Please provide the Senate Judiciary Committee with a copy of the following document: *U.S. v. Hawkins*, 1:13 CR 244, ECF No. 30 (D.D.C.).

RESPONSE: I am unable to access the “Probation Petition” that resulted in my April 17, 2019 order in *United States v. Hawkins*, No. 3-cr-244 (D.D.C. 2013) because this record is the property of the U.S. District Court for the District of Columbia and I am no longer a member of that court. I would additionally note that it is common practice for “Probation Petitions” like the one filed in Mr. Hawkins’ case to be treated confidentially given that they contain sensitive information about a defendant and his supervision.

15. Please provide a list of every defendant you have sentenced to probation for whom you received a probation violation report and/or who appeared before you for a probation revocation hearing while you were a district judge.

RESPONSE: Out of the more than 100 individual and corporate defendants whom I sentenced, I only sentenced a small number to serve terms of probation in lieu of imprisonment. According to the public dockets, none of those defendants appeared before me for a probation revocation hearing. If there were any probation violation reports associated with those defendants, I am unable to access them because those records are the property of the U.S. District Court for the District of Columbia and I am no longer a member of that court.

16. Please name the most poorly reasoned Supreme Court case, in your view, of the last fifty years.

RESPONSE: As a sitting federal judge, all of the Supreme Court's pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, it is my testimony that, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court's binding precedents.

17. You spoke a bit at your hearing about justiciability. Where is the line between political questions and questions that are appropriate for a court to decide?

RESPONSE: "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012) (citation omitted). The Court has described the "political question doctrine" as a "narrow exception to that rule." *Id.* at 195. The Court has "explained that a controversy 'involves a political question . . . where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.''" *Id.* (citations omitted).

18. Have you ever represented a defendant in a death penalty case?

RESPONSE: No.

19. In any given generation, does the Supreme Court have the authority to look at current American society, culture and mores to determine that there are new needs or freedoms that should be considered fundamental rights, or that there are new groups that may in certain circumstances be considered suspect classes?

RESPONSE: When an act of government distinguishes between groups of people, the Supreme Court has described the "traditional indicia of suspectness" to include those classifications that pertain to "an immutable characteristic determined solely by the accident of birth," and also those that pertain to classes of persons who are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (internal quotation marks and citations omitted). The Supreme Court has determined that race, religion, national origin, and alienage are suspect classes that are subject to heightened ("strict") scrutiny. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371–32 (1971). In

substantive due process cases, the Supreme Court has recognized that the Constitution protects “fundamental rights” that are “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks and citations omitted).

20. Does the Court have the authority to look at current American society and decide that rights once held fundamental are no longer fundamental?

RESPONSE: The Supreme Court has explained that certain rights are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). As in every case, the Supreme Court’s authority in cases involving fundamental rights is constrained by the Constitution and binding precedent. In the substantive due process context, Supreme Court cases that recognize fundamental rights are binding precedents that are subject to respect under the principle of *stare decisis*.

21. In your testimony about ascertaining the meaning of the Constitutional text, you spoke both about looking for the original intent of the Framers’ and the original public meaning of the text. Do you believe we should consider both the original intent of the authors and the original public meaning of the text?

RESPONSE: The Supreme Court has recently interpreted various constitutional provisions by attempting to ascertain the original meaning of the words used as understood by the public at the time of the Founding. *See, e.g., United States v. Jones*, 132 S. Ct. 945, 949 (2012) (Fourth Amendment); *Citizens United v. Federal Election Commission*, 558 U.S. 310, 906 (2010) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42–57 (2004) (Confrontation Clause); *Alden v. Maine*, 527 U.S. 706, 715–724 (1999) (Eleventh Amendment). And while the Supreme Court has primarily evaluated the original public meaning of the text of the constitutional provision at issue, *see Jones*, 132 S. Ct. at 949, 953; *Heller*, 554 U.S. at 576–77, its binding precedents also sometimes refer to the original intent of the Framers, *see Crawford*, 541 U.S. at 53–54, 59, 61.

22. When Senator Durbin asked about your judicial philosophy, you said that you look both to the drafters’ “intent” and to the “original public meaning.” What is the difference between original intent and original public meaning?

RESPONSE: Please see my response to Question 21.

23. If the two conflict, which one should a judge rely on?

RESPONSE: Please see my response to Question 21.

24. You have said that you consider Congressional purpose in interpreting laws.

a. How do you discern Congressional purpose?

RESPONSE: A court interpreting a statute seeks to understand the intention of the legislature that enacted the law. The Supreme Court has explained that “[n]o legislation pursues its purposes at all costs,” and “[e]very statute [proposes], not only to achieve certain ends, but also to achieve them by particular means.” *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 637 (2012) (citations and internal quotation marks omitted).

Accordingly, “[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Park ‘N Fly, Inc. v. Dollar Park & Flu, Inc.*, 469 U.S. 189, 194 (1985). If the “statutory text is plain and unambiguous,” the Court “must apply the statute according to its terms.” *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). A Court may also discern Congress’s purpose by considering the structure of the statute as a whole, other traditional tools of statutory construction, and any statutory provision setting forth the purpose of the statute.

- b. Do members of Congress act with one unified purpose when writing and voting for laws?

RESPONSE: Please see my response to Question 24a.

- c. If members of Congress have different purposes in voting for laws, which member’s purpose do you consider when interpreting the law?

RESPONSE: Please see my response to Question 24a.

- d. Senator Durbin said your opinions—almost all of them from the district court—show us your judicial philosophy. But when you were before the Committee last year for your nomination the D.C. Circuit, you told Senator Cruz that you “have not had any cases that have required [you] to develop a view on constitutional interpretation of text in the way that the Supreme Court has to do.” If not your time on the district court, what aspects of your record should we look to in determining your view of constitutional interpretation?

RESPONSE: My record shows that I faithfully adhere to precedent, that I decide cases impartially, and that I stay within the boundaries of the proper judicial role. Consistent with that record, I would interpret the Constitution in the manner that the Supreme Court employs when it undertakes to interpret constitutional provisions. That includes reviewing the text of the constitutional provision, any relevant history, and any applicable precedent. The Supreme Court has recently interpreted various constitutional provisions by attempting to ascertain the original meaning of the words used as understood by the public at the time of the Founding. *See, e.g., United States v. Jones*, 132 S. Ct. 945, 949 (2012) (Fourth Amendment); *Citizens United v. Federal Election Commission*, 558 U.S. 310, 906 (2010) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42–57 (2004) (Confrontation Clause); *Alden v. Maine*, 527 U.S. 706, 715–724 (1999) (Eleventh Amendment). And while the Supreme Court has primarily evaluated the original public meaning of the text of the constitutional provision at issue, *see Jones*, 132 S. Ct. at 949,

953; *Heller*, 554 U.S. at 576–77, its binding precedents also sometimes refer to the original intent of the Framers, see *Crawford*, 541 U.S. at 53–54, 59, 61.

The prevailing interpretive frame for interpreting the Constitution is to look back through history and determine what the words meant at the time of the founding. There are some provisions in the Constitution that set forth specific rules. For example, the Constitution states that a person must be at least thirty-five years old to be President of the United States. As to clear provisions of this sort, the Constitution can be interpreted based on the text alone. Other provisions of the Constitution, like the protection against unreasonable searches and seizures or the protection of due process of law, are not clear from the text alone. As to those provisions, the Court looks at them in the context of history and in the structure of the Constitution. They look at the circumstances of the case in comparison to what the words meant at the time that they were adopted, and they analogize to current circumstances. It is a process that seeks to understand the core foundational principles in the Constitution as captured by the text as originally intended, and to apply those principles to modern circumstances.

25. I asked you, of the 115 Justices who served before you, do any of them have a judicial philosophy that most closely resembles your own, you said that your philosophy is influenced by your time as a trial judge and that, to your knowledge, only Justice Sotomayor shares that experience.

a. In what ways does your judicial philosophy resemble Justice Sotomayor's?

RESPONSE: My time as a trial judge informs my judicial approach in several respects. A trial judge is bound by the law as stated by the court of appeals and the Supreme Court. Thus, I understand the importance of precedent and the significance of *stare decisis*. From my trial experience, I am also conscious of how important it is for appellate courts to communicate clearly so that lower courts can follow their rulings. I also found it important to communicate clearly to everyone in my courtroom, especially the defendant in a criminal case, so that they understood the proceedings and the harms they had caused. In addition, a trial judge is responsible for overseeing the development of facts in a case. By contrast, by the time a case reaches an appellate court, there is already a record and the court is looking primarily at the law. From my experience as a trial judge, I am particularly mindful of the standards of review that apply to factfinding at the trial level. My time as a trial judge also informs my views on the importance of the adversarial system in promoting fair determinations. I am not able to comment on the extent to which Justice Sotomayor drew similar or different lessons from her time as a trial judge.

b. In what ways does your judicial philosophy differ from Justice Sotomayor's?

RESPONSE: Please see my response to Question 25a.

26. Senator Sasse asked you if you had studied the differences in the judicial philosophies of Justices Kagan, Sotomayor, and Breyer. You said you had not yet had time to study that. Now that the hearing is over, please state what you view as the differences in judicial

philosophy between Justices Kagan, Sotomayor, and Breyer, based on your reading of their opinions and other writings.

a. What aspects of Justice Breyer's judicial philosophy do you agree and disagree with?

RESPONSE: Please see my response to Question 1 for an explanation of my judicial approach. Judges and Justices decide individual cases and controversies on a case-by-case basis, and the judicial philosophies that the named Justices have employed may or may not be evident in some or all of their written opinions. Consequently, ascertaining each Justices' judicial philosophy cannot be done in the aggregate or in the abstract, and I am not able to draw comparisons between my approach and any of the judicial philosophies that might be gleaned from the Justices' rulings.

b. What aspects of Justice Kagan's judicial philosophy do you agree and disagree with?

RESPONSE: Please see my response to Question 26a.

c. What aspects of Justice Sotomayor's judicial philosophy do you agree and disagree with?

RESPONSE: Please see my response to Question 26a.

27. What is your view of the use of corpus linguistics to ascertain the meaning of Constitutional or statutory text?

RESPONSE: Justice Alito recently noted that "perhaps someday it will be possible to evaluate" the "strength and validity of an interpretive canon" by "conducting what is called a corpus linguistics analysis, that is, an analysis of how particular combinations of words are used in a vast database of English prose." See *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1174 (2021) (Alito, J., concurring in the judgment) (citing Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788, 792 (2018)). As a pending judicial nominee and a sitting federal judge, I am bound by the Supreme Court's precedents, including those that pertain to how courts should ascertain the meaning of Constitutional and statutory text.

28. What are fundamental rights?

RESPONSE: The Supreme Court has explained that certain rights are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The Supreme Court has described the concept of fundamental rights in various contexts, and while all of the uses suggest an important principle that warrants a high degree of protection I do not understand there to be a single universal meaning. For example, the Court has sometimes called freedom of speech and free exercise of religion fundamental. The Court has said that protections in the Bill of Rights that are "fundamental to the American scheme of justice" (such as the right to trial by jury in a serious criminal case) were made applicable to the states by the Due Process Clause of the Fourteenth Amendment. See *Duncan v. Louisiana* (1968). In *McDonald v. City of Chicago* (2010), the plurality said that the Second Amendment's individual right to keep and bear arms for self defense was applicable to the States because it is "a provision of the Bill of Rights that protects a

right that is fundamental from an American perspective.” The Court has also referred to voting rights as “fundamental.” *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”). In substantive due process cases, “fundamental rights” are rights protected by the Constitution and “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks and citations omitted).

29. What is the source of fundamental rights?

RESPONSE: The Constitution is the source of fundamental rights.

30. When does something become a fundamental right?

RESPONSE: Please see my response to Question 28.

31. In 2007, you represented a defendant on appeal who had pleaded guilty to threatening President George W. Bush. *United States v. Bauer*, 2006 WL 3620588, No. 05–3050 (D.C. Cir. Nov. 29, 2006). During the sentencing phase, the prosecution relied on the defendant’s history of violence to assess sentencing enhancements. You challenged the defendant’s sentence; specifically, the government’s assertions that the defendant had a history of violence.

In 2001, the defendant had pleaded guilty to animal cruelty after he shot his dog twice in the head with a shotgun. Fourth Judicial Circuit, Case No. 01–1229-CF, *Florida v. Bauer*, Order Withholding Adjudication of Guilt and Sentence, Nov. 15, 2001. The Florida judge “withheld adjudication,” which, under Florida law, is permissible if the court finds “that the defendant is not likely again to engage in a criminal course of conduct.” F.S.A. § 948.01. However, in the sentencing context, Florida instructs courts to treat these withholdings the same as a guilty plea with court adjudication. *McRae v. Florida*, 395 So. 2d 1145, 1154 (Fla. 1980).

Despite this, you characterized the defendant’s guilty plea for animal cruelty as an “uncharged animal cruelty incident” in her reply brief to the D.C. Circuit. 2006 WL 3620588 (emphasis added). You also cited to the PSR to assert that “no conviction or judgment ever resulted from the alleged offense.” (emphasis added). You also argued that “the only thing in the record below that in any way suggests that Mr. Bauer has ever acted out in a ‘violent’ manner” is a paragraph in the PSR describing this incident. 2006 WL 3620588, at *19 (emphasis added).

As the government’s supplemental sentencing memorandum states, Bauer had engaged in “one previous act of violence that was particularly ominous” (shooting his dog). No. 1:03-cr-00502-RMC, Dkt. No. 38, at 3. But the government also wrote, “[a]n aside, in 1991 he had been convicted of carrying a concealed weapon and other offenses and in 1994 of resisting officers.” *Id.* Further, on July 29, 2003, the defendant’s mother told a Secret Service agent

that the defendant had taken a loaded pistol, pointed it at her, and threatened to kill her. Bond Hearing Tr. 18:11–21 (Oct. 20, 2003). His mother later denied this statement, but it was still evidence in the record that she had “suggest[ed] that Mr. Bauer [had] acted out in a ‘violent’ manner.”

The government also relied on the defendant’s concealed weapons charge. This arrest happened when he told police officers that he would “stab people with a ball point pen if they crossed him,” showing the officer a pen which, when the top portion was removed, “turned into a knife blade.” Giunta Evaluation at 3, Ex. 5 to Defendant’s Memorandum in Aid of Sentencing and Motion for a Downward Departure, Feb. 2, 2004; *see also* Sentence Tr. 13:18, Feb. 2, 2004 (“his conviction for carrying the prohibited weapon, knife”).

Do you remember the basis for the claim that there was only one incident of violence in the record or that his conduct was uncharged?

RESPONSE: I was assigned to represent Mr. Bauer over 15 years ago when I was an appellate assistant federal public defender. As an assistant federal public defender, I had an ethical obligation to zealously advocate on behalf of my clients. In this case, that included presenting good faith arguments about Mr. Bauer’s past interactions with the criminal justice system. Having served as a federal district court judge for almost nine years, I would note that it is quite common for defense counsel to contest their client’s past interactions with the criminal justice system or allegations of criminal behavior. Such arguments, along with the corresponding arguments made by the prosecution, support the very core of our adversarial criminal justice system. Having served as a federal judge for the past decade, I have seen firsthand the benefits of strong advocacy on both sides of a case in order to ensure that the judge is informed of the strongest arguments on all sides.

32. While you were an associate at Goodwin Proctor, you and two other lawyers wrote an amicus brief on behalf of NARAL, the Abortion Access Project of Massachusetts, and other pro-abortion groups. In *McGuire v. Reilly*, the district court held that “[p]ro-life advocates who firmly believe that abortion remains a grave moral evil must be given as equal an opportunity as their opponents to express to those seeking an abortion their sincere message of respect for the sanctity of innocent human life. The First Amendment requires no less.” Your amicus brief argued that the district court was wrong.

- a. Please describe your understanding of the First Amendment’s free speech protections as they apply to pro-life advocates.

RESPONSE: The amicus brief in *McGuire v. Reilly* was drafted and filed in the First Circuit when I was an associate at Goodwin Proctor LLP in Boston in 2001, during my first year of law practice after completing my Supreme Court clerkship. The arguments presented in that brief were made on behalf of our clients. In the two decades since the brief was filed, there have been developments in the law concerning buffer zones. *See, e.g., McCullen v. Coakley*, 573 U.S. 464 (2014). Overall, the Supreme Court’s rulings confirm that similarly situated speakers—regardless of their viewpoints—are entitled to the same First Amendment protections. *Cf. Iancu v. Brunetti*, 588 U.S. ___, 139 S. Ct. 2294, 2299 (2019) (noting prohibition on viewpoint-discrimination).

- b. In your view, does the First Amendment require that pro-life advocates have an equal opportunity as their opponents to express a sincere message of respect for the sanctity of human life?

RESPONSE: Overall, the Supreme Court’s rulings confirm that similarly situated speakers—regardless of their viewpoints—are entitled to the same First Amendment protections. *Cf. Iancu v. Brunetti*, 588 U.S. ___, 139 S. Ct. 2294, 2299 (2019) (noting prohibition on viewpoint-discrimination). Under the Code of Conduct for United States Judges and established standards of judicial ethics, a judge’s personal views must not have any bearing on her adjudication of cases. This question speaks to an issue that is likely to come before the courts in the future, and I share the concern of past nominees that offering my views here could give future litigants the misimpression that I have prejudged their cases.

33. In 2015, the Obama administration awarded grants to over 80 non-profit organizations under the Teen Pregnancy Prevention Program. The organizations receiving grants included Planned Parenthood and other abortion providers. In 2017, the Trump administration tried to stop federal funding for abortion providers. But in *Policy Research, LLC v. Department of Health and Human Services*, you held that the administration could not do so.

- a. Please describe any relevant statutes and Supreme Court precedent concerning the authority of a federal agency to rescind grant funding to organizations.

RESPONSE: In *Policy Research, LLC v. Department of Health and Human Services*, 313 F. Supp. 3d 62, 68 (D.D.C. 2018), I determined that the U.S. Department of Health and Human Services (HHS) failed to comply with the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., when it terminated plaintiffs’ grant funding two years early “without any explanation and in contravention of its own regulations.” As the opinion explained, “a federal agency that changes course abruptly without a well-reasoned explanation for its decision or that acts contrary to its own regulations is subject to having a federal court vacate its action as ‘arbitrary [and] capricious.’” 313 F. Supp. 3d at 67 (quoting 5 U.S.C. § 706(2)(A) and citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016); *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 48–49 (1983); *National Environmental Development Association’s Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014)).

- b. In your view, does the Department of Health and Human Services have the authority to terminate grant funding for pro-abortion groups?

RESPONSE: As a sitting federal judge and a pending judicial nominee, I cannot speculate as to hypothetical agency actions. The well-established legal standards and requirements that are discussed in *Policy Research, LLC v. Department of Health and Human Services*, 313 F. Supp. 3d 62 (D.D.C. 2018), apply without regard to the views of the affected groups

34. In 2021, I asked you about your views on religious liberty and you said “[d]uring my confirmation hearing, I testified in response to a question from Senator Hawley that the Free Exercise Clause is a fundamental and foundational constitutional right. The Supreme Court has made clear that the First Amendment’s Free Exercise Clause and Establishment Clause, the Religious Freedom Restoration Act, and other federal statutes guarantee that religious individuals and organizations will have substantial autonomy to act consistently with their religious beliefs.” However, the phrase “substantial autonomy” does not appear in any Supreme Court opinion related to religious freedom. What did you mean by “substantial autonomy” in relation to religious individuals and organizations?

RESPONSE: I was not quoting from a specific Supreme Court case and intended merely to convey that, under the Supreme Court’s precedents, religious activity is a fundamental right. I stand by my 2021 statement that “The Supreme Court has made clear that the First Amendment’s Free Exercise Clause and Establishment Clause, the Religious Freedom Restoration Act, and other federal statutes guarantee that religious individuals and organizations will have substantial autonomy to act consistently with their religious beliefs.”

35. In *Lemon v. Kurtzman*, 402 U.S. 602 (1971), the Supreme Court created a judge-made test for determining whether government action violates the Establishment Clause. The Supreme Court has repeatedly “either expressly declined to apply the test or has simply ignored it.” *American Legion v. American Humanist Association*, 139 S. Ct. 2067, 2080 (2019). Please explain whether the *Lemon* test remains good law after *American Legion*.

RESPONSE: I am aware that in *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019), a plurality of the Supreme Court stated that: “For at least four reasons, the *Lemon* test presents particularly daunting problems in cases, including the one now before us, that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations. Together, these considerations counsel against efforts to evaluate such cases under *Lemon* and toward application of a presumption of constitutionality for longstanding monuments, symbols, and practices.” *Id.* at 2081–82. If a case came before me that presented these issues, I would carefully review all of the relevant precedents from the Supreme Court. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to provide comment beyond the fact that, if confirmed, I would resolve each case based on the factual record and applicable law.

36. How would you evaluate a claim about a violation of the Establishment Clause?

RESPONSE: If confirmed, I would resolve each case that comes before me on an individual basis by assessing the parties’ legal arguments based on the facts and applicable law.

37. Please explain how you would determine whether an employee of a religious organization qualifies as a “minister” for the purposes of the ministerial exception.

RESPONSE: If confirmed, I would resolve each case that comes before me on an individual basis by assessing the parties’ legal arguments based on the facts and applicable law, including *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

38. Do federal courts have the authority to review how a church manages its funds?

RESPONSE: I am not currently aware of circumstances where federal courts have reviewed how a church manages its funds. As pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment further.

39. In *Patterson v. United States*, you recognized a free speech right to shout profanities in a public park. But in *McGuire v. Reilly*, you filed an amicus brief advocating for the restriction of free speech rights of pro-life sidewalk counselors. How do you determine when speech is offensive and whether it is protected?

RESPONSE: As described in response to Question 32.a, the brief I helped to prepare in *McGuire v. Reilly* constituted legal advocacy on behalf of clients. The decision I issued in *Patterson v. United States*, 999 F. Supp. 2d 300 (D.D.C. 2013), represented my work as a jurist, applying the relevant precedents to the facts of the case.

In *Patterson*, the plaintiff had been arrested for disorderly conduct during a protest in a public park for uttering a profanity after seeing a counter-protestor. The plaintiff brought *Bivens* claims against the three U.S. Park Police officers involved in the arrest. I denied the officers' motion to dismiss plaintiff's First Amendment and Fourth Amendment *Bivens* claims based on qualified immunity, concluding that no reasonable officer could have found that plaintiff's use of profanity was likely to instigate violence or prompt a violent reaction from a counter-protestor. 999 F. Supp. 2d at 315–18. I found the allegations in the complaint (assumed to be true for purposes of the motion) reasonably supported the claim that plaintiff had been arrested as retaliation for his protected speech in violation of his clearly established First Amendment and Fourth Amendment rights. *Id.* at 317–18.

My ruling in *Patterson* recognized, consistent with Supreme Court precedent, that offensive speech may be entitled to First Amendment protections. Indeed, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”).

Under established Supreme Court case law, the circumstances in which speech's First Amendment protections are diminished or lost are limited. For example, the Washington, D.C. law at issue in *Patterson* criminalized speech as “disorderly conduct” only to the extent that it implicated a substantial likelihood of a violent reaction. Unprotected “fighting words” are typically “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” *Cohen v. California*, 403 U.S. 15, 20 (1971) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). To determine what constitutes “fighting words,” the Supreme Court has held that courts must apply “careful consideration of the actual circumstances surrounding” the expression at issue, and must ask “whether the expression ‘is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.’” *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (citation omitted).

40. In *Patterson* you recognized a *Bivens* claim for First Amendment retaliation.

- a. Has the Supreme Court ever recognized a *Bivens* claim for First Amendment retaliation?

RESPONSE: The Supreme Court recently heard arguments in a case that presents the question of whether a cause of action exists under *Bivens* for First Amendment retaliation claims. See *Egbert v. Boule*, No. 21–147. It would be inappropriate for me to opine on an issue presented by a case currently before the Supreme Court.

- b. When is it appropriate to recognize a *Bivens* claim?

RESPONSE: See response to Question 40a.

41. Under what circumstances may the government impose a limit on the number of people attending a worship service?

RESPONSE: As I have stated previously, the Free Exercise Clause is a fundamental and foundational constitutional right. The Supreme Court has made clear that, under certain circumstances, various constitutional protections limit what the government can impose on, or require of, private persons and institutions. These constitutional limits include the First Amendment’s Free Exercise Clause. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021) (per curiam); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66–68 (2020) (per curiam). Because issues concerning the scope of constitutional and statutory protections for religious freedom are the subject of ongoing litigation, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment further on this question.

42. To promote public health, may the government impose restrictions on houses of worship that are not imposed on movie theaters, restaurants, or night clubs?

RESPONSE: Please see my response to Question 41.

43. Under what circumstances may the government impose a vaccine mandate that includes no religious exemptions?

RESPONSE: The First Amendment prohibits the government from abridging free speech. The Supreme Court recognized in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), that private owners of shopping center are not governmental actors and held that they may—as a matter of federal constitutional law—impose restrictions. The Court stressed that the invitation of the public to use the mall for designated purposes does not deprive it of its private character. *Id.* at 81.

44. Please describe how you would evaluate a claim that parents have the right to refuse to vaccinate their children.

RESPONSE: As a judicial nominee and sitting federal judge, it would be inappropriate for me to offer my views about this abstract legal question. As a judge, it is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law. Related questions are the focus of ongoing litigation, and may well come before me in the future.

45. Generally speaking, under what circumstances is a nationwide injunction more appropriate than narrower, targeted relief?

RESPONSE: Article III of the Constitution limits the exercise of the judicial power to ‘Cases’ and ‘Controversies.’” A federal court may entertain a suit only by a plaintiff who has suffered a concrete “injury in fact,” and the court may grant relief only to remedy “the inadequacy that produced [the plaintiff’s] injury.” *Gill v. Whitford*, 138 S. Ct. 1916, 1929–30 (2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). Principles of equity reinforce those limitations, as a court’s equitable authority to award relief is generally confined to relief “traditionally accorded by courts of equity” in 1789. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318, 319 (1999). The Supreme Court has in some cases narrowed injunctions that extended relief beyond the harms to “any plaintiff in th[e] lawsuit.” *Lewis*, 518 U.S. at 358. In other cases, the Court has declined to narrow an injunction to only the plaintiffs in the suit. *See, e.g., Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (allowing “injunctions to remain in place” for those “similarly situated” to the plaintiffs).

The proper scope of any relief depends on the record before the Court and the relevant law. Consistent with Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract on when an injunction would not be appropriate.

46. Are there any instances where nationwide injunctions are not appropriate?

RESPONSE: “Article III of the Constitution limits the exercise of the judicial power to ‘Cases’ and ‘Controversies.’” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted). A federal court may entertain a suit only by a plaintiff who has suffered a concrete “injury in fact,” and the court may grant relief only to remedy “the inadequacy that produced [the plaintiff’s] injury.” *Gill v. Whitford*, 138 S. Ct. 1916, 1929–30 (2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). Principles of equity reinforce those limitations, as a court’s equitable authority to award relief is generally confined to relief “traditionally accorded by courts of equity” in 1789. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318, 319 (1999). The Supreme Court has in some cases narrowed injunctions that extended relief beyond the harms to “any plaintiff in th[e] lawsuit.” *Lewis*, 518 U.S. at 358.

Whether any injunction is appropriate or not appropriate depends upon the record in the particular case and the relevant law. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract on when an injunction would not be appropriate.

47. What happens if different district court judges issue conflicting nationwide injunctions?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on abstract legal issues or hypotheticals.

48. What happens if a circuit court disagrees with a nationwide injunction that has been issued by a district court outside the circuit? Is there anything that can be done to reconcile those inconsistent positions?

RESPONSE: Under Article III, courts have jurisdiction only to resolve the “cases and controversies” that come before them. In determining whether to grant certiorari in a case, Supreme Court Rule 10 states that one reason the Court may consider granting certiorari is if “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.” Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract about what would happen if a circuit court disagreed with an injunction issued by a district judge outside the circuit.

49. Are decisions by the Supreme Court issued on its emergency docket precedential? If not, what level of deference are lower courts required to accord emergency docket orders?

RESPONSE: All Supreme Court decisions are precedential and entitled to respect under *stare decisis* principles, and in revisiting any precedent, the Court applies the factors it has articulated for determining whether to overrule a prior decision. Those factors include the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to “rob[]” the decision “of significant application or justification.” *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Federation Of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2478 (2018).

50. Please explain whether you agree or disagree with the following statement: “The judgments about the Constitution are value judgments. Judges exercise their own independent value judgments. You reach the answer that essentially your values tell you to reach.”

RESPONSE: I am not familiar with this quote or the context in which it was given. As a sitting federal judge, my role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present. I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law, as I understand it, including the binding precedents of the Supreme Court.

51. Do parents have a constitutional right to direct the education of their children?

RESPONSE: The Supreme Court has held that parents have the right to direct their children’s education and upbringing. *See Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“[Plaintiff’s] right thus to teach and the right of parents to engage [Plaintiff] so to instruct their children, we think, are within the liberty [of the Fourteenth Amendment].”); *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“[W]e have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the right[] . . . to have children . . . [and] to direct the education and upbringing of one’s children”) (internal citations omitted).

52. Is whether a specific substance causes cancer in humans a scientific question?

RESPONSE: I do not believe this is an issue that either the Supreme Court or D.C. Circuit has addressed. Because this is a question that may give rise to a matter before the court, as a pending judicial nominee and sitting federal judge, it would be inappropriate for me to comment further.

53. Is when a “fetus is viable” a scientific question?

RESPONSE: As a sitting federal judge and a pending judicial nominee, it would be inappropriate for me to offer any personal views on this question. If confirmed as a Justice, I would approach all cases, including any case involving this question, without regard to my personal views, if any.

54. Is when a human life begins a scientific question?

RESPONSE: As a sitting federal judge and a pending judicial nominee, it would be inappropriate for me to offer any personal views on this question. If confirmed as a Justice, I would approach all cases, including any case involving this question, without regard to my personal views, if any.

55. You stated that all Supreme Court precedents deserve respect. What does it mean to “respect” a Supreme Court precedent?

RESPONSE: *Stare decisis* is a bedrock legal principle that ensures consistency and impartiality of judgments. “*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). The Court has articulated factors to consider in determining whether to overrule a prior decision, including the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to “rob[]” the decision “of significant application or justification.” *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Federation Of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2478 (2018).

56. Does respecting a Supreme Court precedent mean refusing to overturn it?

RESPONSE: Please see my response to Question 55.

57. Does the Second Amendment protect the right to bear a firearm outside the home?

RESPONSE: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment “confer[s] an individual right to keep and bear arms.” And in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court held that this right is fully applicable to the States. In *Heller*, the Court emphasized that the Second Amendment protects weapons commonly in use for self-defense. And both *Heller* and *McDonald* said that the Court did not cast doubt on longstanding prohibitions on possession of firearms by felons and the mentally ill, or carrying of firearms in sensitive places like schools and government buildings.

Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and sitting federal judge, to comment further given that courts are actively considering such issues as applied to various government regulations.

58. How many rounds in a magazine can a state ban before violating by the Second Amendment?

RESPONSE: Please see my response to Question 57.

59. Are bump stocks protected by the Second Amendment?

RESPONSE: Please see my response to Question 57.

60. Are silencers protected by the Second Amendment?

RESPONSE: Please see my response to Question 57.

61. Do felon dispossession statutes violate the Second Amendment? If not, can states prohibit even non-violent felons from possessing a firearm?

RESPONSE: Please see my response to Question 57.

62. In *Baisden v. Barr*, you dismissed a claim that prohibiting a non-violent former felon from possessing a gun violates his Second Amendment rights. Assume the complaint stated that the man planned to own or use a firearm in the future, and that he was a gun owner before his conviction. How would you assess his Second Amendment claim?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on this hypothetical question, which implicates matters that are the subject of ongoing litigation.

63. Does the First Amendment protect the uploading and dissemination online of printable CAD files of plastic gun schematics?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on the application of the First Amendment to the dissemination of instructions for 3-D printing plastic guns, which is an issue that could be the subject of litigation.

64. Have you ever done any work, legal or non-legal, with or for a gun control group?

RESPONSE: To the best of my recollection, no.

65. Under what circumstances is a court capable of determining whether a child pornography defendant is not a pedophile?

RESPONSE: As a federal judge, I am concerned only with the proper resolution of cases to which I have been assigned. In each of the more than 100 sentencings I have conducted, including those involving child pornography offenses, I followed the law as set forth by Congress. Consistent with 18 U.S.C. § 3353(a), I considered the specific factors in the statute, including but not limited to: the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” “to afford adequate deterrence,” and “to protect the public from further crimes of the defendant”; the sentencing range established by the Sentencing Guidelines; “any pertinent policy statement” of the Sentencing Commission; and “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” I also considered victim statements and the sentencing recommendations of the government, defense counsel, and U.S. Probation Office.

66. During the hearings, you discussed Congress’s role in establishing appropriate punishments for traffickers of child pornography. I have worked to fight against the exploitation of minors for decades. As I mentioned during the hearings, I supported the Protection of Children Against Sexual Exploitation Act in 1983. In 2012, I sent a letter to the Sentencing Commission while you were Vice Chair. In the letter, I urged the Commission not to recommend lower sentences for the possession of child pornography. I said that “it would be a disservice to the American people to have the Commission issue a report that advocates for the reduction in sentencing for a class of criminals who cause profound and lasting damage to their victims.”

- a. Do you recall receiving this letter, or any communications from Congress about sentencing in child exploitation cases while you were on the Sentencing Commission?

RESPONSE: I served on the U.S. Sentencing Commission from 2010 to 2014. The Commission is a bipartisan, independent agency that was created by Congress to reduce sentencing disparities and promote transparency and proportionality in sentencing. It also continuously establishes and amends sentencing guidelines for the judicial branch and assists the other branches in developing effective and efficient crime policy. The Commission is bipartisan by design, and during my tenure, it almost always acted unanimously.

I recall that the Commission received a great deal of information and communications while it was evaluating many aspects of federal sentencing policy, including this issue. While I do recall that the Commission often received congressional input on topics of interest, I have no specific recollection of this particular letter.

- b. Did you participate in any Commission work about sentencing in child exploitation and sex offense cases? If so, please describe the nature and product of your work.

RESPONSE: I served on the U.S. Sentencing Commission from 2010 to 2014. The Commission is a bipartisan, independent agency that was created by Congress to reduce sentencing disparities and promote transparency and proportionality in sentencing. It also

continuously establishes and amends sentencing guidelines for the judicial branch and assists the other branches in developing effective and efficient crime policy. The Commission is bipartisan by design, and during my tenure, it almost always acted unanimously.

During my tenure, the Commission analyzed, evaluated, and held public hearings about the federal sentencing guidelines for child pornography offenses. As a result of that multi-year effort, a bipartisan and unanimous Commission issued a 2012 report to Congress regarding how federal child pornography offenders are prosecuted, sentenced, incarcerated, and supervised following their reentry into the community. I note that the first item listed in the section devoted to “Highlights of the Report” was: “All child pornography offenses, including the simple possession of child pornography, are extremely serious because they both result in perpetual harm to victims and validate and normalize the sexual exploitation of children.”

- c. To your knowledge, did the Commission address reducing or increasing sentences relating to the possession or distribution of child pornography while you were on the Commission?

RESPONSE: During my tenure, the Commission analyzed, evaluated, and held public hearings about the federal sentencing guidelines for child pornography offenses. As a result of that multi-year effort, a bipartisan and unanimous Commission issued a 2012 report to Congress regarding how federal child pornography offenders are prosecuted, sentenced, incarcerated, and supervised following their reentry into the community. Within that 2012 report to Congress, the Commission recommended that Congress amend the statutory penalty scheme to align the penalties for receipt of child pornography with those for possession of child pornography, and to lower the mandatory minimum for those offenses to less than five years. The 2012 report did not recommend amending the statutory penalty scheme for distribution of child pornography.

- d. Were there any policies relating to sentencing for child pornographers that the Sentencing Commission declined to adopt while you were on the Commission? If so, which ones?

RESPONSE: The best reflection of the Commission’s consideration of these issues is the 2012 report that was issued by a unanimous Commission and submitted to Congress.

67. As a district court judge, you repeatedly stated that there are multiple purposes of punishment, including specific and general deterrence. Which forms of punishment do you believe most effectively deter child pornography?

RESPONSE: Congress has set forth multiple purposes of punishment in 18 U.S.C. § 3553(a), and district court judges are required to consider all of them when they sentence defendants. Congress has stated that the sentence imposed should (A) reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense; (B) afford adequate deterrence to criminal conduct; (C) protect the public from further crimes by the defendant; and (D) provide the defendant with needed educational or vocational training, medical care, or other

correctional treatment. 18 U.S.C. § 3553(a). In each of the more than 100 sentencings I have conducted, including those involving child pornography offenses, I followed the law as set forth by Congress.

I have recognized that my role as a judge is a limited one—to fairly and impartially apply the law to the facts of any case that has been properly presented. The question of which forms of punishment best deter criminal behavior is one for policymakers.

68. Please list all the cases in which you sentenced a defendant convicted of child pornography charges for whom you gave a sentence within or above the Sentencing Guidelines range as calculated before your decision to reject any enhancements because of your policy disagreements with those enhancements.

RESPONSE: In each of the more than 100 sentencings I have conducted, including those involving child pornography offenses, I followed the law as set forth by Congress. Consistent with 18 U.S.C. § 3353(a), I considered the specific factors in the statute, including but not limited to: the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” “to afford adequate deterrence,” and “to protect the public from further crimes of the defendant”; the sentencing range established by the Sentencing Guidelines; “any pertinent policy statement” of the Sentencing Commission; and “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” I also considered victim statements and the sentencing recommendations of the government, defense counsel, and U.S. Probation Office. I employed this methodology in each of the matters I handled that involved child pornography charges. In the eleven child pornography cases I handled, the sentences I imposed were below the guidelines range; however, in eight of the eleven cases the sentence I imposed was consistent with or above the recommendations submitted by the government or U.S. Probation Office.

69. Please provide all sentencing decisions of defendants convicted of child pornography charges for whom you gave a sentence above the Sentencing Guidelines range as calculated after your decision to reject any enhancements.

RESPONSE: Please see my answer to Question 68.

70. In *United States v. Lowe*, you represented on appeal a man convicted of “assaulting an Assistant United States Attorney with a hammer.” Citing no authority to support your argument, you suggested that violating a court-ordered condition of supervised release is appropriate so long as the defendant “consistently and persistently questioned the special condition of supervised release” with which the defendant disagreed.

- a. Please describe your understanding of how federal courts evaluate a claim that a defendant has violated a condition of supervised release.

RESPONSE: I was assigned to represent Mr. Lowe over 15 years ago when I was an appellate assistant federal public defender. As an assistant federal public defender, I had an ethical obligation to zealously advocate on behalf of my clients. Based on publicly available information, Mr. Lowe was sentenced to a 39-month term of imprisonment,

followed by 12 months of supervised release, which included a special condition of supervised release that required Mr. Lowe to participate in mental health treatment. Mr. Lowe objected to the mental health treatment condition, asserting that it was not necessary, and during the subsequent term of supervision, he refused to comply with the treatment condition. I was assigned to Mr. Lowe's case after the district judge revoked his supervision for failure to comply and imposed a 12-month prison sentence for the revocation. On appeal, I noted that Lowe had "consistently and persistently questioned the special condition of supervised release" and argued that it was an abuse of discretion for the district court to revoke his term of supervised release under those circumstances. *See United States v. Lowe*, No. 05-3138, Br. for Appellant at 16 (D.C. Cir. Feb. 10, 2005).

- b. In your view, can defendants ignore the terms of their probation simply because they disagree with those terms?

RESPONSE: Please see my response to Question 72a.

71. Does the Fourth Amendment prohibit a police officer from searching a vehicle ten minutes after arresting the driver if he was arrested when standing next to the driver's side door of the vehicle?

RESPONSE: The Supreme Court has held that a warrantless search of a vehicle can be reasonable under the "search incident to arrest" exception to the warrant requirement when the vehicle's passenger compartment is within reach of the arrestee at the time of the search, or when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. *Arizona v. Gant*, 556 U.S. 332 (2009). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a sitting federal judge and a pending judicial nominee, to opine on whether the specific hypothesized search is prohibited by the Fourth Amendment.

72. During the hearings, you discussed your policy disagreements with sentencing guidelines relating to criminal history and the use of a computer in the commission of a child pornography crime. You have also said that, in your view, "the fact that the defendant is serving a criminal justice sentence at the time of an escape is baked into the offense of conviction, just like a computer is now baked into the commission of a child pornography offense."

- a. Please describe the statutes and/or Supreme Court cases providing that a judge's policy disagreement can serve as the basis of a sentencing decision.

RESPONSE: The Supreme Court has held that the Sentencing Guidelines are advisory; district courts are "not bound to apply the Guidelines" although they "must consult those Guidelines and take them into account when sentencing." *United States v. Booker*, 543 U.S. 220, 264-65 (2005). District courts may impose sentences outside the applicable Guidelines range, including "based on a policy disagreement with those Guidelines." *Spears v. United States*, 555 U.S. 261, 266 (2009); *see also Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

In each of the more than 100 sentencings I have conducted, including those involving child pornography offenses, I followed the law as set forth by Congress. Consistent with 18 U.S.C. § 3353(a), I considered the specific factors in the statute, including but not limited to: the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” “to afford adequate deterrence,” and “to protect the public from further crimes of the defendant”; the sentencing range established by the Sentencing Guidelines; “any pertinent policy statement” of the Sentencing Commission; and “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” I also considered victim statements and the sentencing recommendations of the government, defense counsel, and U.S. Probation Office.

b. Do you have any other policy disagreements with the sentencing guidelines?

RESPONSE: Please see my response to Question 72a.

73. Have you ever applied the career offender enhancement? If so, please provide the case name and citation for each case. If not, please explain why not.

RESPONSE: I have presided over more than 1000 cases and sentenced more than 100 criminal defendants. The cases in which I have applied the career offender enhancement to defendants include *United States v. Terry*, 14-cr-00009, 2020 WL 7773389 (D.D.C. Dec. 29, 2020) and *United States v. Murphy*, 13-cr-285, 2014 WL 444220 (D.D.C. Feb. 4, 2014).

74. In *United States v. Savage*, you noted that the U.S. District Court for the District of Columbia has “not adopted a local rule governing disclosure of the Probation Office’s sentencing recommendation,” and that you “decided not to order the Probation Office to disclose the recommendation document itself, except in extraordinary circumstances that are not present here. In your view, what are the “extraordinary circumstances” justifying public disclosure of the Probation Office’s recommendation?”

RESPONSE: My opinion in *United States v. Savage*, No. 15-cr-95, ECF No. 25 (D.D.C. 2015), concerned the U.S. Probation Office’s sentencing recommendation document in that case, which contained the same information that was confidentially revealed to the parties as part of the U.S. Probation Office’s Presentence Investigation Report. The only additional information in the U.S. Probation Office’s sentencing recommendation document was the U.S. Probation Office’s opinion regarding the particular sentence that should be imposed, which I decided I would disclose in open court to the parties during the sentencing hearing.

As a sitting federal judge and a pending judicial nominee, it would be inappropriate for me to offer any views on what “extraordinary circumstances” would justify public disclosure of the U.S. Probation Office’s sentencing recommendation document outside the context of a particular case or controversy.

75. In 2014, you moderated a panel discussion related to probation and sentencing that discussed several cases related to probation recommendations. Do you agree with the following statement from an Order written by Judge Reggie B. Walton: “Disclosure of the sentencing

recommendation thus provides the defendant with little more than an opportunity to disagree with the recommendation, potentially fostering resentment towards the Probation Office and impairing the Office's ability to help the defendant successfully complete supervision." *U.S. v. Jeter*, No. 1:13 CR 0291 (D.D.C.), ECF No. 22, at *2.

RESPONSE: I do not recall discussing this statement. In addition, this question asks for me to critique a written order filed by another judge and/or calls for my views on a policy matter concerning when and under what circumstances Probation Office Recommendations should be disclosed. Thus, it would be inappropriate for me to comment further.

76. In 2014, you moderated a panel discussion related to probation and sentencing that discussed several cases related to probation recommendations. Do you agree with the following statement from an Order written by Judge Reggie B. Walton: "The undersigned member of the Court finds that disclosure of the United States Probation Office's sentencing recommendation is inappropriate. The Probation Office is an arm of the Court, and, like any other court staff, including the Court's law clerks, its advice to the undersigned is intended to be confidential and is not subject to disclosure. Maintaining this confidentiality protects the officers' ability to be candid in their recommendations to the Court." *U.S. v. Jeter*, No. 1:13 CR 0291 (D.D.C.), ECF No. 22, at *1.

RESPONSE: I do not recall discussing this statement. In addition, this question asks for me to critique a written order filed by another judge and/or calls for my views on a policy matter concerning when and under what circumstances Probation Office Recommendations should be disclosed. Thus, it would be inappropriate for me to comment further.

77. In law school, you wrote that a sex offender registry "subjects ex-convicts to stigmatization and ostracism, and puts them at the mercy of a public that is outraged by sex crimes." You also suggested that states use the guise of protecting public safety to pass restrictions on convicted sex offenders.

- a. Do you still believe that states put sex offenders at the mercy of a public that is outraged by sex crimes?

RESPONSE: My law school note was written more than 25 years ago, before I had ever worked as an attorney or served as a judge. As a law school student, I was trying to do what law school students do, which is analyze a new set of legal provisions. Sex offender registration and notification laws were new, and I was trying to assess what criteria courts could use to evaluate them. As a federal judge for almost a decade, I have decided cases based on the relevant facts and the applicable law—not my law school note.

- b. What legal standard would you use to evaluate a claim that sex offender registries are unconstitutional?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract about a hypothetical case. In any such case, I would consider the arguments of the parties, the facts in the record, the governing statutes, the Constitution, and any relevant precedent.

78. Do foreign nationals who are not in the United States have Fifth Amendment rights?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and sitting federal judge, to opine on this question because it is the subject of ongoing litigation.

79. As a judge you have generally deferred to federal agencies' reasonable interpretations of statutes and regulations, as required by *Chevron*, *Kisor*, and other cases. But when it comes to immigration, you have taken a notably different approach. In *Kiakombua v. Wolf*, you held that you had the authority to require the Department of Homeland Security to rewrite its training materials.

- a. The Department is required by law to gather "all relevant and useful information" when it evaluates whether someone seeking asylum has a credible fear of persecution in their home country. 8 C.F.R. § 208.30(d). The training materials in *Kiakombua* allowed DHS officers to seek evidence and require asylum seekers to present some facts showing a credible fear of persecution. Please explain why a federal court has the authority to review these training materials and to hold that they are unreasonable.

RESPONSE: I disagree with the statement that I take a different approach when it comes to deferring to federal agencies in the immigration area. *See, e.g., Las Americas Immigrant Advocacy Center v. Wolf*, 507 F. Supp. 3d 1, 10 (D.D.C. 2020) (rejection contention that immigration policy at issue violated the Constitution and granting to summary judgment to the government).

In *Kiakombua*, I explained that a federal statute specifically prescribes the substantive standards that front-line asylum officers must apply in order to identify those noncitizens designated for expedited removal who have a "credible fear or persecution" in their home countries and are thus entitled to a more probing evaluation of their asylum request in the context of a full removal hearing. *See, e.g.,* 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. § 208.30; *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104–208, div. C, 110 Stat. 3009–546 (amending 8 U.S.C. § 1101 et seq.). The United States Citizenship and Immigration Services has developed a related training course for its screening officers, which utilizes a manual titled the "Lesson Plan on Credible Fear of Persecution and Torture Determinations." (Ex. 1 to Admin. Record ("Lesson Plan"), ECF No. 61–1, at 2–38.). That document—which the agency colloquially refers to as "the Lesson Plan"—purported "to explain [to asylum officers] how to determine whether an alien subject to expedited removal or an arriving stowaway has a credible fear of persecution or torture." *Id.* at 2. According to USCIS, the Lesson Plan enabled asylum officers "to correctly make a credible fear determination consistent with the statutory provisions, regulations, policies, and procedures that govern whether the applicant has established a credible fear of persecution or a credible fear of torture." *Id.*

In that case, I followed the Supreme Court's requirement that "a court review[ing] an agency's construction of the statute which it administers" must defer to the agency's authoritative interpretation of that statute in certain circumstances. *Chevron, U.S.A., Inc.*

v. Natural Resources. Defense Council, Inc., 467 U.S. 837, 842 (1984). In order to determine whether or not to defer under *Chevron*, courts must employ a two-step process. The court decides, first, “whether Congress has directly spoken to the precise question at issue[.]” using “traditional tools of statutory construction[.]” *Chevron*, 467 U.S. at 842, 843 n.9. “If the intent of Congress is clear,” the court “must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43. But “if the statute is silent or ambiguous with respect to the specific issue,” the court must proceed to determine whether the agency’s interpretation is “based on a permissible construction of the statute [.]” *id.* at 843, and, if so, the court must defer to the agency’s interpretation.

After applying that framework, I found that certain provisions of the Lesson Plan could be said to be based on an unreasonable interpretation of the Immigration and Nationality Act, and thereby exceeded the reasonable boundaries of any ambiguity to be found in the statute and related regulations.

b. Under what circumstances can federal courts review non-final agency actions?

RESPONSE: Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, provides that “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” It further provides that “preliminary, procedural, or intermediate agency action . . . is subject to review on the review of the final agency action.”

80. In *Make the Road New York v. McAleenan*, you noted that Congress gave the Department of Homeland Security “sole and unreviewable” discretion to decide which illegal immigrants would be subject to expedited removal. Nonetheless, you went on to review the Department’s decision. You issued an injunction blocking DHS from removing illegal immigrants who had been in the country for less than two years.

a. Please explain your understanding of Congress’s intent when it uses the phrase “sole and unreviewable.”

RESPONSE: The text of section 1225(b)(1)(A)(iii)(I) of the Immigration and Nationality Act (“INA”) grants DHS “sole and unreviewable discretion” to designate categories of unauthorized noncitizens for expedited removal, which plainly indicates Congress’s intention to give DHS exclusive discretion to make that determination. The language also suggests that once DHS makes that determination, its decision regarding how long a noncitizen must be present in the United States to warrant more expedited removal procedures is final (i.e., “unreviewable”). There is now binding precedent in the D.C. Circuit that establishes that an APA challenge may not be brought to assail the procedures that an agency uses in its discretion pursuant to a “sole and unreviewable” grant of agency authority.

b. The D.C. Circuit reversed your decision. It said that there “could hardly be a more definitive expression of congressional intent” than the words “sole and unreviewable.” The Circuit also noted that the Administrative Procedure Act does not provide a cause of action where the “agency action is committed to agency discretion

by law.” 5 U.S.C. § 701(a)(2). If you are willing to ignore such clear and unambiguous statutory language, how can we be confident that you will faithfully apply the text of the Constitution?

RESPONSE: In *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), I acknowledged that the final substantive determination regarding persons subject to expedited removal fell within the Secretary’s “sole and unreviewable discretion.” However, I interpreted the statutory language of section 1225(b)(1)(A)(iii)(I) of the Immigration and Nationality Act as not preclusive of the presumptive applicability of the procedural requirements of the Administrative Procedure Act (“APA”). Consequently, I reasoned that the Department of Homeland Security’s discretion on the substantive determination could not be questioned so long as the agency complied with the APA’s procedural requirements. *Cf. Texas All. for Home Care Servs. v. Sebelius*, 681 F.3d 402, 408 (D.C. Cir. 2012) (noting that “the court must heed the APA’s basic presumption of judicial review” that “will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress” (quoting *Banzhaf v. Smith*, 737 F.2d 1167, 1168–69 (D.C. Cir. 1984)). In reversing my decision, the D.C. Circuit determined there was no cause of action under the APA, reasoning that the law “provide[d] no discernible standards by which a court could evaluate the Secretary’s judgment,” *id.* at 632, and that the designation determination was committed to agency discretion by law. *Id.* at 633. As a result, there is now binding precedent in the D.C. Circuit that establishes that an APA challenge may not be brought to assail the procedures that an agency uses in its discretion pursuant to a “sole and unreviewable” grant of agency authority.

81. In a case you heard while on the district court, labor unions challenged President Trump’s executive orders governing relations between federal agencies and the unions. You acknowledged that the President has “substantial authority over executive branch employees.” But you still held that you could declare the President’s orders invalid based on your own view of the collective bargaining rights the unions should have. The D.C. Circuit was unanimous in reversing you.

a. Under what circumstances is it permissible for a federal court to invalidate a President’s executive order relating to federal labor-management relations?

RESPONSE: As I explained during the hearing, *AFL-CIO v. Trump* was a matter of first impression that involved interpreting a statute that was designed to channel judicial authority into an agency. F. Supp. 3d 370 (D.D.C. 2018), *rev’d and vacated on other grounds*, 929 F.3d 748 (D.C. Cir. 2019). In my opinion, I explained my reasoning as to why I thought the court had jurisdiction over the matter, and then proceeded to address the merits of the case, which is the duty of the judge when they determine they have jurisdiction. In addressing the merits, I consulted and applied binding Supreme Court and D.C. Circuit case law regarding the authority of the President to regulate federal labor-management relations with or without specific congressional authorization, *see id.* at 412–18, and interpreted the statute’s text in light of precedents that define the statutory right of federal employees to bargain collectively, *see id.* at 418–40. The D.C. Circuit later overturned the threshold ruling, finding that the court did not have jurisdiction, but did not reach my determination of the merits.

Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to opine in the abstract about hypothetical cases. It would also be inappropriate for me to comment on questions that are or may be the subject of ongoing litigation.

- b. Do you still believe that a federal court can assert jurisdiction over a president's executive orders about federal employee labor relations?

RESPONSE: In reversing my decision, the D.C. Circuit did not hold that a federal court could never assert jurisdiction in such cases. To the contrary, the court held that “[t]he unions must pursue their claims through the scheme established by the Statute, which provides for administrative review by the FLRA *followed by* judicial review in the courts of appeals.” *American Federation of Government Employees, AFL-CIO v. Trump*, 929 F.3d 748, 754 (D.C. Cir. 2019) (emphasis added).

As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to opine in the abstract about hypothetical cases. It would also be inappropriate for me to comment on questions that are or may be the subject of ongoing litigation.

82. In *Equal Rights Center v. Uber*, you held that a disability-rights group had standing to sue Uber even though the member represented by the group had never downloaded the Uber app or been denied an accessible ride. In *Federal Forest Coalition v. Vilsack*, you held that a lumber industry coalition lacked standing to sue the U.S. Forest Service, even though the Service had issued a rule that the coalition alleged would directly affect the lumber industry by reducing the total amount of timber available for harvest.

- a. When determining whether a plaintiff has Article III standing, how do federal courts evaluate the plaintiff's factual allegations relating to standing?

RESPONSE: The Supreme Court has held that “the party invoking federal jurisdiction bears the burden” of establishing “irreducible constitutional minimum” elements of Article III standing: (1) that the plaintiff has suffered an injury in fact that is “concrete and particularized” and “actual or imminent”; (2) that the asserted injury is fairly traceable to the defendant’s action, and (3) that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted). “Since [these elements] are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.” *Id.* at 561. Thus, “at the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss [the Court] presum[es] that general allegations embrace those specific facts that are necessary to support the claim.” *Id.* (internal quotation marks and citation omitted). However, even at the pleading stage, “it is within the trial court’s power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact

deemed supportive of plaintiff's standing." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). "If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Id.* at 501–502. "In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' . . . which for purposes of the summary judgment motion will be taken to be true." *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e). "And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial." *Id.* (internal quotation marks and citation omitted).

- b. Why was the standing inquiry you used much more demanding for the lumber industry in *Federal Forest Coalition* than it was for the disability-rights group in *Equal Rights Center*?

RESPONSE: I do not agree that I employed a more demanding standard in either of these cases, and the mere fact that one party had standing and the other did not is not an indication that a different standard was applied. Instead, as I have done in each of my cases, I considered the specific factual circumstances and legal doctrines applicable to each of these cases individually. These cases arose in different factual, procedural, and legal contexts, and I applied binding D.C. Circuit and Supreme Court precedent to reach my conclusion in each case.

The plaintiffs in *Equal Rights Center* alleged an injury arising from a violation of the Americans with Disabilities Act, which the Supreme Court has interpreted as not "requir[ing] a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by [Title III of the ADA] does not intend to comply with its provisions." 42 U.S.C. § 12188(a)(1); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 363, 365–66 (1977) (establishing the futile gesture doctrine in the context of Title VII). Thus, in that case, at the motion to dismiss stage, the plaintiff was not required to engage in the "futile act" of downloading the Uber app or requesting an accessible ride because she had averred in a sworn affidavit that she knew Uber's service was not accessible for a user in a motorized wheelchair like herself. Her alleged inability to acquire an accessible ride was, under the Supreme Court's precedent and the provisions of the ADA, sufficient to demonstrate injury-in-fact at the pleading stage.

I found that the plaintiffs in *Federal Forest Resource Coalition*, who alleged an injury arising from the promulgation of a United States Forest Service Planning Rule lacked Article III standing at the summary judgment stage. This was because the plaintiffs' alleged injury relied on the speculative assertion that the Planning Rule would in fact reduce the amount of forest land available for the plaintiffs' commercial uses. But the Planning Rule did not in itself set any particular timber-harvest or animal-grazing levels, which had yet to be determined by the agency. Applying binding D.C. Circuit precedent, I found that the plaintiffs had failed to demonstrate "actual or imminent" injury resulting from such a speculative causal chain of events. *See Public Citizen, Inc. v. NHTSA*, 513 F.3d 234, 237 (D.C. Cir. 2008) (requiring a plaintiff who argues that a challenged action will increase the mere risk of harm to demonstrate that it faces "both (i)

a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account.”).

- c. In your view, would it ever be appropriate for a federal judge to narrow or broaden standing doctrine to achieve particular policy outcomes?

RESPONSE: Judges should apply the law to the facts of each case, without fear or favor, and regardless of any personal views, if any, on desirable policy outcomes. In every case that I have handled, I have considered only the parties’ arguments, the relevant facts, and the law as I understand it, including and especially the binding precedents of the Supreme Court and the D.C. Circuit.

83. In *Make the Road New York*, you criticized the Trump Department of Homeland Security for its “terrible proposal,” its “peculiar argument,” and a “long series of unpersuasive missives.” You criticized the government’s arguments as “bizarre” and “convoluted,” and you said that the argument regarding the scope of the injunction “reeked of bad faith.” Your decision in that case was reversed, and at least one constitutional law professor commented on how unusual this type of rhetoric was for a judge. Given the ongoing debate in academia and in the courts, what made you comfortable referring to this argument as a “bad faith” argument?

RESPONSE: The quotes reproduced in this question relate to one particular argument of the government: that any injunctive relief must be limited to the named plaintiffs and the government could otherwise continue to apply the rule that I had determined was invalid. That argument, in my view, was plainly contrary to D.C. Circuit precedent and the text of the APA, which directs courts to set aside agency actions they hold unlawful. 5 U.S.C. § 706(2). It IS important to me that the analysis and reasoning behind my written decisions are explained in a way that the general public can understand. Clear writing is key to a transparent judiciary and public confidence in courts. The writing in this ruling reflects that commitment to promote public understanding.

84. In *Committee on the Judiciary v. McGahn*, you said that “Presidents are not kings” and that “they do not have subjects, bound by loyalty or blood.” Did the Justice Department argue that the President of the United States enjoys the same status as a monarch, or that he has subjects who have sworn a blood oath to him?

RESPONSE: It is important to me that the analysis and reasoning behind my written decisions are explained in a way that the general public can understand. Clear writing is key to a transparent judiciary and public confidence in courts. I therefore have at times used imagery, allegories, or metaphors to explain complicated legal arguments. This is consistent with the practices of many other judges and justices, including Justice Antonin Scalia. *See, e.g., Maryland v. King*, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting) (“Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.”); see also Meghan J. Ryan, Justice Scalia’s Bottom-Up Approach to Shaping the Law, 25 WM. & MARY BILL RTS. J. 297 (2016) (describing Justice Scalia’s “use of metaphors, colloquialisms, and humor . . . to create rapport with his audience”).

85. During your testimony in response to questions from Senator Graham, you said that “[i]f a person who could otherwise be subject to expedited removal makes and has a credible fear of torture in their country,” he or she may “qualify for regular removal.” Please explain the legal standards for (a) an asylum claim, and (b) for protection under the Convention Against Torture.

RESPONSE: Pursuant to 8 U.S.C. § 1225(b)(1)(A)(i)-(ii) noncitizens otherwise subject to expedited removal who “indicate[] either an intention to apply for asylum ... or a fear of persecution .. shall [be] refer[red] for an interview by an asylum officer.” Section 1225(b)(1)(B)(ii) further specifies that if the asylum officer determines that the noncitizen “has a credible fear of persecution, [he] shall be detained for further consideration of the application for asylum.” Pursuant to § 1225(b)(1)(B), a “credible fear of persecution” means that “there is a significant possibility, taking into account the credibility of the statements made by the [noncitizen] in support of the [noncitizen’s] claim and such other facts as are known to the officer, that the [noncitizen] could establish eligibility for asylum.” The standards for asylum and protection under the Convention Against Torture are set forth in different provisions.

Pursuant to 8 U.S.C. §§ 1101(a)(42)(A) and 1158, to prevail on an asylum claim, a noncitizen must demonstrate “past persecution or a well-founded fear of persecution” on account of a protected ground. Under current regulations, a noncitizen who is the subject of a final removal order is nevertheless eligible for protection under the Convention Against Torture if he or she demonstrates that “it is more likely than not that he or she would be tortured if removed to the proposed country of removal.” 8 C.F.R. § 208.16(c).

86. Does the constitution limit who may vote in presidential elections? If so, who may vote?

RESPONSE: The Constitution prohibits states from denying or abridging the right to vote based on race, color, previous condition of servitude, sex, age, or ability to pay a tax. U.S. Const., Amdts. XV, XIX, XXIV, XXVI.

87. Does the constitution limit who may vote in congressional elections? If so, who may vote?

RESPONSE: The Constitution provides that, in each state, voters in congressional elections “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. Const., art. I, Sec. 2, Cl. 1; Amdt. XVII. The Constitution also prohibits states from denying or abridging the right to vote based on race, color, previous condition of servitude, sex, or age. U.S. Const., Amdts. XV, XIX, XXVI.

88. In *Make the Road New York v. McAleenan*, 405 F.Supp.3d 1 (D.D.C. 2019), you were reviewing the application of 8 U.S.C. § 1225. Throughout that statute, it refers to the persons present in the United States as “aliens.” In your opinion, you regularly refer to those persons as “non-citizens.” You told Senator Padilla that “clarity and language matters” when explaining the law. How do you decide whether to deviate from the statutory language in this situation and other situations in which you do not use the statutory language?

RESPONSE: It is important to me that the analysis and reasoning behind my written decisions are explained in a way that the general public can understand. Clear writing is key to a transparent judiciary and public confidence in courts. Consequently, when not quoting a statute

directly, I have in some circumstances used language that may be more accessible to the broader public, such as “noncitizen” rather than “alien.” This approach is consistent with the one taken in current Supreme Court jurisprudence. *See, e.g., Barton v. Barr*, 140 S. Ct. 1442 n.2 (2020) (“This opinion uses the term ‘noncitizen’ as equivalent to the statutory term ‘alien.’”).

89. If you do decide to use language that differs from the statute, how do you decide differences between the parties about what language to use?

RESPONSE: As a sitting judge, my role is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law.

90. In your AB Thesis at Harvard College, “The Hand of Oppression”: Plea Bargaining Processes and the Coercion of Criminal Defendants, you stated that “plea bargaining is unacceptably coercive”. Do you still hold this view? If so, why?

RESPONSE: My academic thesis was written 30 years ago, when I was a senior in college. The views I expressed were primarily based upon observations that I had made during a summer internship—before I attended law school, before I became an attorney, and before I became a judge. Since then, I have had extensive experience with the actual workings of the criminal justice system in a variety of capacities. In my work as a judge, I have ratified plea bargains and accepted guilty pleas, and I now understand plea bargaining to be an important part of the administration of criminal justice.

91. In your AB Thesis at Harvard College, “The Hand of Oppression”: Plea Bargaining Processes and the Coercion of Criminal Defendants, you stated that “[g]enerally speaking then, plea bargains, which threaten burdensome sentence differentials and are fueled by incentives that are not part of our regular adjudication process, can be said to operate in an inherently coercive manner.” Do you still hold this view? If so, why?

RESPONSE: Please see my response to Question 90.

92. In your AB Thesis at Harvard College, “The Hand of Oppression”: Plea Bargaining Processes and the Coercion of Criminal Defendants, you stated that “[t]he judge who methodically imposes sentence differentials which have the effect of pressuring defendants intends to exert pressure in the objective sense whether or not to do so is her ultimate goals.” Do you still hold this view? If so, why?

RESPONSE: Please see my response to Question 90.

93. In your AB Thesis at Harvard College, “The Hand of Oppression”: Plea Bargaining Processes and the Coercion of Criminal Defendants, you stated “the abolition of plea bargaining” is “the ultimate goal of any reform that aims at eliminating state coercion in the criminal justice system.” Do you still hold this view? If so, why?

RESPONSE: Please see my response to Question 90.

94. In your AB Thesis at Harvard College, “The Hand of Oppression”: Plea Bargaining Processes and the Coercion of Criminal Defendants, you stated “[e]ven if both the defendant and the state benefit, when the hand of oppression reigns, society suffers.” Do you still hold this view? If so, why?

RESPONSE: Please see my response to Question 90.

95. Senator Coons mentioned that you have a sense of empathy to those in your courtroom. You also have stated that as an appellate attorney, you focus mostly on the law, not the facts. How do you utilize that sense of empathy as an appellate judge?

RESPONSE: A judge has a duty to decide cases based solely on the law, without fear or favor, prejudice or passion. In all cases, courts should generally be mindful that the exercise of judicial authority has a profound impact on the lives and circumstances of litigants. But to the extent that empathy is defined as one’s ability to share what another person is feeling from the other person’s point of reference, empathy should not play a role in a judge’s consideration of a case.

96. Media reports suggested that you enlisted private PR and consulting firms to assist you during the nomination process. For example, Politico reported that you “enlisted Robert Raben, the founder of the consulting firm The Raben Group” to help you with the “deluge of press scrutiny,” “with a small assist from onetime Biden spokesperson TJ Ducklo.”¹

a. Have you or anyone representing you discussed any aspect of your nomination to the Supreme Court with TJ Ducklo, Robert Raben, or anyone representing them?

RESPONSE: I did not hire or enlist TJ Ducklo, Robert Raben, or anyone else to assist me during the nomination process. Prior to my nomination, friends of mine offered to help with managing the flood of media requests, and in that context, Robert Raben was identified as a point person for media inquiries. To my knowledge, he volunteered his services in this regard.

b. Did you or anyone representing you hire any PR or consulting professionals to help you navigate the nomination process? If so, please provide their names and the organizations they work for.

RESPONSE: Neither I nor anyone representing me hired any PR or consulting professionals to help with the nomination process.

97. Media reports suggested that one of your former law clerks, Matteo Godi, edited your Wikipedia page and those of other judges to improve your chances of being nominated. For example, Politico reported that Mr. Godi “alter[ed] the pages of [your] competitors in an apparent attempt to invite liberal skepticism.”² Have you had any conversations with Mr.

¹ Christopher Cadelago & Sam Stein, *Biden’s SCOTUS Shortlist Staffs Up To Handle The Media Barrage*, Politico, Feb. 16, 2022, <https://www.politico.com/news/2022/02/16/biden-supreme-court-shortlist-media-00009565>.

² Samuel Benson, *Former Clerk Rewrites SCOTUS Contenders’ Wikipedia Bios*, Politico, Feb. 4, 2022, <https://www.politico.com/news/2022/02/04/former-clerk-rewrites-supreme-court-wikipedia-bios-00005914>.

Godi since Justice Breyer announced his retirement? If so, did you discuss anything relating to Mr. Godi's efforts to improve your chances of being nominated?

RESPONSE: I first became aware that I had a Wikipedia page many years ago, and have been aware that for several years, Mr. Godi has made accurate edits to my page regarding my background and work. Since the public reporting on this matter, I have had no conversations with Mr. Godi regarding my Wikipedia page or any other matter. Prior to public reporting, I had been unaware of the edits to the pages of other potential nominees, and at no time have I ever suggested, encouraged, or directed anyone to edit the Wikipedia page of any other individual.

98. What constitutes bad faith by a federal agency with respect to its Freedom of Information Act (FOIA) obligations?

RESPONSE: FOIA "generally requires the disclosure, upon request, of records held by a federal government agency[.]" *Sciacca v. Fed. Bureau of Investigation*, 23 F.Supp.3d 17, 25 (D.D.C.2014) (alteration in original) (internal quotation marks omitted) (quoting *Judicial Watch, Inc. v. U.S. Department of the Treasury*, 796 F.Supp.2d 13, 18 (D.D.C.2011)); see 5 U.S.C. § 552(a)(3)(A). FOIA also includes nine exemptions that permit agencies to withhold information from disclosure. See *Judicial Watch*, 796 F.Supp.3d at 23. These exemptions are to be construed narrowly, see *U.S. Department of the Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976), and the government bears the burden of demonstrating that any withheld information falls within the claimed exemptions, see *Maydak v. Department of Justice*, 218 F.3d 760, 764 (D.C.Cir.2000).

The courts have generally found that delays in responding to requests and inconsistencies are not sufficient to demonstrate bad faith. See *Budik v. Department of the Army*, No. 09–1518, 2010 WL 3833828 (D.D.C. Sept. 30, 2010) (finding Army's delay in responding to the requests, discrepancies concerning the page counts of documents disclosed, lack of notice informing of plaintiff of her right to administrative appeal, and an improper redaction of a signature block that was subsequently voluntarily released were insufficient to demonstrate bad faith); *Iturralde v. Comptroller of Currency*, 315 F.3d at 315 (concluding that "initial delays in responding to a FOIA request are rarely, if ever, grounds for discrediting later affidavits by the agency"); *Fischer v. U.S. Department of Justice*, Civ. A. No. 07–2037 (ESH), 2010 WL 2745811, at *3 (D.D.C. July 13, 2010) (rejecting argument that agency's failure to produce documents until after litigation commenced evidenced agency's bad faith); *Western Center for Journalism v. Internal Revenue Serv.*, 116 F. Supp. 2d 1, 10 (D.D.C. 2000) (finding plaintiff's allegations that underlying audit was "politically inspired" to be immaterial to adequacy of agency's search), aff'd, 22 Fed. Appx. 14 (D.C. Cir. 2001). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further because the extent of an agency's obligations in FOIA cases is a question under active litigation.

99. Is a federal employee's statement, "I want to avoid FOIA" evidence of bad faith with respect to FOIA?

RESPONSE: As a sitting federal judge and judicial nominee, it would be inappropriate for me to comment on a hypothetical.

100. Is a federal employee's failure to retain any e-mails from his government e-mail account upon his separation from the agency evidence of bad faith with respect to FOIA?

RESPONSE: The Federal Records Act, 44 U.S.C. § 3102 and § 3103 outlines how federal agency employees should determine whether information they create qualifies as a federal record and governs how federal records are to be collected, retained, and eventually either destroyed or provided to the National Archives and Records Administration for permanent archiving. *See* 36 C.F.R. § 1230.10. As a sitting federal judge and judicial nominee, it would be inappropriate for me to comment further on a hypothetical.

101. Is a federal employee's use of a private e-mail server an indicium of bad faith with respect to FOIA?

RESPONSE: The Federal Records Act, 44 U.S.C. § 3102 and § 3103 outlines how federal agency employees should determine whether information they create qualifies as a federal record and governs how federal records are to be collected, retained, and eventually either destroyed or provided to the National Archives and Records Administration for permanent archiving. As a sitting federal judge and judicial nominee, it would be inappropriate for me to comment further on a hypothetical.

102. Is a federal employee's use of a personal e-mail account an indicium of bad faith with respect to FOIA?

RESPONSE: The Federal Records Act, 44 U.S.C. § 3102 and § 3103 outlines how federal agency employees should determine whether information they create qualifies as a federal record and governs how federal records are to be collected, retained, and eventually either destroyed or provided to the National Archives and Records Administration for permanent archiving. As a sitting federal judge and judicial nominee, it would be inappropriate for me to comment on a hypothetical.

103. When is limited discovery appropriate in a FOIA case?

RESPONSE: Courts have held the limited discovery may be appropriate in FOIA cases where the agency's own declarations suggested it had destroyed relevant records, the agency subsequently admitted that some statements in its own declarations were false, and the agency withheld relevant information from the plaintiffs as a result of litigation tactics. *See Citizens for Responsibility & Ethics in Washington v. U.S. Department of Veterans Affairs*, 828 F Supp. 2d 325 (D.D.C. 2011); *see also Raheer v. BOP*, No. 09-526, 2012 WL 2721613 (D. Or. July 6, 2012) (granting plaintiff limited discovery regarding the Bureau of Prisons' record retention/destruction policies because the BOP admitted that it has a policy of routinely destroying employee emails immediately upon an employee's departure); *Families for Freedom v. U.S. Customs & Border Protection*, No. 10-2705, 2011 WL 6780905 (S.D.N.Y. Dec. 27, 2011) (granting limited discovery because the agency acknowledged previous searches were insufficient and the record undercut prior declarations).

104. When is it appropriate to seek limited discovery from a former federal agency employee in a FOIA case?

RESPONSE: Please see my response to Question 103.

105. What constitutes bad faith by a federal agency with respect to its Federal Records Act obligations?

RESPONSE: Under the Federal Records Act, 44 U.S.C. § 3102 and § 3103, agencies are required to establish records management programs that identify records that should be preserved, and to plan for the storage and disposal of records having only temporary significance. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further because this is a question under active litigation.

106. What is the relationship between a federal agency's Federal Records Act obligations and its FOIA obligations?

RESPONSE: Under the Federal Records Act, 44 U.S.C. § 3102 and § 3103, agencies are required to establish records management programs that identify records that should be preserved, and to plan for the storage and disposal of records having only temporary significance. Agency records in the physical possession of a federal agency are generally subject to the Freedom of Information Act, 5 U.S.C. § 552.

107. How can a federal agency meet its Federal Records Act and its FOIA obligations if its employees shield their e-mails from these statutes by using personal e-mail accounts?

RESPONSE: Please see my response to Question 106.

108. How do changes in technology including but not limited to cloud-based technology affect Federal Records Act obligations and FOIA obligations?

RESPONSE: The Presidential and Federal Records Act Amendments of 2014 (P.L. 113–187) includes a revised definition of a federal record to cover “recorded information, regardless of form or characteristics” where recorded information is further defined as “information created, manipulated, communicated, or stored in digital or electronic form.” Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

109. I previously asked you about your views of the American Constitution Society, a self-described progressive legal organization, for which you have spoken at events. In 2013, when I asked you whether you agreed with the American Constitution Society's goal of “countering right-wing distortions of our Constitution” you said “I was asked to be a panelist at a single event sponsored by the American Constitution Society. I have never been a member of the organization, nor was I previously aware of any statements that the organization's leaders have made regarding the organization's goals or constitutional views. Given my limited involvement with this organization, I cannot opine on any characterization of its goals.” However, when you spoke at the American Constitution Society on June 8, 2017, you said, “I will start by thanking ACS for making my dreams come true and for the incredible work that you do every day to advance the cause of justice

to promote the rule of law and to champion our constitutional norms. These are values that should never be taken lightly and ACS does the heavy lifting of building networks and fostering national conversations about important issues and for that we should all be very grateful.”

- a. What did you mean when you said that the American Constitution Society “advance[s] the cause of justice”?

RESPONSE: In 2017, the American Constitution Society invited Justice Breyer to participate in a conversation with his friend, Dean Alan Morrison, as part of its annual national convention, and they asked me to introduce Justice Breyer at the start of this event. Being able to introduce my former boss and lifelong mentor at an event like this was a dream of mine which I was happy to be in a position to fulfill. Never having been a member of ACS, I gleaned from the materials provided to me the matters on which the organization focuses.

- b. What did you mean when you said that the American Constitution Society “promote[s] the rule of law”?

RESPONSE: Please see my response to Question 109a.

- c. What did you mean by the “incredible work” of the American Constitution Society?

RESPONSE: Please see my response to Question 109a.

110. Please describe the selection process that led to your nomination to be a Justice on the United States Supreme Court from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).

RESPONSE: On January 30, 2022, White House Counsel Dana Remus contacted me concerning my potential nomination to the Supreme Court to fill the anticipated vacancy that would arise from Justice Breyer’s announced retirement. Since that date, I have been in contact with Dana Remus, White House Chief of Staff Ronald Klain, and officials from the White House Counsel’s Office and the White House Office of Presidential Personnel regarding my potential nomination and the nomination process. On February 11, 2022, I met with the Vice President on Zoom concerning the nomination. On February 14, 2022, I met with President Biden and Ms. Remus at the White House concerning the nomination. On February 24, 2022, the President offered me the nomination, and I accepted, and he announced his intent to nominate me on February 25, 2022. Since my nomination was announced, I have been in regular contact with officials from the White House Counsel’s Office and the White House Office of Legislative Affairs regarding my nomination and preparations for the Committee hearing.

111. Demand Justice is a progressive organization dedicated to “restor[ing] ideological balance and legitimacy to our nation’s courts.”

- a. Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

RESPONSE: No.

- b. Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

RESPONSE: No.

- c. Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

RESPONSE: Chris Kang, who I understand is currently affiliated with Demand Justice, is among the many people who offered me congratulations on my nomination to the D.C. Circuit in 2021. Mr. Kang had formerly served as chief judicial nominations counsel to President Obama in 2012, when I was nominated to be a U.S. District Judge. Other than the 2021 communication with Chris Kang, I have not had contact with Demand Justice or anyone who is, to my knowledge, currently associated with Demand Justice.

- 112. The Alliance for Justice is a “national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society.”

- a. Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

RESPONSE: No.

- b. Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?

RESPONSE: No.

- c. Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?

RESPONSE: I have never been in contact with Rakim Brooks or Danial Goldberg. Chris Kang, who I understand is currently affiliated with Demand Justice, is among the many people who offered me congratulations on my nomination to the D.C. Circuit in 2021. Mr. Kang had formerly served as chief judicial nominations counsel to President Obama in 2012, when I was nominated to be a U.S. District Judge. Other than the 2021 communication with Chris Kang, I have not had contact with Demand Justice or anyone who is, to my knowledge, currently associated with Demand Justice.

- 113. Arabella Advisors is a progressive organization founded “to provide strategic guidance for effective philanthropy” that has evolved into a “mission-driven, Certified B Corporation” to “increase their philanthropic impact.”

- a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.

RESPONSE: No.

- b. Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.

RESPONSE: No.

- c. Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.

RESPONSE: No.

114. The Open Society Foundations is a progressive organization that “work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens.”

- a. Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

RESPONSE: No.

- b. Are you currently in contact with anyone associated with the Open Society Foundations?

RESPONSE: No.

- c. Have you ever been in contact with anyone associated with the Open Society Foundations?

RESPONSE: No.

115. Fix the Court is a “non-partisan, 501(C)(3) organization that advocates for non-ideological ‘fixes’ that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people.”

- a. Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

RESPONSE: No.

- b. Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?

RESPONSE: No.

- c. Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?

RESPONSE: No.

- 116. During your selection process did you talk with anyone from or anyone directly associated with Demand Justice, the American Constitution Society, Arabella Advisors, the Open Society Foundations, Fix the Court, or any of these organizations' subsidiaries? To your knowledge, did anyone do so on your behalf? If so, what was the nature of these discussions?

RESPONSE: No.

- 117. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding your nomination.

RESPONSE: Please see my response to Question 110.

- 118. Please explain, with particularity, the process whereby you answered these questions.

RESPONSE: My answers to each question are my own. Consistent with the practice of past nominees, I drafted answers to these questions with the assistance of attorneys from the Office of the White House Counsel as well as my current and former chambers staff.

**Nomination of the Honorable Ketanji Brown Jackson
to be an Associate Justice of the Supreme Court
Questions for the Record
Submitted March 24, 2022**

QUESTIONS FROM SENATOR GRAHAM

1. Does the Geneva Convention create a private cause of action to sue our troops?

RESPONSE: The 2006 Military Commissions Act provides that no party may invoke the Geneva Conventions as a source of rights in any civil suit against current or former U.S. service members or other U.S. officials. Pub. L. 109–366, Sec. 5 (Oct. 17, 2006), 120 Stat. 2631.

2. How is one’s status as an enemy combatant determined?

RESPONSE: The Executive Branch makes the decision whether to treat someone who is detained in an armed conflict as an enemy combatant. My understanding is that, following the attacks on September 11, 2001, the President and the Department of Defense established various administrative bodies over time to determine whether certain individuals are properly detained as enemy combatants. The Supreme Court in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Boumediene v. Bush*, 553 U.S. 723 (2008), held that enemy combatants detained at Guantanamo Bay could challenge the legality of their detention by seeking writs of *habeas corpus* in federal court.

3. Do you think the 2001 AUMF gave the President authority to militarily detain citizens domestically? What about lawful residents?

RESPONSE: In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a plurality of the Supreme Court held that the 2001 Authorization for the Use of Military Force authorized the domestic military detention of an enemy combatant who was a U.S. citizen and was captured in a foreign combat zone.

4. In your opinion, must Congress explicitly confer domestic military detention power on the President?

RESPONSE: The Supreme Court and the D.C. Circuit have recognized that Congress conferred detention authority under the 2001 Authorization for the Use of Military Force. In other circumstances, the Supreme Court would likely analyze this question of executive power under the framework set forth in Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

5. Under domestic criminal law, are there any provisions that allow the government to hold someone indefinitely without trial?

RESPONSE: The Sixth Amendment and the Due Process Clauses of the Constitution guarantee a speedy and public trial by an impartial jury, as well as other procedural protections, before an individual may be subject to criminal sanctions. By statute, including in the Speedy Trial Act and statutes of limitations, Congress has imposed time limits on various phases of the criminal justice process.

6. Under the law of armed conflict, it is permissible to hold an enemy combatant as long as the holding force deems them to be dangerous?

RESPONSE: In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a majority of the Supreme Court said that unlawful enemy combatants may be detained “for the duration of the particular conflict in which they were captured.” 542 U.S. at 518 (plurality opinion of O’Connor, J.); *id.* at 588–89 (Thomas, J., dissenting).

7. Do soldiers need to read suspected terrorists their *Miranda* rights when they are captured on the battlefield in Afghanistan?

RESPONSE: I am not aware of any judicial decision requiring *Miranda* warnings for enemy combatants captured on a battlefield. The Supreme Court has addressed the constitutional rights held by non-citizens outside the United States in *Agency for International Development v. Alliance for Open Society International, Inc.*, 140 S. Ct. 2082, 2086 (2020). Because the scope and application of that ruling could be the subject of future litigation, it would be inappropriate for me as a sitting federal judge to further opine on it.

8. Do soldiers need to read suspected terrorists their *Miranda* rights when they are captured in the United States?

RESPONSE: In *New York v. Quarles*, 467 U.S. 649, 657 (1984), the Supreme Court held that “the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.” The Court concluded that “overriding considerations of public safety” justified asking an arrestee about the location of an abandoned weapon before providing *Miranda* warnings. Because the scope and application of that ruling could be the subject of future litigation, it would be inappropriate for me as a sitting federal judge to further opine on it.

9. Do you have any concerns that reading *Miranda* rights to suspected terrorists caught in the United States would impede our ability to collect intelligence?

RESPONSE: Please see my response to Question 8.

10. Would broadening *Miranda*’s public safety exception to allow the intelligence community to find out where a suspected terrorist trained and what he knows about future attacks make us more secure as a nation?

RESPONSE: As a sitting federal judge, my role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present. I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law. To the extent this question seeks my views on a question of policy, it would be inappropriate for me to comment on it.

11. If we took the war on terror and made it a crime, would we be limiting our ability to defend ourselves?

RESPONSE: As a pending judicial nominee and a sitting federal judge, my role in the judicial system is to consider any legal claims brought before me. It would be inappropriate for me to comment on this policy question.

12. What do you think the purpose of the criminal justice system is: rehabilitation, retribution, incapacitation, or specific/general deterrence?

RESPONSE: Pursuant to section 3553(a) of Title 18 of the United States Code, judges must impose sentences that are “sufficient, but not greater than necessary” to promote the purposes of punishment, including providing just punishment, deterrence, incapacitation and rehabilitation. *Id.* § 3553(a).

13. Do you believe that crime is a disease that needs a cure or is it antisocial behavior that deserves punishment?

RESPONSE: Neither of those options are words that I have ever used to describe crime. As a sitting federal circuit court judge, I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law, as I understand it, including the binding precedents of the Supreme Court and the D.C. Circuit.

14. When sentencing an individual defendant in a criminal case, what role, if any, should the defendant’s group identity (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges’ sentencing analysis?

RESPONSE: The factors that a judge may appropriately consider when sentencing an individual defendant are prescribed by Congress in section 3553(a) of Title 18 of the United States Code. Section 3553(a) instructs courts to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” *Id.* § 3553(a)(6). And consistent with congressional commands in this regard, section 5H1.10 of the Sentencing Guidelines Manual states that race and certain other demographic factors (*i.e.*, sex, national origin, creed, religion, and socio-economic status) “are not relevant in the determination of a sentence.”

15. In the case *United States v. Hawkins*, No. 1:13 CR 244 (D.D.C.), you sentenced the defendant to three months in BOP custody and 73 three months of supervised release. In April 17, 2019 (five and one-half years after your original sentence), you concurred with the recommendation of a “Probation Petition” and ordered that Hawkins’ return to BOP custody in a residential reentry center (e.g., a halfway house) for six months. This was twice the length of time in federal custody as your original 3-month sentence.

You also ordered that he allow the probation officer to install computer monitoring software on his electronic devices and that he allow the probation officer to conduct random and unannounced searches of any computer subject to monitoring.

- What did Mr. Hawkins do in 2019 that necessitated you returning him to federal custody and ordering enhanced monitoring and randomized searches?

- Additionally, can you please provide the Committee with a copy of the probation petition, ECF No. 30, that you referenced in your April 2019 order (ECF No. 31)?

If those details necessitate confidentiality, please contact the Committee to schedule a closed-door briefing on the topic.

RESPONSE: I am unable to access the “Probation Petition” that resulted in my April 17, 2019 order in *United States v. Hawkins*, No. 3-cr-244 (D.D.C. 2013) because this record is the property of the U.S. District Court for the District of Columbia and I am no longer a member of that court. I would additionally note that it is common practice for “Probation Petitions” like the one filed in Mr. Hawkins’ case to be treated confidentially given that they contain sensitive information about a defendant and his supervision.

16. It was reported by *Politico* on February 16 that you had “enlisted” Robert Raben, the founder of the Raben Group, to assist with press inquiries.

- Was that report accurate?
- What sort of assistance has Robert Raben or the Raben Group provided to you, directly or indirectly, since you retained his services?
- How frequently have you been in contact with Robert Raben or members of the Raben Group since retaining his services? What have your communications with them concerned?

RESPONSE: I did not hire or enlist Robert Raben or the Raben Group to assist me during the nomination process. Prior to my nomination, friends of mine offered to help with managing the flood of media requests, and in that context, Robert Raben was identified as a point person for media inquiries. To my knowledge, he volunteered his services in this regard.

17. Do you know who Chris Kang is?

- Please describe your contacts with Chris Kang since 2012.
- Have you had any contact with Demand Justice or anyone associated with Demand Justice, directly or indirectly, in the past 2 years?

RESPONSE: Chris Kang, who I understand is currently affiliated with Demand Justice, is among the many people who congratulated me regarding my nomination to the D.C. Circuit in 2021. Mr. Kang had formerly served as chief judicial nominations counsel to President Obama in 2012, when I was nominated to be a U.S. District Judge. Other than the 2021 communication with Mr. Kang, I have not had contact with Demand Justice or anyone who is, to my knowledge, currently associated with Demand Justice in the past two years.

18. Are you aware of a letter that was sent by Demand Justice on February 23, 2022, urging President Biden to nominate “someone with civil rights or public defense experience to the Supreme Court”?

- If so, when did you become aware of this letter?

RESPONSE: I am generally aware, through media reporting and statements made at my confirmation hearing, that Demand Justice sent correspondence to President Biden regarding the qualities that the organization desires in a Supreme Court nominee. I have not read any such correspondence.

19. In your testimony, you spoke about how you seek to discern original meaning in interpreting the Constitution and statutory text.

- What is the originalist argument that supports the holding in *Obergefell v. Hodges*?
- What is the originalist argument that supports the holding in *Roe v. Wade*?
- What is the originalist argument that supports the holding in *Casey v. Planned Parenthood*?

RESPONSE: As a sitting federal judge, all of the Supreme Court's pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, it is my testimony that, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court's binding precedents.

Senator John Cornyn
Questions for the Record

Judge Ketanji Brown Jackson
Nominee, Associate Justice of the Supreme Court of the United States

1. Justice Thomas said this: “In my view, the Court’s typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law.” Do you agree or disagree with this statement? Please provide an explanation.

RESPONSE: *Stare decisis* is a bedrock legal principle that ensures consistency and impartiality of judgments. The Court has articulated factors to consider in determining whether to overrule a prior decision, including the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed so as to as to “rob[]” the decision “of significant application or justification.” See *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); see also, e.g., *Janus v. American Fed. Of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018). These factors are themselves a precedent of the Supreme Court. As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from commenting on the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings.

2. During your confirmation hearing you discussed in detail the *stare decisis* factors to consider before overruling Supreme Court precedent. Do you believe that any of those factors should be given more weight than the others? If so, which one(s)?

RESPONSE: The Supreme Court has articulated factors to consider when it determines whether or not to overrule a prior decision, including the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to “rob[]” the decision “of significant application or justification.” See *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); see also, e.g., *Janus v. American Fed. Of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018). The application of these factors is case specific. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract regarding how these factors should apply in a given case. If I am confirmed, and if I am asked to revisit a particular precedent in the context of a specific case, I would evaluate the parties’ arguments, the relevant law, the factual record, and would consider the views of my colleagues.

3. Do you believe that there have been reliance interests built up around the Supreme Court’s decision in *District of Columbia v. Heller*?

RESPONSE: *District of Columbia v. Heller*, 554 U.S. 570 (2008) is a precedent of the Supreme Court that is entitled to respect under the doctrine of *stare decisis*. “*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Because issues concerning the scope of *Heller* are the subject of ongoing litigation, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment further on this question.

4. What sources would you consult when you are determining whether a prior decision is “workable” or whether society has relied on a particular precedent?

RESPONSE: In determining whether a precedent is workable, the Court has considered, for example, whether a “line” established by past precedent has “prove[n] to be impossible to draw with precision” in subsequent cases. *See, e.g., Janus v. American Fed. Of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2481 (2018). In considering whether society has relied on past precedent, the Court has explained, among other things, that the inquiry “counts the costs of a rule’s repudiation as it would fall on those who have relied reasonably on the rule’s continued application.” *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992); *see also, e.g., Dickerson v. United States*, 530 U.S. 428, 443 (2000) (declining to overrule *Miranda* and explaining that “*Miranda* has become embedded in routine police practice.”). As explained above, the application of the *stare decisis* factors is case specific. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract on how these factors might apply in a given case. If I am confirmed, and if I am asked to revisit prior precedent in the context of a specific case, I would evaluate the parties’ arguments, the relevant law, the factual record, and would consider the views of my colleagues.

5. If you are confirmed to the Supreme Court, will you commit to standing with your colleagues to denounce any and all efforts to engage in “court packing”?

RESPONSE: I agree with Justice Barrett, who stated at her confirmation hearing that “the size of the Supreme Court is a question left open for Congress.” Answering this policy question, which the Constitution has placed in Congress’ hands might suggest that I do not understand the limited role of a judge, which is to rule on cases and controversies that come before the Court.

6. When is it appropriate for a Supreme Court Justice to consult international law?

RESPONSE: In very limited circumstances, international law may play a role in a case, such as when the case concerns the interpretation of a treaty. However, it is not appropriate to rely on international law in determining the meaning of the Constitution.

7. Justice Breyer, in his book *Active Liberty*, posed this hypothetical question: “Why would the Framers have preferred (1) a system of interpretation that relies heavily on linguistic canons to (2) a system that seeks more directly to find the intent of the legislators who enacted the statute?” Judge, what is your answer to this hypothetical?

RESPONSE: As a sitting federal judge, I follow Supreme Court precedent as to the system of interpretation that determines the meaning of statutory text. Consistent with that precedent, I give the statute's text controlling weight, and I consider the meaning of the terms that the legislature used, the structure of the statute as a whole, and other traditional tools of statutory construction, including canons of statutory interpretation.

8. What sources are appropriate for a judge to consult when interpreting an unambiguous statutory provision?

RESPONSE: Under Supreme Court precedent, a court's interpretation of an unambiguous statutory provision begins with the text, and ends there as well. *See, e.g., National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617, 631 (2018).

9. What sources are appropriate for a judge to consult when interpreting an ambiguous statutory provision?

RESPONSE: As reflected in my decisions, I seek to resolve alleged ambiguities in a statutory provision by examining the structure of the statute as a whole and other indicia of meaning based upon the statutory text. *See, e.g., All. of Artists & Recording Cos., Inc. v. Gen Motors Co.*, 162 F. Supp. 3d 8 (D.D.C. 2016), *aff'd*, 947 F.3d 849 (D.C. Cir. 2020). If that does not resolve the ambiguity, I look to Supreme Court precedent for guidance as to the tools of interpretation to apply next in light of the particular circumstances of the case (e.g., the rule of lenity in the criminal context, *Chevron* deference, etc.). I have also consulted the legislative history of a statute, as the Supreme Court permits, but I have never resolved an ambiguity based solely on the legislative history of the statute.

10. When you are trying to discern legislative intent, do you take a "reasonable legislator" approach?

RESPONSE: When I seek to discern legislative intent, I give the statute's text controlling weight. I consider the meaning of the terms that the legislature used, the structure of the statute as a whole, and other traditional tools of statutory construction, including canons of statutory interpretation. *See, e.g., All. of Artists & Recording Cos., Inc. v. Gen. Motors Co.*, 162 F. Supp. 3d 8 (D.D.C. 2016), *aff'd*, 947 F.3d 849 (D.C. Cir. 2020). I also apply governing precedent regarding the appropriate method of interpretation in light of the particular circumstances of the case (e.g., the rule of lenity in the criminal context, *Chevron* deference, etc.). If and only if a statute is ambiguous, I have also occasionally consulted the legislative history of a statute, as the Supreme Court permits, to assess the original intent of the legislative body that enacted the provision at issue. I have not asked what interpretation a reasonable legislator would prefer. And I have not resolved a statutory ambiguity based solely on the legislative history of the statute.

11. What records and sources do you or would you consider when attempting to determine the legislative intent behind a statutory provision?

RESPONSE: Please see my response to Question 10.

12. Do you believe that the Constitution changes and adapts to meet the needs of each generation without passing and ratifying a new constitutional amendment? Please explain your answer.

RESPONSE: Courts must apply established constitutional principles to new circumstances, but the meaning of the Constitution itself is fixed and does not change or evolve.

13. Do you believe that when you are interpreting the Constitution, it is appropriate to consider contemporary values? Please explain your answer.

RESPONSE: Please see my response to Question 12.

14. In 2001, you authored an amicus brief on behalf of a number of pro-abortion groups in *McGuire v. Reilly*. In that brief, you characterized people exercising their First Amendment rights outside of abortion clinics as “a hostile, noisy crowd of ‘in-your-face’ protesters” and wrote that “[b]oth patients and reproductive health care workers have been waylaid by screams shouted inches from their ears and gruesome placards shoved under their noses.” On the fourth day of the confirmation hearing process, the Committee heard testimony from Eleanor McCullen, the lead plaintiff in a lawsuit that challenged an updated version of the Massachusetts law you defended in *McGuire v. Reilly*.

a. At the time you wrote the amicus brief in *McGuire v. Reilly*, had you personally observed the behavior of pro-life Americans outside of abortion clinics? Did you personally interview anyone exercising their First Amendment rights to persuade women not to abort an unborn child?

RESPONSE: As a law firm associate, I worked with other attorneys to draft briefs that made arguments on behalf of my clients based on the factual record. I did not engage in any extra-record fact-finding or make any personal observations concerning the issues raised in the briefs that were filed on my client’s behalf in this appellate matter.

b. After hearing Eleanor McCullen’s testimony, do you stand by your earlier characterization of pro-life sidewalk counselors as a “hostile, noisy crowd of ‘in-your-face’ protesters”?

RESPONSE: Please see my response to Question 14a.

c. Should the issue of buffer zones come before the Court again, would you be able to separate yourself from your earlier advocacy and recognize the value of pro-life speech like sidewalk counseling?

RESPONSE: I have served as a federal judge for almost a decade. During my tenure on the bench, arguments I previously made on behalf of clients as an advocate have not impacted the decisions I have made as a judge. The same would continue to be true if I was confirmed to the Supreme Court.

15. Your nomination has been strongly supported by groups including NARAL ProChoice America and Planned Parenthood. NARAL wrote that your “nomination comes at a pivotal moment in the fight for reproductive freedom” and that you have “a demonstrated record of defending and upholding our constitutional rights and fundamental freedoms—including reproductive freedom.” Why do you believe that NARAL Pro-Choice America would make

these statements about your nomination, and why do you believe that pro-abortion groups are strongly advocating that you be confirmed to the Supreme Court?

RESPONSE: I am not aware of the activities that private groups and individuals might be undertaking to advocate for or against my confirmation. Any public advocacy by any individual or group for or against my confirmation will be irrelevant to my work if I am confirmed to the Supreme Court, just as public advocacy related to my prior nominations has played no role in my work as a federal trial court and circuit court judge for the last decade. Moreover, I understand that my role as a judge is a limited one—fairly and impartially applying the law to the facts of any case that has been properly presented—and I take my duty to be independent very seriously.

16. In *Make the Road New York v. McAleenan*, you interpreted the Immigration & Nationality Act to require the Secretary of Homeland Security to conduct notice-and-comment rulemaking prior to designating the aliens to which the Department’s expedited removal authorities apply. Judges on the U.S. Court of Appeal for the D.C. Circuit, reviewing your decision, noted that because there would be no cause of action to review the Secretary’s decision, “the notice-and-comment procedure would be an empty, yet time-consuming, exercise—all form and no substance.” What do you make of this line in the D.C. Circuit’s ruling?

RESPONSE: In *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), I interpreted the statutory language of section 1225(b)(1)(A)(iii)(I) of the Immigration and Nationality Act as granting DHS ‘sole and unreviewable discretion’ to designate categories of unauthorized noncitizens for expedited removal, but that the procedural requirements of the APA remained applicable, in light of long-standing D.C. Circuit precedent that judicial review of agency procedures may be required despite broadly worded delegations of authority. *See, e.g., Delta Air Lines, Inc. v. Export-Import Bank of the U.S.*, 718 F.3d 974, 977 (D.C. Cir. 2013) (*per curiam*) (explaining that a “statute can confer on an agency a high degree of discretion, and yet a court might still have an obligation to review the agency’s exercise of its discretion to avoid abuse, especially on procedural grounds” (internal quotation marks omitted)); *Texas Alliance for Home Care Services v. Sebelius*, 681 F.3d 402, 408 (D.C. Cir. 2012) (noting that “the court must heed the APA’s basic presumption of judicial review’ that ‘will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress’” (quoting *Banzhaf v. Smith*, 737 F.2d 1167, 1168–69 (D.C. Cir. 1984)); *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) (explaining that “[t]he mere fact that a statute grants broad discretion to an agency does not render the agency’s decisions completely nonreviewable under the ‘committed to agency discretion by law’ exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised.”). The D.C. Circuit disagreed and reversed my decision. *Make the Road New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

17. During an exchange with Senator Sasse, it seemed as though you were hesitant to outright denounce what is happening on college and law school campuses across the country— that is, individuals with conservative or traditional views are unable to participate in the free exchange of ideas because students are shouting them down or otherwise preventing them from speaking. Recently, at Yale Law School, students interrupted a discussion on civil liberties with a representative from Alliance Defending Freedom and a representative from

the American Humanist Association. Judge, do you agree that this type of behavior stifles the free exchange of ideas and ultimately inhibits a learning environment?

RESPONSE: As a federal judge, I have found that the ability to listen with an open mind to other points of view—, and to be respectful to the differing viewpoints, analyses, or conclusions of others, even those with which you disagree—is crucial to the effective operation of the court, and, ultimately, maintains public trust in the court as an institution. In my service as a judge on both the District Court of the District of Columbia and the Court of Appeals for the District of Columbia Circuit, collegiality has been extremely important to me, and I have been grateful for the guidance, insights, and generosity of my judicial colleagues. I have no comment on the event that this question references or any other similar happening.

18. What advice would you give students who attempt to prevent their classmates from hearing certain perspectives or engaging with ideas that they may not agree with?

RESPONSE: Please see my response to Question 17. Schools, like courthouses, are places where it is important that different ideas and perspectives be considered and examined.

19. Do you believe that natural law is reflected in our Bill of Rights? Please explain in detail.

RESPONSE: I would interpret the Bill of Rights based on the methods of constitutional interpretation the Supreme Court employs, not based on principles derived from natural law.

20. What is your understanding of the relationship between the free exercise clause and establishment clause in the First Amendment?

RESPONSE: The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion.” The Free Exercise Clause enjoins Congress from “prohibiting the free exercise” of religion. The Supreme Court has held that both Clauses apply against the States through the Due Process Clause of the Fourteenth Amendment. The Supreme Court has “long recognized that the government may... accommodate religious practices... without violating the Establishment Clause.” *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S.136, 144–145 (1987). The Court has stated that “there is room for play in the joints between” the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause. *Locke v. Davey*, 540 U.S.712, 718 (2004) (quoting *Walz v. Tax Comm’n of City of New York*, 397 U.S.664, 669 (1970)).

21. How would you resolve a situation in which these two clauses—the free exercise clause and establishment clause—come into conflict?

RESPONSE: If confirmed, I would resolve each dispute that comes before me on a case-by-case basis, by neutrally assessing the parties’ legal arguments based on the facts and applicable law.

22. What is the purpose behind the doctrine of ecclesiastical abstention?

RESPONSE: The ecclesiastical abstention doctrine refers to the principle that a civil court should refrain from deciding legal claims that require the interpretation of religious doctrine.

23. What's the difference between how religious liberty objections are evaluated under the Religious Freedom Restoration Act and how they are evaluated in the employment context under Title VII of the Civil Rights Act of 1964?

RESPONSE: The Religious Freedom Restoration Act of 1993 (RFRA) provides religious liberty protections from federal government action beyond those afforded by the Free Exercise Clause. Specifically, the Act prohibits the government from substantially burdening an individual's exercise of religion unless it demonstrates that the government action furthers a compelling government interest and is the least restrictive means to further that interest. 42 U.S.C. §§ 2000bb-2000bb-4. Title VII of the Civil Rights Act of 1964 prohibits employers from undertaking certain employment practices "because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Because questions of how religious liberty objections are evaluated under either law may be the subject of future litigation, it would be improper for me as a pending judicial nominee and as a sitting circuit court judge to comment in the abstract.

24. Judge, in 2000 you appeared as a legal pundit on CNN to discuss the *Bush v. Gore* case. You were asked a series of questions regarding how the Justices would vote. During that interview, you said that the Supreme Court Justices "at the end of the day" would "vote . . . their consciences." Is it ever appropriate for a judge to vote based on his or her conscience?

RESPONSE: A judge has a duty to decide cases based solely on the law, without fear or favor, prejudice or passion and not in regard to personal views.

25. In that same interview with CNN, you provided analysis and commentary on the "different ideologies" of the Supreme Court Justices. Could you speak to what you meant by "different ideologies" of the Supreme Court Justices? Could you also provide some analysis of each individual Justices ideology you had referenced at the time?

RESPONSE: The interview in question took place in 2000 after I had just left my Supreme Court clerkship. I was asked about my assessment of how the votes of the Justices had come down in the matter and if there was any concern in my mind about what message a divided vote on this matter may send. I responded that the Justices often have to deal with very difficult issues, have previously issued several 5–4 decisions, and that there could be a non-unanimous decision in that matter because of the justices' different perspectives.

26. In Justice Breyer's book, *Active Liberty*, he asserts that "[s]ince law is connected to life, judges, in applying a text in light of its purpose, should look to consequences, including 'contemporary conditions, social, industrial, and political, of the community to be affected.'" Do you agree with this statement? Please explain your answer.

RESPONSE: I am not certain what Justice Breyer meant by that statement. I follow the methods of statutory and constitutional interpretation that the Supreme Court has employed. I look at the relevant provision of the Constitution, statute, or other applicable legal authority. I work to discern those words' meaning as intended by the people who wrote them. I focus on original public meaning; I look at history and practice at the time the document was created to understand what those who created the text intended; I also look at precedent to understand how the text has been previously interpreted and applied. As a lower court judge, I am bound by precedent. If I

am fortunate enough to be confirmed to the Supreme Court, I would be bound by *stare decisis*. I do not decide cases based on my personal views or policy preferences.

27. What do you believe the difference between judicial philosophy and methodology is?

RESPONSE: It is central to my philosophy as a judge that I respect the limits on judicial authority, and that I always stay in my judicial lane. I apply the same methodology to every case in furtherance of that philosophy. That includes carefully observing the constraints that our system imposes on the judicial power.

28. What is a judge's role in upholding the value of transparency?

RESPONSE: It enhances public confidence in the judiciary when the public understands the court's reasons for rendering its ruling. Thus, in my work as a judge, I have endeavored to explain thoroughly the arguments that I have considered, the facts that I have reviewed, and my legal reasoning.

29. How should a Supreme Court Justice ensure the American people have access to their institutions?

RESPONSE: My current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present. It would be inappropriate for me, as a sitting federal judge and nominee for a judicial position, to comment on what Supreme Court Justices should do in this regard.

30. What is your view of the Freedom of Information Act?

RESPONSE: In 1966, Congress amended the Administrative Procedure Act to implement "a general philosophy of full agency disclosure." *Department of Air Force v. Rose*, 425 U.S. 352, 360 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). This amendment, known as the Freedom of Information Act, accords "any person" a right to request any records held by a federal agency. 5 U.S.C. § 552(a)(3)(A). An agency must "make the records promptly available" unless the materials fall within one of the Act's enumerated exemptions. *Id.* § 552(a)(3)(A). The Supreme Court has noted that "the basic purpose of the Freedom of Information Act" [is] "to open agency action to the light of public scrutiny." *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

31. In *Apple, Inc. v. Fintiv, Inc.*, (IPR2020–00019, *Fintiv*), the Patent Trial and Appeal Board (PTAB) at the United States Patent and Trademark Office (USPTO) laid out six factors that provide guidance to the PTAB in analyzing whether to deny institution of an *inter partes* review under 35 U.S.C. § 314(a) based on a parallel district court proceeding. One factor calls for the Board to consider the proximity of the court's trial date to the Board's projected statutory deadline for a final written decision. Recent data has clearly shown that this has resulted in inaccurate trial dates and unreasonable delays.

- a. Do you agree that because trial dates in patent litigation often change, that they are not a reliable basis for determining whether to deny institution based on a parallel proceeding?

RESPONSE: In *Apple, Inc. v. Fintiv, Inc.*, (IPR2020–00019, *Fintiv*), the Patent Trial and Appeal Board stated it “generally take[s] courts’ trial schedules at face value absent some strong evidence to the contrary.” However, the PTAB has since recognized the uncertainty of district court case schedules, including scheduled trial dates, particularly during the COVID-19 pandemic. *Apple Inc. v. Parus Holdings, Inc.*, IPR2020–00686, Paper 9 at 13 (P.T.A.B. Sep. 23, 2020). The extent to which trial dates are a reliable basis for determining whether to deny institution based on a parallel proceeding is the subject of litigation and, consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further.

- b. If you agree, how would you address this pressing problem, if confirmed? If you do not agree, please explain your point of view.

RESPONSE: Please see my response to Question 31a.

Senator Mike Lee
Questions for the Record
Ketanji Brown Jackson, Nominee to be an Associate Justice of the Supreme Court
of the United States

1. In your undergraduate thesis titled, “The Hand of Oppression,” you argued that court officials, including judges, have “personal hidden agendas” that affect how they decide cases. Would you apply that observation to yourself?

RESPONSE: I do not harbor any personal hidden agendas. My academic thesis was written 30 years ago, when I was a senior in college. The views I expressed were primarily based upon observations that I had made during a summer internship—before I attended law school, before I became an attorney, and before I became a judge.

2. In your undergraduate honors thesis, you made radical arguments about the plea bargaining process. The premise of your argument was that plea negotiations involve “a certain amount of state coercion” and “the government has no justifiable or ‘compelling’ reason for exerting pressures which burden constitutional rights.” Do you stand by these statements?

RESPONSE: My academic thesis was written 30 years ago, when I was a senior in college. The views I expressed were primarily based upon observations that I had made during a summer internship—before I attended law school, before I became an attorney, and before I became a judge. Since then, I have had extensive experience with the actual workings of the criminal justice system in a variety of capacities. In my work as a judge, I have ratified plea bargains and accepted guilty pleas, and I now understand plea bargaining to be an important part of the administration of criminal justice.

3. What should courts do when original meaning conflicts with precedent?

RESPONSE: *Stare decisis* is a bedrock legal principle that ensures consistency and impartiality of judgments. The Supreme Court has articulated factors to consider in determining whether to overrule a prior decision, including the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to “rob[]” the decision “of significant application or justification.” See *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); see also, e.g., *Janus v. American Fed. Of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018). These factors are themselves a precedent of the Court. Whether the Court should overrule a challenged precedent of the Court would depend on the facts and circumstances of the particular case.

4. Does the current structure of the administrative state reflect a proper separation of powers?

RESPONSE: As a judicial nominee and sitting federal judge, it would be inappropriate for me to comment on this abstract concern or any other policy matter. As a federal judge for almost a decade, I resolve each case on an individual basis by assessing the parties’ legal arguments based on the factual record and applicable law, including relevant statutes and binding precedent.

5. What are the limiting principles of the non-delegation doctrine?

RESPONSE: The Supreme Court recently described the structure of this doctrine in *Gundy v. United States*, 139 S. Ct. 2116 (2019). The Court explained:

Article I of the Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” §1. Accompanying that assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch “powers which are strictly and exclusively legislative.” *Wayman v. Southard*, 23 U.S. 1, 10 Wheat. 1, 42–43, 6 L. Ed. 253 (1825). But the Constitution does not “deny[] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s].” *Yakus v. United States*, 321 U.S. 414, 425, 64 S. Ct. 660, 88 L. Ed. 834 (1944) (internal quotation marks omitted).

Id. at 2123. The Court continued:

Congress may “obtain[] the assistance of its coordinate Branches”—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws. *Mistretta v. United States*, 488 U.S. 361, 372, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). “[I]n our increasingly complex society, replete with ever changing and more technical problems,” this Court has understood that “Congress simply cannot do its job absent an ability to delegate power under broad general directives.” *Ibid.* So we have held, time and again, that a statutory delegation is constitutional as long as Congress “lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.” *Ibid.* (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S. Ct. 348, 72 L. Ed. 624, *Treas. Dec.* 42706 (1928); brackets in original).

Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegatee’s use of discretion. So, the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides.

6. Will you commit to following the Supreme Court’s precedent on the major questions doctrine?

RESPONSE: All Supreme Court decisions are precedential and entitled to respect under *stare decisis* principles.

7. Do you believe that Judges should rely on congressional reports that are potentially written by one senator’s staff in order to ascertain the intent of a statute?

RESPONSE: A court may rely on legislative history if and only if the statute is ambiguous. *See, e.g., Milner v. Department of Navy*, 562 U.S. 562, 574 (2011) (“Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.”); *United States v. Woods*, 571 U.S. 31, 46 n.5 (2013) (explaining that legislative history “need not be consulted when . . . the statutory text is unambiguous”). Accordingly, if the text is clear, then no piece of legislative history should determine the construction of the statute. When the Supreme Court has reviewed

legislative history, it has found some sources more authoritative than others. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984). The role that any piece of legislative history may play in a case would depend on the circumstances of the particular case or controversy before the Court.

8. Consistent with federal laws applicable to most universities in the United States, when is it appropriate for a university to treat a student or applicant differently on the basis of race?

RESPONSE: The Supreme Court has held that a university may consider race to achieve the educational benefits that flow from a diverse student body if such use is narrowly tailored. *See University of California v. Bakke*, 98 S. Ct. 2733 (1978); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013). The Court also has held that narrow tailoring requires academic institutions to provide individualized consideration to each applicant, rather than relying on quotas or inflexible preferences that make race decisive. *See id.* Most recently, in *Fisher v. University of Texas*, the Supreme Court upheld the University of Texas’s admission program, finding that it was sufficiently narrowly tailored to the legitimate interest in achieving the educational benefits that flow from a diverse student body. *See Fisher*, 133 S. Ct. 2411 (2013).

9. Do you believe that courts should adhere faithfully to the Constitution’s strict ban on race-based decision making within government?

RESPONSE: Our Constitution expressly guarantees that no person or group shall be denied equal protection of the law. The Fourteenth Amendment prohibits states from denying any person equal protection of the laws and the Fifth Amendment prevents the federal government from doing so. The Supreme Court has held that all race-based classifications are subject to “strict scrutiny”—the most rigorous form of review. *See City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1988); *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995). Under strict scrutiny, a law or program will generally be struck down unless the government can show that it is narrowly tailored to serve a compelling governmental interest. I cannot comment on the propriety of the government’s consideration of race in the abstract; as a judge, it is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law.

10. If race-based decision making were permitted within government for benevolent (as opposed to malicious) reasons—and if those reasons extend to the need to correct historical inequities and previous *de jure* discrimination—where is the logical stopping point?

RESPONSE: Please see my response to Question 9.

11. If the government, having previously denied one group equal protection under the law, is later entitled to prefer that same group over others, what would stop that pattern from repeating itself in the future?

RESPONSE: Please see my response to Question 9.

12. In *U.S. v. Young*, you held that because the defendant Keith Young had an increased risk of serious illness because of Covid-19, he could be resentenced from twenty years to ten years in prison. Mr. Young had only served two years of his sentence at the time, and so will not be

release for approximately eight years. How was the sentence reduction you granted to Mr. Young helpful in mitigating his risk of exposure to Covid-19?

RESPONSE: The criminal defendant in *U.S. v. Young* filed a motion to reduce his sentence pursuant to the First Step Act, 18 U.S.C. § 3582(C)(1)(A)(i). *U.S. v. Young*, 17-CR-83, ECF No. 95. Under the First Step Act, when the defendant requests a modification of an imposed term of imprisonment, a court “may reduce the term of imprisonment. . . after considering the factors set forth in section 3553(a) to the extent that they are applicable” if the court finds that “extraordinary and compelling reasons warrant such a reduction.” 18 U.S.C. § 3582(c)(1)(A).

In granting the defendant’s motion, I first found that, in light of the COVID-19 pandemic, the defendant’s medical conditions met the “extraordinary and compelling reason” standard. That determination was not contested by the government. *See U.S. v. Young*, 17-CR-83, ECF No. 99 at 12. Second, as instructed by Congress, I considered the factors set forth under 18 U.S.C. § 3553(a) and sentenced the defendant accordingly.

As a district court judge, I sentenced more than 100 defendants. In each case, I engaged in the fact-specific, individualized inquiry that Congress has mandated federal judges undertake in order to ensure that the sentence I imposed satisfied the purposes of punishment set forth by Congress. I have granted and denied petitions in these cases based solely on whether the facts of a specific case met the applicable standards set forth by Congress.

13. How was reducing Mr. Young’s sentence compatible with the relief offered in the compassionate release statute?

RESPONSE: Please see my response to Question 12.

14. In the transcript of the sentencing hearing you acknowledged that the D.C. Circuit held that the First Step Act “does not automatically entitle Mr. Young to a new sentence.” If that was their conclusion, why was it appropriate for you to give him a new sentence based on the 3553 factors?

RESPONSE: In the First Step Act, Congress made clear that if and only if “extraordinary and compelling circumstances” existed, federal judges could—but are not required to—reduce the term of imprisonment for criminal defendants after considering the statutory factors in 18 U.S.C. § 3553(a). A new sentence is not automatic under the First Step Act—defendants first have to establish “extraordinary and compelling” circumstances, and then Congress has instructed that judges “may reduce the term of imprisonment. . . after considering the factors set forth in section 3553(a) to the extent that they are applicable.” 18 U.S.C. § 3582(c)(1)(A). I determined that Mr. Young met the statutory requirements Congress had set out in the First Step Act and then considered the 18 U.S.C. § 3553(a) factors in sentencing Mr. Young.

As a district court judge, I sentenced more than 100 defendants. In each case, I engaged in the fact-specific, individualized inquiry that Congress has mandated federal judges undertake in order to ensure that the sentence I imposed satisfied the purposes of punishment set forth by Congress. I have granted and denied petitions in these cases based solely on whether the facts of a specific case met the applicable standards set forth by Congress.

15. Does 18 U.S.C. § 3553 entitle all criminal defendants to a new sentence anytime there is a change in the law under which they were convicted and sentenced?

RESPONSE: No.

16. Last year, you granted LaVance Greene’s compassionate release petition, over the strong objections of the government and the U.S. Marshals Service. Mr. Greene was convicted in 1971 of killing Deputy U.S. Marshal Norman Sherriff, and disarming three other marshals. Despite the nature of this crime, the objections of the government, and the disciplinary infractions Greene committed in custody, you granted Mr. Greene’s compassionate release motion and released him from prison in February of 2021. You also released D’Angelo Dunlap, who robbed three banks within three days and had a history of other violent offenses. Mr. Dunlap had served less than half of his 57-month sentence when you granted his request. How do you justify releasing defendants who have committed violent crimes under the compassionate release program?

RESPONSE: As a district court judge, I sentenced more than 100 defendants. In each case, I engaged in the fact-specific, individualized inquiry that Congress has mandated federal judges undertake in order to ensure that the sentence I imposed satisfied the purposes of punishment set forth by Congress. Additionally, I have granted and denied petitions in these cases based solely on whether the facts of a specific case met the applicable standards set forth by Congress.

Congress enacted the First Step Act in 2018 and made clear what process federal judges should follow when considering compassionate release requests. With respect to the defendant’s motion in this case, I repeatedly noted the grave and serious crimes the defendant had committed in 1971. However, I was statutorily obligated to evaluate the defendant’s application for compassionate release by applying the factors that Congress set forth for federal judges to apply. I found the defendant’s “advanced age, lengthy period of incarceration, and age-related deterioration in health constitute[d] extraordinary and compelling reasons to reduce his sentence. And the Court further [found] that, after 49 years in prison, Greene’s continued incarceration would be greater than necessary to comply with the purposes of punishment identified in section 3553(a).” *U.S. v. Greene*, 516 F. Supp. 3d 1, 28 (D.D.C. 2021). Additionally, there was evidence in the record that Greene had a “highly unusual level of support” from “numerous correctional officials who have consistently advocated for his release, both during his parole hearings and with respect to the instant motion.” For example, I considered the testimony of numerous BOP officers who testified at Mr. Greene’s parole hearings in support of his release due, in part, to his efforts to save two guards’ lives during a prison riot. *Id.* at 4–5, 25. Several BOP officers wrote to the Court in support of Mr. Greene’s motion. *Id.* at 24. Taken together, I found this evidence suggested that Mr. Greene was unlikely to pose a danger to any person or the community, and had a minimal risk of recidivism in agreement with BOP’s findings. *Id.* at 25. Mr. Greene was 72 years old at the time of his release and died a few months after I granted his motion.

17. Would you agree that releasing violent criminals from prison creates a public safety concern?

RESPONSE: As a district court judge, I sentenced more than 100 defendants, and each time, I engaged in the fact-specific, individualized inquiry that Congress has mandated federal judges undertake in order to ensure that the sentence I imposed met the purposes of punishment set forth

by Congress. One of the purposes of punishment that courts are always required to consider is “the need for the sentence imposed . . . to protect the public from further crimes of the defendant.” 18 U.S. Code § 3553(a)(2)(C).

18. Is law enforcement in the United States systemically racist?

RESPONSE: As a federal judge for the last decade, it has been my duty to adjudicate individual claims in specific cases and controversies, including claims of race discrimination and/or claims involving law enforcement. When I have jurisdiction to do so, I resolve properly filed legal disputes concerning race discrimination and/or law enforcement based on the arguments that the parties make, the established facts of the particular case, and the applicable law.

I would additionally reiterate what I shared at my hearing—that I have family members who have served in law enforcement, who have committed themselves to protecting and serving their communities.

19. Do you agree that in communities with high rates of criminal activity—including armed robbery and home invasion—that such conduct undermines the rule of law?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me as a pending judicial nominee and sitting federal judge, to comment on this abstract concern, or any other policy matter. As a federal judge for almost a decade, I resolve each case on an individual basis by assessing the parties’ legal arguments based on the factual record and applicable law, including relevant statutes and binding precedent.

20. Do you believe record rates of illegal immigration undermine the rule of law?

RESPONSE: The Constitution explicitly assigns to Congress significant responsibility for crafting our immigration laws. As a federal judge for the last decade, my role in the judicial system is to consider specific legal claims raised in the particular cases that come before me.

21. Multiple senators during your hearing asked you about Critical Race Theory, and you responded that you have never studied Critical Race Theory. Are you prepared to categorically reject the teachings and tenets of Critical Race Theory?

RESPONSE: As I stated at my hearing, critical race theory has not come up in my work as a judge, and it is not a theory I have studied or relied on—nor would it if I were confirmed to the Supreme Court. As a judge, it is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law; academic theories have not formed the basis of any decisions I have reached in my near-decade on the bench, and the same would be true if I were fortunate to be confirmed to the Supreme Court.

22. In a landmark women’s rights case, *United States v. Virginia*, Justice Ruth Bader Ginsburg writing for the majority stated: “Physical differences between men and women, however, are enduring.” See 388 U.S.1 (1967). Was it appropriate for Justice Ginsburg to make this observation?

RESPONSE: The Supreme Court’s decision in *United States v. Virginia* 388 U.S.1 (1967) is binding precedent. As noted, the majority opinion stated that “physical differences between men and women . . . are enduring.” The Court also recognized: “‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” As Justices Kagan and Barrett explained, it is inappropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

23. Do you agree with Justice Ginsburg that there are physical differences between men and women?

RESPONSE: The Supreme Court’s decision in *United States v. Virginia* 388 U.S.1 (1967) is binding precedent.

24. Do you interpret her meaning of men and women as male and female?

RESPONSE: Please see my response to Question 23.

25. Do you believe that sex-separated spaces are permissible based on the “enduring” physical differences between men and women?

RESPONSE: As a federal judge for almost a decade, I resolve each case on an individual basis by assessing the parties’ legal arguments based on the factual record and applicable law, including relevant statutes and binding precedent. For example, in the case these questions reference, *United States v. Virginia*, 515 U.S. 518 (1996), the Supreme Court “conclude[d] that Virginia has shown no ‘exceedingly persuasive justification’ for excluding all women from the citizen soldier training afforded by [Virginia Military Institute].” Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on this question, as questions about this topic are the subject of ongoing litigation.

26. The Violence Against Women Act includes the word “women” in it. How can we make any sense of this law—or others on the books—if we cannot define the word “women”?

RESPONSE: Respectfully, I am not aware that any prior Supreme Court nominee has been asked to define what a woman is or answer related questions, for example, about biological differences between men and women. And I am aware that the reason these questions are being posed to me is because there are active conversations happening in the public sphere—among policymakers and others—regarding LGBTQ individuals, especially transgender individuals, and their participation in various activities.

This is precisely why I, as a federal judge and as a nominee, must decline to answer these questions. It would be inappropriate for me to opine in the abstract on legal issues that are or could be in litigation, including legal issues regarding who is protected under the Constitution and our civil rights laws, or the scope of that protection. I can tell you that as a federal judge for almost a decade, it has been my duty to adjudicate individual claims in specific cases and controversies, including claims of sex discrimination. When I have jurisdiction to do so, I resolve

properly filed legal disputes concerning sex discrimination based on the arguments that the parties make, the established facts of the particular case, and the applicable law.

Finally, I would note that I am pleased to be the sixth woman nominated to serve on the Supreme Court.

27. If a case before you required an analysis of the meaning of “women,” what would be your analysis?

RESPONSE: Please see my response to Question 26.

28. How can you conduct a rational analysis of the law if you could not define the word “woman” in the context of your hearing?

RESPONSE: Please see my response to Question 26.

29. When asked by Senator Kennedy about when the Equal Protection of the laws attaches to an unborn child. You responded, “I don’t know.” When he asked you when life begins you responded “I don’t know.” Please clarify the answers you gave to Senator Kennedy?

RESPONSE: During my hearing, I explained that I set aside any personal religious beliefs when I am ruling on cases. To quote Justice Barrett, if confirmed, “I will apply the law fully and faithfully. I will not impose my religious convictions or personal beliefs on anyone”.

30. Does the equal protection of the laws attach to a full-term child who is in the process of being born?

RESPONSE: Please see my response to Question 29.

31. Recently, efforts have been made to move antitrust jurisprudence away from the consumer welfare standard. Were courts to evaluate antitrust claims on the basis of something other than the ultimate economic effect on consumers would require them to balance competing policy preferences and interest groups—a fundamentally political decision that is reserved to Congress alone. Do you agree that such an approach would violate the separation of powers?

RESPONSE: The consumer welfare standard has been described differently by different courts and scholars. The Supreme Court has stated that “the principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 539 (2013) (quoting 1 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 100, p. 4 (3d ed. 2006)). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further because the proper method of evaluating antitrust claims could be the subject of future litigation.

32. Department of Justice Antitrust Division leadership recently stated that the Department would consider bringing criminal charges for monopolization. What burden would the government need to meet in order to obtain a criminal penalty for a monopolization claim under Section 2 of the Sherman Act?

RESPONSE: As in all criminal cases, the government would need to meet the beyond a reasonable doubt standard to impose criminal liability for a monopolization claim under Section 2 of the Sherman Act. In addition, the Supreme Court has explained with regard to the necessary mens rea for such an offense that “we conclude that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws.” *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 444 (1978). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further because, as the question suggests, the burden that the government would need to meet in order to obtain a criminal penalty for a monopolization claim under Section 2 of the Sherman Act could be the subject of future litigation.

33. Do you believe that the Constitution should be interpreted “in a way that makes sense for our modern world” even if doing so would be contradictory to the original public meaning of the Constitution?

RESPONSE: I would interpret the Constitution in a manner that is consistent with the methods of interpretation that the Supreme Court employs when it undertakes to interpret constitutional provisions. That includes reviewing the text of the constitutional provision, any relevant history, and any applicable precedent. The Supreme Court has recently interpreted various constitutional provisions by attempting to ascertain the original meaning of the words used as understood by the public at the time of the Founding. *See, e.g., United States v. Jones*, 132 S. Ct. 945, 949 (2012) (Fourth Amendment); *Citizens United v. Federal Election Commission*, 558 U.S. 310, 906 (2010) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42–57 (2004) (Confrontation Clause); *Alden v. Maine*, 527 U.S. 706, 715–724 (1999) (Eleventh Amendment). And while the Supreme Court has primarily evaluated the original public meaning of the text of the constitutional provision at issue, *see Jones*, 132 S. Ct. at 949, 953; *Heller*, 554 U.S. at 576–77, its binding precedents also sometimes refer to the original intent of the Framers, *see Crawford*, 541 U.S. at 53–54, 59, 61. The prevailing interpretive frame for interpreting the Constitution is to look back through history and determine what the words meant at the time of the founding. There are some provisions in the Constitution that set forth specific rules. For example, the Constitution states that a person must be at least thirty-five years old to be President of the United States. As to clear provisions of this sort, the Constitution can be interpreted based on the text alone. Other provisions of the Constitution, like the protection against unreasonable searches and seizures or the protection of due process of law, are not clear from the text alone. As to those provisions, the Court looks at them in the context of history and in the structure of the Constitution. They look at the circumstances of the case in comparison to what the words meant at the time that they were adopted, and they analogize to current circumstances. It is a process that seeks to understand the core foundational principles in the Constitution as captured by the text as originally intended, and to apply those principles to modern circumstances. While courts must apply established constitutional principles to new circumstances, the meaning of the Constitution itself does not change or evolve.

34. When Congress wishes to foreclose the opportunity for Article III review of agency action, what language would you expect Congress to use in a statute to adequately convey that message to the court?

RESPONSE: The Administrative Procedure Act, 5 U.S.C. § 701(a), precludes judicial review of agency action where “statutes preclude judicial review” or “agency action is committed to agency discretion by law.” The Supreme Court has explained that the latter provision is applicable “in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’ S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).” *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 410 (1972) (footnote omitted). More recently, the Supreme Court explained that the explanation from *Overton Park* “clearly separates the exception provided by § (a)(1) from the § (a)(2) exception. The former applies when Congress has expressed an intent to preclude judicial review. The latter applies in different circumstances; even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion. In such a case, the statute (‘law’) can be taken to have ‘committed’ the decision-making to the agency’s judgment absolutely.” *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

Further, I note that in *Patchak v. Zinke*, 138 S. Ct. 897 (2018), the Supreme Court, in evaluating a question of jurisdiction, stated:

The statute uses jurisdictional language. It states that an “action” relating to the Bradley Property “shall not be filed or maintained in a Federal court.” It imposes jurisdictional consequences: Actions relating to the Bradley Property “shall be promptly dismissed.” See *Ex parte McCardle*, 74 U.S. 506, 7 Wall. 506, 514, 19 L. Ed. 264 (1869) (“[W]hen [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause”). Section 2(b) has no exceptions. Cf. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S.154, 165, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010). And it applies “[n]otwithstanding any other provision of law,” including the general grant of federal-question jurisdiction, 28 U.S.C. §1331. Although §2(b) does not use the word “jurisdiction,” this Court does not require jurisdictional statutes to “incant magic words.” *Sebelius v. Auburn Regional Medical Center*, 568 U.S.145, 153, 133 S. Ct. 817, 184 L. Ed. 2d 627 (2013). Indeed, §2(b) uses language similar to other statutes that this Court has deemed jurisdictional. See, e.g., *Gonzalez v. Thaler*, 565 U.S.134, 142, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012) (““an appeal may not be taken”” (quoting 28 U.S.C. §2253(c)(1))); *Keene Corp. v. United States*, 508 U.S.200, 208–209, 113 S. Ct. 2035, 124 L. Ed. 2d 118 (1993) (““[n]o person shall file or prosecute”” (quoting 36 Stat. 1138)); *Weinberger v. Salfi*, 422 U.S.749, 756, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975) (““[n]o action . . . shall be brought under [28 U.S.C. §1331]”” (quoting 42 U.S.C. §405(h))).

Id. at 905–06. Beyond these observations, as a sitting judge and a nominee, it would be inappropriate for me to opine on abstract questions that could be the subject of future litigation.

35. If you are confirmed to the Court, do you think it would be appropriate for people who disagree with your rulings or judicial philosophy to attack your husband for it?

RESPONSE: No judge has control over what third parties say about her rulings. It would not be appropriate for me to comment on the propriety of any reactions.

36. Would it be appropriate for people to attack you for your husband's political views?

RESPONSE: No judge has control over what third parties say, and it would be inappropriate for me to comment on the propriety of any hypothetical statements made about my husband. My political views and those of my husband, if any, are irrelevant to my job as a judge. As a judicial officer, it is my duty to adjudicate individual claims that are filed by persons who are authorized to litigate such cases or controversies in federal court. When I have jurisdiction to do so, I resolve properly filed legal disputes based on the arguments that the parties make, the established facts of the particular case, and the applicable law, and I do not draw upon, reference, or consider any personal views or those of my husband.

37. Would you force your husband not to share his political views because of your position on the Court?

RESPONSE: Please see my responses to Question 36.

38. Would you need to recuse yourself from cases that implicate your husband's political views?

RESPONSE: As Justice Barrett explained, the question of recusal is a threshold question of law that must be addressed in the context of the facts of each case. Justice Ginsburg described the process that Supreme Court justices follow in deciding whether to recuse, which involves reading the statute, reviewing precedents, and consulting with colleagues. As I explained at the hearing, I commit to following the recusal process and faithfully applying the law of recusal if confirmed.

39. Apart from being an actual litigant in a case before you, do you think your husband's political views have any bearing whatsoever on your role as a judge?

RESPONSE: Please see my response to Questions 36 and 38.

40. Does Congress have the authority to impose liability on States for excessive force claims?

RESPONSE: It is not the role of a federal judge to determine, in the abstract, whether Congress has "the authority to impose liability on States for excessive force claims." As a judicial officer, it is my duty to adjudicate individual claims that are filed by persons who are authorized to litigate such cases or controversies in federal court. When I have jurisdiction to do so, I resolve properly filed legal disputes concerning the lawfulness of conduct based on the arguments that the parties make, the established facts of the particular case, and the applicable law, giving due weight to Supreme Court precedent. Additionally, I should note that the topic of Congress' abrogation of state sovereign immunity could come before me in litigation, so it would be improper for me to opine on it.

41. During the Covid-19 pandemic, the Court granted injunctive relief to Ritesh Tandon who challenged a California law that unconstitutionally restricted his ability to worship in his home with fellow believers. The Court held "government regulations are not neutral and

generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.” How has the Court balanced health and safety requirements and religious liberty?

RESPONSE: The First Amendment of the Constitution expressly protects a fundamental and foundational right to religious liberty. The Supreme Court’s decisions in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020), and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), held that the Free Exercise Clause continues to apply even in moments of public health emergencies, and that government action that is not neutral or generally applicable remains subject to strict scrutiny.

42. Many state Constitutions targeted Catholics through the enactment of Blaine Amendments. *Espinoza v. Montana Department of Revenue* struck another blow against Blaine Amendments, strengthening the Court’s decision in *Trinity Lutheran v. Comer*.

a. What is the current jurisprudence of the Court regarding Blaine Amendments?

RESPONSE: The original Blaine Amendment—a proposal that Congress considered but did not pass in the 1870’s—“would have amended the Constitution to bar any aid to sectarian institutions.” *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). Some states have enacted state-law provisions or have adopted practices that bar government entities from appropriating funds to religious sects or institutions (which I understand are referred to as Blaine Amendments), on the grounds that doing so is necessary to prevent Establishment Clause violations. The Supreme Court recently addressed one such state-law provision in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2262 (2020) (assessing the Montana Supreme Court’s application of a no-aid provision in Montana’s Constitution to invalidate a state scholarship program). In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the Supreme Court reviewed a similar state agency’s practice of summarily denying a religious institution’s application for competitively awarded grant funding on the grounds that the money could not be given to a religious institution. In both cases, the Supreme Court struck down the state restrictions as a violation of the First Amendment’s neutrality requirement.

b. What analysis would you undertake in analyzing a Blaine Amendment case?

RESPONSE: If confirmed, I would resolve each case that comes before me on an individual basis by assessing the parties’ legal arguments based on the facts and applicable law, including the Supreme Court’s decisions in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2262 (2020) and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

43. In recent years, the Court has spent a great deal of time examining the lines between employment law and the ministerial exemption which seeks to safeguard the “freedom” of religious institutions “to select their own ministers” and prevent “government involvement in ecclesiastical decisions.”

- a. What are the current nuances of the Ministerial Exemption as delineated by the Court?

RESPONSE: The Supreme Court has held that the Free Exercise Clause and the Establishment Clause protect against government intrusion on certain decisions of religious organizations, such as the hiring or firing of ministers, through employment discrimination laws. *See, e.g., Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). Because future cases may implicate whether specific employees fall under this exception, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment further on this question.

- b. What analysis would you undertake in analyzing a ministerial exception case?

RESPONSE: Please see my response to Question 43a.

44. In some cases, like *Federal Forest Resource Coalition*, you seem to take a very strict view of standing requirements, but in a similar situation in *Make the Road New York*, your application of the same requirements seemed much more lenient. How do you distinguish your application of standing requirements in these two cases?

RESPONSE: I do not agree that I have employed a more demanding standard in certain cases, and the mere fact that one party had standing and the other did not is not an indication that a different standard was applied. Instead, as explained below, I considered the specific factual circumstances and legal doctrines applicable to each of these cases individually. These cases arose in different factual, procedural, and legal contexts, and I applied binding D.C. Circuit and Supreme Court precedent to reach my conclusions in both.

In *Federal Forest Resource Coalition v. Vilsack*, 100 F. Supp. 3d 21 (D.D.C. 2015), I found that the plaintiffs who challenged the promulgation of a United States Forest Service Planning Rule lacked Article III standing because they failed to allege actual or imminent injury. Rather, their alleged injury relied on the speculative assertion that the Planning Rule would reduce the amount of forest land available for the plaintiffs' commercial uses although the agency had yet to determine any timber-harvest or animal-grazing levels.

In *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), I found that the plaintiffs who sought a preliminary injunction had Article III standing, in part, because they filed sworn declarations that at least three individuals could be placed in expedited removal proceedings and that this risk of injury was concrete, particularized, and imminent, especially since the Department of Homeland Security's impending enforcement of the new expedited removal rule. Although the D.C. Circuit ultimately reversed my grant of a preliminary injunction, it held that I properly exercised jurisdiction over the case. *Make the Road, New York v. Wolf*, 962 F.3d 612, 618 (D.C. Cir. 2020).

45. In *Committee on the Judiciary v. McGahn*, you took an extremely broad view of standing that all but ignored the previous elements of standing that you clung to in *Federal Forest Resource Coalition* (individualized injury). Setting aside the merits of the underlying

controversy, your opinion never once mentions the phrase “political question.” Isn’t a case where the legislative branch is suing the executive branch a quintessential political question?

RESPONSE: In my opinion in *Committee on the Judiciary v. McGahn*, I both mentioned the phrase “political question” and provided an explanation as to why the political question doctrine was not applicable despite the nature of the parties as political branches. 415 F. Supp. 3d 148, 177–78 (D.D.C. 2019). In particular, I cited to the Supreme Court’s jurisprudence with respect to the political question doctrine which has “specifically confirmed that not all legal claims that impact the political branches are properly deemed non-justiciable political questions.” *Id.* at 178 (citing *Zivotofsky v. Clinton*, 566 U.S. 189 (2012) and *INS v. Chadha*, 462 U.S. 919 (1983)). In *McGahn*, I determined that the claims presented by the parties were related to the enforceability of a subpoena, and thus, presented purely legal questions of the variety that courts regularly confront. Such a determination was consistent with horizontal precedent in the circuit, *see id.* at 177 (citing *Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53, 71 (D.D.C. 2008)), as well as binding precedent from the D.C. Circuit, *see id.* at 178 (citing *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 389 (D.C. Cir. 1976)).

46. In both *AFGE v. Trump* and *Make the Road New York*, despite clear statutory language, you found a way to rule on the merits of the case. In both instances, liberal-leaning judges on the D.C. Circuit Court overruled you. In spite of the Circuit Court’s opinion, you repeatedly defended your decision during your hearing. Should we be concerned that your application of the law is unduly influenced by your own personal politics?

RESPONSE: No. Consistent with my methodology, I proceed in every case from a position of neutrality by first setting aside any preconceived notions and personal views regarding the parties and matters at issue in any case presented to me. Doing so at the outset of a case allows me to observe the constraints on my judicial authority and ensure that I consider only those inputs that are relevant to deciding a particular case or controversy. This methodology has led me to on occasion rule against the Obama Administration and to uphold Trump Administration policies. I have never considered or relied upon my own personal views in any case, including *Make the Road New York v. McAleenan* and *AFGE v. Trump*.

47. How many of those you sentenced for possessing, receiving or distributing child pornographic images reoffended? Please provide a list of the cases in which, after serving his/her sentence, the defendant reoffended.

RESPONSE: To my knowledge, none of the defendants whom I sentenced for child pornography offenses have reoffended. However, after a criminal defendant is released from custody and completes the imposed term of supervised release, the sentencing judge does not receive additional information about the defendant’s conduct. I therefore lack a factual basis to determine whether any defendant I have ever sentenced reoffended after they were released and completed their period of supervision by the court.

48. You previously served on the board of a school that espoused traditional Christian beliefs about marriage and human sexuality. Do you believe that being on the board of such an organization in any way disqualifies you from being put on the Supreme Court?

RESPONSE: I served on the inaugural advisory board of Montrose Christian School—a now-defunct kindergarten through 12th grade private school—from the fall of 2010 to the fall of 2011, prior to my nomination and confirmation as a federal district judge. I was aware that Montrose Christian School was affiliated with Montrose Baptist Church. I was not aware that the school had a public website or that any statement of beliefs was posted on the school’s website at the time of my service. My service on the advisory board primarily involved planning for school fund-raising activities for the benefit of enrolled students. I did not receive any compensation for my service.

Article VI of the Constitution forbids any religious test for appointment to any public office, including an appointment to judicial service. That provision states, in relevant part, that “all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” Per the oath of office and the Code of Conduct, a judge is required to set aside all personal beliefs, including any religious beliefs, when she undertakes to rule in the cases to which she is assigned.

- a. Do you believe people who hold traditional beliefs about marriage being exclusively the union of one man and one woman should be disqualified from being on the Supreme Court?

RESPONSE: Please see my response to Question 48. Disqualification from serving on the Supreme Court based solely on religious beliefs is inconsistent with Article VI of the Constitution.

49. In your hearing this week, you consistently described your judicial methodology as a three step process. I have some questions about the process.

- a. You mentioned that the first step is that you take yourself to a place of neutrality. Isn’t the best way to ensure that you make a neutral adjudication of the law to focus exclusively on the text and its original meaning?

RESPONSE: Over the course of my almost decade on the bench, I have developed a methodology that I use to ensure that I am ruling impartially and adhering to the limits on my judicial authority. I first ensure that I am proceeding from a position of neutrality by setting aside any personal views and clearing my mind of any preconceived notions about how the case might come out. Next, I consider the parties’ arguments and the record, to understand all of the facts, claims, and arguments. The final step is interpretation and application of the law to the facts in the case, where I am particularly mindful of the constraints on judicial authority. I assess the question of jurisdiction, and ask whether I even have the power to hear the case. If I do have jurisdiction, I look at the relevant provision of the Constitution, statute, or other applicable legal authority. I work to discern those words’ meaning as intended by the people who wrote them. I focus on original public meaning; I look at history and practice at the time the document was created to understand what those who created the text intended; I also look at precedent to understand how the text has been previously interpreted and applied. As a lower court judge, I am bound by precedent. If I am fortunate enough to be confirmed to the Supreme

Court, I would be bound by *stare decisis*. I do not decide cases based on my personal views or policy preferences. I observe these limits in recognition of the fact that judges have limited authority, and I must always stay in my limited, judicial lane.

- b. You also consistently said, “I look to the text and to what it meant to those who drafted it.” How do you differentiate this claimed approach from an original public meaning approach?

RESPONSE: I have not used any particular label to describe my approach to interpreting the Constitution or statutory text. I follow the methods of statutory and constitutional interpretation that the Supreme Court has employed. I look at the relevant provision of the Constitution, statute, or other applicable legal authority. I work to discern those words’ meaning as intended by the people who wrote them. I focus on original public meaning; I look at history and practice at the time the document was created to understand what those who created the text intended; I also look at precedent to understand how the text has been previously interpreted and applied. As a lower court judge, I am bound by precedent. If I am fortunate enough to be confirmed to the Supreme Court, I would be bound by *stare decisis*. I do not decide cases based on my personal views or policy preferences.

- c. Should a Judge’s personal viewpoint play a role in her jurisprudence?

RESPONSE: No.

50. Is retribution a proper consideration when sentencing a defendant? Is there statutory support for your position?

RESPONSE: Pursuant to section 3553(a) of Title 18 of the United States Code, district judges must impose sentences that are “sufficient, but not greater than necessary” to promote the purposes of the sentence, including providing just punishment, deterrence, incapacitation, and rehabilitation. 18 U.S.C. § 3553(a).

51. Is the holding of *United States v. American Express* limited to two-sided platforms that are purely transactional?

RESPONSE: In *Ohio v. American Express*, 138 S. Ct. 2274 (2018), the Supreme Court held that American Express’s requirement that merchants not dissuade customers from using American Express to avoid fees as a condition for using their two-sided platform did not violate the antitrust laws. Because the scope of *Ohio v. American Express* could be the subject of future litigation, it would be improper for me as a sitting judge to opine on that question.

52. How much deference, if any, should the Court give to the DOJ and FTC Horizontal Merger Guidelines?

RESPONSE: Courts are not bound by U.S. Department of Justice and U.S. Federal Trade Commission Horizontal Merger Guidelines, and do not owe particular deference to these sources. Some courts have relied on them as one tool to use in the merger evaluation process. See, e.g., *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017).

- a. Should that change if the guidelines are revised from administration to administration?

RESPONSE: Please see my response to Question 52.

53. How should a court approach a situation where DOJ and FTC are on the opposite sides of an antitrust case?

RESPONSE: As Justice Barrett noted, it would not be appropriate for me, as a sitting judge and as a judicial nominee, to offer an opinion on a hypothetical. In any case before me, I would consider the positions of the parties, the facts, and the binding Supreme Court precedent to decide the case.

54. Are there any good reasons for the court to continue upholding the judicially-created antitrust exemption for major league baseball?

RESPONSE: In *Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs*, 259 U.S. 200 (1922), the Supreme Court held that the antitrust laws do not apply to Major League Baseball. Because the antitrust exemption for Major League Baseball could be the subject of future litigation, it would be improper for me as a sitting judge to opine on this question.

55. Do you believe *Illinois Brick* and *Hanover Shoe* have inappropriately narrowed the remedies available to antitrust plaintiffs?

RESPONSE: It would not be appropriate for me to opine on this question; as Justices Kagan and Barrett explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

56. Given that the Constitution reserves to Congress the prerogative to balance competing political interests, do you think it is appropriate for courts to take into consideration factors other than consumer welfare in applying the antitrust laws?

RESPONSE: Please see my response to Question 31.

57. Does the non-delegation doctrine prevent the FTC from engaging in antitrust rulemaking? If it does not, what limits are there on FTC’s rulemaking authority?

RESPONSE: Administrative agencies can only exercise the rulemaking authority that Congress has delegated to them. *See United States v. Mead Corporation*, 533 U.S. 218, 228 n.6 (2001). Because the proper scope of the U.S. Federal Trade Commission’s rulemaking authority could be the subject of future litigation, it would be improper for me as a sitting judge and pending judicial nominee to opine on that question.

58. Should courts require that economic evidence of procompetitive benefits or efficiencies in an antitrust case be reasonably quantifiable and likely to be realized?

RESPONSE: Under the rule of reason, courts often use a “three-step, burden-shifting framework.” *Ohio v. American Express*, 138 S. Ct. 2274, 2284 (2018). First, “the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market.” *Id.* Second, “[i]f the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint.” *Id.* Third, “[i]f the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.” *Id.* Because the question of whether economic evidence of procompetitive benefits must be reasonably quantifiable and likely to be realized could be the subject of future litigation, it would be improper for me as a sitting judge and pending judicial nominee to opine on this question.

59. Should courts give weight to out-of-market efficiencies offered by defendants in an antitrust case? What about out-of-market harms offered by plaintiffs?

RESPONSE: The Supreme Court has stated that “anticompetitive effects in one market [cannot] be justified by procompetitive consequences in another.” *United States v. Philadelphia National Bank*, 374 U.S. 321, 370 (1963). The extent to which courts can and should give weight to out-of-market efficiencies and harms in particular cases could be the subject of future litigation; therefore, it would be improper for me as a sitting judge to opine on this question.

SENATOR TED CRUZ U.S. Senate Committee on the Judiciary

Questions for the Record for Ketanji Brown Jackson, Nominee to be Associate Justice of the United States Supreme Court

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. Is racial discrimination wrong?

RESPONSE: Under the Equal Protection Clause, all race-based classifications are highly suspect. The Supreme Court has held that the Constitution requires that all race-based classifications are subject to strict scrutiny and are thus only permissible when narrowly tailored to achieve a compelling government interest.

2. Do you condemn racial discrimination in all forms?

RESPONSE: Please see my response to Question 1.

3. Is religious discrimination wrong?

RESPONSE: As I stated at my hearing, religious freedom is a core, foundational, constitutional right. It is in the First Amendment of the Constitution and reflects the Founding Fathers' understanding that people in this country should be able to hold their religious beliefs and practice them without persecution. Additionally, religious discrimination is prohibited by numerous federal and state laws.

4. Do you condemn religious discrimination in all forms?

RESPONSE: Please see my response to Question 3.

5. Is disability discrimination wrong?

RESPONSE: Multiple statutes address disability discrimination, including the Americans with Disabilities Act, which Congress enacted “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” as well as “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1)-(2). As a federal judge for the last decade, it has been my duty to adjudicate individual claims in specific cases and controversies, including claims of disability discrimination. When I have jurisdiction to do so, I resolve properly filed legal disputes concerning disability discrimination based on the arguments that the parties make, the established facts of the particular case, and the applicable law.

6. Do you condemn disability discrimination in all forms?

RESPONSE: Please see my response to Question 5.

7. What is your understanding of the concept of “original meaning” originalism?

RESPONSE: The Supreme Court has recently interpreted various constitutional provisions by attempting to ascertain the original meaning of the words used as understood by the public at the time of the Founding. *See, e.g., United States v. Jones*, 132 S. Ct. 945, 949 (2012) (Fourth Amendment); *Citizens United v. Federal Election Commission*, 558 U.S. 310, 906 (2010) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42–57 (2004) (Confrontation Clause); *Alden v. Maine*, 527 U.S. 706, 715–724 (1999) (Eleventh Amendment). While the Supreme Court has primarily evaluated the original public meaning of the text of the constitutional provision at issue, *see Jones*, 132 S. Ct. at 949, 953; *Heller*, 554 U.S. at 576–77, its binding precedents also sometimes refer to the original intent of the Framers, *see Crawford*, 541 U.S. at 53–54, 59, 61.

8. When it comes to interpreting the U.S. Constitution, do you consider yourself an originalist?

RESPONSE: I have not used any particular label to describe my approach to interpreting the Constitution. I would interpret the Constitution in a manner that is consistent with the methods of interpretation that the Supreme Court employs when it undertakes to interpret constitutional provisions. That includes reviewing the text of the constitutional provision, any relevant history,

and any applicable precedent. As explained in my response to Question 7, the Supreme Court has recently interpreted various constitutional provisions by attempting to ascertain the original meaning of the words used as understood by the public at the time of the Founding. *See, e.g., United States v. Jones*, 132 S. Ct. 945, 949 (2012) (Fourth Amendment); *Citizens United v. Federal Election Commission*, 558 U.S. 310, 906 (2010) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42–57 (2004) (Confrontation Clause); *Alden v. Maine*, 527 U.S. 706, 715–724 (1999) (Eleventh Amendment). While the Supreme Court has primarily evaluated the original public meaning of the text of the constitutional provision at issue, *see Jones*, 132 S. Ct. at 949, 953; *Heller*, 554 U.S. at 576–77, its binding precedents also sometimes refer to the original intent of the Framers, *see Crawford*, 541 U.S. at 53–54, 59, 61.

The prevailing interpretive frame for interpreting the Constitution is to look back through history and determine what the words meant at the time of the founding. There are some provisions in the Constitution that set forth specific rules. For example, the Constitution states that a person must be at least thirty-five years old to be President of the United States. As to clear provisions of this sort, the Constitution can be interpreted based on the text alone. Other provisions of the Constitution, like the protection against unreasonable searches and seizures or the protection of due process of law, are not clear from the text alone. As to those provisions, the Court looks at them in the context of history and in the structure of the Constitution. They look at the circumstances of the case in comparison to what the words meant at the time that they were adopted, and they analogize to current circumstances. It is a process that seeks to understand the core foundational principles in the Constitution as captured by the text as originally intended, and to apply those principles to modern circumstances.

- a. If not, do you reject the idea that the constitutional text ought to be read according to its original meaning?

RESPONSE: Please see my response to Question 8.

9. Besides existing precedent, are there any tools that you would use to interpret constitutional provisions?

RESPONSE: Yes.

- a. Please describe those tools.

RESPONSE: Over the course of my almost decade on the bench, I have developed a methodology that I use to ensure that I am ruling impartially and adhering to the limits on my judicial authority. I first ensure that I am proceeding from a position of neutrality by setting aside any personal views and clearing my mind of any preconceived notions about how the case might come out. Next, I consider the parties' arguments and the record, to understand all of the facts, claims, and arguments. The final step is interpretation and application of the law to the facts in the case, where I am particularly mindful of the constraints on judicial authority. I assess the question of jurisdiction, and ask whether I even have the power to hear the case. If I do have jurisdiction, I look at the relevant provision of the Constitution. I work to discern those words' meaning as intended by the

people who wrote them. I consider original public meaning; I look at history and practice at the time the document was created to understand what those who created the text intended; I also look at precedent to understand how the text has been previously interpreted and applied. As a lower court judge, I am bound by precedent. If I am fortunate enough to be confirmed to the Supreme Court, I would be bound by *stare decisis*. I do not decide cases based on my personal views or policy preferences. I observe these limits in recognition of the fact that judges have limited authority, and I must always stay in my limited, judicial lane.

10. What value would you place on public statements of the Founders and Framers of the Constitution or its respective Amendments in interpreting the Constitution and its Amendments?

RESPONSE: In some cases, the Supreme Court has looked to the public statements of the Founders and Framers to guide the Court in interpreting the Constitution. *See, e.g., Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2203 (2020). The role that such statements may play in a case would depend on the circumstances of the particular case or controversy before the Court.

11. What value would you place on the English Common Law in interpreting the Constitution and the Bill of Rights?

RESPONSE: In some cases, the Supreme Court has looked to English Common Law to guide the Court in interpreting the Constitution. *See, e.g., Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020). The role that English Common Law may play in a case would depend on the circumstances of the particular case or controversy before the Court.

12. What value would you place on the Declaration of Independence in interpreting the Constitution and the Bill of Rights?

RESPONSE: In some cases, the Supreme Court has looked to the Declaration of Independence as part of the history it considers in interpreting the Constitution. *See, e.g., Stern v. Marshall*, 564 U.S. 462, 483–84 (2011). The role the Declaration of Independence may place in a case would depend on the circumstances of the particular case or controversy before the Court.

13. What is your understanding of the judicial philosophy called strict constructionism.?

RESPONSE: I understand the term “strict constructionism” to refer to a methodology that interprets text literally.

14. Do you hold a position on strict constructionism, yes or no?

RESPONSE: The Supreme Court has explained that, when interpreting a statute, it does “not aim for ‘literal’ interpretations,” but instead “simply seek[s] the law’s ordinary meaning.” *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1484 (2021). I would follow the Supreme Court’s methods of interpretation. That includes giving the text of a statute controlling weight, considering the meaning of the terms that the legislature used, the structure of the statute as a whole, and other traditional tools of statutory construction.

a. If yes, what is your position?

RESPONSE: Please see my response to Question 14.

15. Please explain, in your own words, the theory prevalent among members of the Founding Fathers' generation that humans possess natural rights that are inherent or inalienable.

RESPONSE: The theory that humans possess inherent or inalienable rights is reflected in the Declaration of Independence, which states: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."

16. Do you hold a position on whether individuals possess natural rights, yes or no?

RESPONSE: I do not hold a position on whether individuals possess natural rights.

a. If yes, what is your position?

RESPONSE: Please see my response to Question 16.

17. Please articulate your understanding of the distinction between natural law and positive law, and state whether you consider each to be relevant to the U.S. Constitution, the Bill of Rights, congressional power, or federal law?

RESPONSE: I understand natural law to refer to principles derived from nature that govern human conduct. I understand positive law to refer to enacted legal texts, such as the Constitution, federal statutes, and treaties. I interpret federal law according to the methods of interpretation employed by the Supreme Court, including by resolving cases or controversies based on the text at issue, any pertinent history, and any applicable precedent.

18. What is your position on relying on precedents from foreign courts to interpret the U.S. constitution?

RESPONSE: It is not proper for judges to rely on foreign law in determining the meaning of the Constitution.

19. Do you hold a position on whether the U.S. Constitution is a "living" document?

RESPONSE: While Courts must apply established constitutional principles to new circumstances, the meaning of the Constitution itself is fixed and does not change or evolve.

a. If yes, please explain the basis for your position.

RESPONSE: Please see my response to Question 19.

20. Which modern Justice is closest to your judicial philosophy or judicial approach?

RESPONSE: Over the course of my almost decade on the bench, I have developed a methodology that I use to ensure that I am ruling impartially and adhering to the limits on my

judicial authority. I first ensure that I am proceeding from a position of neutrality by setting aside any personal views and clearing my mind of any preconceived notions about how the case might come out. Next, I consider the parties' arguments and the record, to understand all of the facts, claims, and arguments. The final step is interpretation and application of the law to the facts in the case, where I am particularly mindful of the constraints on judicial authority. I assess the question of jurisdiction, and ask whether I even have the power to hear the case. If I do have jurisdiction, I look at the relevant provision of the Constitution, statute, or other applicable legal authority. I work to discern those words' meaning as intended by the people who wrote them. I focus on original public meaning; I look at history and practice at the time the document was created to understand what those who created the text intended; I also look at precedent to understand how the text has been previously interpreted and applied. As a lower court judge, I am bound by precedent. If I am fortunate enough to be confirmed to the Supreme Court, I would be bound by *stare decisis*. I do not decide cases based on my personal views or policy preferences. I observe these limits in recognition of the fact that judges have limited authority, and I must always stay in my limited, judicial lane. I am not able to single out any particular Justice's judicial philosophy as closest to the approach that I employ as a judge.

21. Have you ever questioned the validity of any current provision of the U.S. Constitution or its Amendments?

RESPONSE: No.

a. If yes, which provisions or Amendments?

RESPONSE: Please see the response to Question 21.

22. Will you commit to not letting your personal policy positions affect your legal decision-making?

RESPONSE: I have served as a federal judge for almost a decade. During my tenure on the bench, arguments I previously made on behalf of clients as an advocate have not impacted the decisions I have made as a judge. The same would continue to be true if I was confirmed to the Supreme Court.

23. Justice Kagan stated in her confirmation hearing that "we're all textualists now." But I want to make sure you agree with that statement. Would you apply the text of statutes as they are written?

RESPONSE: Yes. Under Supreme Court precedent, if "statutory text is plain and unambiguous," a judge "must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

24. Have you read any of Justice Antonin Scalia's books regarding statutory interpretation?

RESPONSE: I am familiar with the principles in Justice Scalia's books because, during judicial training seminars sponsored by the Federal Judicial Center, I attended several sessions at which Brian Garner (Justice Scalia's co-author) was the presenter. I have also referenced, where

appropriate in my decisions, portions of his books that were relevant to the issues upon which I was ruling

25. If yes, which books?

RESPONSE: Please see my response to Question 24.

26. If you have not yet read *Reading Law: The Interpretation of Legal Texts*, by Scalia and Garner, will you commit to making reasonable efforts to do so over the next 12 months?

RESPONSE: Please see my response to Question 24.

27. Are there any common canons of statutory interpretation to which you do not subscribe?

RESPONSE: No.

28. Do you believe the Supreme Court should continue to employ substantive canons, generally?

RESPONSE: As a sitting federal judge, all of the Supreme Court's pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, it is my testimony that, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court's binding precedents, or on abstract legal issues or hypotheticals.

29. Do you believe that contemporaneous dictionaries can be appropriate resources for judges to determine statutory meaning?

RESPONSE: The Supreme Court has stated that "our job is to interpret the words" of a statute "consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" *Wisconsin Central Limited v. United States*, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The Court has looked to dictionaries from around the time of enactment to assist in determining the ordinary meaning of the words at issue. *See, e.g., id.* at 2070–71.

30. To what extent do you think the intent of individual legislators who voted for a bill ought to influence your interpretation of a statute?

RESPONSE: As the Supreme Court has stated, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Incorporated v. Dollar Park & Fly, Incorporated*, 469 U.S. 189, 194 (1985). If the text of the statute is clear, the Court "must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). If and only if a statute is ambiguous, I have occasionally consulted the legislative history of a statute, as the Supreme Court permits, to assess the original intent of the legislative body that enacted the provision at issue, and have primarily, if not exclusively, cited to official Senate or House

Reports. I have not resolved a statutory ambiguity based solely on the legislative history of the statute. *See, e.g., Milner v. Department of the Navy*, 562 U.S. 562, 572 (2011) (“Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.”).

31. To what extent do you think that a committee report issued by a Congressional Committee in Congress ought to influence your interpretation of a statute?

RESPONSE: Legislative history “need not be consulted when . . . the statutory text is unambiguous.” *United States v. Woods*, 571 U.S. 31, 46 n.5 (2013); *see also Milner v. Department of the Navy*, 562 U.S. 562, 574 (2011) (“Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.”). Accordingly, legislative history may influence the interpretation of a statute if and only if the statute is ambiguous. *See Milner*, 562 U.S. at 572; Response to Question 30. When the Supreme Court has reviewed legislative history, it has found some sources more authoritative than others. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984) (citations omitted). The role that any piece of legislative history may play in a case would depend on the circumstances of the particular case or controversy before the Court.

32. To what extent do you think that an individual legislator’s speech or remarks in the record ought to influence your interpretation of a statute?

RESPONSE: Please see my response to Question 31.

33. How should a court assess the reliability of legislative history and Congressional records?

RESPONSE: Please see my response to Question 31.

34. Should a court defer to Congressional fact-finding if a trial court determines that Congress was deliberately indifferent to the truth or falsity of factual findings?

RESPONSE: The Supreme Court has stated that it “review[s] congressional factfinding under a deferential standard,” but it “retains an independent constitutional duty to review factual findings where constitutional rights are at stake.” *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007). Whether a court should defer to congressional factfinding and how it would evaluate such factfinding would depend on the circumstances of the particular case or controversy.

35. If a court can evaluate the veracity of Congressional fact-finding, on what basis should a court evaluate the truth or falsity of such factual findings?

RESPONSE: Please see my response to Question 34.

36. To what extent would you apply notions of legislative purpose to interpret a statute?

RESPONSE: A court interpreting a statute seeks to understand the intention of the legislature that enacted the law. The Supreme Court has explained that “[n]o legislation pursues its purposes at all costs,” and “[e]very statute [proposes], not only to achieve certain ends, but also to achieve them by particular means.” *Freeman v. Quicken Loans, Incorporated*, 566 U.S. 624, 637 (2012)

(citations and internal quotation marks omitted). Accordingly, “[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Park ‘N Fly, Incorporated v. Dollar Park & Fly, Incorporated*, 469 U.S. 189, 194 (1985). If the “statutory text is plain and unambiguous,” the Court “must apply the statute according to its terms.” *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). A Court may also discern Congress’s purpose by considering the structure of the statute as a whole, other traditional tools of statutory construction, and any statutory provision setting forth the purpose of the statute.

37. In looking at floor debates as a source of legislative history, is it necessary to compare what a member of Congress said on the floor with his or her final vote on the legislation to determine the relevance of the remarks?

RESPONSE: Please see my response to Question 31.

38. When looking at committee reports, is a report relevant only to the extent it reflects the views of those Congressional members who voted in favor of the legislation? If not, should courts also look to the views of those members who did not vote for the bill in committee but ultimately voted for the bill’s passage?

RESPONSE: Please see my response to Question 31.

39. What is your reaction to a recent comment that Justice Thomas’s opinions often reflect the beliefs of white conservatives?

RESPONSE: I am not familiar with the comment referenced by this question, but I hold all of my potential future colleagues in the highest esteem.

40. Do you believe that judicial philosophies are inherently interwoven with concepts of race?

RESPONSE: I am not familiar with this statement, and I have never purported to be a proponent of the view “that judicial philosophies are inherently interwoven with concepts of race.”

41. What is your view regarding the Rule of Lenity?

RESPONSE: As a sitting federal judge, I have routinely undertaken to interpret statutes, and I have issued many written opinions that involve statutory interpretation. As my past practice shows, I seek to resolve alleged ambiguities in a statutory provision by examining the structure of the statute as a whole and other indicia of meaning based upon the statutory text. If that does not resolve the ambiguity, I look to Supreme Court precedent for guidance as to the tools of interpretation to apply next in light of the particular circumstances of the case, including the rule of lenity, which establishes that “when there are two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language.” *McNally v. United States*, 483 U.S. 350, 359–60 (1987).

42. Have you expressed a view on the correctness or incorrectness of any Supreme Court decision to President Biden or any other official or employee in the Executive Branch?

RESPONSE: I have not expressed a view on the correctness or incorrectness of any Supreme Court decision to President Biden or any other official or employee in the Executive Branch.

a. If yes, which opinions and what views have you expressed?

RESPONSE: Please see my response to Question 42a.

43. In your opinion, how strongly does the doctrine of stare decisis bind justices to prior decisions by the Supreme Court?

RESPONSE: As I have previously explained, *stare decisis* is a bedrock legal principle that ensures consistency and impartiality of judgments. The Court has articulated factors to consider in determining whether to overrule a prior decision, including the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to “rob[]” the decision “of significant application or justification.” *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Federation Of State, County, & Municipal Employees.*, 138 S. Ct. 2448, 2478 (2018).

44. Under what circumstances should or could a prior opinion be overturned?

RESPONSE: Please see my response to Question 43.

45. Some of the seminal and most contemporaneously controversial decisions by the Supreme Court were reached by overturning precedent, such as *Brown v. Board of Education*, which overturned the “separate but equal” doctrine from *Plessy v. Ferguson*. That decision had been settled law for sixty years before the Supreme Court overruled it. *Brown v. Board of Education* was a landmark victory for justice and the promise of equal protection guaranteed in the Constitution. Was the Supreme Court correct to overturn *Plessy* in *Brown v. Board of Education*?

RESPONSE: As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from commenting on the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Court’s binding precedents.

Brown v. Board of Education, 347 U.S. 483 (1954), is one of three exceptions to the general principle that a judge should not comment on the Court’s precedents. *Brown* warrants this special status because that decision overruled the manifest injustice of *Plessy v. Ferguson*, 163 U.S. 537 (1896), and the underlying premise of the *Brown* decision—*i.e.*, that “separate but equal is inherently unequal”—is beyond dispute. Therefore, just as other nominees for judicial office and other sitting federal judges have done, I can confirm that *Brown* was rightly decided without calling into question my duties under the Code of Conduct.

46. Was *Brown v. Board of Education* correctly decided?

RESPONSE: Please see my response to Question 45.

47. Please describe what you consider to be the holding of *Brown v. Board of Education*.

RESPONSE: The Court in *Brown* held “that in the field of public education the doctrine of ‘separate but equal’ has no place,” and segregated educational facilities violate the right to “the equal protection of the laws guaranteed by the Fourteenth Amendment.” *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

48. If you are willing to state that you agree with the holding of *Brown v. Board of Education*, will you commit to not revisiting the idea that racial segregation in education is unconstitutional?

RESPONSE: As I have stated, the underlying premise of the *Brown* decision—that “separate but equal is inherently unequal”—is beyond dispute. The Court’s decision in *Brown* is a precedent of the Court entitled to respect under *stare decisis* principles.

49. Do you agree with Justice Harlan’s 1896 dissent in *Plessy v. Ferguson*, in which he said that the U.S. Constitution is colorblind?

RESPONSE: The Supreme Court has held that the Constitution requires that all race-based classifications are subject to strict scrutiny and are thus only permissible when narrowly tailored to achieve a compelling government interest.

50. In 2010, the Supreme Court overturned its earlier decision, *Austin v. Michigan State Chamber of Commerce*, in its landmark case, *Citizens United v. FEC*. Unlike *Brown v. Board of Education*, which was controversial at the time the opinion was issued but is now widely praised and accepted, *Citizens United* remains controversial in legal and political circles. Did the Supreme Court correctly decide *Citizens United v. FEC*?

RESPONSE: *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), is a precedent of the Court entitled to respect under *stare decisis* principles. As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from commenting on the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court’s binding precedents.

a. If not, what factors did the Supreme Court fail to consider in overturning its prior precedent?

RESPONSE: Please see my response to Question 50.

51. Please state whether you agree or disagree that the following cases are entitled to *stare decisis* as valid precedents of the Supreme Court.

a. *Marbury v. Madison*

- b. *McCulloch v. Maryland*
- c. *Wickard v. Filburn*
- d. *Griswold v. Connecticut*
- e. *Giden v. Wainwright*
- f. *Miranda v. Arizona*
- g. *United States v. Lopez*
- h. *Shelby County v. Holder*
- i. *Trump v. Hawaii*
- j. *Janus v. American Federation of State, County, and Municipal Employees, Council 31*
- k. *NIFLA v. Becerra*
- l. *Brnovich v. DNC*

RESPONSE: As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from commenting on the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, it is my testimony that, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court’s binding precedents.

Marbury v. Madison, 5 U.S. 137 (1803), is one of three exceptions to the general principle that a judge should not critique or comment on the Supreme Court’s precedents. *Marbury* warrants this special status because the principle of judicial review that that decision established—*i.e.*, its holding that, per the design of our Constitution, “[i]t is emphatically the province and duty of the judicial department to say what the law is[,]” *Marbury*, 5 U.S. at 177—is a foundational finding that is beyond dispute. *See* Federalist No. 78 (Alexander Hamilton) (“The interpretation of the laws is the proper and peculiar province of the courts.”). Therefore, just as other nominees for judicial office and other sitting federal judges have done, I can confirm that *Marbury* was rightly decided without calling into question my duties under the Code of Conduct.

52. If you believe that not all cases listed in Question 51 are entitled to the same respect as precedent under the doctrine of *stare decisis*, please identify which cases you believe are not settled or are entitled to be revisited.

RESPONSE: Please see my response to Question 51. All precedents of the Supreme Court are entitled to respect under *stare decisis* principles. In determining whether to revisit any precedent, the Court applies the factors it has articulated for determining whether to overrule a prior

decision. Those factors include the quality of the decision's reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to "rob[]" the decision "of significant application or justification." *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Federation Of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2478 (2018).

53. Have you ever expressed a view, publicly or otherwise, on the correctness of *Roe v. Wade*?

RESPONSE: As I explained at the hearing, *Roe v. Wade*, 410 U.S. 113 (1973), is a precedent of the Supreme Court entitled to respect under *stare decisis* principles. As a sitting federal judge, all of the Supreme Court's pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court's binding precedents.

a. If yes, what views have you expressed?

RESPONSE: Please see my response to Question 53.

54. Have you ever expressed a view, publicly or otherwise, on the correctness of *Planned Parenthood v. Casey*?

RESPONSE: As I explained at the hearing, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), is a precedent of the Supreme Court entitled to respect under *stare decisis* principles. As a sitting federal judge, all of the Supreme Court's pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court's binding precedents.

a. If yes, what views have you expressed?

RESPONSE: Please see my response to Question 54.

55. Do you believe that constitutional provisions have "penumbras"?

RESPONSE: In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court described several "penumbras." The Court stated, for example, that "[t]he right of association contained in the penumbra of the First Amendment is one[.]" *Id.* at 484. I have not used the term "penumbras" in any of the cases I have decided as a federal judge. Consistent with the positions taken by other pending judicial nominees, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court's binding precedents.

56. Do you currently hold a view on the case of *Employment Division v. Smith*?

RESPONSE: In *Employment Division v. Smith*, 494 U.S. 872, 878–82 (1990), the Court held that “neutral, generally applicable” laws generally do not violate the First Amendment’s Free Exercise Clause, even if they incidentally burden religious exercise. Congress enacted the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, in response to *Smith* to provide greater statutory “protection for religious exercise than is available under the First Amendment.” See *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). *Smith* is precedent of the Supreme Court entitled to respect under *stare decisis* principles. As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court’s binding precedents.

a. If yes, what is your view?

RESPONSE: Please see my response to Question 56.

57. Please describe your understanding of when a Supreme Court decision should be considered “super precedent” that cannot be overturned.

RESPONSE: As I explained at the hearing, I am not familiar with a Supreme Court decision that has used the term “super precedent.” All Supreme Court decisions are precedential and entitled to respect under *stare decisis* principles, and in revisiting any precedent, the Court applies the factors it has articulated for determining whether to overrule a prior decision. Those factors include the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to “rob[]” the decision “of significant application or justification.” *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); see also, e.g., *Janus v. American Federation Of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2478 (2018).

58. In *Gregg v. Georgia*, the Supreme Court held that the death penalty was not per se unconstitutional, as it could serve the social purposes of retribution and deterrence, narrowing its earlier opinion in *Furman v. Georgia*. More specifically, the Gregg Court upheld Georgia’s new capital sentencing procedures as the new rules reduced the problem or arbitrary application that had arisen in earlier statutes. Do you agree with Justice Stewart’s plurality opinion in *Gregg v. Furman* that the death penalty is constitutional and serves purposes of retribution and deterrence?

RESPONSE: The Supreme Court rejected the argument that the death penalty violated the Eighth Amendment in *Gregg v. Georgia*, 428 U.S. 153 (1976), and I would respect that precedent as I would all Supreme Court precedents.

59. Should courts consider the race of a defendant when sentencing or affirming capital sentences? For example, if a court finds that capital punishment has been enforced in a way that has a disproportionate impact on a particular demographic group, should the court

weigh whether the defendant is a member of that demographic group against imposing the death penalty?

RESPONSE: As a sitting circuit judge, when I have jurisdiction to do so, I resolve properly filed legal disputes based on the arguments that the parties make, the established facts of the particular case, and the applicable law. Accordingly, I would analyze any issue regarding the death penalty in light of the factual context and the arguments presented to the Court. As explained by the Supreme Court, a “defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination.” *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987).

60. What considerations or evidence should courts consider when interpreting and applying the “cruel and unusual punishment” clause of the Eighth Amendment?

RESPONSE: In deciding how to apply the Eighth Amendment in particular cases, judges appropriately look to the structure and history of the text, including evidence about how the Eighth Amendment was understood when drafted and ratified. Where appropriate in a specific case, I would engage in that undertaking. I would also be bound, consistent with the doctrine of *stare decisis*, to follow judicial precedents that have interpreted and applied the constitutional text in question. To date, the Supreme Court has repeatedly stated that the Eighth Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

61. In your opinion, when is it appropriate for the Supreme Court to consider evidence that the parties or amici believe sheds light on changes to societal norms or values?

RESPONSE: The role of the judiciary is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and to resolve each case on an individual basis by assessing the parties’ legal arguments based on the law, including relevant precedent. It would be inappropriate for me to opine in the abstract about the circumstances in which evidence might be properly considered.

62. What is the role of sociology, scientific evidence, and data in the Supreme Court’s analysis?

RESPONSE: The role of a judge is to evaluate legal claims, and to determine the merits of those claims based on arguments presented by the parties, in light of applicable law, including the binding precedents of the Supreme Court. Judges should not be policymakers. Judges interpret law; they do not make it. “It is Congress’s job to enact policy and it is th[e] Court’s job to follow the policy Congress has prescribed.” *SAS Institute, Incorporated v. Iancu*, 138 S. Ct. 1348, 1358 (2018). Whether sociology, scientific evidence, and data may play any role in the Court’s legal analysis would depend on the facts and circumstances of the particular case or controversy before the Court.

63. Should the Supreme Court consider its own credibility or legitimacy when considering whether to overturn precedent in light of contemporary norms or values? If so, how should the Court weigh the importance of its credibility against other considerations?

RESPONSE: As previously explained, *stare decisis* is a bedrock legal principle that ensures consistency and impartiality of judgments. The Court has articulated factors to consider in

determining whether to overrule a prior decision, including the quality of the decision's reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to "rob[]" the decision "of significant application or justification." *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Federation Of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2478 (2018). The application of these factors is case specific. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract on how these factors should apply or what other considerations if any may be appropriate. If I am confirmed, and if I am asked to revisit a particular precedent in the context of a specific case, I would evaluate the parties' arguments, the relevant law, the factual record, and would consider the views of my colleagues.

64. During the confirmation hearings for Justice Kagan, Senator Cornyn asked her about what role she thought a judge's opinion of the evolving norms and traditions of our society had in interpreting the Constitution. She replied: "I think that traditions are most often overlooked in considering the liberty clause of the 14th Amendment. I think every member of the court thinks that the liberty clause of the 14th Amendment applies to more than physical restraints. And I think almost every member thinks that it gives some substantive protection and not just procedural protections." Do you agree with Justice Kagan's statement?

RESPONSE: I am not familiar with the basis for Justice Kagan's statement, but as a pending judicial nominee and a sitting federal judge, I am bound by the Supreme Court's precedents. According to the Supreme Court, the Due Process Clauses of the Fifth and Fourteenth Amendments are the primary sources for the recognition of unenumerated rights, and the Court has held that, as a general matter, due process protects "those fundamental rights and liberties which are, objectively, 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 quotation marks and citations omitted).

65. What substantive protections do you believe are impliedly protected by the Fourteenth Amendment that are not expressly addressed in its text?

RESPONSE: Cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), recognize an unenumerated right to privacy that encompasses the right to marital privacy and to use contraception. *Obergefell v. Hodges*, 576 U.S. 644 (2015), and *Loving v. Virginia*, 388 U.S. 1 (1967), affirm a constitutional right to marry, and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), recognize the right to have children and to direct their education. In *Saenz v. Roe*, 526 U.S. 489 (1999), the Supreme Court affirmed a right to travel. In *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court has recognized a right to abortion subject to limitations as articulated. The Supreme Court has also "assumed, and strongly suggested" that there is a "right to refuse unwanted lifesaving medical treatment." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

According to the Supreme Court, the Due Process Clauses of the Fifth and Fourteenth Amendments are the primary sources for the recognition of these rights. The Court has explained that due process protects “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty[.]” *Glucksberg*, 521 U.S. at 720–21 (internal quotation marks and citations omitted).

66. Once new types of substantive due process protections have been announced by the Supreme Court, can the Supreme Court roll them back by overturning precedent in light of changing social norms or values?

RESPONSE: In revisiting any precedent, the Court applies the factors it has articulated for determining whether to overrule a prior decision. Those factors include the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to “rob[]” the decision “of significant application or justification.” *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Federation Of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2478 (2018).

67. In the Supreme Court’s 2018 ruling, *Janus v. American Federation of State, County, and Municipal Employees*, it set forth a non-exhaustive list of factors to weigh in considering whether to overturn precedent: “the quality of [the precedent’s] reasoning, the workability of the rule it establishes, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decisions.” For each of the factors listed in subquestions (a)-(e) below, please explain your understanding of what each factor means and how to apply it.

a. Quality of the precedent’s reasoning

RESPONSE: In determining whether to overturn precedent, one factor the Court has considered is the “strength of [its] reasoning.” *See, e.g., Montejo v. Louisiana*, 556 U.S. 778, 793 (2009); *Janus v. American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2480–81 (2018). The application of this factor is case specific. As a pending nominee and a sitting judge, it would not be appropriate for me to discuss in the abstract whether or how this factor would apply. If I am confirmed, and if I am asked to revisit a prior precedent in the context of a specific case, I would evaluate the parties’ arguments, the relevant law, and consult the views of my colleagues.

b. Workability of the precedent’s rule or standard

RESPONSE: In determining whether to overturn precedent, one factor the Court has considered is whether its rule has “proven to be intolerable simply in defying practical workability.” *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *see also Janus v. American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2481–82 (2018). The application of this factor is case specific. As a pending nominee and a sitting judge, it would not be appropriate for me to discuss in the abstract whether or how this factor would apply. If I am confirmed, and if I am asked to revisit a prior

precedent in the context of a specific case, I would evaluate the parties' arguments, the relevant law, and consult the views of my colleagues.

c. Consistency with other related decisions

RESPONSE: In determining whether to overturn precedent, one factor the Court has considered is “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine.” *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *see also Janus v. American Federation Of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2483–84 (2018). The application of this factor is case specific. As a pending nominee and a sitting judge, it would not be appropriate for me to discuss in the abstract whether or how this factor would apply. If I am confirmed, and if I am asked to revisit a prior precedent in the context of a specific case, I would evaluate the parties' arguments, the relevant law, and consult the views of my colleagues.

d. Factual developments since the case was decided

RESPONSE: In determining whether to overturn precedent, one factor the Court has considered is “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.” *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *see also Janus v. American Federation Of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2482 (2018). The application of this factor is case specific. As a pending nominee and a sitting judge, it would not be appropriate for me to discuss in the abstract whether or how this factor would apply. If I am confirmed, and if I am asked to revisit a prior precedent in the context of a specific case, I would evaluate the parties' arguments, the relevant law, and consult the views of my colleagues.

e. Reliance interests

RESPONSE: In determining whether to overturn precedent, one factor the Court has considered is “whether a rule is subject to the kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation.” *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *see also Janus v. American Federation Of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2484 (2018). The application of this factor is case specific. As a pending nominee and a sitting judge, it would not be appropriate for me to discuss in the abstract whether or how this factor would apply. If I am confirmed, and if I am asked to revisit a prior precedent in the context of a specific case, I would evaluate the parties' arguments, the relevant law, and consult the views of my colleagues.

68. Out of the five *Janus* factors discussed in Question 67, which do you believe is most dispositive or persuasive when assessing whether to overrule precedent?

RESPONSE: The application of the *stare decisis* factors is case specific. As a pending nominee and a sitting judge, it would not be appropriate for me to discuss in the abstract whether or how the *stare decisis* factor would apply. If I am confirmed, and if I am asked to revisit a prior

precedent in the context of a specific case, I would evaluate the parties' arguments, the relevant law, and consult the views of my colleagues.

69. If the Supreme Court reaches a decision this term, before Justice Stephen Breyer leaves the bench, that you believe is incorrectly decided or in which you would have reached a different decision, are you bound by precedent from this term?

RESPONSE: All Supreme Court decisions are precedential and entitled to respect under *stare decisis* principles.

70. Explain the current scope of the Privileges or Immunities clause, contained in the Fourteenth Amendment, to the best of your knowledge.

RESPONSE: The Fourteenth Amendment states, in part, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]" The Supreme Court has stated that "[d]espite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases*, 16 Wall. 36 (1873), it has always been common ground that this Clause protects . . . the right to travel." *Saenz v. Roe*, 526 U.S. 489, 503 (1999). Because the scope of the Privileges or Immunities Clause could be the subject of future litigation, it would be improper for me as a sitting judge and pending judicial nominee to opine on it.

71. Explain the current scope of the Privileges and Immunities clause, contained in Article IV, Section 2, of the Constitution, to the best of your knowledge.

RESPONSE: The Supreme Court has, at times, suggested that the Privileges and Immunities Clause of Article IV, section 2, which states that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States[.]" is a source for certain unenumerated rights. *Saenz v. Roe*, 526 U.S. 489, 501–02 (1999) (recognizing a right to travel). Because the scope of the Privileges and Immunities Clause could be the subject of future litigation, it would be improper for me as a sitting judge to opine on it.

72. President Biden has committed to nominating a Supreme Court Justice who would enforce the Ninth Amendment. Will you commit to enforcing that Amendment?

RESPONSE: The role of a judge is to interpret and apply the law, including all constitutional amendments, to the cases and controversies presented.

73. What does it mean to you, in your opinion, to "enforce the Ninth Amendment" as a justice?

RESPONSE: The role of a judge is to interpret and apply the law, including all constitutional amendments, to the cases and controversies presented.

74. Will you commit to enforcing the Tenth Amendment?

RESPONSE: I am committed to upholding and defending the entire Constitution.

75. Do you hold a view on whether the holding expressed by the Supreme Court in the *Bostock v. Clayton County, Ga.* decision encompasses bisexuals and “gender non-binary” individuals? Yes or no?

RESPONSE: In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2021), the Supreme Court held that Title VII’s prohibition against discrimination on the basis of sex encompasses discrimination on the basis of sexual orientation and gender identity. In delivering the majority opinion for the Supreme Court, Justice Gorsuch wrote that “[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.” *Id.* at 1737. This is a binding precedent of the Supreme Court. As in all cases, if I am confirmed I would evaluate any case relating to this issue based on the factual record and applicable law.

- a. If yes, what is your view?

RESPONSE: Please see my response to Question 75.

76. Do you agree with Justice Kennedy’s statement in his *Obergefell v. Hodges* opinion that “[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises,” as opposed to bigotry?

RESPONSE: Consistent with the positions taken by other pending judicial nominees, it is my testimony that, as a general matter, it would be inappropriate for me to comment on the merits or demerits of statements that Justices have made in opinions that are binding precedents of the Supreme Court.

- a. If not, why not?

RESPONSE: Please see my response to Question 75.

77. What is your understanding of the holding of the Supreme Court in *McGirt v. Oklahoma*?

RESPONSE: In *McGirt v. Oklahoma*, the Supreme Court ruled that the lands in Oklahoma reserved for the Creek Nation by 19th century treaties remain a reservation for purposes of the Major Crimes Act, which gives the federal government exclusive criminal jurisdiction over certain crimes committed by Indians in “Indian country.” 140 S. Ct. 2452 (2020).

78. Please explain the test for determining whether a congressional statute regulates interstate commerce.

RESPONSE: According to the Supreme Court, Congress’s power under the Commerce Clause is broad, but not unlimited. The Court has held that Congress may only regulate three categories of activity pursuant to that constitutional provision: (1) “the use of the channels of interstate commerce;” (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce” and activities that threaten such instrumentalities, persons or things; and

(3) activities that “substantially affect interstate commerce[.]” *United States v. Lopez*, 514 U.S. 549, 558–59 (1995); *see also National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519, 536 (2012).

79. Congress has delegated some rulemaking authority to executive agencies through legislation over the past decades. Without addressing any specific dispute over agency authority, when the scope of delegated authority to an agency under the text of a federal originating statute is unclear, please explain your approach or methodology to identify and understand what limits apply to the agency’s rulemaking authority.

RESPONSE: As reflected in my opinions, I seek to resolve alleged ambiguities in a statutory provision by examining the structure of the statute as a whole and other indicia of meaning based upon the statutory text. *See, e.g., Alliance of Artists and Recording Companies v. General Motors Company*, 162 F. Supp. 3d 8 (D.D.C. 2016), *aff’d*, 947 F.3d 849 (D.C. Cir. 2020). If that does not resolve the ambiguity, I look to Supreme Court precedent for guidance as to the tools of interpretation to apply next in light of the particular circumstances of the case (e.g., the rule of lenity in the criminal context, *Chevron* deference, etc.). I have also consulted the legislative history of a statute, as the Supreme Court permits, but I have never resolved an ambiguity based solely on the legislative history of the statute. Also, Congress’s power to delegate authority to administrative agencies is limited by the requirement that an intelligible principle must govern any such delegation, such that the agency can conform its rulemaking to that principle. Questions about how to understand the scope of a delegated authority in a specific factual and statutory context would have to be answered in that context.

80. What is the purpose of notice and comment rulemaking?

RESPONSE: The Supreme Court has observed that in enacting the Administrative Procedure Act and requiring notice and comment procedures for substantive rulemaking, “Congress made a judgment that notions of fairness and informed administrative decision-making require that agency decisions be made only after affording interested persons notice and an opportunity to comment.” *Chrysler Corporation v. Brown*, 441 U.S. 281, 316 (1979).

81. Do protections for free speech under the First Amendment vary based on viewpoint?

RESPONSE: The Supreme Court has held that the First Amendment generally prohibits viewpoint-based regulation of speech. *See, e.g., Iancu v. Brunetti*, 588 U.S. ___, 139 S. Ct. 2294, 2299 (2019) (“The government may not discriminate against speech based on the ideas or opinions it conveys.” (citing *Rosenberger v. Rector & Visitors of University of Virginia*., 515 U.S.819, 829–30 (1995) (explaining that viewpoint discrimination is an “egregious form of content discrimination” and is “presumptively unconstitutional”))).

82. Obviously the Supreme Court has listed some limitations on what qualifies as protected speech under the First Amendment. But should the Supreme Court consider how popular a viewpoint is at the given point in time in weighing whether the First Amendment applies?

RESPONSE: No. Considering how popular a viewpoint is in order to assess whether the First Amendment applies would be at odds with the Supreme Court’s First Amendment precedents, which generally preclude discriminating on the basis of the viewpoint represented.

83. Does the First Amendment apply to speech that the government views as inaccurate or disfavored?

RESPONSE: The Supreme Court has established that the First Amendment can apply to speech that is regarded as inaccurate or is disfavored. *See, e.g., United States v. Alvarez*, 567 U.S. 709 (2012) (holding the Stolen Valor Act’s criminal prohibition on false claims about one’s own receipt of a military medal unconstitutional under the First Amendment); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (explaining that a “bedrock principle” of the First Amendment is that the expression of an idea cannot be prohibited simply because “the idea itself [is] offensive or disagreeable”). That said, under Supreme Court precedents, if such speech falls within one of a limited number of categories—*e.g.*, obscenity, fighting words, true threats—then First Amendment protections may be reduced or inapplicable. *See, e.g., Virginia v. Black*, 538 U.S. 343, 359 (2003); *Miller v. California*, 413 U.S. 15, 24 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

84. Does the right to free speech still apply under the First Amendment if people who hear the speech are offended?

RESPONSE: The Supreme Court has held that First Amendment protections can apply to offensive speech. Indeed, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”).

The Supreme Court has made clear, however, that “speech that is ‘vulgar,’ ‘offensive,’ and ‘shocking’ is ‘not entitled to absolute constitutional protection under all circumstances.’” *Hustler Magazine, Incorporated v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 747 (1978)). For instance, the government can “lawfully punish an individual for the use of insulting ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). Similarly, “obscene material is unprotected by the First Amendment[.]” such that the government may regulate materials that, “taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973).

85. Please state your understanding of the doctrine of qualified immunity, as it stands now.

RESPONSE: Under the doctrine of qualified immunity, “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). While there need not be a prior case directly on point, a right is “clearly established” only when existing precedent has “placed the statutory or constitutional question beyond debate.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).

86. In what situations may a judge reduce a final criminal sentence? What factors or provisions constrain a judge's ability to reduce a sentence?

RESPONSE: Several federal statutes and rules address post-conviction procedures, such as 18 U.S.C. § 3582, 28 U.S.C. § 2255, 28 U.S.C. § 2241, and Rule 35 of the Federal Rules of Criminal Procedure. The applicable factors or provisions regarding a judge's authority to reduce a sentence are predicated on the relevant statutes and the Constitution. Under the First Step Act, enacted by Congress in 2018, a federal judge may revisit and reduce the sentence of a federal inmate upon motion of the Director of the Bureau of Prisons or, under enumerated circumstances, by motion of the defendant. As the statute instructs, a federal judge ruling on such a motion may reduce a defendant's sentence where "extraordinary and compelling reasons warrant a reduction" or the defendant is at least 70 years of age and meets other enumerated criteria, and upon consideration of applicable factors set forth in Section 3553(a) and applicable policy statements issued by the Sentencing Commission. 18 U.S.C. § 3582.

87. To your knowledge, have any of the defendants that you sentenced that were discussed during this week's hearing been brought back into custody for reoffending or violating the terms of their supervised release?

RESPONSE: To my knowledge, none of the defendants whom I sentenced that were discussed last week have reoffended. After a defendant is released from custody and completes the imposed term of supervised release, the sentencing judge does not receive additional information about the defendant's conduct. I therefore lack a factual basis to determine whether any defendants discussed at my hearing reoffended after they were released and completed their period of supervision by the court.

a. If yes, please identify which defendants and the violations that they are alleged to have committed after release.

RESPONSE: Please see my response to Question 87.

88. How has the Supreme Court defined the term "immutable characteristics" within the scope of equal protection analysis?

RESPONSE: When an act of government distinguishes between groups of people, the Supreme Court has described the "traditional indicia of suspectness" to include those classifications that pertain to "an immutable characteristic determined solely by the accident of birth," and also those that pertain to classes of persons who are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (internal quotation marks and citations omitted). To date, when there is a constitutional challenge, the Supreme Court has determined that race, religion, national origin, and alienage are suspect classes that are subject to heightened ("strict") scrutiny. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371–32 (1971).

89. Please describe the difference between the rational basis test, intermediate scrutiny, and strict scrutiny under equal protection analysis.

RESPONSE: The Supreme Court has identified three levels of scrutiny in resolving equal protection challenges. Strict scrutiny generally applies to classifications based on a suspect category (e.g., race or national origin) or those that implicate the ability to exercise a fundamental right, pursuant to which the law will be struck down unless the government can show that the law is narrowly tailored to serve a compelling governmental interest. Other laws are subject to intermediate scrutiny, which requires that the law must be substantially related to an important government interest. Still other laws, including economic legislation and other non-suspect classifications, are reviewed under a rational basis standard, under which the law will be upheld unless it furthers no legitimate government interest.

90. In what circumstances has the Supreme Court applied intermediate scrutiny to equal protection challenges?

RESPONSE: The Supreme Court has subjected laws that classify by sex to intermediate scrutiny, which requires that the law must be substantially related to an important government interest. The Supreme Court has explained that “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” *United States v. Virginia*, 518 U.S. 515, 531 (1996).

91. Please describe your understanding of the holding of each of the following cases as they involve women’s rights or privileges under the law.

- a. *Reed v. Reed*, 404 U.S. 71 (1971)
- b. *Stanton v. Stanton*, 421 U.S. 7 (1975)
- c. *Craig v. Boren*, 429 U.S. 190 (1976)
- d. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981)
- e. *United States v. Virginia*, 518 U.S. 515 (1996)

RESPONSE: In *Reed v. Reed*, 404 U.S. 71 (1971), which concerned a mother and father’s competing petitions to administer their deceased intestate son’s estate, the Supreme Court held unconstitutional a provision of Idaho state probate law requiring males to be preferred over females in the selection of estate administrators. The Court found the provision’s preference for males over females in this context inconsistent with the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

In *Stanton v. Stanton*, 421 U.S. 7 (1975), the Supreme Court held that a Utah statute specifying a greater age of majority for males (21) than for females (18), in the context of parental child support obligations, was unconstitutional in that it denied equal protection of the laws as guaranteed by the Fourteenth Amendment.

In *Craig v. Boren*, 429 U.S. 190 (1976), the Supreme Court held that Oklahoma’s regulation of beer sales under which females 18–20 years of age could buy 3.2% beer but males of the same age could not, was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The majority of the Court reasoned that the proffered defense of the law failed to

demonstrate its substantial relationship to the achievement of any important governmental objective.

In *Kirchberg v. Feenstra*, 450 U.S. 455 (1981), the Supreme Court affirmed a judgment of the Fifth Circuit Court of Appeals invalidating a Louisiana statute that gave a husband the unilateral right to dispose of property jointly owned with his wife without her consent, reasoning that the statute violated the Equal Protection Clause of the Fourteenth Amendment because the defense of the statute failed to evince an “‘exceedingly persuasive justification’” for “‘expressly discriminat[ing] on the basis of sex,’” *id.* at 461 (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979)), or show that it served an “important government objective,” *ibid.*

In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court struck down Virginia Military Institute’s policy of limiting enrollment to male cadets as unconstitutional. A majority of the Justices reasoned that Virginia failed to provide the “‘exceedingly persuasive justification,’” *id.* at 546 (quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 731 (1982)), required to sustain the Institute’s “categorical exclusion of women” under the Equal Protection Clause of the Fourteenth Amendment, *id.* at 547.

92. In *United States v. Virginia*, Justice Ruth Bader Ginsburg wrote the majority, in which she explained: “Supposed inherent differences are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring. The two sexes are not fungible, a community made up exclusively of one sex is different from a community composed of both.” During the hearing, you said you are not familiar with the case or quote. Now that you have had time to look at the case, do you believe that Judge Ginsburg’s reasoning that “physical differences between men and women...are enduring” is still good law?

RESPONSE: Yes, the Supreme Court’s decision in *United States v. Virginia*, 518 U.S. 515 (1996), is binding precedent. As noted, the majority opinion stated that “physical differences between men and women . . . are enduring.” *Id.* at 533. The Court also recognized: “‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” *Id.*

93. Each of these cases in Question 91 addresses the correct application of constitutional law to women, either because of women’s similarities and equality to men or because of their biological differences. Do you believe that there is a biological difference between men and women?

RESPONSE: Respectfully, I am not aware that any prior Supreme Court nominee has been asked to define what a woman is or answer related questions, for example, about biological differences between men and women. I am aware that the reason these questions are being posed to me is because there are active conversations happening in the public sphere—among policymakers and others—regarding LGBTQ individuals, especially transgender individuals, and their participation in various activities.

This is precisely why I, as a federal judge and as a nominee, must decline to answer these questions. It would be inappropriate for me to opine in the abstract on legal issues that are or could be in litigation, including legal issues regarding who is protected under the Constitution and our civil rights laws, or the scope of that protection. I can tell you that as a federal judge for almost a decade, it has been my duty to adjudicate individual claims in specific cases and controversies, including claims of sex discrimination. When I have jurisdiction to do so, I resolve properly filed legal disputes concerning sex discrimination based on the arguments that the parties make, the established facts of the particular case, and the applicable law.

Finally, I would note that I am pleased to be the sixth woman nominated to serve on the United States Supreme Court.

94. Each of these cases focused on women. How has the Supreme Court defined or understood the term “woman” in these cases?

RESPONSE: As noted in my response to Question 90 and Question 91, the Supreme Court has considered a number of cases involving classifications based upon sex. If confirmed, I would resolve each case by assessing the parties’ legal arguments based on the facts and applicable law. To the extent that this question relates to legal issues regarding who is protected under the Constitution and our civil rights laws and the scope of that protection, it would be inappropriate to opine in the abstract on legal issues that are or could be in litigation.

95. Must a judge have scientific training in the field of biology to identify whether an individual seeking relief from a federal court is a man or a woman in cases where the claims involve gender-based causes of action?

RESPONSE: As a federal judge, my role in the judicial system is to consider any legal claims in light of the facts of a particular case and applicable law. To the extent that this question relates to legal issues regarding who is protected under the Constitution and our civil rights laws and the scope of that protection, it would be inappropriate to opine in the abstract on legal issues that are or could be in litigation.

96. In each of the cases described in Question 91, the Supreme Court was able to address the rights and protections afforded to women as a matter of law. How to define a woman was not a contentious issue and was accepted as a necessary predicate fact to address the merits of each case. The Supreme Court as such has accepted what a woman is as a matter of fact not even meriting taking judicial notice. As such, no canons of ethics or code of conduct prohibit you from assessing a factual question. As a factual matter, how do you define a “woman”?

RESPONSE: Please see my response to Question 93 and Question 95.

97. If the question of how a woman should be defined is a matter that might come before you if confirmed, then surely all of the precedent protecting women’s rights—however controversial—are also unsettled. Should the Supreme Court’s precedents that protect women *because they are women* and not men be overturned in light of new theories of gender identity?

RESPONSE: As a sitting federal judge, I am bound by the Supreme Court’s precedents, including precedent regarding sex-based classifications. If confirmed, I will continue to respect all binding Supreme Court precedent.

98. Each of these cases in Question 91 reflected a legal battle at the time they were heard for women’s rights and equal protection under the Constitution. If men and women do not have biological differences, why were any of these Supreme Court cases necessary?

RESPONSE: Please see my response to Question 97.

99. If men and women are not different, is the Supreme Court’s application of heightened scrutiny, introduced in *Craig v. Boren*, to laws that treat women differently than men, still necessary to enforce the Equal Protection Clause?

RESPONSE: Please see my response to Question 97.

100. At your hearing you told Senator Blackburn that you could not define the word “woman” because you are not a biologist. Is gender dependent on biology?

RESPONSE: Please see my response to Question 93 and Question 95.

101. What methodology would you employ to determine the sex of a litigant under the law?

RESPONSE: Please see my response to Question 93

102. On the campaign trail, President Joe Biden announced that he would only consider possible nominees who are African American women. Are you aware of what criteria or qualities the office of White House Counsel used to determine whether possible nominees are women?

RESPONSE: No.

103. Before announcing retirement, did Justice Stephen Breyer ever communicate to you about the potential of filling his seat?

RESPONSE: No.

- a. If yes, please describe the approximate date and substance of any such communications.

RESPONSE: Please see my response to Question 103.

104. Did you discuss the possibility of filling Justice Breyer’s seat with anyone in 2021?

RESPONSE: I did not discuss the possibility of filling Justice Breyer’s seat with anyone at the White House, or make any public statements about this issue. At various points in time, I have had private conversations with friends and family regarding a variety of topics.

- a. If yes, please describe the approximate dates and substance of such communications.

RESPONSE: Please see my response to Question 104.

105. Did you ever initiate contact directly or indirectly with the Biden White House in order to communicate your interest or qualifications regarding a potential nomination?

RESPONSE: No.

106. The Supreme Court has never had an Asian American on the bench. Do you think it is appropriate for Asian Americans to be excluded from consideration for any given judicial nomination?

RESPONSE: As I testified during the hearing, having a diverse judicial branch is important because it bolsters public confidence in our judicial system.

107. Should non-black Hispanics be excluded from consideration for any given judicial nomination?

RESPONSE: Please see my response to Question 106.

108. Should Native American individuals be excluded from consideration for any given judicial nomination?

RESPONSE: Please see my response to Question 106.

109. Senator Whitehouse (D-RI) refers to some outside groups that raise money for legal disputes as “dark money” organizations. Have you spoken to the leaders or other representatives of any dark money groups since Justice Breyer’s retirement was announced?

RESPONSE: No.

a. If yes, which groups?

RESPONSE: Please see my response to Question 109

110. In the course of your preparation for your hearings, were there any questions that Biden Administration officials advised you not to answer?

RESPONSE: No.

a. If yes, what kinds of questions were you advised not to answer?

RESPONSE: Please see my response to Question 110.

111. Have you ever communicated to anyone about your Wikipedia page?

RESPONSE: Yes. I first became aware that I had a Wikipedia page many years ago, and have been aware that for several years, Mr. Godi has made accurate edits to my page regarding my background and work. Since the public reporting on this matter, I have had no conversations

with Mr. Godi regarding my Wikipedia page or any other matter. Prior to public reporting, I had been unaware of the edits to the pages of other potential nominees, and at no time have I ever suggested, encouraged, or directed anyone to edit the Wikipedia page of any other individual.

- a. If yes, state the approximate dates and substance of those communications.

RESPONSE: Please see my response to Question 111.

112. Did your potential nomination affect the timing or substance of your opinions on the D.C. Circuit?

RESPONSE: No.

- a. If yes, please describe how the timing or substance of your opinions were altered.

RESPONSE: Please see my response to Question 112.

113. Before her passing, Justice Ginsburg made negative comments about President Trump that she later expressed regret for making. What is your position on a Supreme Court Justice making negative statements regarding Executive Branch leaders?

RESPONSE: As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on statements made by a Justice of the Supreme Court.

114. Have you attended any rallies as a participant or as a speaker at a rally?

RESPONSE: The First Amendment to the Constitution guarantees the right to free speech and assembly. This is a bedrock protection of our free and democratic society. To the best of my recollection, I cannot recall whether I have ever attended any rallies as a participant or speaker.

- a. If yes, for which cause(s)?

RESPONSE: Please see my response to Question 114.

115. Have you attended any protests as a participant?

RESPONSE: The First Amendment to the Constitution guarantees the right to free speech and assembly. This is a bedrock protection of our free and democratic society. To the best of my recollection, as a college student more than 30 years ago, I participated in at least one protest with other members of the Black Students Association related to the dearth of full-time faculty in the African-American Studies Department at Harvard University. Additionally, I participated in protest activities my freshman year of college after a fellow student hung a confederate flag outside his dorm room window.

- a. If yes, for which cause(s)?

RESPONSE: Please see my response to Question 115.

116. Have you attended any parades in support of causes?

RESPONSE: The First Amendment to the Constitution guarantees the right to free speech and assembly. This is a bedrock protection of our free and democratic society. To the best of my recollection, in 1988 or so I attended a school spirit parade for my high school, Miami Palmetto Senior High School. I was the President of my class and the parade was in support of our homecoming celebration. I do not recall attending any other parades in support of causes.

a. If yes, please state the cause or causes.

RESPONSE: Please see my response to Question 116.

117. Have you ever volunteered or worked in support of a political candidate?

RESPONSE: Yes.

a. If yes, please identify which candidate or candidates.

RESPONSE: In 2008, I was an election poll monitor for both the primary and general elections on behalf of Lawyers for Change, Obama for America Presidential Campaign.

118. Please describe your commitment to collegiality with colleagues who have differing views from you.

RESPONSE: I have had the privilege of working alongside people who have a variety of viewpoints about the law and legal analysis throughout my professional career. As a Supreme Court law clerk, for example, I evaluated complex legal issues and regularly exchanged significant insights with the clerks of other Justices. Similarly, my work in both private practice and on the Sentencing Commission (an entity that is bipartisan by design) routinely required me to consider, assess, and incorporate the views and concerns of brilliant lawyers and judges with different backgrounds and perspectives. Taking into account the views of others helped me to formulate my own perspective on the issues.

The ability to listen with an open mind to other points of view, and to be respectful even if a judge ultimately disagrees with another judge's analysis or conclusions, is crucial to the effective operation of the court, and, ultimately, maintains public trust in the court as an institution. As a judge on both the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit, collegiality has been tremendously important to me. I have been grateful for the guidance, insights, and generosity of my judicial colleagues.

119. Have you ever attended a Federalist Society event?

RESPONSE: Not to my recollection.

a. If yes, which ones?

RESPONSE: Please see my response to Question 119.

b. If no, why not?

RESPONSE: To the best of my recollection, I do not recall ever being invited to speak or serve as a panelist at any Federalist Society event.

120. You offered remarks at a 2017 conference of the American Constitution Society. Please list all other American Constitution Society events that you have attended or in which you have participated.

RESPONSE: I am not a member of the American Constitution Society. Over the past 15 years, I have attended or participated in the following eight ACS events by invitation. On December 5, 2007, I was a panelist at an American Constitution Society event at Jones Day, Washington, D.C. I participated in a panel discussion regarding the representation of Guantanamo detainees and amici in cases before the Supreme Court. On March 26, 2015, I was a panelist on a panel entitled the “12th Annual Federal Judge’s Panel” discussing criminal justice system reforms, including proposed changes to the federal sentencing system. The event was hosted by the Penn Law American Constitution Society at the University of Pennsylvania Carey Law School. On November 17, 2016, I was a guest speaker at a question and answer session about careers and clerking that was co-hosted by the American Constitution Society among other organizations. On June 8, 2017, I introduced Justice Breyer at “A Conversation with Associate Justice Stephen Breyer” at the American Constitution Society Annual National Convention, which covered a variety of constitutional law issues. The event took place at Yale Law School. On March 10, 2018, I served as a moderator on a panel entitled “The Power of Protest and Legal Responses to Threats to Assembly” at the American Constitution Society 2018 National Student Convention at Northwestern Law School, Chicago, Illinois. On March 7, 2019, I was a guest speaker at an event entitled “Path to the Bench,” hosted by the Harvard Chapter of the American Constitution Society at Harvard Law School. On July 10, 2019, I was a panelist on a panel entitled “How to Land a Clerkship: Practical Advice from Judges,” hosted by the American Constitution Society in Washington, D.C. On June 8–12, 2020, I attended the Virtual National Convention of the American Constitution Society.

121. Will you commit to making reasonable efforts to attend or speak at a Federalist Society event over the next three years, if invited?

RESPONSE: As a judge, I have and will evaluate all invitations to attend or speak at events on a case-by-case basis and in compliance with any relevant ethical rules. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to commit in the abstract to attend unspecified events hosted by any particular organization.

122. When hiring clerks, have you ever considered race as a factor when making hiring decisions?

RESPONSE: As a judge, I have always strived to hire smart, capable clerks from a wide variety of backgrounds, and with diverse experiences and interests. This involves a holistic evaluation of many criteria including, but not limited to: an applicant’s educational achievement, work experience, letters of recommendation, life experiences, challenges overcome, my interview with them, and their skills working with others.

- a. If yes, in what way have you considered race as a factor?

RESPONSE: Please see my response to Question 122.

123. When hiring clerks, have you ever considered sex as a factor when making hiring decisions?

RESPONSE: Please see my response to Question 122.

a. If yes, in what way have you considered gender as a factor?

RESPONSE: Please see my response to Question 122.

124. When hiring clerks in the future, do you intend to use race as a factor in making your decisions?

RESPONSE: I will continue to employ the same process that I described in my response to Question 122.

125. When hiring clerks in the future, do you intend to use sex as a factor in making your decisions?

RESPONSE: Please see my response to Question 124.

126. When hiring clerks in the future, do you intend to use an applicant's selfdesignated gender-identity as a factor in making your decisions?

RESPONSE: Please see my response to Question 124.

127. Do you believe that an individual person can be "diverse"?

RESPONSE: This question does not provide sufficient context (or a definition) of the intended meaning of the term "diverse" to enable me to provide a substantive answer, but I believe that every person has multiple distinct qualities.

a. If yes, what does it mean for an individual person to be "diverse"?

RESPONSE: Please see my response to Question 127.

128. Some Justices, such as Justice Scalia, occasionally hired clerks who maintained explicit disagreements with them, often referred to as "counterclerks." Are you open to hiring such clerks?

RESPONSE: Please see my response to Question 122.

a. If not, why?

RESPONSE: Please see my response to Question 122.

129. Have you ever hired a clerk who was a member of the Federalist Society?

RESPONSE: To the best of my recollection, yes.

130. Would you be willing to hire a qualified clerk if they were a member of the Federalist Society during their tenure in your chambers?

RESPONSE: Please see my response to Question 122 and Question 129.

131. Can non-black individuals be the subject of racism or racial discrimination?

RESPONSE: Yes. Our Constitution guarantees that no person or group will be denied equal protection of the law. Consistent with that guarantee, Congress has enacted several civil rights laws to protect individuals from discrimination on the basis of a protected status, including race, color, religion, sex, and national origin. Such laws, including the relevant provisions of the Civil Rights Act of 1964, apply to all Americans.

132. Have you ever made comments regarding the idea that white people cannot be victims of racism?

RESPONSE: No.

a. If yes, please provide the approximate date and substance of such comments.

RESPONSE: Please see my response to Question 132.

133. Do you believe that the American legal system is systematically racist?

RESPONSE: As a federal judge for the last decade, it has been my duty to adjudicate individual claims in specific cases and controversies, including claims of race discrimination. When I have jurisdiction to do so, I resolve properly filed legal disputes concerning race discrimination based on the arguments that the parties make, the established facts of the particular case, and the applicable law.

134. Do you believe that the American economic system is systematically racist?

RESPONSE: Please see my response to Question 133.

135. In your 2020 presentation at the University of Michigan, you discussed the 1619 Project, a series which has also been published as a podcast by the “acclaimed investigative journalist Nikole Hannah-Jones (who happens to be a black woman).” You described her “provocative thesis” and quoted from her podcast that “[W]e are raised to think about 1776 as the beginning of our democracy. But when that ship arrived on the horizon...in 1619[, the] decision made by the colonists to purchase that group of 20 to 30 human beings—*that* was a beginning, too.”

You described Nikole Hannah-Jones as an “acclaimed investigative journalist” and quoted from her work. Do you agree with Nikole Hannah-Jones’ factual conclusions drawn in the 1619 Project that the American Revolution was fought in large part to preserve slavery in North America?

RESPONSE: As I noted at my nomination hearing, the 1619 Project is not something I have studied and it has not come up in my work as a judge.

136. Do you believe that the founders of the United States declared the colonies' independence from Great Britain "in order to ensure slavery would continue"?

RESPONSE: Please see my response to Question 135.

137. Do you reject any claim that the U.S. Constitution is illegitimate because its authors were Caucasian or because some authors were slave owners?

RESPONSE: I do not support any claim that the Constitution is illegitimate. As I stated during my hearing, I love our country and the Constitution, and the rights that make us free. As a federal judge for almost a decade, I am committed to upholding and defending the Constitution.

138. Do you reject recent statements made by a legal commentator that the U.S. Constitution is "kind of trash"?

RESPONSE: I do not support the claim that the Constitution is "kind of trash." As I stated during my hearing, I love our country and the Constitution, and the rights that make us free. As a federal judge for almost a decade, I am committed to upholding and defending the Constitution.

139. In this same presentation, you spoke about how black women are "*bona fide* leaders of mass social movements, such as #Me Too and Black Lives Matter, and are routinely called upon offer cogent commentary on the workings of government, on television and elsewhere, and, of course, they have also persisted in authentically and courageously speaking truth to power, standing in the gap between the powerful and the powerless, and providing crucial civil-rights litigation support." Do you believe that the leaders of the Black Lives Matter ("BLM") organization offer "cogent commentary on the workings of government" and "speak[] truth to power"?

RESPONSE: In this quotation, I was referring to Black women generally as being "called upon [to] offer cogent commentary on the workings of government, on television and elsewhere" and "courageously speaking truth to power[.]" Beyond that, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to express any personal views about any organization's involvement in political advocacy.

140. At the time that you gave this speech in January 2020, BLM had a list of its statement of beliefs—called "What We Believe"—available on its website¹:

- a. "Black Lives Matter began as a call to action in response to state sanctioned violence and anti-Black racism The impetus for that commitment was, and still is, the rampant and deliberate violence inflicted on us by the state." Do you agree with this statement from BLM's statements of beliefs?

¹ "What We Believe," Black Lives Matter (last accessed Sept. 30, 2019), available at <https://web.archive.org/web/20190930154938/https://blacklivesmatter.com/what-we-believe/>.

RESPONSE: I am not familiar with this statement. As a judicial nominee and sitting federal judge, it would be inappropriate for me to comment on a private group's statement of beliefs and it would contravene the Code of Conduct for United States Judges to associate myself with any political viewpoint.

- b. "We are self-reflexive and do the work required to dismantle cisgender privilege and uplift Black trans folk, especially Black trans women who continue to be disproportionately impacted by trans-antagonistic violence." Do you agree with this statement from BLM's statements of beliefs?

RESPONSE: Please see my response to Question 140a.

- c. "We disrupt the Western-prescribed nuclear family structure requirement by supporting each other as extended families and 'villages' that collectively care for one another, especially our children, to the degree that mothers, parents, and children are comfortable." Do you agree with this statement from BLM's statements of beliefs?

RESPONSE: Please see my response to Question 140a.

- d. "We foster a queer-affirming network. When we gather, we do so with the intention of freeing ourselves from the tight grip of heteronormative thinking, or rather, the belief that all in the world are heterosexual (unless s/he or they disclose otherwise)." Do you agree with this statement from BLM's statements of beliefs?

RESPONSE: Please see my response to Question 140a.

141. As you noted, BLM was founded and led by three black women, Patrisse Cullors, Alicia Garza, and Opal Tometi. In 2015, Patrisse Cullors described the organization as follows: "We actually do have an ideological frame[work]." "We are trained Marxists. We are super-versed on, sort of, ideological theories." Do you believe that Marxist beliefs are a "cogent commentary on the workings government"?

RESPONSE: Please see my response to Question 140a.

142. In your 2020 Speech at Michigan Law School, you also spoke about Derrick Bell's book, *Faces at the Bottom of the Well: The Permanence of Racism*. "Dr. Janet Bell's late husband, Professor Derrick Bell, who was a civil rights lawyer and the first tenured African-American professor at Harvard Law School, wrote a book in the early 1990s about the persistence of racism in American life that he entitled '**Faces At the Bottom of the Well.**' [slide] My parents had this book on their coffee table for many years, and I remember staring at the image on the cover when I was growing up; I found it difficult to reconcile the image of the person, who seemed to be smiling, with the depressing message that the title and subtitle conveyed. I thought about this book cover again for the first time in forty years when I started preparing for this speech, because, before the civil rights gains of the 1960s, black women were the quintessential faces at the bottom of the well of American society, given their existence at the intersection of race and gender—both of which were highly disfavored characteristics." Did you review this book as part of the process of preparing your speech?

RESPONSE: No.

143. What is your opinion of Dr. Bell’s conclusions that he draws in the book about the “permanence of racism” in this country?

RESPONSE: I am not familiar with the conclusions referenced in this question.

144. In October 2021, you spoke at a Harvard Alumni Association event where you said that America is facing “growing inequality in wealth and access to education in the United States, and various systemic obstacles to social advancement and democratic ideals.”

a. What, specifically, did you mean in this address by “systemic obstacles to social advancement”?

RESPONSE: In October 2021, I was asked to moderate a conversation with Harvard President Lawrence Bacow on behalf of the Harvard Alumni Association. The questions that I posed to President Bacow were provided to me by the Harvard Alumni Association and were chosen from questions that other alumni had posed.

b. What, specifically, did you mean by “systemic obstacles” to “democratic ideals”?

RESPONSE: See my response to Question 144a. As a federal judge for the last decade, it has been my duty to adjudicate individual claims in specific cases and controversies, rather than “systemic obstacles.”

145. In that same address, you suggested that Harvard should work to “accelerate[] social justice.” What did you mean in this address by “social justice”?

RESPONSE: See my response to question 144.a.

146. In June 2017, you spoke as a guest at the American Constitution Society’s (ACS) Annual National Convention, where you thanked ACS “for the incredible work that you do every day to advance the cause of justice, to promote the rule of law, and to champion our constitutional norms.” Please describe the kind of activities that ACS promotes that you were referring to in this statement.

RESPONSE: At the June 2017 event, I served as an introductory speaker for “A Conversation with Associate Justice Stephen Breyer.” My understanding is that the American Constitution Society (ACS) hosts a wide variety of events and panels that include discussions by prominent legal scholars, practicing lawyers, as well as sitting judges. ACS also hosts events where speakers offer advice to law students about careers in the law, including through describing their own career trajectories. These serve a valuable role in providing information for the next generation of lawyers.

147. Did you attend or participate in any other panel discussions or speeches at the 2017 ACS Annual National Convention?

RESPONSE: No. To the best of my recollection, the only other event I attended at the convention was a meal.

148. As ACS describes on its website, “The ACS National Convention attracts nearly 1,000 of the nation’s leading progressive lawyers, law professors, policy advocates, judges and elected officials, providing a unique opportunity to learn about pressing legal issues. The 2017 convention took place from June 8–10 and included panel discussions on a wide range of topics, including the future of constitutional law, immigration, voting rights, reproductive rights and fake news.” Would you describe yourself as a progressive judge?

RESPONSE: I have never called myself a “progressive judge” nor do I have a clear understanding of the meaning of that phrase. Under the Code of Conduct for United States Judges and established standards of judicial ethics, a judge’s own personal views regarding any matter must not have any bearing on her interpretation and application of the law. I abide by the Code of Conduct when I review cases and publish opinions. Furthermore, as I noted at the hearing, I have a methodology to ensure that I am ruling impartially that I have employed in my years on the bench. I first ensure that I am proceeding from a position of neutrality, by clearing my mind of preconceived notions and setting aside any personal views.

149. ACS provided attendees of the 2017 ACS Annual National Convention the opportunity to obtain CLE credit for attending its panels, and created descriptions of the events on each topic, such as the descriptions below.² Please answer each question about these various panel discussions separately.

a. Panel: “A New Battle in the Fight for Voting Rights” – “The past ten years have seen a deluge of state laws restricting the right to vote through voter ID requirements, limits to voter registration drives, cuts to early voting, and other restrictive measures. In 2013, many states were newly emboldened by the Supreme Court’s decision devastating key provisions of the Voting Rights Act, and the assault on voting rights intensified. Now, with a presidential administration that repeatedly speaks of millions of ‘illegally cast ballots’ despite all evidence to the contrary, advocates fear a new battle in the fight for voting rights may be approaching. How can we most effectively defend against restrictive measures in the states and at the federal level?”

i. Do you believe that state voter ID laws are restrictive or intended for voter suppression?

RESPONSE: The Supreme Court has held that voter identification laws are not per se unconstitutional. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). As a sitting judge and judicial nominee, it would not be appropriate for me to offer an opinion on threshold policy questions or abstract legal issues.

ii. Do you believe that the Supreme Court’s 2013 decision in *Shelby County v. Holder* “devastated” the Voting Rights Act?

² 2017 ACS National Convention, Continuing Legal Education (CLE) Instructions (June 15, 2017), <https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/CLE%206.15.17.pdf>.

RESPONSE: As Justices Kagan and Barrett explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

iii. Do you believe that there is an intensifying assault on voting rights?

RESPONSE: As a sitting judge and judicial nominee, it would not be appropriate for me to offer an opinion on threshold policy questions or abstract legal issues.

- b. Panel: “A Nation of Immigrants No More?” – “Our national debate over immigration policy is certainly not new, but with executive orders suspending refugee admissions and immigration from certain Muslim majority nations, and sweeping DHS memoranda designed to make all undocumented immigrants fair game for deportation, the Trump Administration has generated a heated debate about the very nature of America. As its agenda continues to take shape, what responses are available legislatively, administratively, or in the courts? Topics may include due process rights, detention, deportation, prosecutorial discretion, childhood arrivals and the legality of registration systems.”

- i. What responses to conservative immigration policies should be taken in or by the courts?

RESPONSE: As a federal judge for the last decade, my role in the judicial system is to consider the legal claims in the particular cases before me. I have performed my judicial role based only on the facts and the law, consistent with the limited role of judges that our Constitution contemplates, and would continue to act accordingly, if confirmed.

- ii. Among illegal aliens who are in the country without proper legal documentation or status, should only some be eligible for deportation?

RESPONSE: As a federal judge for the last decade, my role in the judicial system is to consider the legal claims in the particular cases before me. It would be inappropriate for me to comment on threshold policy questions concerning which noncitizens should be subject to removal proceedings.

- iii. Are deportation or removal valid policy responses to individuals breaking federal immigration laws?

RESPONSE: Please see my response to Question 149(b)(ii).

- iv. What steps have you taken in writing your opinions to use the term “undocumented immigrant” or “noncitizen” instead of the language used in the Immigration and Nationalization Act, “illegal alien”?

RESPONSE: As I have testified, the judiciary is the only branch of government required to explain its decisions. When writing opinions, I strive

to use language that is clear and accessible so that the people who read my opinions will understand what the law is and the basis for my decision.

- c. Panel: “The Price of Injustice” – “Over the last several decades, America’s criminal justice system has increasingly imposed onerous financial burdens on the criminally accused—often the most economically vulnerable—including money bail, asset forfeiture, court fees, and fines. When used appropriately, these tools may increase public safety and hold those who commit crimes accountable for their actions. But too often these financial penalties are imposed indiscriminately or used to raise funds for police, the courts, or other local government programs without the need to raise taxes, while leaving the accused and their families with crushing, sometimes insurmountable debt. The inability to pay money bail results in extended jail stays, even for those eventually acquitted. Forfeited assets are often impossible to reclaim regardless of a person’s innocence or guilt. Failure to pay fines can result in driver’s license suspensions, probation or parole revocation, and even incarceration. What are the tools we can bring to bear to reduce the burdens of criminal justice debt?”

- i. Is there a legitimate purpose for federal or state courts to impose cash bail requirements on criminal defendants? If yes, please describe.

RESPONSE: The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” In *Carlson v. Landon*, the Supreme Court stated that the “[Excessive Bail Clause of the] Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country.” 342 U.S. 524, 545 (1952). My current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law including the binding precedents of the Supreme Court and the D.C. Circuit. Should I be confirmed to serve as an Associate Justice on the Supreme Court, I would approach the analysis of any question properly before me in a similar fashion, including by applying the binding precedents of the Supreme Court. As a sitting judge, it would be inappropriate for me to offer an opinion on this question as it calls for my views on a matter of public policy. Further, as a pending nominee to serve on the Supreme Court and a sitting federal circuit court judge, it would be inappropriate for me to comment on this question, as questions about this topic are the subject of ongoing litigation.

- ii. Should a judge consider the race or socioeconomic status of a criminal defendant when imposing cash bail?

RESPONSE: As a sitting judge, my current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law including the

binding precedents of the Supreme Court and the D.C. Circuit. Should I be confirmed to serve as an Associate Justice on the Supreme Court, I would approach the analysis of any question properly before me in a similar fashion, including by applying the binding precedents of the Supreme Court. Further, as a pending nominee to serve on the Supreme Court and a sitting federal circuit court judge, it would be inappropriate for me to comment on this question, as questions about cash bail requirements on criminal defendants could be the subject of future litigation.

- iii. Is there a legitimate purpose for federal criminal asset forfeiture? If yes, please describe.

RESPONSE: Determination of the appropriate role of federal criminal asset forfeiture is a policy determination best made by legislative bodies through the legislative process. This question calls for my views on a matter of public policy. As a sitting judge, it would be inappropriate for me to offer an opinion on the matter. My current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties' legal arguments based on the law including the binding precedents of the Supreme Court and the D.C. Circuit. Should I be confirmed to serve as an Associate Justice on the Supreme Court, I would approach the analysis of any question properly before me in a similar fashion, including by applying the binding precedents of the Supreme Court.

- d. Panel: "Defending New Ground in Reproductive Rights" – "Reproductive rights have seen significant new and renewed protections during the past several years, as the Affordable Care Act guaranteed full coverage of all FDA-approved contraceptives for women and *Whole Woman's Health v. Hellerstedt* reaffirmed and strengthened the constitutional right to abortion. On the other hand, there have been some setbacks, as the contraceptive mandate has been limited by successful religious objections in *Hobby Lobby v. Burwell* and Congress threatens to repeal the Affordable Care Act and strip federal funding from Planned Parenthood. This panel will discuss the current state of protections for reproductive rights and will consider existing and future threats to those rights. Will politicians continue to attack the right to abortion despite the Supreme Court's recent rebuke? Will religious accommodations and exemptions swallow rules guaranteeing the provision of contraception, abortion, and other reproductive services? With the executive branch, both houses of Congress, and a majority of the states under Republican control, might anti-choice legislators make changes in the law for which they lack popular support? If so, how should pro-choice advocates most effectively respond both inside and outside of the courts?"
 - i. Do you consider abortion to be a "reproductive right"?

RESPONSE: The Supreme Court has recognized a right to abortion subject to limitations as articulated in *Roe* and *Casey*. See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

ii. Is abortion a constitutional right?

RESPONSE: The Supreme Court has recognized a right to abortion subject to limitations as articulated in *Roe* and *Casey*. See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

iii. Where, specifically, is abortion protected in the Constitution?

RESPONSE: Justice Rehnquist explained in *Washington v. Glucksberg*, 521 U.S. 702 (1997), that, under the Supreme Court’s precedents, “the ‘liberty’ specially protected by the Due Process Clause includes the right[] . . . to abortion.” *Id.* at 720 (citing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)). The Court has held that the liberty provision of the Due Process Clause of the Fourteenth Amendment recognized a right to abortion subject to limitations as articulated in *Roe* and *Casey*.

iv. Should religious accommodations and exemptions exist for employers or healthcare workers who hold religious objections to contraception or abortion?

RESPONSE: Religious freedom is a foundational right and is protected by the Constitution and federal statutes, including the Religious Freedom Restoration Act (RFRA). RFRA “prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 690–91 (2014) (holding that the challenged federal regulations mandating contraceptive coverage substantially burdened the plaintiffs’ free exercise of religion in violation of RFRA). As a sitting judge and judicial nominee, it would not be appropriate for me to offer an opinion on threshold policy questions or abstract legal issues.

v. Do you believe that affirming such religious accommodations or exemptions undermines so-called “reproductive rights”?

RESPONSE: Please see my responses to Questions 149d(i) and 149d(iv). In addition, I note that the Supreme Court has said that “Congress, in enacting RFRA, took the position that ‘the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.’ The wisdom of Congress’s judgment on this matter is not our concern.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 735–36 (2014) (citing 42 U.S.C.

§2000bb(a)(5)). Consistent with the practice of prior nominees, it would not be appropriate for me to comment or opine further.

150. ACS coordinates a project called “Truth, Racial Healing, and Transformation.” As part of this project, ACS calls for a “national commission, with the requisite independence and resources” “to develop a full and accurate historical record of the laws and legal systems that must be dismantled, rewritten, and reimagined to achieve racial equity and prosperity in this country.”³

- a. Do you agree that some of the laws and legal systems of our country “must be dismantled, rewritten, and reimagined to achieve racial equity”?

RESPONSE: As a federal judge for the last decade, it has been my duty to adjudicate individual claims in specific cases and controversies, including claims of race discrimination. When I have jurisdiction to do so, I resolve properly filed legal disputes concerning race discrimination based on the arguments that the parties make, the established facts of the particular case, and the applicable law. Whether any current laws on any issue should change is a question for policymakers.

- b. Is this effort part of what you described as “the incredible work that [ACS] do[es] every day to advance the cause of justice, to promote the rule of law, and to champion our constitutional norms”?

RESPONSE: Please see my response to Question 150a. I am unfamiliar with this project and this statement.

151. ACS’s “Truth, Racial Healing, and Transformation” Project also states: “Slavery was not eliminated as much as it was replaced over time with laws that reinforced the marginalization of Black people in our tax code, housing regulations, voting laws, criminal legal system, and other laws and systems.”⁴

- a. Do you agree that in the United States, slavery was not so much eliminated as it was replaced by modern laws that marginalize black people?

RESPONSE: I am not familiar with this project and this statement. As a judicial nominee and sitting federal judge, it would be inappropriate for me to comment on my personal views, if any, about the topics of the ACS project referenced in the question. As a judge, it is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law.

- b. Do you believe that the modern tax code, housing regulations, voting laws, criminal legal system, and other laws and systems are a replacement of slavery intended to marginalize black people?

³ ACS, *Truth, Racial Healing, and Transformation* (2022), <https://www.acslaw.org/projects/truth-racial-healingand-transformation/>.

⁴ *Id.*

RESPONSE: Please see my response to Question 151a.

- c. Is this part of what you described as “the incredible work that [ACS] do[es] every day to advance the cause of justice, to promote the rule of law, and to champion our constitutional norms”?

RESPONSE: Please see my responses to Questions 146 and 151a.

152. The ACS “Truth, Racial Healing, and Transformation” Project states: “Racism is baked into our laws, and even into our institutions that interpret and apply those laws. History will play on repeat until this legal infrastructure is not just modified but dismantled and then built anew with the goal of lived equality.”⁵

- a. Is racism baked into the laws of the United States?

RESPONSE: Please see my response to Question 151a.

- b. Is racism baked into the American court system?

RESPONSE: Please see my response to Question 151a.

- c. Is racism baked into the United States Congress that creates those laws?

RESPONSE: Please see my response to Question 151a.

- d. Do you believe that there is a risk that slavery or segregation, of the kind that earlier generations experienced, will imminently return unless the American Constitution and legal infrastructure are “not just modified but dismantled and then built anew”?

RESPONSE: Please see my response to Question 151a.

- e. Is this part of what you described as “the incredible work that [ACS] do[es] every day to advance the cause of justice, to promote the rule of law, and to champion our constitutional norms”?

RESPONSE: Please see my response to Question 151a.

153. The President of ACS, Russ Feingold, a former Senator and member of the Senate Judiciary Committee, wrote the following in the 2021 ACF Annual Report: “The Biden-Harris administration has met the moment and prioritized the nomination of diverse judicial candidates ... We know that this is not enough when we have a Supreme Court that has been packed by the Right and that, as a result, we can no longer trust to uphold our constitutional rights or the guardrails of our democracy. This is why ACS stepped up to call for structural and non-structural Supreme Court reform. We will continue to call for such

⁵ *Id.*

reform until we again have a credible Court that fulfills its mission by protecting and upholding judicial norms, constitutional rights, and our democratic legacy.”⁶

- a. Is ACS’s effort to reform the Supreme Court part of what you described as “the incredible work that [ACS] do[es] every day to advance the cause of justice, to promote the rule of law, and to champion our constitutional norms”?

RESPONSE: I am not a member of the American Constitution Society and cannot speak to its views. I agree with Justice Barrett, who stated at her confirmation hearing that “the size of the Supreme Court is a question left open for Congress.” Answering this policy question, which the Constitution has placed in Congress’ hands, might suggest that I do not understand the limited role of a judge, which is to rule on cases and controversies that come before the Court.

The statement of mine that is referenced in this question is from remarks that I made to introduce Justice Breyer in 2017 at an ACS conference.

- b. Do you agree with ACS President Russ Feingold that because President Trump filled the seats vacated by Justice Scalia, Justice Kennedy, and Justice Ginsburg, “we can no longer trust [the Supreme Court] to uphold our constitutional rights or the guardrails of our democracy”?

RESPONSE: Please see my response to Question 153a.

- c. Do you agree that adding seats to the Supreme Court is necessary to uphold judicial norms and constitutional rights?

RESPONSE: Please see my response to Question 153a.

- d. In the same annual report, ACS stated the Supreme “Court is now a direct threat to the guardrails of our democracy.”⁷ Do you agree with that statement?

RESPONSE: I am not familiar with that statement. As I have said previously, I am not a member of the American Constitution Society and cannot speak to its views. I have nothing but esteem for the United States Supreme Court and my hopefully future colleagues on the Court.

154. In May 2021, ACS hosted an event called “Founding Failures: How America’s Racial Caste System Has Limited Opportunities for People of Color.”

- a. Do you believe that America’s founders created a racial caste system?

RESPONSE: I am not familiar with this statement. As a judicial nominee and sitting federal judge, it would be inappropriate for me to comment on my personal views, if any,

⁶ACS at 20: *American Constitution Society Annual Report 2021* (2021), https://issuu.com/acslaw/docs/acs_annual_report_2021?fr=sYWQxNzQ3MzE1NDY.

⁷*Id.* at 6.

about the topics of the ACS event referenced in the question. It is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law. As I stated during my hearing, I love our country and the Constitution, and the rights that make us free. And as a sitting federal judge for almost a decade, I am committed to upholding and defending the Constitution.

- b. Do you believe that the foundational documents of our nation, such as our Constitution, limit opportunities for people of color?

RESPONSE: Please see my response to Question 154a.

- c. Is this event an example of what you called “the incredible work that [ACS] do[es] every day to advance the cause of justice, to promote the rule of law, and to champion our constitutional norms”?⁸

RESPONSE: Please see my response to Question 154a.

155. In 2021, ACS hosted a series on Race and the Constitution, including its first event “Reckoning with the Constitution,” which “set the stage for discussing how our country’s founding document was encoded with white supremacy since its inception and the constitutional, legal, and policy reforms required to address the institutional racism that continues to infect our economic, legal, educational, and health systems.”

- a. Do you believe that the Constitution was encoded with white supremacy since its inception?

RESPONSE: I am not familiar with this statement. As a judicial nominee and sitting federal judge, it would be inappropriate for me to comment on my personal views, if any, about the topics of the ACS event referenced in the question. It is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law. As I stated during my hearing, I love our country and the Constitution, and the rights that make us free. And as a sitting federal judge for almost a decade, I am committed to upholding and defending the Constitution.

- b. Do you believe that constitutional reform is required to address institutional racism?

RESPONSE: Please see my response to Question 155a.

- c. Is this event an example of what you called “the incredible work that [ACS] do[es] every day to advance the cause of justice, to promote the rule of law, and to champion our constitutional norms”?⁹

⁸ *Id.* at 8; *see also* Am. Constitution Soc’y, “Founding Failures: How America’s Racial Caste System Has Limited Opportunities for People of Color”, YouTube (May 28, 2021), https://www.youtube.com/watch?v=r4_pP7cbSQA.

⁹ *Id.* at 27; *see also* Am. Constitution Soc’y, “Reckoning with the Constitution”, YouTube (Mar. 3, 2021), <https://www.youtube.com/watch?v=OfnUg8hOmGs>.

156. On February 25, 2022, ACS issued the following statement of support for your nomination to the Supreme Court: “Our democracy is confronting a moment of truth, torn between succumbing to autocracy and forging a genuinely multiracial democracy. The Supreme Court is at the center of this inflection point, with the ability to preserve the guardrails of democracy or to continue its systemic erosion of our rights and liberties. This moment underscores the importance of this nomination, of a nominee with a proven track record of upholding constitutional rights and safeguarding the rule of law. We look forward to heralding Judge Jackson’s impact and contribution to the Court and to our country for years to come.”⁹

- a. Do you agree with ACS that the Supreme Court has demonstrated continued systemic erosion of rights and liberties?

RESPONSE: As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from commenting on the law that governs my decisions because I am bound to respect all Supreme Court precedents. As Justices Kagan and Barrett explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases—or Supreme Court jurisprudence more broadly.

- b. ACS previously stated in 2021, just weeks before your nomination was announced, that the Supreme Court is “now a direct threat to the guardrails of our democracy” and cannot be trusted to uphold constitutional rights.¹⁰ In order to resolve these problems, ACS called to expand the Supreme Court. Why does ACS believe that your nomination to the Supreme Court will offset the fundamental, existential problems that it previously identified?

RESPONSE: I am not aware of that organization’s view on this issue, or the basis for its view. Moreover, and in general, I am not aware of how private groups have chosen to characterize my nomination, or the activities that private groups and individuals might be undertaking to advocate for or against my confirmation. Any public advocacy by any individual or group for or against my confirmation will be irrelevant to my work if I am confirmed to the Supreme Court, just as public advocacy related to my prior nominations has played no role in my work as a federal trial court and circuit court judge for the last decade. Moreover, I understand that my role as a judge is a limited one—fairly and impartially applying the law to the facts of any case that has been properly presented—and I take my duty to be independent very seriously.

157. Between 2015 and 2020—all during your tenure as a federal judge—you identified your participation in at least six events with ACS, as listed in your responses to the Senate

⁹ *ACS Applauds President Biden’s Historic Nomination of Judge Ketanji Brown Jackson*, ACS (Feb. 25, 2022), https://www.acslaw.org/press_release/acs-applauds-president-bidens-historic-nomination-of-judge-ketanji-brownjackson/.

¹⁰ *ACS at 20: American Constitution Society Annual Report 2021* (2021), https://issuu.com/acslaw/docs/acs_annual_report_2021?fr=sYWQxNzQ3MzE1NDY.

Judiciary Questionnaire. Were you aware of ACS's progressive policy and political beliefs when you participated in these events?

RESPONSE: I appeared at each event by invitation. I have never been a member of ACS and thus am not in a position to speak as to whether ACS espouses "progressive policy and political beliefs."

158. Do you believe that ACS's stances on race, court reform, abortion, and immigration fall within the mainstream of constitutional and legal interpretation in this country?

RESPONSE: I have no comment on whether any particular group's views should be categorized as "mainstream."

159. If ACS's organizational statements and efforts no longer reflect your beliefs and views of the United States or its Constitution, will you commit to end your association with ACS and not attend its events or endorse its efforts?

RESPONSE: I have never been a member of or associated with ACS. Before accepting any invitation that I may receive to attend or participate in any organization's event, I will continue my practice of considering whether accepting the invitation will interfere with my ability to perform my duties as an Article III judge.

160. To date, how many clerks have you hired who have been or were currently members of ACS during the tenure of your time on the federal bench?

RESPONSE: I do not know whether any of my current or former clerks were members of ACS during my tenure on the federal bench.

161. Your nomination enjoys broad support from a variety of other left-leaning and leftist advocacy groups. Among these groups are anti-religious organizations, including American Atheists, American Humanist Association, Americans United for Separation of Church and State, and Freedom from Religion Foundation. Americans United for Separation of Church and State made the following statement: "We look to Judge Jackson to be a bulwark against the Court's ultra-conservative majority, who seem set on redefining religious freedom as a sword to harm others instead of a shield to protect all of us. We deserve a justice who will defend our country's foundational principle of separation of religion and government like our democracy depends on it – because it does."¹¹

Do you agree that you would be a bulwark against other members of the Court on this issue?

RESPONSE: I have served as a federal judge for almost a decade. If confirmed, my role would be to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I would resolve each case on an individual basis by assessing the parties' legal arguments based on the law. In general, I am not aware of how private groups have chosen

¹¹ *Americans United Applauds Nomination of Ketanji Brown Jackson to U.S. Supreme Court*, Americans United (Feb. 25, 2022), <https://www.au.org/the-latest/press/ketanji-brown-jackson-supreme-court/>.

to characterize my nomination, or the activities that private groups and individuals might be undertaking to advocate for or against my confirmation. Any public advocacy by any individual or group for or against my confirmation will be irrelevant to my work if I am confirmed to the Supreme Court, just as public advocacy related to my prior nominations has played no role in my work as a federal trial court and circuit court judge for the last decade.

162. You also enjoy broad support from pro-abortion groups, including the Center for Reproductive Rights, NOW, and Planned Parenthood. The Center for Reproductive Rights said “While Judge Jackson will not join the bench until after the Supreme Court rules in *Dobbs v. Jackson Women’s Health Organization*, she will play a critical role in both interpreting and applying that decision and in adjudicating future cases advancing constitutional protections for reproductive rights. In this moment, it is critical that we have a justice who will defend equality and liberty for everyone, including in abortion cases.”¹² What do you think it looks like a justice to “defend equality and liberty for everyone, including in abortion cases”?

RESPONSE: I am not aware of what particular activities private groups and individuals might be undertaking to advocate for or against my confirmation. Any public advocacy by any individual or group for or against my confirmation will be irrelevant to my work if I am confirmed to the Supreme Court, just as public advocacy related to my prior nominations has played no role in my work as a federal trial court and circuit court judge for the last decade. Moreover, I understand that my role as a judge is a limited one—fairly and impartially applying the law to the facts of any case that has been properly presented—and I take my duty to be independent very seriously.

163. May or should judges consider the equality and liberty of unborn children when considering cases about the constitutionality of abortion?

RESPONSE: As a sitting federal judge and a pending judicial nominee, I have a duty to refrain from offering views on the proper adjudication of cases concerning matters that are presently before the courts or those that are expected to come before the courts in the future.

164. The National Organization for Women (NOW) said you “will be an advocate for justice and for the intersectional issues that matter to NOW.”¹³ NOW’s website states “NOW fully supports safe and legal abortion.”¹⁵ If confirmed to the Supreme Court, would you be an advocate for legal abortion?

RESPONSE: If confirmed to the Supreme Court, I would serve as a Justice, not an advocate. Please see my response to Question 162.

¹² *The Historic Nomination of Judge Ketanji Brown Jackson to the U.S. Supreme Court*, Center for Reproductive Rights (Feb. 25, 2022), <https://www.reproductiverights.org/us-supreme-court-nomination-ketanji-brown-jackson/>.

¹³ *NOW Hails Ketanji Brown Jackson’s Historic SCOTUS Nomination*, NOW (Feb. 25, 2022), <https://www.now.org/media-center/press-release/now-hails-ketanji-brown-jacksons-historic-scotusnomination/#:~:text=,%20The%20National%20Organization%20for%20Women%20%28NOW%29%20commends,lived%20experience%20as%20a%20Black%20woman%20in%20America.>

165. The Southern Poverty Law Center has said: “Our citizens are best served by justices who represent our multicultural society and are committed to ensuring equal justice and protecting the rights of all Americans. When the U.S. Supreme Court includes members with different personal and legal backgrounds, that diversity and inclusion helps to improve decision-making on the bench – and increase public trust in the rulings. Because of Judge Jackson’s historic nomination, the high court is continuing to take necessary steps forward to include voices representative of the racial, ethnic and cultural make-up of our nation.”¹⁴ Do you agree that a justice’s race influences or determines the quality of their decision making?

RESPONSE: I am not familiar with this statement. As I testified during the hearing, having a diverse judicial branch is important is because it bolsters public confidence in our judicial system.

166. In 2021, Justice Breyer offered remarks condemning the idea of adding seats to the U.S. Supreme Court, an idea also known as Court-packing. Justice Ginsburg made similar comments condemning the idea of Court-packing an interview with Nina Totenberg in 2019. You stated to Senator Tillis during the hearing this week that you have an opinion on the topic, but do not think it is appropriate to give a response. However, sitting justice have already addressed the topic freely. What is your position on Court-packing?

RESPONSE: I agree with Justice Barrett, who stated at her confirmation hearing that “the size of the Supreme Court is a question left open for Congress.” Answering this policy question, which the Constitution has placed in Congress’ hands, might suggest that I do not understand the limited role of a judge, which is to rule on cases and controversies that come before the Court.

167. Have you ever expressed openness or support for Court-packing?

RESPONSE: Please see my response to Question 166.

168. Do you condemn the idea of Court-packing, as Justice Breyer and Justice Ginsburg have done publicly?

RESPONSE: Please see my response to Question 166.

169. Do you believe that you are subject to different codes of conduct that might limit your ability to opine on this subject than those that applied to Justice Breyer in 2021 and Justice Ginsburg in 2019?

RESPONSE: Please see my response to Question 166.

170. Are you familiar with the Presidential Commission on the Supreme Court of the United States?

¹⁴ *The Southern Poverty Law Center Applauds Historic Nomination of Judge Ketanji Brown Jackson to the U.S. Supreme Court*, Southern Poverty Law Center (Feb. 25, 2022), <https://www.splcenter.org/presscenter/southernpoverty-law-center-applauds-historic-nomination-judge-ketanji-brown-jackson-us>.

RESPONSE: I am aware that was is a commission established by President Biden to study the Supreme Court.

171. Have you commented, publicly or otherwise, on that Commission or its establishment?

RESPONSE: To the best of my recollection, no. In my individual capacity, I have had private conversations on a wide variety of topics.

a. If yes, please describe the dates and the substance of such comments.

RESPONSE: Please see my response to question 172.

172. Have you commented, publicly or otherwise, on the Commission's draft or final reports, or its conclusions?

RESPONSE: To the best of my recollection, no. In my individual capacity, I have had private conversations on a wide variety of topics.

a. If yes, please describe the dates and the substance of such comments.

RESPONSE: Please see my response to question 172.

173. Are there any structural changes to the Court about which you have previously expressed an opinion, publicly or otherwise?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on this policy question.

a. If yes, please describe the dates and the substance of such comments.

RESPONSE: Please see my response to Question 173.

174. Do you currently hold a view on whether appellate judges who have not been confirmed to the Supreme Court ought to hear or decide Supreme Court cases, either as part of a rotation of appellate judges or otherwise?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on this policy question.

a. If yes, what is your view?

RESPONSE: Please see my response to Question 174.

175. Do you currently hold a view on whether Justices ought to be subject to term limits?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on this policy question.

a. If yes, what is your view?

RESPONSE: Please see my response to Question 175.

176. In 2001, Justice Sonia Sotomayor—prior to filling a seat on the U.S. Supreme Court—stated that she “would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.” Have you ever made a statement or comment, publicly or otherwise, on Justice Sotomayor’s statement?

RESPONSE: Not to my recollection.

a. If so, what comments have you made regarding Justice Sotomayor’s statement?

RESPONSE: Please see my response to Question 176.

177. Have you ever offered prepared remarks that have named a sitting Justice and criticized their judicial opinions or methodology?

RESPONSE: No

178. Which sitting Supreme Court Justices have you had communications with?

RESPONSE: I have communicated with many sitting Supreme Court Justices at various stages of my career. For example, in 1999–2000 I clerked for Justice Breyer on the Supreme Court and communicated with the other Justices on the Court at that time. Since becoming a federal judge, it has been the annual tradition of my chambers to attend a Supreme Court oral argument, and in that context I have communicated with several justices. Additionally, I have communicated with Supreme Court Justices in my role as a member of the Supreme Court Law Fellows Commission. Further, for many years I have participated in the Shakespeare mock trial program through which I have communicated with several Justices.

179. Have you discussed California Supreme Court Justice Leondra Kruger in the past 24 months?

RESPONSE: I have only the highest esteem for my former, current, and if I am fortunate enough to be confirmed, future judicial colleagues—including colleagues serving on state courts. I have not made any public comments related to Justice Kruger. In my individual capacity, I have had private conversations on a wide variety of topics.

a. If yes, please state the approximate dates and substance of such discussion.

RESPONSE: Please see my response to Question 179.

180. Have you discussed Judge Michelle Childs in the past 24 months?

RESPONSE: I have only the highest esteem for my former, current, and if I am fortunate enough to be confirmed, future judicial colleagues. I have not made any public comments related to Judge Childs. I have spoken directly to Judge Childs; after she was nominated to serve on the U.S. Court of Appeals for the District of Columbia Circuit, I reached out to congratulate her and we subsequently discussed my experience on the D.C. Circuit. In my individual capacity, I have had private conversations on a wide variety of topics.

a. If yes, please state the approximate dates and substance of such discussion.

RESPONSE: Please see my response to Question 180.

181. Have you ever leveled criticism, publicly or otherwise, at Justice Clarence Thomas?

RESPONSE: I have only the highest esteem for my former, current, and if I am fortunate enough to be confirmed, future judicial colleagues. In my Senate Judiciary Questionnaire, I referenced a public comment I made regarding Justice Thomas in the spring of 2007. I have not made any other public comments related to Justice Thomas. In my individual capacity, I have had private conversations on a wide variety of topics.

a. If yes, please state the approximate dates and substance of such criticism(s).

RESPONSE: Please see my response to Question 181.

182. Did you express an opinion, publicly or otherwise, on the nomination of Merrick Garland to the U.S. Supreme Court in 2016?

RESPONSE: I have only the highest esteem for my former, current, and if I am fortunate enough to be confirmed, future judicial colleagues. I have never made any public comments related to Attorney General Garland. I spoke directly with Judge Garland on several occasions during the period in which his Supreme Court nomination was pending and throughout the more than eight years that I served on the U.S. District Court for the District of Columbia. In my individual capacity, I have had private conversations on a wide variety of topics.

a. If yes, state the approximate dates and the substance of the opinions.

RESPONSE: Please see my response to Question 182.

183. Did you express an opinion, publicly or otherwise, on the nomination of Justice Neil Gorsuch to the U.S. Supreme Court in 2017?

RESPONSE: I have only the highest esteem for my former, current, and if I am fortunate enough to be confirmed, future judicial colleagues. I have not made any public comments related to Justice Gorsuch. In my individual capacity, I have had private conversations on a wide variety of topics.

a. If yes, state the approximate dates and the substance of the opinions.

RESPONSE: Please see my response to Question 183.

184. Did you express an opinion, publicly or otherwise, on the nomination of Justice Brett Kavanaugh to the Supreme Court in 2018?

RESPONSE: I have only the highest esteem for my former, current, and if I am fortunate enough to be confirmed, future judicial colleagues. I have not made any public comments related to Justice Kavanaugh. I spoke directly with Justice Kavanaugh during the period in which his Supreme Court nomination was pending and throughout the time that he and I were both serving in the federal courthouse in Washington D.C. In my individual capacity, I have had private conversations on a wide variety of topics.

a. If yes, state the approximate dates and the substance of the opinions.

RESPONSE: Please see my response to Question 184.

185. Specifically, did you comment, publicly or otherwise, on allegations against Justice Kavanaugh made by Dr. Christine Blasey Ford?

RESPONSE: I have only the highest esteem for my former, current, and if I am fortunate enough to be confirmed, future judicial colleagues. I have not made any public comments related to such allegations, and as a pending judicial nominee and a sitting federal judge it would be inappropriate for me to do so. In my individual capacity, I have had private conversations on a wide variety of topics.

a. If yes, state the approximate dates and the substance of the opinions.

RESPONSE: Please see my response to Question 185.

186. Did you express an opinion, publicly or otherwise, on the nomination of Justice Amy Coney Barrett to the Supreme Court in 2020?

RESPONSE: I have only the highest esteem for my former, current, and if I am fortunate enough to be confirmed, future judicial colleagues. I have not made any public comments related to Justice Barrett. In my individual capacity, I have had private conversations on a wide variety of topics.

a. If yes, state the approximate dates and the substance of the opinions.

RESPONSE: Please see my response to Question 186.

187. Do you recognize a natural right to self-defense?

RESPONSE: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that self-defense is the core of the Second Amendment, which confers a fundamental individual right to keep and bear arms. That decision is a precedent of the Supreme Court entitled to respect under the doctrine of *stare decisis*.

188. Do you recognize that the text of the Second Amendment indicates that it protects a pre-existing right?

RESPONSE: In *Heller*, the Supreme Court said that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right,” and that “[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it ‘shall not be infringed.’” 554 U.S. at 592 (emphasis in original).

a. If not, what does it do?

RESPONSE: Please see my response to Question 188.

189. Do you hold a view on whether the Second Amendment protects an individual right?

RESPONSE: Please see my response to Question 187.

a. If not, what does it protect?

RESPONSE: Please see my response to Question 187.

190. What sources would you look to in order to form your analysis of the Second Amendment?

RESPONSE: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), all of the Justices (including the dissenters) focused on history and the original public meaning of the Second Amendment’s text. One genius of the Framers was to set out fixed but enduring principles in the Constitution that could be applied to new circumstances. In the modern world, the Supreme Court is called on to do that. But the sources of the law that the Court appropriately brings to bear on the interpretive exercise are the same: text, history, structure, and precedent.

191. Justice Breyer dissented in *Heller v. District of Columbia*. He wrote that the Second Amendment “protects militia-related, not self-defense-related, interests.” Do you agree with your former boss that the Second Amendment does not apply to gun rights that are used for self-defense?

RESPONSE: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment “confer[s] an individual right to keep and bear arms.” That decision, and not Justice Breyer’s dissent, is a precedent of the Supreme Court that is entitled to respect under the doctrine of *stare decisis*.

192. After retiring from the Supreme Court, Justice John Paul Stevens wrote an oped in the New York Times, in which he urged that the United States should repeal the Second Amendment. He explained that the Second Amendment, in his view, only applies to the ability of citizens to have a militia, and that concern is no longer relevant to modern Americans. Do you agree with Justice Stevens that the United States would be best off if the Second Amendment were repealed?

RESPONSE: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment “confer[s] an individual right to keep and bear arms.” That decision,

and not Justice Stevens' op-ed, is a precedent of the Supreme Court that is entitled to respect under the doctrine of *stare decisis*.

193. Given the ongoing situation in Ukraine, do you recognize that individuals may use firearms in order to defend themselves from attacks by foreign countries?

RESPONSE: Please see my response to Question 187.

194. Justice Kagan has mentioned previously that she went hunting with Justice Scalia, after joining the Court. Will you commit to making reasonable efforts to go to a shooting range or go hunting prior to ruling on any Second Amendment cases?

RESPONSE: As a judge, my role is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties' legal arguments based on the law, including the binding precedents of the Supreme Court. If I am fortunate enough to be confirmed, I would welcome the opportunity to interact with my new colleagues in a variety of settings outside the Court.

195. Please confirm that *Heller* and *McDonald* are valid precedents of the Supreme Court and entitled to *stare decisis*.

RESPONSE: The Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), are valid precedents that are entitled to respect under the doctrine of *stare decisis*.

196. Please list all recusals that you have made and articulate the reasons for your recusal.

RESPONSE: The United States Court of Appeals for the District of Columbia Circuit has a system under which judges submit a list of self-identified conflicts, which the Clerk's Office then uses while generating panels to hear cases. Specifically, the computer assignment system will not assign a matter to a judge if a conflict is identified based on the submitted list. In addition, I individually analyze each case that is assigned to me to determine if there are any conflicts. Finally, I am automatically recused from any appeal where I had issued a ruling in any form in the underlying district court matter.

The United States District Court for the District of Columbia has a system that flags newly assigned cases based on recusal criteria that each judge identifies. This system permits a judge to identify potential conflicts *ex ante*, and then decide whether to recuse *sua sponte* in a newly assigned case.

I recused myself *sua sponte* in the following twelve cases while I was sitting on the District Court, for the reasons described below.

I recused myself from *Jacobs v. Reliance Standard Life Insurance Co.*, 21-cv-0323, because the plaintiff in the case was previously employed as a doctor at Medstar Georgetown University Hospital, and the complaint asserted that the plaintiff's claim for disability benefits under a group plan that the hospital provides was improperly denied. My husband is a surgeon who is employed by Medstar Georgetown University Hospital. After reviewing the Code of Conduct for

United States Judges, I determined that my impartiality might reasonably be questioned and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Clark v. Environmental Protection Agency*, 18-cv-0075, because the case arose from EPA's failure to respond to a FOIA request that the plaintiff, a university research librarian, had submitted. At the time the matter was assigned to me, I was a member of the board of the university that employed the plaintiff, and after reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Pulphus v. Ayers*, 17-cv-310, because I have a personal and familial relationship with a material witness named in the complaint whose actions were challenged in the complaint. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Callas v. Callas*, 17-mc-127, because it involved a motion to quash a non-party subpoena, and I have a personal and familial relationship with the lawyer who was representing the movant. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Van Allen v. Gibson*, 16-cv-1426, because the plaintiff filed an amended complaint that named as defendants all judges who had been appointed by President Barack Obama, including me.

I recused myself from *Doe v. Lhamon*, 16-cv-1158, because the complaint challenged the Department of Education's sexual assault guidelines for colleges and universities, and at the time that the matter was assigned to me, I was serving on the board of a university that was evaluating its own potential response to those guidelines. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *National Railroad Passenger Corp. v. 3.44 Acres More or Less of Land and Building*, No. 15-cv-1088, and two related cases, *National Railroad Passenger Corp. v. Casco Second Street, LLC*, No. 15-cv-1020 and *National Railroad Passenger Corp. v. 1.45 Acres More or Less of Air Space Above Land Located at 900 2nd Street NE*, 15-cv-1021, because these are civil cases that involve potential money damages, and my husband's brother is an equity partner at a law firm that had entered its appearance as counsel for one of the defendants. Canon 3(C)(1)(d)(ii) of the Code of Conduct for United States Judges appears to require recusal in such circumstances.

I recused myself from *Sandza v. Barclays Bank PLC*, 15-cv-0732, because these are civil cases that involve potential money damages, and my husband's brother is an equity partner at a law firm that represented defendants in this matter. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned in light of this

connection with defense counsel, and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Williams v. United States of America*, 15-mc-0283, because the firm representing the petitioner had previously represented my husband in two civil matters arising out of his employment as a surgeon, and had also consulted with my husband regarding medical matters and medical legal matters over time. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned, and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Arrington v. Federal Public Defender of the District of Columbia*, 14-cv-1557, because I previously worked for the Federal Public Defender of the District of Columbia, and because one of the named defendants was my supervisor when I worked in that office and remains a personal friend of mine. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned in light of my personal relationship with one of the parties, and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Zaidi v. United States Sentencing Commission*, 14-cv-1308, because the plaintiff in this case alleged that certain policies that the United States Sentencing Commission had promulgated were unlawful and unconstitutional. I was serving as Vice Chair of the Sentencing Commission at the time this matter came before me. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from *Chenari v. George Washington University*, 14-cv-0929, because the plaintiff alleged that George Washington University improperly terminated his enrollment at the school for honor code violations, and at the time this matter came before me, I was affiliated with George Washington University Law School as an adjunct professor. Given G.W.U. Law School's relationship to the University—the defendant in this matter—I reviewed the Code of Conduct for United States Judges, and I determined both that my impartiality might reasonably be questioned and that this issue was incurable. I therefore returned the case to the Calendar Committee for reassignment.

I recused myself from the following case when the matter was assigned to me, after being asked to do so by the parties.

Defense counsel in *Wilson v. Cope*, No. 14-cv-1434, filed a consent motion asking me to transfer this matter to another judge because his firm had previously represented my husband in two civil matters arising out of his employment as a surgeon, and had also consulted with my husband regarding medical matters and medical legal matters over time. I was not aware of this relationship before the parties brought it to my attention by filing the motion. After reviewing the Code of Conduct for United States Judges, I determined that my impartiality might reasonably be questioned and that this issue was incurable. I therefore granted the motion and returned the case to the Calendar Committee for reassignment.

197. Will you commit to recusing yourself from cases when you do not feel as though you can separate your policy preferences from your legal conclusions?

RESPONSE: My role as a circuit and district court judge has been to consider the facts and arguments that are presented in each case and controversy that is presented, and to apply the law faithfully to resolve the issues before me. Because any personal policy preferences I may have play no role in the performance of my duties, in every case that I have handled, I have considered only the parties' arguments, the relevant facts, and the law, including and especially the binding precedents of the Supreme Court and the D.C. Circuit.

As I stated during the hearing, if confirmed, I commit to applying the law of recusal faithfully.

198. Will you commit to recusing yourself from cases in which your impartiality can reasonably be questioned?

RESPONSE: Yes. The recusal statute provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). As I explained at the hearing, if confirmed, I commit to applying the law of recusal faithfully.

199. During your hearing, you said that you plan to recuse from participating in the upcoming case of *Students for Fair Admissions v. President and Fellows of Harvard College*. Yes or no, should you be confirmed, will you commit to recusing from participating in this case?

RESPONSE: As I stated during the hearing, if I am confirmed, I plan to recuse myself from this case.

I have served as a federal judge for almost a decade, and during that time, I have a demonstrated record of faithfully applying the law of recusal. Justice Ginsburg described the process that Supreme Court justices follow in deciding whether to recuse, which involves reading the statute, reviewing precedents, and consulting with colleagues. As I explained at the hearing, if confirmed, I commit to following the recusal process and applying the law of recusal faithfully.

200. The U.S. Courts Code of Judicial Conduct Canon 2(c) states, "A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin." Should the Supreme Court decide that Harvard's admissions policy discriminates against Asian-American students, would you consider revoking your membership on the Harvard Board of Overseers?

RESPONSE: The Harvard Board of Overseers is not a membership organization.

201. Have you at any time expressed an opinion, publicly or otherwise, about the merits of any case currently pending before the Supreme Court?

RESPONSE: I have not expressed an opinion publicly about the merits of any case currently pending before the Supreme Court. As sitting federal judge, all of the Supreme Court's precedents are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from commenting on the law that governs my decisions. Consistent with the

positions taken by other pending judicial nominees, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Court's binding precedents.

a. If yes, which cases and what view(s) did you express?

RESPONSE: Please see my response in Question 201.

202. Do you currently hold a view regarding the merits of any case currently pending before the Supreme Court?

RESPONSE: Under the Code of Conduct for United States Judges and established standards of judicial ethics, a judge's personal views regarding a matter must not have any bearing on her interpretation and application of the law. My personal views, if any, are irrelevant to my work as a judge.

a. If yes, which cases and what view(s) do you hold?

RESPONSE: Please see my response in Question 202.

203. Senators on the U.S. Senate Committee on the Judiciary asked Justice Barrett to recuse herself from election disputes involving President Trump. She declined to issue a blanket recusal without knowing the details of any case that would be before her. What is your position on whether you are willing to commit to recusing yourself from any election cases involving President Biden or Vice President Harris?

RESPONSE: As Justice Barrett explained, the question of recusal is a threshold question of law that must be addressed in the context of the facts of each case. Justice Ginsburg described the process that Supreme Court justices follow in deciding whether to recuse, which involves reading the statute, reviewing precedents, and consulting with colleagues. As I explained at the hearing, if confirmed, I commit to following the recusal process and applying the law of recusal faithfully.

204. Please describe your chambers' COVID-19 protocols and any changes as they occurred between March 2020 and now. Provide specific dates when chambers were closed, subject to mask mandates, vaccine mandates, and, if applicable, when your chambers returned to normal.

RESPONSE: Between June 2021 and the present, my chambers has followed the COVID-19 policies established by the U.S. Court of Appeals for the District of Columbia Circuit and, prior to my elevation in June of 2021, by the U.S. District Court for the District of Columbia. These policies have evolved over time, and have included teleworking during the spring and early summer of 2020, and then maximizing telework and ensuring social distancing; wearing masks in public areas of the courthouse; wearing masks in private areas of the courthouse, including chambers; and providing either proof of vaccination or being subject to testing/additional masking requirements.

a. Please update your answer to this question if additional changes occur prior to your confirmation.

RESPONSE: Please see my response to Question 204.

205. What COVID-19 protocols do you expect to adopt for your chambers, if confirmed to the U.S. Supreme Court?

RESPONSE: If confirmed to the Supreme Court, I expect to adopt for my chambers any Supreme Court COVID-19 policies then in effect.

206. Have you ever evaluated a request for a religious exemption to one of your chambers' COVID-19 protocols?

RESPONSE: No.

a. If yes, was the exemption request granted?

RESPONSE: Please see my response to Question 206.

207. Have you ever evaluated a request for a disability accommodation to one of your chambers' COVID-19 protocols?

RESPONSE: No.

a. If yes, was the accommodation request granted?

RESPONSE: Please see my response to Question 206.

208. Have you ever expressed, publicly or otherwise, the factually inaccurate statement that there are over one hundred thousand children in serious condition, with many on ventilators, due to COVID-19?

RESPONSE: No.

209. Have you ever commented on any web blogs, more commonly known as blogs?

RESPONSE: To the best of my recollection, no.

a. Please name the blogs and provide URLs for blogs that you can recall commenting on.

RESPONSE: Please see my response to Question 209a.

b. Please provide written copies of any comments that you can obtain.

RESPONSE: Please see my response to Question 209a.

c. Please describe the substance of any comments that you can recall.

RESPONSE: Please see my response to Question 209a.

210. In 2006, Justice Breyer, who you clerked for and whose seat you have been nominated to fill, published a book called *Active Liberty: Interpreting Our Democratic Constitution*. What is your understanding of his thesis in that book?

RESPONSE: In *Active Liberty: Interpreting Our Democratic Constitution*, Justice Breyer states: “My thesis is that courts should take greater account of the Constitution’s democratic nature when they interpret constitutional and statutory texts.”

211. Have you commented, publicly or otherwise, on the book *Active Liberty* or its thesis previously?

RESPONSE: I have not commented publicly on the book *Active Liberty*.

212. What have you articulated about the book?

RESPONSE: Please see my response to Question 211.

213. Do you subscribe to the thesis in *Active Liberty*?

RESPONSE: For a description of my judicial approach, please see my response to Question 20. I am not able to draw comparisons between my approach and the thesis of *Active Liberty*, nor am I able to draw an analogy between any particular Justice’s judicial philosophy and the approach that I have employed as a lower court judge or would employ as a Supreme Court Justice, if I am confirmed.

214. What media sources do you most commonly review, including print, television, and electronic media?

RESPONSE: I commonly review a broad range of media sources.

215. Do you commonly review media reports regarding the work of the Supreme Court, the status of its cases, or its Justices?

RESPONSE: I occasionally review media reports regarding the Supreme Court when they appear in the general news media.

a. If so, which media sources do you most commonly review regarding these topics?

RESPONSE: I commonly review a broad range of media sources that include media reports regarding the Supreme Court.

216. Have you ever been accused of sexual harassment, formally or informally, to the best of your knowledge?

RESPONSE: No.

217. If you are accused of sexual harassment before the vote on your confirmation, would you expect to have an opportunity to defend your reputation and challenge the factual accuracy of the allegation?

RESPONSE: It would be inappropriate for me to comment on the propriety of any process the U.S. Senate might afford a nominee in connection with the Senate's exercise of its constitutional advise and consent power.

218. What standard should the U.S. Senate Committee on the Judiciary apply, if it is called upon to weigh an accusation of sexual harassment against you, balanced against a vociferous denial?

RESPONSE: It would be inappropriate for me to comment on the propriety of any standard the U.S. Senate Committee on the Judiciary might use in connection with the Senate's exercise of its constitutional authority.

219. What standard should the U.S. Senate apply, if it is called upon to weigh an accusation of sexual harassment against you, balanced against a vociferous denial?

RESPONSE: It would be inappropriate for me to comment on the propriety of any standard the U.S. Senate might use in connection with the Senate's exercise of its constitutional authority.

220. Have you ever been accused of improper conduct, formally or informally, since becoming a judge?

RESPONSE: No.

221. Are you in any current discussions with book publishers to author a book?

RESPONSE: No.

a. If yes, which publisher(s)?

RESPONSE: Please see my response to Question 221.

b. If yes, please identify the approximate dates and substance of the discussions.

RESPONSE: Please see my response to Question 221.

222. If you feel that you are no longer able to adequately perform the role of a Supreme Court Justice, will you commit to resigning, regardless of which political party controls the presidency?

RESPONSE: I am committed to serving as a federal judge to the best of my abilities for as long as I am able to do so.

223. Have you ever commented, publicly or otherwise, on the results of the 2016 election?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to publicly weigh in any subject of political debate. In my individual capacity, I have had private conversations on a wide variety of topics.

- a. If yes, please provide the approximate date(s) and substance of your comments.

RESPONSE: Please see my response to Question 223.

224. Specifically, have you ever expressed skepticism, publicly or otherwise, regarding the validity of the outcome of the 2016 election?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to publicly weigh in any subject of political debate. In my individual capacity, I have had private conversations on a wide variety of topics.

- a. If yes, please provide the approximate date(s) and substance of your comments.

RESPONSE: Please see my response to Question 224.

225. Have you ever commented, publicly or otherwise, on the results of the 2020 election?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to publicly weigh in any subject of political debate. In my individual capacity, I have had private conversations on a wide variety of topics.

- a. If yes, please provide the approximate date(s) and substance of your comments.

RESPONSE: Please see my response to Question 225.

226. Have you ever commented, publicly or otherwise, on the events at the Capitol on the date of January 6, 2021?

RESPONSE: During my time as a district judge, I was assigned to preside over a handful of prosecutions of individuals who were accused of participating in the events at the Capitol on January 6th, and in my official capacity, I made statements about the events during hearings held in those matters. I was also a panel member in the case of *Trump v. Thompson*, 20 F.4th 10 (D.C. Cir. 2021). I have not made any other public comments concerning the events of January 6th. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to publicly weigh in any subject of political debate. In my individual capacity, I have had private conversations on a wide variety of topics.

- a. If yes, please provide the approximate date(s) and substance of your comments.

RESPONSE: Please see my response to Question 226.

227. Have you ever commented, publicly or otherwise, on the effort to form a National Popular Vote Interstate Compact?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to publicly weigh in any subject of political debate. In my individual capacity, I have had private conversations on a wide variety of topics.

a. If yes, please provide the approximate date(s) and substance of your comments.

RESPONSE: Please see my response to Question 227.

228. The Supreme Court has been criticized for ruling on disputed motions without holding oral argument and issuing a full written justification, a practice that the critics refer to as the “shadow docket.” As a federal judge, have you ever ruled on a contested motion without holding oral argument?

RESPONSE: My role as a judge has been to consider the facts and arguments that are presented in each case and controversy, and to apply the law faithfully to resolve the issues before me. This includes resolving contested motions based on briefing.

229. As a federal judge, have you ever ruled on a contested motion without issuing a written opinion or with only a short written opinion?

RESPONSE: I handled hundreds of cases, and made thousands of decisions related to contested motions in the eight years that I was a district court judge. In light of the case load and pace of trial courts, many decisions at the trial-court level take the form of short orders that are not published in electronic case reporting databases such as Westlaw or LEXIS. The shortest written decisions I have issued as a district court judge take the form of paperless Minute Orders that consist of a sentence or two on the docket of a case. *See, e.g., Tarque v. Biden*, No. 21-cv-338, Min. Order of Apr. 4, 2021 (granting motion for extension of time to answer complaint); *Centro Presente, Inc. v. Wolf*, No. 19-cv-2480, Min. Order of Mar. 17, 2021 (granting motion for leave to appear pro hac vice). I have also routinely issued short paper orders regarding a variety of legal issues. *See, e.g., Hogue v. Costal Int’l, Inc.*, No. 18-cv-389, Order Dismissing Case for Lack of Prosecution, ECF No. 39 (D.D.C. May 4, 2021); *In re Subpoena Duces Tecum to Verizon Wireless*, No. 19-mc-103, Order Transferring Case, ECF No. 4 (D.D.C. July 18, 2019); *Nugent v. Nat’l Pub. Radio, Inc.*, No. 14-cv-0416, Order, ECF No. 8 (D.D.C. March 28, 2014) (granting the defendant’s motion to withdraw its notice of removal and remanding the case to the Superior Court of the District of Columbia).

230. Please estimate the percentage of contested motions you resolved through the “shadow docket” as described in Questions 228 or 229.

RESPONSE: It is my understanding that the term “shadow docket” refers to the Supreme Court’s emergency docket—a mechanism for resolving motions that does not have a direct analogue in the practices of any of the courts on which I’ve served. With respect to cases in which I have ruled on a motion with a short order, please see my response to question 229. I am unable to determine accurately the number of short orders that I have issued as a district court judge, and thus I am unable to provide an estimated percentage.

231. Does your use of the “shadow docket” reflect that you did not resolve those contested motions on the basis of the applicable law and facts?

RESPONSE: It is my understanding that the term “shadow docket” refers to the Supreme Court’s emergency docket—a mechanism for resolving motions that does not have a direct analogue in the practices of any of the courts on which I’ve served. When resolving a contested motion, I consider the facts and arguments that are presented in each case and controversy, and apply the law faithfully. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, as a pending judicial nominee and a sitting federal judge, it would not be appropriate for me to offer an opinion on the circumstances in which the Supreme Court should resolve issues without argument or written opinions.

232. During your time as a judge, would you have found it practicable or desirable to withhold judgment on all contested motions until you could schedule oral argument and draft a lengthy written opinion?

RESPONSE: My role as a judge has been to consider the facts and arguments that are presented in each case and controversy, and to apply the law faithfully to resolve the issues before me. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, as a pending judicial nominee and a sitting federal judge, it would not be appropriate for me to offer an opinion on the circumstances in which the Supreme Court should resolve issues without argument or written opinions.

233. Please state whether you agree with the following statement: “The Free Exercise Clause of the First Amendment protects the right of individuals to act consistently with their beliefs in the public square.”

RESPONSE: The Supreme Court has considered a number of cases involving the Free Exercise Clause. If confirmed, I would resolve each case on this issue based on the factual record and applicable law. To the extent that this question relates to legal issues regarding the scope of the protections provided by the First Amendment that are the subject of ongoing litigation, it would be inappropriate for me, as a sitting judge and pending judicial nominee, to opine on those legal issues.

234. In response to a question from Senator Cornyn, you said religious freedom “is a core, foundational, constitutional right,” based in part on the idea that people “have sincerely held religious beliefs and practice them without persecution.” How do you define the “practice” of religious beliefs that is, as you said, protected by the fundamental, constitutional right of religious freedom?

RESPONSE: The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion.” The Free Exercise Clause enjoins Congress from “prohibiting the free exercise” of religion. The Supreme Court has held that both Clauses apply against the States through the Due Process Clause of the Fourteenth Amendment. Because issues concerning the scope of First Amendment and statutory protections for religious freedom are the subject of ongoing litigation, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment further on this question.

235. In response to a Question for the Record I asked you in 2021, you said that “no federal statute currently prohibits educational institutions that receive federal funding from discriminating on the basis of speech.” Do you believe that the First Amendment, rather than a federal statute, provides any protection from discrimination on the basis of speech for students and professors at educational institutions that receive federal funding?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees it would be inappropriate for me, as a pending judicial nominee and sitting federal judge, to offer my views about this abstract legal question. As a judge, it is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law. Related questions are the focus of ongoing litigation, and may well come before me in the future.

236. Cancel culture has become a significant problem at campuses of higher education. School administrations are increasingly punishing professors for their private speech and students are increasingly shouting down speakers who offer perspectives with which the students disagree. My colleague Senator Sasse asked you a series of questions about the concept of “cancel culture.” He asked you if it “is better to debate ideas that you disagree with than shout them down” and whether you are “against cancelling people.” Your answers did not indicate a clear stance on the issue.

RESPONSE: As a judge, I have found that the ability to listen with an open mind to other points of view—and to be respectful to the differing viewpoints, analyses, or conclusions of others, even those with which you disagree—is crucial to the effective operation of the court, and, ultimately, maintains public trust in the court as an institution. Schools, like courthouses, are places where it is important that diverse ideas and perspectives be considered and examined. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me as a pending judicial nominee and sitting federal judge to comment further on a matter of public policy.

- a. Do you believe it is appropriate for students on school campuses to shout down speakers who offer perspectives with which the students do not agree?

RESPONSE: Please see my response to Question 236.

- b. Do you believe it is appropriate for Americans to “cancel” individuals over their private speech?

RESPONSE: Please see my response to Question 236.

237. In a 2020 speech to the Black Law Students Association of the University of Chicago School of Law, you told students “[Y]ou will very much want to call out or cancel people who say and do discriminatory things that are designed to make you feel unworthy. But doing so takes time and effort...”¹⁵ This statement seems to imply that students should

¹⁵ Ketanji Brown Jackson, *Three Qualities for Success in Law and Life Presentation at the Third Annual Judge James B. Parsons Legacy Dinner*, Black Law Students Association of the University of Chicago School of Law

refrain from “cancel[ing] people” merely because it takes “time and effort” rather than because “cancel[ing] people” is antithetical to the constitutional value of Free Speech. Please clarify whether you believe it is appropriate for individuals to “cancel people.”

RESPONSE: I disagree with this question’s suggestion regarding what the quoted statement implies. As a judge, I have found that the ability to listen with an open mind to other points of view—and to be respectful to the differing viewpoints, analyses, or conclusions of others, even those with which you disagree—is crucial to the effective operation of the court, and, ultimately, maintains public trust in the court as an institution. In my speech, I encouraged the audience to spend their time, energy, and focus on achieving their goals and learning from those around them rather than focusing on the perceived slights of others. That is an important value of education because schools, like courthouses, are places where it is important that diverse ideas and perspectives be considered and examined.

238. Did you receive information concerning former cases of yours, including, but not limited to, probation recommendations, Presentence Investigation Reports, case files, or sealed documents—either in whole, or in part, or summaries thereof—from any member of the Executive Branch as part of your confirmation process, yes or no?

RESPONSE: No.

a. If yes, please provide those documents in full.

RESPONSE: Please see my response to Question 238.

239. Did you receive information concerning former cases of yours, including, but not limited to, probation recommendations, Presentence Investigation Reports, case files, or sealed documents—either in whole, or in part, or summaries thereof—from any member of the Judicial Branch as part of your confirmation process, yes or no?

RESPONSE: Shortly before the hearing, when my record with respect to the sentencing of child pornography offenders was called into question, my chambers reached out to the U.S. Probation Office for the District of Columbia to confirm their sentencing recommendations in certain cases involving child pornography or other child sex crimes. The U.S. Probation Office provided the requested information.

a. If yes, please provide those documents in full.

RESPONSE: The chart referencing the Probation Office’s sentencing recommendations is included with my responses to these questions for the record. My understanding is that this chart was provided to the Committee during my hearing. It has subsequently come to my attention that due to an unintentional oversight, *United States v. Cane*, No. 19-cr-103, was left off this chart.

(Feb. 24, 2020), available at U.S. S. Comm. on the Judiciary Questionnaire for Judicial Nominees, Attachments to Question 12(d), Ketanji Brown Jackson, Nominee to be Associate Justice of the Supreme Court of the United States, Comm. on the Judiciary, U.S. S., 117th Cong., 577 (2022).

240. Did you receive information concerning former cases of yours, including, but not limited to, probation recommendations, Presentence Investigation Reports, case files, or sealed documents—either in whole, or in part, or summaries thereof—from any member of the Legislative Branch as part of your confirmation process, yes or no?

RESPONSE: No.

a. If yes, please provide those documents in full.

RESPONSE: Please see my response to Question 240.

Case Number	Name	USPO Rec - custody	Sentence Imposed-custody	USPO Rec-Supervised Release	Supervised Release Imposed
13CR00137	Nickerson	120 months	120 months	120 months	120 months
13CR00244	Hawkins	18 months	3 months	120 months	73 months
14CR00184	Hammond	120 months	84 months	Life	240 months
15CR00085	Fyffe	240 months	240 months	180 months	120 months
15CR00095	Savage	36 months	37 months	120 months	120 months
16CR00030	Hillie	492 months	354 months	Life	240 months
16CR00067	Stewart	42 months	57 months	120 months	120 months
17CR00002	Hess	60 months	60 months	120 months	120 months
18CR00049	Nguyen	60 months	37 months	120 months	120 months
18CR00391	Downs	60 months	60 months	120 months	120 months
19CR00021	Sears	120 months	71 months	120 months	120 months
19CR00120	Buttry	72 months	72 months	120 months	120 months
19CR00382	Cooper	60 months	60 months	180 months	120 months
21CR00076	Chazin	28 months	28 months	60 months	73 months

Senator Ben Sasse
Questions for the Record
Judge Ketanji Brown Jackson
Nominee, Associate Justice of the Supreme Court of the United States

1. In the 2006 book, “Active Liberty: Interpreting our Democratic Constitution,” Justice Breyer wrote, “Since law is connected to life, judges, in applying a text in light of its purpose, should look to consequences including contemporary conditions, social, industrial and political, of the community to be affected.”¹

a. Do you agree with Justice Breyer?

RESPONSE: I am not certain what Justice Breyer meant by that statement. I follow the methods of statutory and constitutional interpretation that the Supreme Court has employed. I look at the relevant provision of the Constitution, statute, or other applicable legal authority. I work to discern those words’ meaning as intended by the people who wrote them. I focus on original public meaning; I look at history and practice at the time the document was created to understand what those who created the text intended. I also look at precedent to understand how the text has been previously interpreted and applied. As a lower court judge, I am bound by precedent. If I am fortunate enough to be confirmed to the Supreme Court, I would be bound by *stare decisis*. I do not decide cases based on my personal views or policy preferences.

2. During the confirmation hearing for now-Justice Amy Coney Barrett, Senator Durbin remarked that the “tool of choice” for “right-wing judicial activists” is the “supposedly neutral judicial philosophy of originalism and textualism, which gives judges the ability to substitute their own judgment for the elected branches and to strike down and restrict laws that are disfavored by powerful special interests.”²

a. Do you agree with Senator Durbin?

RESPONSE: I am not familiar with the statements made by Senator Durbin, nor is it appropriate for me to comment on remarks made by a Senator in connection with the Senate’s exercise of its constitutional advise and consent power.

3. In a 2021 interview with the Washington Post, Justice Breyer discussed his most recent book, “The Authority of the Court and the Peril of Politics.”³ Part of the discussion focused on Justice Breyer’s concerns with proposals to add additional seats to the Supreme Court, saying:

“It’s risky changing the structure. It’s risky for if one party can change the structure to add more favorable people, then the other party can do the same, and

¹ STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2007).

² See Barrett Confirmation Hearing, Day 3 Part 1, C-SPAN.org (Oct. 14, 2022), <https://www.c-span.org/video/?476317-1/barrett-confirmation-hearing-day-3-part-1>.

³ Stephen Breyer, “The Authority of the Court and the Perils of Politics,” Interview by David Ignatius, *Washington Post*, Sept. 13, 2021, <https://www.washingtonpost.com/washington-post-live/2021/09/13/transcript-authority-court-peril-politics-with-justice-stephen-g-breyer/>.

the risk, of course, is that the public in general will become less convinced that it's being decided as a matter of law, and they will be less likely if they think we're junior league politicians to follow what the court said.”

a. Do you agree with Justice Breyer’s comments about expanding the Supreme Court?

RESPONSE: I agree with Justice Barrett, who stated at her confirmation hearing that “the size of the Supreme Court is a question left open for Congress.” Answering this policy question, which the Constitution has placed in Congress’ hands, might suggest that I do not understand the limited role of a judge, which is to rule on cases and controversies that come before the court.

b. If you are unable to answer, why not?

RESPONSE: Please see my response to Question 3a.

c. Is it appropriate for sitting justices to discuss proposals to expand the Supreme Court but not judicial nominees?

RESPONSE: Please see my response to Question 3a.

4. Since beginning your professional legal career, what do you believe to be the most important Supreme Court cases that have been decided? Please explain why you consider each case to be significant.

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to opine on this question. . As Justices Kagan and Barrett explained, it is inappropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

5. Following your hearing to be a Judge on the U.S. Court of Appeals for the D.C. Circuit, you received numerous written questions for the record. In response to a question by Senator Tillis, you said that your “record of rulings in cases challenging government action demonstrates [your] ability to rule independently and impartially, regardless of the presidential administration that promulgates the policy being challenged.”

a. What three opinions would you name that best demonstrate your judicial independence?

RESPONSE: No single case can stand in for a judge’s record. In each of my cases, I set aside any personal views I may have about the matter and apply the law to the facts without fear or favor. Accordingly, any of my more than 570 written opinions demonstrates my judicial independence, as each of them was written following a methodology designed to ensure such independence.

6. Following your hearing to be a Judge on the U.S. Court of Appeals for the D.C. Circuit, you received numerous written questions for the record. In response to a question by Senator

Grassley, you defined “judicial activism” as “when a judge who is unwilling or unable to rule as the law requires and instead resolves cases consistent with his or her personal views.”

a. What is a real-world example of “judicial activism”?

RESPONSE: Identifying real-world examples of judicial activism would be inconsistent with my role as a judge, insofar as it would require insight into the personal views of other judges and would qualify as a critique of the opinions of other judicial officers.

b. Are there any eras or opinions from the Supreme Court’s history that can be described as “judicial activist”?

RESPONSE: As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court’s binding precedents.

7. The First Amendment’s Establishment Clause provides that “Congress shall make no law respecting an establishment of religion.” Throughout the years, the Supreme Court has proposed a number of tests to determine what actions might violate the Establishment Clause. One proposed test is from 1971 Supreme Court case, *Lemon v. Kurtzman*.⁴

a. What is the *Lemon* test?

RESPONSE: The *Lemon* test refers to a three-part test used to analyze an Establishment Clause claim in the context of government-sponsored expression. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, the Supreme Court articulated the test as: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Id.* at 612–13 (internal citations omitted).

b. What are the criticisms of the *Lemon* test?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on the merits or demerits of the Supreme Court’s precedent.

c. Is *Lemon* still good law?

⁴ 403 U.S. 602 (1971).

RESPONSE: I am aware that in *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019), a plurality of the Supreme Court stated that: “For at least four reasons, the Lemon test presents particularly daunting problems in cases, including the one now before us, that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations. Together, these considerations counsel against efforts to evaluate such cases under Lemon and toward application of a presumption of constitutionality for longstanding monuments, symbols, and practices.” *Id.* at 2081–82. If a case came before me that presented these issues, I would carefully review all of the relevant precedents from the Supreme Court. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to provide comment beyond the fact that, if confirmed, I would resolve each case based on the factual record and applicable law.

8. During your hearing, you discussed that when reviewing a statute or provision of the Constitution you look to the text, and the text is a constraint on your authority as a judge. Supreme Court precedent, you said, is another constraint on your judicial authority.
 - a. What is your judicial approach in cases in which these two constraints—case precedent and the text—conflict?

RESPONSE: *Stare decisis* is a bedrock legal principle that ensures consistency and impartiality of judgments. The Court has articulated factors to consider in determining whether to overrule a prior decision, including the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to “rob[]” the decision “of significant application or justification.” *See Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Federation Of State, City, & Municipal Employees*, 138 S. Ct. 2448, 2478 (2018). These factors are themselves a precedent of the Court. Whether the Court should overrule a challenged precedent of the Court would depend on the facts and circumstances of the particular case.

9. Was *Marbury v. Madison* correctly decided?

RESPONSE: As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by prior nominees, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court’s binding precedents.

Marbury v. Madison is one of three exceptions to the general principle that a judge should not critique or comment on the Supreme Court’s precedents. *Marbury* warrants this special status because the principle of judicial review that that decision established—i.e., its holding that, per the design of our Constitution, “[i]t is emphatically the province and duty of the judicial department to say what the law is[,]” *Marbury v. Madison*, 5 U.S. 137, 177 (1803)—is a foundational finding that is beyond dispute. *See* Federalist No. 78 (Alexander Hamilton) (“The

interpretation of the laws is the proper and peculiar province of the courts.”). Therefore, just as other nominees for judicial office and other sitting federal judges have done, I can confirm that *Marbury* was rightly decided without calling into question my duties under the Code of Conduct.

10. Was *Brown v. Board of Education* correctly decided?

RESPONSE: As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by prior nominees, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court’s binding precedents.

Brown v. the Board of Education is one of three exceptions to the general principle that a judge should not comment on the Supreme Court’s precedents. *Brown* warrants this special status because that decision overruled the manifest injustice of *Plessy v. Ferguson*, which had given rise to legally enforceable segregation in various places in the United States by endorsing ‘separate but equal’ as consistent with the Constitution’s Equal Protection Clause. The underlying premise of the *Brown* decision—i.e., that “separate but equal is inherently unequal”—is beyond dispute, and judges can express their agreement with that principle without calling into question their ability to apply the law faithfully to cases raising similar issues. Therefore, just as other nominees for judicial office and other sitting federal judges have done, I can confirm that *Brown* was rightly decided without calling into question my duties under the Code of Conduct.

11. Was *Roe v. Wade* correctly decided?

RESPONSE: As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by prior nominees, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court’s binding precedents.

12. Was *United States v. Virginia* correctly decided?

RESPONSE: Please see my response to Question 11.

13. Was *District of Columbia v. Heller* correctly decided?

RESPONSE: Please see my response to Question 11.

14. Was *Boumediene v. Bush* correctly decided?

RESPONSE: Please see my response to Question 11.

15. Was *Citizens United v. FEC* correctly decided?

RESPONSE: Please see my response to Question 11.

16. Was *Obergefell v. Hodges* correctly decided?

RESPONSE: Please see my response to Question 11.

Senator Josh Hawley
Questions for the Record

Ketanji Brown Jackson
Nominee, Associate Justice, Supreme Court

1. Justice Marshall famously described his philosophy as “You do what you think is right and let the law catch up.”
 - a. Do you agree with that philosophy?

RESPONSE: Over the course of my almost decade on the bench, I have developed a methodology that I use to ensure that I am ruling impartially and adhering to the limits on my judicial authority. I first ensure that I am proceeding from a position of neutrality by setting aside any personal views and clearing my mind of any preconceived notions about how the case might come out. Next, I consider the parties’ arguments and the record, to understand all of the facts, claims, and arguments. The final step is interpretation and application of the law to the facts in the case, where I am particularly mindful of the constraints on judicial authority. I assess the question of jurisdiction, and ask whether I even have the power to hear the case. If I do have jurisdiction, I look at the relevant provision of the Constitution, statute, or other applicable legal authority. I work to discern those words’ meaning as intended by the people who wrote them. I focus on original public meaning; I look at history and practice at the time the document was created to understand what those who created the text intended; I also look at precedent to understand how the text has been previously interpreted and applied. As a lower court judge, I am bound by precedent. If I am fortunate enough to be confirmed to the Supreme Court, I would be bound by *stare decisis*. I do not decide cases based on my personal views or policy preferences. I observe these limits in recognition of the fact that judges have limited authority, and I must always stay in my limited, judicial lane. I am not able to draw comparisons between my approach and the judicial philosophies that other Justices have employed. In addition, as a sitting federal judge and a pending judicial nominee, it would be inappropriate for me to criticize the views or opinions of particular Justices.

- b. If not, do you think it is a violation of the judicial oath to hold that philosophy?

RESPONSE: Please see my response to Question 1a.

2. Have you ever worked on a legal case or representation in which you opposed a party’s religious liberty claim?

RESPONSE: I do not recall any such case.

- a. If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.

RESPONSE: Please see my response to Question 2.

3. What is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment’s prohibition on cruel and unusual punishment?

RESPONSE: The Supreme Court has recently stated that a proper analysis of an Eighth Amendment challenge to a state’s method of execution should include an examination of “the original and historical understanding of the Eighth Amendment.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1126 (2019). Under the applicable legal standard, a petitioner cannot state a claim for a violation of the Eighth Amendment based on the method of execution unless the petitioner can show both that (1) the method of execution carries a substantial risk of severe pain and that (2) such risk is substantial when compared to known and available alternative methods of execution. *Id.* at 1129–30.

4. Under the Supreme Court’s holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a “known and available alternative method” that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?

RESPONSE: The Supreme Court recently reaffirmed the holding in *Glossip* – and held that a petitioner cannot state a claim for a violation of the Eighth Amendment based on the method of execution unless the petitioner can show both that (1) the method of execution carries a substantial risk of severe pain and that (2) such risk is substantial when compared to known and available alternative methods of execution. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1129–30 (2019).

5. Has any federal court ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?

RESPONSE: The Supreme Court in *District Attorney’s Office for the Third Judicial District v. Osborne*, 557 U.S. 52 (2009) held that, although the defendant had a constitutional liberty interest in proving his innocence after conviction with new evidence under applicable state law, state procedures for obtaining DNA evidence adequately protected that interest. In so ruling, the Supreme Court reversed the Ninth Circuit’s decision to the contrary. The Supreme Court also refused to recognize a freestanding substantive due process right to DNA evidence under the circumstances of the case.

6. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

RESPONSE: No. As a federal judge for almost a decade, I resolve each case on an individual basis by assessing the parties’ legal arguments based on the factual record and applicable law, including relevant statutes and binding precedent. Regardless of the issues in the case, any personal views I may have are irrelevant to my decision-making process. As a sitting federal circuit court judge, I am required to apply all of the Supreme Court’s binding precedents—including those regarding the death penalty—and I would respect those precedents should I be confirmed to the Supreme Court.

7. What is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.

RESPONSE: The First Amendment expressly guarantees the right to the free exercise of religion, and the Supreme Court has held that this right is a fundamental right. Consequently, government actions that regulate religious activity are subject to strict scrutiny unless they are neutral and generally applicable. *See Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878–82 (1990). Determining whether an action is neutral and generally applicable requires a two-part analysis.

First, a court must resolve whether a law is neutral. This inquiry looks to both whether the action is facially neutral, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533–34 (1993), and whether religious animus motivated the action’s enactment or enforcement, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729–31 (2018). A non-neutral action is subject to strict scrutiny.

Second, a court determines whether a government action is generally applicable. This inquiry looks to both whether there is already “a mechanism for individualized exemptions,” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (internal quotation marks omitted), and whether the action “prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Id.* at 1877. An action that is not generally applicable is subject to strict scrutiny.

However, not every application of a “valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017). For example, the Supreme Court has recognized that employees of religious organizations may not bring claims under worker-protection laws if enforcement of those laws would impair the religious entity’s ability to choose its ministers., *See, e.g., Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012).

8. What is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

RESPONSE: Please see my response to Question 7.

9. What is the standard for evaluating whether a person’s religious belief is held sincerely?

RESPONSE: The Supreme Court’s precedents affirm the protection of sincerely held religious beliefs. The term “sincerely held” does not require that a claimant be “responding to the commands of a particular religious organization.” *Frazee v. Illinois Department of Employee Security*, 489 U.S. 829, 834 (1989). Instead, courts look to whether the beliefs are honest convictions on the part of the claimant. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

10. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, “The 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics.” 198 U.S. 45, 75 (1905).

- a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

RESPONSE: In his dissent in *Lochner*, Justice Holmes was arguing that the Court should not impose its own view of “economic theory” on legislatures. *Lochner v. New York*, 19 U.S. 45, 75 (1905). As I have previously explained, I believe that the role of a judge is to evaluate the legal claims that are made and to determine the merits of those claims based on arguments presented by the parties, in light of applicable law. At no point in the process of judicial decision making can a judge substitute her own policy preferences for those of Congress or state legislative bodies, either to reach a desired outcome or for any other purpose.

- b. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

RESPONSE: The Court in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), largely abrogated *Lochner*, and the Court has explained that “[t]he doctrine that prevailed in *Lochner* . . . has long since been discarded,” *Ferguson v. Skurpa*, 3272 U.S. 726 (1963). Those decisions are precedent of the Court entitled to respect under *stare decisis* principles. As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, as a general matter, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court’s binding precedents.

11. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

RESPONSE: There are Supreme Court opinions that have been abrogated by statute or constitutional amendment but that have not been formally overruled, such as *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which was abrogated by the Reconstruction Amendments. In addition, the Court has explained that *Korematsu v. United States*, 323 U.S. 214 (1944), “was gravely wrong the day it was decided,” and “has been overruled in the court of history.” See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

- a. If so, what are they?

RESPONSE: Please see my response to Question 11.

- b. With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?

RESPONSE: I commit to respecting all precedents of the Supreme Court.

12. Judge Learned Hand famously said 90% of market share “is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not.” *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

- a. Do you agree with Judge Learned Hand?

RESPONSE: According to the Supreme Court, “[t]he existence of such power ordinarily may be inferred from the predominant share of the market,” *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), but when determining the market share sufficient to constitute monopoly power, “no magic inheres in numbers; The relative effect of percentage command of a market varies with the setting in which that factor is placed.” *Times-Picayune Publishing Corporation v. United States*, 345 U.S. 594, 612 (1953). If asked in a case before me to assess whether a particular percentage of market share constitutes a monopoly, I would examine all of the relevant facts and circumstances and apply the applicable case law in making that determination.

- b. If not, please explain why you disagree with Judge Learned Hand.

RESPONSE: Please see response to Question 12a.

- c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

RESPONSE: Please see response to Question 12a.

13. Please describe your understanding of the “federal common law.”

RESPONSE: In *Erie Railroad Co. v. Tompkins*, the Supreme Court stated that “[t]here is no federal general common law.” 304 U.S. 64, 78 (1938). “Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision.” *Rodriguez v. Federal Deposit Insurance Corporation*, 140 S. Ct. 713, 717 (2020). “These areas have included admiralty disputes and certain controversies between States.” *Id.* “[B]efore federal judges may claim a new area for common lawmaking, strict conditions must be satisfied,” including “one of the most basic: In the absence of congressional authorization, common lawmaking must be necessary to protect uniquely federal interests.” *Id.* (internal quotation marks omitted).

14. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

RESPONSE: In our federalist system of government, federal courts must interpret state constitutional provisions under state law in accordance with the pronouncements of the State Supreme Court.

- a. Do you believe that identical texts should be interpreted identically?

RESPONSE: In the statutory interpretation context, the Supreme Court has explained that it “does not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes.” *Azar v. Allina Health Services*, 139 S. Ct. 1804, 1812 (2019). However, state courts can interpret their state’s Constitution differently than how federal courts have interpreted the United States Constitution. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). In our federalist system of government, federal courts must interpret state constitutional provisions in accordance with state law.

- b. Do you believe that the federal provision provides a floor but that the state provision provides greater protections?

RESPONSE: The Supreme Court has determined that state constitutional or statutory provisions can provide greater protection than the United States Constitution. *See, e.g., Cooper v. State of California*, 386 U.S. 58, 68 (1967) (discussing a “State’s power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so”).

15. Do federal courts have the legal authority to issue nationwide injunctions?

RESPONSE: Article III of the Constitution limits the exercise of the judicial power to ‘Cases’ and ‘Controversies.’” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted). A federal court may entertain a suit only by a plaintiff who has suffered a concrete “injury in fact,” and the court may grant relief only to remedy “the inadequacy that produced [the plaintiff’s] injury.” *Gill v. Whitford*, 138 S. Ct. 1916, 1929–30 (2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). Principles of equity reinforce those limitations, as a court’s equitable authority to award relief is generally confined to relief “traditionally accorded by courts of equity” in 1789. *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318, 319 (1999). The Supreme Court has in some cases narrowed injunctions that extended relief beyond the harms to “any plaintiff in th[e] lawsuit.” *Lewis*, 518 U.S. at 358. In other cases, the Court has declined to narrow an injunction to only the plaintiffs in the suit. *See, e.g., Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (allowing “injunctions to remain in place” for those “similarly situated” to the plaintiffs).

The proper scope of any relief depends on the record before the Court and the relevant law. Consistent with Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract on when an injunction would not be appropriate.

- a. If so, what is the source of that authority?

RESPONSE: Please see my response to Question 15.

- b. In what circumstances, if any, is it appropriate for courts to exercise this authority?

RESPONSE: Please see my response to Question 15.

16. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

RESPONSE: Article III of the Constitution limits the exercise of the judicial power to ‘Cases’ and ‘Controversies.’” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted). A federal court may entertain a suit only by a plaintiff who has suffered a concrete “injury in fact,” and the court may grant relief only to remedy “the inadequacy that produced [the plaintiff’s] injury.” *Gill v. Whitford*, 138 S. Ct. 1916, 1929–30 (2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). Principles of equity reinforce those limitations, as a court’s equitable authority to award relief is generally confined to relief “traditionally accorded by courts of equity” in 1789. *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318, 319 (1999). The Supreme Court has in some cases narrowed injunctions that extended relief beyond the harms to “any plaintiff in th[e] lawsuit.” *Lewis*, 518 U.S. at 358.

As I explained at the hearing, however, the Administrative Procedure Act (APA) authorizes courts to “set aside” agency action that is unlawful. 5 U.S.C. 706(2). In some cases, the agency action challenged is an agency rule that the agency has opted to apply nationwide. In these cases, if the reviewing court finds the rule unlawful, the court can, consistent with the APA, issue an order to “set” the rule “aside” and invalidate it. Although this order would have a nationwide effect because the challenged rule had nationwide application, I do not consider this statutory remedy to be a “nationwide injunction.” The issue of whether and in what circumstances federal judges have the power to issue nationwide injunctions is currently the subject of litigation, and it would be inappropriate for me to comment further on an issue that may come before me in litigation.

17. What is your understanding of the role of federalism in our constitutional system?

RESPONSE: The Supreme Court has stated that, “under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.” *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). This system provides “a check on abuses of government power,” as “a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991); *see also* The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”).

18. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

RESPONSE: The Supreme Court has stated that while “federal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant,” it

“has recognized . . . certain instances in which the prospect of undue interference with state proceedings counsels against federal relief.” *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 72–73 (2013). Several cases have described instances in which abstention may be appropriate. See, e.g., *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); *Younger v. Harris*, 401 U.S. 37 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941). “The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.” *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987).

19. What in your view are the relative advantages and disadvantages of awarding damages versus injunctive relief?

RESPONSE: Whether damages or injunctive relief is appropriate depends on the context of the particular case. Consistent with Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract on when damages as opposed to injunctive relief may be appropriate.

20. What is your understanding of the Supreme Court’s precedents on substantive due process?

RESPONSE: The Supreme Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendments protects certain unenumerated “fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks and citations omitted). The Court in *Glucksberg* cited “a long line of cases” addressing “the ‘liberty specially protected by the Due Process Clause,’ commonly referred to as substantive due process, explaining that it encompasses:

the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one’s children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, [*Planned Parenthood of Pa. v. Casey*, 505 U.S. 833 (1992)].

Id. at 720.

21. The First Amendment provides “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

- a. What is your view of the scope of the First Amendment’s right to free exercise of religion?

RESPONSE: The First Amendment’s right to free exercise of religion is a fundamental and foundational constitutional right. The Supreme Court is actively evaluating the scope of the First Amendment right to free exercise in a variety of circumstances. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on this question.

- b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

RESPONSE: Please see my response to Question 21a.

- c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

RESPONSE: Please see my response to Question 21a.

- d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

RESPONSE: Please see my response to Question 9.

- e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

RESPONSE: According to the Supreme Court, the Religious Freedom Restoration Act (RFRA) “applies to all Federal law, and the implementation of that law, whether statutory or otherwise. RFRA also permits Congress to exclude statutes from RFRA’s protections.” *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020). The Supreme Court frequently considers cases alleging violations of RFRA; therefore, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment further on this question.

- f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

RESPONSE: I do not recall any such case.

22. Justice Scalia said, “The judge who always likes the result he reaches is a bad judge.”

- a. What do you understand this statement to mean?

RESPONSE: I understand this statement to recognize that faithfully interpreting the law can sometimes result in an outcome that may conflict with a judge’s own personal view

of the matter. It is the judge's duty to set aside any personal view of the matter, and/or the outcome that she would personally prefer, and faithfully apply the law. An outcome that comports with the law, as set forth in binding precedent, is required by the judge's oath and the Constitution.

23. Have you ever taken the position in litigation or a publication that a federal or state statute was unconstitutional?

RESPONSE: To best of my recollection, I have not. In *Boumediene v. Bush*, 553 U.S. 723 (2008), I filed an amicus brief on behalf of clients which argued that "Unless the Detainee Treatment Act (DTA) authorizes the court to determine whether, and to what extent, an Executive detention is based on statements extracted by torture or other impermissible coercion when the court rules on the legality of the detention, judicial review under the DTA cannot be an adequate substitute for the common law writ of habeas corpus." The brief did not argue that the DTA was unconstitutional.

- a. If yes, please provide appropriate citations.

RESPONSE: Please see my response to Question 23.

24. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

RESPONSE: No.

25. Do you believe America is a systemically racist country?

RESPONSE: As a federal judge for the last decade, it has been my duty to adjudicate individual claims in specific cases and controversies, including claims of race discrimination. When I have jurisdiction to do so, I resolve properly filed legal disputes concerning race discrimination based on the arguments that the parties make, the established facts of the particular case, and the applicable law.

26. Have you ever taken a position in litigation that conflicted with your personal views?

RESPONSE: Consistent with my methodology, as a judge I proceed with every case from a position of neutrality by first setting aside any preconceived notions and personal views regarding the parties and matters at issue in any case presented to me. Doing so at the outset of a case allows me to observe the constraints on my judicial authority and ensure that I consider only those inputs that are relevant to deciding a particular case or controversy. As a result, I have never considered or relied upon my own personal views in any case.

- a. How did you handle the situation?

RESPONSE: Please see my response to Question 26.

27. If confirmed, do you commit to applying the law written, regardless of your personal beliefs concerning the policies embodied in legislation?

RESPONSE: Yes. Under Supreme Court precedent, if “statutory text is plain and unambiguous,” a judge “must apply the statute according to its terms.” *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). I follow that rule regardless of any personal views or policy preferences I may have. As I stated at my hearing, judges should not be policymakers. Judges interpret law; they do not make it. “It is Congress’s job to enact policy and it is th[e] Court’s job to follow the policy Congress has prescribed.” *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018).

28. Which of the Federalist Papers has most shaped your views of the law?

RESPONSE: I have always particularly appreciated Federalist 51 because it discusses the Framers’ intent regarding the separation of powers. Checks and balances play an essential role in our constitutional scheme, because liberty can only be achieved, and retained, through the stratification of government power. The Framers carefully and deliberately divided the powers of government among the three branches, and they also authorized each branch to relate to, and work in concert with, the others, so as to serve as a check on the others’ accumulation of power. In Federalist 51, James Madison explained that “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” The Federalist No. 51 (James Madison); *see also Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (“[T]he men who met in Philadelphia in the summer of 1787 . . . viewed the separation of powers as a vital check against tyranny.”). And the structure of our constitutional system prevents autocracy while also promoting “a workable government.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also id.* (“While the Constitution diffuses power to better secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government[,]” and thereby “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”). Thus, the system of separate powers, accompanied by checks and balances, is a foundational component of our governmental scheme that promotes core constitutional values, by design. *See Myers v. United States*, 272 U.S. 52, 292–93 (1926) (Brandeis, J., dissenting) (“Checks and balances were established in order that this should be ‘a government of laws and not of men.’ . . . The purpose [of the doctrine of the separation of powers] was not to promote efficiency but to preclude the exercise of arbitrary power . . . by means of the inevitable friction incident to the distribution of the governmental powers among three departments,” in order “to save the people from autocracy.”).

29. Do you believe that an unborn child is a human being?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to offer personal views, if any, on this question. My personal views play no role in the performance of my duties; in every case that I have handled, I have considered only the parties’ arguments, the relevant facts, and the law as I understand it, including and especially the binding precedents of the Supreme Court and the D.C. Circuit.

30. Other than at your hearings before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is available online or as a record, please include the reference below or as an attachment.

RESPONSE: To best of my recollection, no.

31. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:

- a. *Roe v. Wade*, 410 U.S. 113 (1973)?

RESPONSE: No.

- b. The Supreme Court's substantive due process precedents?

RESPONSE: No.

- c. Systemic racism?

RESPONSE: No.

- d. Critical race theory?

RESPONSE: No.

32. Do you currently hold any shares in the following companies:

RESPONSE: I do not hold any individual stocks. I only hold mutual funds.

- a. Apple?

RESPONSE: Please see my response to Question 32.

- b. Amazon?

RESPONSE: Please see my response to Question 32.

- c. Google?

RESPONSE: Please see my response to Question 32.

- d. Facebook?

RESPONSE: Please see my response to Question 32.

- e. Twitter?

RESPONSE: Please see my response to Question 32.

33. Have you ever authored or edited a brief that was filed in court without your name on the brief?

RESPONSE: At large law firms, it is typical for teams of lawyers to be assigned to work on cases and briefing. There may have been times, when I worked at firms, that I assisted with the review, editing, or drafting of a brief, and was not a primary contributor and therefore was not listed on the brief. I do not have a specific recollection of any particular brief.

a. If so, please identify those cases with appropriate citation.

RESPONSE: Please see my response to Question 33.

34. Have you ever confessed error to a court?

RESPONSE: To best of my recollection, no.

a. If so, please describe the circumstances.

RESPONSE: Please see my response to Question 34.

35. Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when testifying before the Senate Judiciary Committee. *See* U.S. Constitution, Article II, § 2, Clause 2.

RESPONSE: I swore an oath before the Senate Judiciary Committee that the testimony I was to give before the committee would be the truth, the whole truth, and nothing but the truth, so help me God. I had a duty to abide by that oath, which I did.

36. In *United States v. Greene*, No. 71-cr-1913 (D.D.C.), you released a defendant who murdered a law enforcement officer in cold blood during a religious service at a church, before commandeering a vehicle at gun point. The U.S. Parole Commission previously denied his clemency pretention six times because his “cold blooded execution” of a U.S. Marshal exhibited a “callous disregard for human life.” According to the government, the defendant stood over the marshal’s body as he lay helpless on the pavement and shot him twice more for good measure. Why did you think it was appropriate for the defendant to be released?

RESPONSE: As a district court judge, I sentenced more than 100 defendants. In each case, I engaged in the fact-specific, individualized inquiry that Congress has mandated federal judges undertake in order to ensure that the sentence I imposed satisfied the purposes of punishment set forth by Congress. Additionally, I have granted and denied petitions in these cases based solely on whether the facts of a specific case met the applicable standards set forth by Congress.

Congress enacted the First Step Act in 2018 and made clear what process federal judges should follow when considering compassionate release requests. With respect to the defendant’s motion in this case, I repeatedly noted the grave and serious crimes the defendant had committed in 1971. However, I was statutorily obligated to evaluate the

defendant's application for compassionate release by applying the factors that Congress set forth for federal judges to apply. I found the defendant's "advanced age, lengthy period of incarceration, and age-related deterioration in health constitute[d] extraordinary and compelling reasons to reduce his sentence. And the Court further [found] that, after 49 years in prison, Greene's continued incarceration would be greater than necessary to comply with the purposes of punishment identified in section 3553(a)." U.S. v. Greene, 516 F. Supp. 3d 1, 28 (D.D.C. 2021). Additionally, there was evidence in the record that Greene had a "highly unusual level of support" from "numerous correctional officials who have consistently advocated for his release, both during his parole hearings and with respect to the instant motion." For example, I considered the testimony of numerous BOP officers who testified at Mr. Greene's parole hearings in support of his release due, in part, to his efforts to save two guards' lives during a prison riot. Id. at 4–5, 25. Several BOP officers wrote to the Court in support of Mr. Greene's motion. Id. at 24. Taken together, I found this evidence suggested that Mr. Greene was unlikely to pose a danger to any person or the community, and had a minimal risk of recidivism in agreement with BOP's findings. Id. at 25. Mr. Greene was 72 years old at the time of his release and died a few months after I granted his motion.

37. How many hours did you bill representing terrorists during your time in private practice? Please breakdown your response by client matter and year.

RESPONSE: In connection with my representation of Gibran Al Kahtani (elsewhere spelled Jabran Al Quhtani) while employed at Morrison Foerster, I billed 19 hours in 2007, 21 hours in 2008, and 7 hours in 2009.

38. During your time as a Member of the Harvard Board of Overseers:

a. Did the board ever receive information or a briefing on litigation challenging Harvard's admissions policies?

RESPONSE: The Board receives general briefings from various divisions, including the Office of General Counsel, about matters related to the University, including pending litigation. The substance of Harvard's admissions policies were never discussed or addressed by the Board, nor did the Board have any input into the strategy for litigating that case.

b. Did anyone ever raise or discuss Harvard's admissions policies?

RESPONSE: Please see my response to Question 38a.

c. Did you ever attend a meeting where Harvard's admissions policies or related litigation were listed on the agenda?

RESPONSE: Please see my response to Question 38a.

d. Have you ever interviewed applicants to Harvard under the current admissions policies challenged in these cases?

RESPONSE: The Harvard Alumni Association organizes local interviews of all applicants, conducted by alumni. Since graduating from Harvard College in 1992, and until my election to the Board of Overseers in 2016, I participated as a local alumni interviewer, generally interviewing approximately 4–5 local high school students per year.

e. How many applicants have you interviewed for Harvard College?

RESPONSE: Please see my response to Question 38d.

f. In considering applicants to Harvard, have you ever provided feedback to the admission's office that included references to an applicant's race?

RESPONSE: I do not recall doing so.

39. In hiring clerks, have you ever considered the race or gender of an applicant? Will you consider those factors in the future?

RESPONSE: As a judge, I have always strived to hire smart, capable clerks from a wide variety of backgrounds, and with diverse experiences and interests. This involves a holistic evaluation of many criteria including, but not limited to: an applicant's educational achievement, work experience, letters of recommendation, life experiences, challenges overcome, my interview with them, and their skills working with others. I plan to continue this practice in the future.

40. Have you ever opposed the death penalty in litigation or a policy role?

RESPONSE: I have never taken a position for or against the death penalty in a litigation or policy role.

41. Please describe your understanding of how the House of Representatives and the Senate generate conference reports.

RESPONSE: A conference report is an agreement on legislation that is negotiated between the House and Senate through conference committees. It is printed and submitted to each chamber for its consideration. If the report is approved by both chambers, the bill is enrolled and sent to the President. If the report is disapproved by either chamber, the matter is treated as if there had been no conference. Our American Government, H. Doc. 108–94 (2003), p. 34.

42. Which federal judges do you most try to emulate?

RESPONSE: Consistent with my response to Question 1a., I am not able to draw comparisons between my approach and the judicial philosophies of other judges. However, I would endeavor to emulate the open-mindedness and collegiality of my prior boss and mentor, Justice Stephen Breyer.

43. Which book on constitutional history have you found to be most helpful in developing your own views of constitutional law?

RESPONSE: As stated at my hearings, I decide each case consistent with my methodology and proceed from a position of neutrality. As a pending judicial nominee and a sitting federal judge, it would be inappropriate to comment on the merits of various books on constitutional history.

44. Has anyone advised you to say that you do not have a judicial philosophy? If so, please identify them.

RESPONSE: No.

45. Have you ever met face-to-face with a terrorist?

RESPONSE: No.

46. Have you ever used a personal email account or personal device to conduct official government business?

RESPONSE: To the best of my recollection, no.

47. What do you believe is the difference between original meaning and original intent?

RESPONSE: The Supreme Court has recently interpreted various constitutional provisions by attempting to ascertain the original meaning of the words used as understood by the public at the time of the Founding. *See, e.g., United States v. Jones*, 132 S. Ct. 945, 949 (2012) (Fourth Amendment); *Citizens United v. Federal Election Commission*, 558 U.S. 310, 906 (2010) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42–57 (2004) (Confrontation Clause); *Alden v. Maine*, 527 U.S. 706, 715–724 (1999) (Eleventh Amendment). While the Supreme Court has primarily evaluated the original public meaning of the text of the constitutional provision at issue, *see Jones*, 132 S. Ct. at 949, 953; *Heller*, 554 U.S. at 576–77, its binding precedents also sometimes refer to the original intent of the Framers, *see Crawford*, 541 U.S. at 53–54, 59, 61.

48. How would you articulate living constitutionalism?

RESPONSE: I understand living constitutionalism to refer to a theory that the meaning of the Constitution changes or evolves over time. In my view, courts must apply established constitutional principles to new circumstances, but the meaning of the Constitution itself is fixed and does not change or evolve.

49. Have you ever possessed, used, inhaled, ingested, manufactured, or distributed any Schedule I substance?

RESPONSE: No.

50. In her personal capacity, Justice Kagan wrote in *Confirmation Messes, Old and New*, 62 U. Chi. L. Rev. 919, 932 (1995) that “many of the votes a Supreme Court Justice casts have

little to do with technical legal ability and much to do with conceptions of value.” Do you agree?

RESPONSE: I am not certain what Justice Kagan meant by that statement. For a description of my judicial approach, please see my response to Question 1a.

51. Do you think the Constitution’s meaning changes over time?

RESPONSE: No. Please see my response to Question 48.

52. Have you ever advocated for more lenient sentences for sex offenders, including for those convicted of producing or possessing child pornography?

RESPONSE: During my time on the bipartisan Sentencing Commission, the Commission issued a unanimous report recommending revisions to the Sentencing Guidelines for child pornography offenses, in light of new data and information that was available, and in furtherance of its duty under the statutes that Congress has enacted to propose Guideline revisions and policies that address unwarranted sentencing disparities.

53. When your nomination to the D.C. Circuit was before this committee, Chairman Durbin asked you in a question for the record whether your representation in *McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001), was done on a pro bono basis. Question #9(a). You did not answer his question. Was your representation in that case pro bono, and why did you not answer that question directly previously?

RESPONSE: I worked on this case in my capacity as a litigation associate at a large firm, which provided pro bono representation to its clients in this case. At the time I answered the questions for the record accompanying my D.C. Circuit nomination, I did not recall whether the firm’s representation in this case was pro bono. In preparing for this nomination, I reviewed my billing records from the firm, which indicated that this case involved pro bono representation.

54. Do you believe *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. __ (2020) is entitled to *stare decisis*?

RESPONSE: All Supreme Court decisions are precedential and entitled to respect under *stare decisis* principles.

55. Have you ever advocated for the consideration of race in making hiring, admissions, or tenure decisions? If so, please explain.

RESPONSE: No.

56. Do you support cameras in the Supreme Court?

RESPONSE: If I am fortunate enough to be confirmed, I would discuss this issue with my colleagues and give it careful consideration.

57. Have you ever made any statements regarding expansion of the Supreme Court?

RESPONSE: No. I agree with Justice Barrett, who stated at her confirmation hearing that “the size of the Supreme Court is a question left open for Congress.” Answering this policy question, which the Constitution has placed in Congress’ hands, might suggest that I do not understand the limited role of a judge, which is to rule on cases and controversies that come before the Court.

58. Were you ever involved in organizing an event where Leonard Jeffries was a speaker?

RESPONSE: I was a Black student at Harvard in the Harvard Undergraduate Black Students Association. I have since learned that the Association hosted him as a speaker my senior year, when I was finalizing my thesis. I did not know of or attend the speech. And I do not support his views.

59. In the following cases, why did you sentence the defendant substantially below the advisory guidelines and below the government’s recommendation?

RESPONSE: Respectfully, the premise of your question is factually incorrect. In many of the cases you identified, I did in fact sentence the defendant consistent with the government’s sentencing recommendation or within the guidelines range. *See, e.g., United States v. Hess*, No. 1:17-cr-2 (D.D.C.) (sentence consistent with government and probation office’s recommendations); *United States v. Nickerson, Jr.*, No. 1:13-cr-137 (D.D.C.) (sentence consistent with government and probation office’s recommendations); *United States v. Savage*, No. 1:15-cr-95 (D.D.C.) (sentence consistent with guidelines range). In other cases, I sentenced consistent with or above the probation office’s recommendation, which is noted in publicly available documents or on the chart made available to the Committee. *See, e.g., United States v. Chazin*, No. 21-cr-076 (D.D.C.) (sentence consistent with probation office’s recommendation); *United States v. Cooper*, No. 19-cr-382 (D.D.C.) (sentence consistent with probation office’s recommendation); *United States v. Downs*, No. 18-cr-391 (D.D.C.) (sentence consistent with probation office’s recommendation); *United States v. Savage*, No. 1:15-cr-95 (D.D.C.) (sentence consistent with guidelines range and above probation office’s recommendation); *United States v. Stewart*, No. 1:16-cr-67 (D.D.C.) (sentence above probation office’s recommendation); *United States v. Hess*, No. 1:17-cr-2 (D.D.C.) (sentence consistent with government and probation office’s recommendation); *United States v. Nickerson, Jr.*, No. 1:13-cr-137 (D.D.C.) (sentence consistent with government and probation office’s recommendation). In still other cases, the sentencing itself required me to decide complicated legal questions about the applicability of certain Guidelines provisions. *See, e.g., United States v. Crummy*, No. 1:16-cr-133 (D.D.C.) (requiring a determination of whether the SBA’s Section 8(a) program qualifies as a government benefit for sentencing purposes, a question on which circuit courts were split). In each of the more than 100 sentencings that I conducted as a federal trial court judge, I have diligently followed the law set out by Congress, considered the relevant factors and facts of the case, and rendered an individualized sentencing determination.

a. *United States v. Baham*, No. 1:13-cr-188 (D.D.C.)

RESPONSE: Please see my response to Question 59.

b. *United States v. Beard*, No. 1:13-cr-324 (D.D.C.)

RESPONSE: Please see my response to Question 59.

c. *United States v. Burch*, No. 1:17-cr-99 (D.D.C.)

RESPONSE: Please see my response to Question 59.

d. *United States v. Chazin*, No. 1:21-cr-76 (D.D.C.)

RESPONSE: Please see my response to Question 59.

e. *United States v. Cho*, No. 1:16-cr-186 (D.D.C.)

RESPONSE: Please see my response to Question 59.

f. *United States v. Choi*, No. 1:20-cr-6 (D.D.C.)

RESPONSE: Please see my response to Question 59.

g. *United States v. Cooper*, No. 1:19-cr-382 (D.D.C.)

RESPONSE: Please see my response to Question 59.

h. *United States v. Crummy*, No. 1:16-cr-133 (D.D.C.)

RESPONSE: Please see my response to Question 59.

i. *United States v. Downs*, No. 1:18-cr-391 (D.D.C.)

RESPONSE: Please see my response to Question 59.

j. *United States v. Dukes*, No. 1:13-cr-327 (D.D.C.)

RESPONSE: Please see my response to Question 59.

k. *United States v. Dunlap*, No. 1:17-cr-1207 (D.D.C.)

RESPONSE: Please see my response to Question 59.

l. *United States v. Ellis*, No. 1:14-cr-41 (D.D.C.)

RESPONSE: Please see my response to Question 59.

m. *United States v. Guerrero-Garcia*, No. 1:13-cr-159 (D.D.C.)

RESPONSE: Please see my response to Question 59.

n. *United States v. Hawkins*, No. 1:13-cr-244 (D.D.C.)

RESPONSE: Please see my response to Question 59.

o. *United States v. Hess*, No. 1:17-cr-2 (D.D.C.)

RESPONSE: Please see my response to Question 59.

p. *United States v. Jenkins*, No. 1:14-cr-3 (D.D.C.)

RESPONSE: Please see my response to Question 59.

q. *United States v. Johnson*, No. 1:18-cr-159 (D.D.C.)

RESPONSE: Please see my response to Question 59.

r. *United States v. Jones*, No. 1:19-cr-202 (D.D.C.)

RESPONSE: Please see my response to Question 59.

s. *United States v. Kahn*, No. 1:18-cr-56 (D.D.C.)

RESPONSE: Please see my response to Question 59.

t. *United States v. Manuel*, No. 1:13-cr-145 (D.D.C.)

RESPONSE: Please see my response to Question 59.

u. *United States v. Mercer*, No. 1:15-cr-132 (D.D.C.)

RESPONSE: Please see my response to Question 59.

v. *United States v. Miller*, No. 1:16-cr-72 (D.D.C.)

RESPONSE: Please see my response to Question 59.

w. *United States v. Milzman*, No. 1:14-cr-186 (D.D.C.)

RESPONSE: Please see my response to Question 59.

x. *United States v. Mirza*, No. 1:15-cr-62 (D.D.C.)

RESPONSE: Please see my response to Question 59.

y. *United States v. Murphy*, No. 1:13-cr-285 (D.D.C.)

RESPONSE: Please see my response to Question 59.

z. *United States v. Nickerson, Jr.*, No. 1:13-cr-137 (D.D.C.)

RESPONSE: Please see my response to Question 59.

aa. *United States v. Revell*, No. 1:13-cr-317 (D.D.C.)

RESPONSE: Please see my response to Question 59.

bb. *United States v. Richardson*, No. 1:14-cr-18 (D.D.C.)

RESPONSE: Please see my response to Question 59.

cc. *United States v. Robinson*, No. 1:20-cr-211 (D.D.C.)

RESPONSE: Please see my response to Question 59.

dd. *United States v. Sanchez*, No. 1:17-cr-188 (D.D.C.)

RESPONSE: Please see my response to Question 59.

ee. *United States v. Savage*, No. 1:15-cr-95 (D.D.C.)

RESPONSE: Please see my response to Question 59.

ff. *United States v. Sears*, No. 1:19-cr-21 (D.D.C.)

RESPONSE: Please see my response to Question 59.

gg. *United States v. Simmons*, No. 1:19-cr-409 (D.D.C.)

RESPONSE: Please see my response to Question 59.

hh. *United States v. Stewart*, No. 1:16-cr-67 (D.D.C.)

RESPONSE: Please see my response to Question 59.

ii. *United States v. Victor*, No. 1:17-cr-53 (D.D.C.)

RESPONSE: Please see my response to Question 59.

60. In *United States v. Brown*, 1:18-cr-380 (D.D.C.), you stated that you were departing from the sentencing guidelines because you had “a long-standing policy disagreement with the criminal history guidelines” and explained that “as a policy matter I will not be applying this enhancement.”

- a. Under what circumstances is it appropriate for judges to issue rulings and sentences based on policy?

RESPONSE: The Supreme Court has held that the Sentencing Guidelines are advisory; district courts are “not bound to apply the Guidelines” although they “must consult those Guidelines and take them into account when sentencing.” *United States v. Booker*, 543 U.S. 220, 264 (2005). For example, the Court has clarified that “district courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy agreement with those Guidelines.” *Spears v. United States*, 555 U.S. 261, 265–66 (2009) (per curiam); see also *Kimbrough v. United States*, 552 U.S. 85 (2007).

In each of the sentencings I have conducted, I followed the law as set forth by Congress. Consistent with 18 U.S.C. § 3553(a), I considered the specific factors in the statute, including but not limited to “the nature and circumstances of the offense and the history and characteristics of the defendant.” I also considered the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” “to afford adequate deterrence,” and “to protect the public from further crimes of the defendant”; the sentencing range established by the Sentencing Guidelines; “any pertinent policy statement” of the Sentencing Commission; and “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” In addition, I considered victim statements and the sentencing recommendations of the government, defense counsel, and Probation Office.

- b. Why in this case did you believe it was appropriate to substitute your own policy judgments?

RESPONSE: The Sentencing Guidelines provided for a two-point criminal history enhancement for an offense committed while the defendant is serving time for another criminal justice offense. *See* Federal Sentencing Guidelines Manual § 4A1.1(d) (U.S. Sentencing Commission, 2021). Mr. Brown was convicted of escape from custody for leaving a halfway house. By its very definition, the offense of escape from custody can only be committed while a defendant is serving time for another criminal justice offense; this would have the effect of applying a sentencing enhancement to every person convicted of escape from custody. I declined to apply the enhancement because it is not an aggravating factor of an escape crime in any meaningful sense and did not reflect that Mr. Brown was more culpable than anyone else who had committed the same crime.

61. Do you believe it is a crime to enter the country illegally?

RESPONSE: Congress has made unlawful entry and reentry criminal offenses. *See* 8 U.S.C. §§ 1325, 1326.

62. In *United States v. Leake* (2020), you suggested that “carrying a gun” always would “pose a significant danger to the community.”

- a. What did you mean by this?

RESPONSE: In 2019, a federal grand jury indicted Robert Leake of four offenses related to his alleged unlawful possession of illegal controlled substances and a firearm while Leake was in the laundry room of the apartment complex where he was residing. When officers discovered Leake in the laundry room and observed a small plastic baggie in his hand, Leake attempted to flee and eventually engaged in a prolonged struggle with the officers, during which a firearm fell from Leake’s person and landed near the open doorway of the laundry room. This laundry room was located across the hall from an after-school program for young children.

Leake filed a motion seeking pre-trial release in light of the COVID-19 pandemic, which I denied, finding that he would pose a significant danger to the community, in part

because “the government ha[d] proffered strong evidence of Leake’s commission of the alleged offenses, and that evidence indicate[d] that not only did Leake actively resist being arrested, he was also carrying a gun on his person at the time of his apprehension.” *United States v. Leake*, No. 19-cr-194 (KBJ), 2020 WL 1905150, at *2 (D.D.C. Apr. 17, 2020).

Judges evaluate cases and controversies based on particular facts and circumstances. In that case, the defendant was carrying a gun in an apartment building, across the hall from a program that cared for young children, while engaging in the sale of narcotics. In the context of that case, I was speaking to the inherent danger posed by a person who was distributing drugs in an apartment building while armed.

b. Do you believe that carrying a firearm is an inherently dangerous activity?

RESPONSE: The Supreme Court has held that the Second Amendment protects a fundamental individual right to keep and bear arms. As a federal judge for almost a decade, any personal beliefs I have about the relative safety or dangerousness of an activity would not factor into my assessment of the facts of a case and the relevant law.

63. What was the nature of your representation of Jobran Saad al-Quhtani?

RESPONSE: Between 2005 and 2007, as an employee of the Office of the Federal Public Defender in Washington D.C., I worked with other assistant federal public defenders to represent some of the individuals designated as enemy combatants who were detained by the federal government at the U.S. Naval Base in Guantanamo Bay, Cuba, and whose legal claims for relief were being litigated in the federal courts in the District of Columbia. The Federal Public Defender’s office in Washington, D.C., is a relatively small office, and to my knowledge, the U.S. District Court for the District of Columbia was the exclusive venue in which the legal claims of Guantanamo Bay detainees were being reviewed. Jobran Saad al-Quhtani was one of the individuals whom the D.C. Federal Public Defenders’ office represented, and in my role as an Assistant Federal Public Defender, I drafted various motions, and worked on other court filings on his behalf.

Morrison & Foerster took over the representation of al-Quhtani before I joined the firm. When I joined the firm, the partners leading the case recognized that I had previously represented him and asked me to work on the case, in my capacity as a member of the firm’s Supreme Court and Appellate Practice.

a. What offenses was he accused of committing?

RESPONSE: Military prosecutors charged al-Quhtani with conspiracy and providing material support for terrorism.

b. When did you begin representing him?

RESPONSE: In my role as an Assistant Federal Public Defender, I began representing al-Quhtani in 2005.

c. Were you assigned to represent him or did you volunteer?

RESPONSE: In my role as an Assistant Federal Public Defender, I was assigned to this representation.

d. Did you have the option to reject this representation?

RESPONSE: Please see my response to Question 63c.

e. During this representation, what filings were you involved in?

RESPONSE: As an Assistant Federal Public Defender, I filed a petition and an amended petition for a writ of habeas corpus in December 2005, and joined several other filings in 2006. Morrison & Foerster then took over the representation of this individual, before I joined the firm. When I joined the firm, the partners leading the case recognized that I had previously represented this individual and asked me to work on the case, in my capacity as a member of the firm's Supreme Court and Appellate Group. I joined filings for this client while at Morrison & Foerster from November 2008 through 2009.

f. Did you ever interview or meet with him?

RESPONSE: No.

g. Did you have access to the factual returns in this case?

RESPONSE: The factual returns were filed in this matter in December 2008. Thus, I did not have access to the returns prior to the habeas filings in 2005 and 2006. I do not recall whether I accessed the returns when I assisted in this representation from 2008 to 2009.

h. What was the basis for any factual claims made in filings?

RESPONSE: The habeas petitions I filed while an Assistant Federal Public Defender were virtually identical because we had very little factual information about each detainee. Part of the issue at the very beginning of these cases was that most of the factual information was classified. Moreover, I worked on these cases with another, more senior defender who did all of the fact gathering relating to these cases. As an appellate defender, I worked on the legal arguments.

i. Did you have any involvement in his cases during your time at Morrison & Foerster?

RESPONSE: Please see my response to Question 63e.

j. What is the current status of his case?

RESPONSE: My understanding is that al-Quhtani was repatriated to Saudi Arabia in January 2017.

64. What was the nature of your representation of Tariq Alsawam?

RESPONSE: Between 2005 and 2007, as an employee of the Office of the Federal Public Defender in Washington D.C., I worked with other assistant federal public defenders to represent some of the individuals designated as enemy combatants who were detained by the federal government at the U.S. Naval Base in Guantanamo Bay, Cuba, and whose legal claims for relief were being litigated in the federal courts in the District of Columbia. The Federal Public Defender's office in Washington, D.C., is a relatively small office, and to my knowledge, the U.S. District Court for the District of Columbia was the exclusive venue in which the legal claims of Guantanamo Bay detainees were being reviewed. Tariq Alsawam was one of the individuals whom the D.C. Federal Public Defenders' office represented, and in my role as an Assistant Federal Public Defender, I drafted various motions, and worked on other court filings on his behalf.

a. What offenses was he accused of committing?

RESPONSE: Military prosecutors charged Alsawam with conspiracy and providing material support for terrorism.

b. When did you begin representing him?

RESPONSE: In my role as an Assistant Federal Public Defender, I began representing Alsawam in 2005.

c. Were you assigned to represent him or did you volunteer?

RESPONSE: In my role as an Assistant Federal Public Defender, I was assigned to this representation.

d. Did you have the option to reject this representation?

RESPONSE: Please see my response to Question 64c.

e. During this representation, what filings were you involved in?

RESPONSE: As an Assistant Federal Public Defender, I filed an amended petition for a writ of habeas corpus in December 2005, and joined other filings in 2006 and 2007.

f. Did you ever interview or meet with him?

RESPONSE: No.

g. Did you have access to the factual returns in this case?

RESPONSE: I believe the Government filed the factual returns in this case after I was no longer working on the matter.

h. What was the basis for any factual claims made in filings?

RESPONSE: Please see my response to Question 63h.

i. Did you have any involvement in his cases during your time at Morrison & Foerster?

RESPONSE: No.

j. What is the current status of his case?

RESPONSE: My understanding is that Alsawam was repatriated to Bosnia and Herzegovina in 2016.

65. What was the nature of your representation of Khudaidad?

RESPONSE: Between 2005 and 2007, as an employee of the Office of the Federal Public Defender in Washington D.C., I worked with other assistant federal public defenders to represent some of the individuals designated as enemy combatants who were detained by the federal government at the U.S. Naval Base in Guantanamo Bay, Cuba, and whose legal claims for relief were being litigated in the federal courts in the District of Columbia. The Federal Public Defender's office in Washington, D.C., is a relatively small office, and to my knowledge, the U.S. District Court for the District of Columbia was the exclusive venue in which the legal claims of Guantanamo Bay detainees were being reviewed. Khudaidad was one of the individuals whom the D.C. Federal Public Defenders' office represented, and in my role as an Assistant Federal Public Defender, I drafted various motions, and worked on other court filings on his behalf.

a. What offenses was he accused of committing?

RESPONSE: To my knowledge, Khudaidad was never formally charged with any offense.

b. When did you begin representing him?

RESPONSE: In my role as an Assistant Federal Public Defender, I began representing Khudaidad in 2005.

c. Were you assigned to represent him or did you volunteer?

RESPONSE: In my role as an Assistant Federal Public Defender, I was assigned to this representation.

d. Did you have the option to reject this representation?

RESPONSE: Please see my response to Question 65c.

e. During this representation, what filings were you involved in?

RESPONSE: As an Assistant Federal Public Defender, I filed an amended petition for a writ of habeas corpus in December 2005, and joined other filings in 2006.

f. Did you ever interview or meet with him?

RESPONSE: No.

g. Did you have access to the factual returns in this case?

RESPONSE: I am not aware whether factual returns were ever filed in this case.

h. What was the basis for any factual claims made in filings?

RESPONSE: Please see my response to Question 63h.

i. Did you have any involvement in his cases during your time at Morrison & Foerster?

RESPONSE: To the best of my recollection, no.

j. What is the current status of his case?

RESPONSE: My understanding is that Kudaidad was repatriated to Afghanistan in February 2006.

66. What was the nature of your representation of Al-Marri?

RESPONSE: I did not represent Al-Marri. I filed an amicus brief in his case on behalf of The Cato Institute, The Constitution Project, and the Rutherford Institute, arguing that Congress's authorization for the use of military force did not permit lawful residents of the United States who are captured domestically to be detained indefinitely as enemy combatants.

a. What offenses was he accused of committing?

RESPONSE: In February 2002, the Department of Justice charged Al-Marri in the Southern District of New York with the possession of unauthorized or counterfeit credit card numbers with the intent to defraud. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 219 (4th Cir. 2008) (en banc) (Motz, J., concurring). In January 2003, he was charged in a second indictment with two counts of making a false statement to the FBI, three counts of making a false statement on a bank application, and one count of using another person's identification for the purpose of influencing the action of a federally insured financial institution. *Id.* After the charges in New York were dismissed for lack of venue, the Government re-indicted him in the Central District of Illinois on the same charges. *Id.* The criminal charges were dropped when Al-Marri was designated an enemy combatant and transferred to military custody. *Id.*

b. When did you begin representing him?

RESPONSE: I did not represent Al-Marri.

c. Were you assigned to represent him or did you volunteer?

RESPONSE: Please see my response to Question 66b.

d. Did you have the option to reject this representation?

RESPONSE: Please see my response to Question 66b.

e. During this representation, what filings were you involved in?

RESPONSE: Please see my response to Question 66b.

f. Did you ever interview or meet with him?

RESPONSE: Please see my response to Question 66b.

g. Did you have access to the factual returns in this case?

RESPONSE: Please see my response to Question 66b.

h. What was the basis for any factual claims made in filings?

RESPONSE: Please see my response to Question 66b.

i. What is the current status of his case?

RESPONSE: The Supreme Court granted certiorari, *Al-Marri v. Pucciarelli*, 129 S. Ct. 680 (2008), but vacated and remanded the case after Al-Marri was transferred from military to civilian custody, 129 S. Ct. 1545 (2009). Once back in civilian custody, Al-Marri pled guilty to conspiracy to provide material support to a terrorist organization and was sentenced to 15 years in prison. My understanding is that Al-Marri was repatriated to Qatar in 2015.

67. What was the nature of your representation of Khiali-Gul?

RESPONSE: Between 2005 and 2007, as an employee of the Office of the Federal Public Defender in Washington D.C., I worked with other assistant federal public defenders to represent some of the individuals designated as enemy combatants who were detained by the federal government at the U.S. Naval Base in Guantanamo Bay, Cuba, and whose legal claims for relief were being litigated in the federal courts in the District of Columbia. The Federal Public Defender's office in Washington, D.C., is a relatively small office, and to my knowledge, the U.S. District Court for the District of Columbia was the exclusive venue in which the legal claims of Guantanamo Bay detainees were being reviewed. Khiali Gul was one of the individuals whom the D.C. Federal Public Defenders' office represented, and in my role as an Assistant Federal Public Defender, I drafted various motions, and worked on other court filings on his behalf.

a. What offenses was he accused of committing?

RESPONSE: My understanding is that Khiali-Gul was never formally charged with any offense.

b. When did you begin representing him?

RESPONSE: In my role as an Assistant Federal Public Defender, I began representing Khiali-Gul in 2005.

c. Were you assigned to represent him or did you volunteer?

RESPONSE: In my role as an Assistant Federal Public Defender, I was assigned to this representation.

d. Did you have the option to reject this representation?

RESPONSE: Please see my response to Question 67c.

e. During this representation, what filings were you involved in?

RESPONSE: As an Assistant Federal Public Defender, I filed an amended petition for a writ of habeas corpus in December 2005, and joined other filings in 2006 and 2007.

f. Did you ever interview or meet with him?

RESPONSE: No.

g. Did you have access to the factual returns in this case?

RESPONSE: It appears that the factual returns were filed in this case in 2004, and that government filed amended returns in 2008. I do not recall whether I had access to the factual returns when I worked on this matter from 2005 to 2007.

h. What was the basis for any factual claims made in filings?

RESPONSE: Please see my response to Question 63h.

i. Did you allege that he had “been forced to provide involuntary statements ... at Guantanamo”? If so, what was the factual basis for this allegation?

RESPONSE: Please see my response to Question 63h.

j. Did you have any involvement in his cases during your time at Morrison & Foerster?

RESPONSE: No.

k. What is the current status of his case?

RESPONSE: Khiali-Gul was repatriated to Afghanistan in 2014.

68. In Khiali-Gul’s case, you argued in essence that the government, despite the fact that it had come into possession of information that (1) Guantanamo detainees were coordinating among themselves to attack U.S. soldiers, and (2) misusing the attorney-client privilege to hide their written communications, should be sanctioned for seizing detainees’ written materials.

a. Do you stand by that request for sanctions today?

RESPONSE: Under the ethics rules that apply to lawyers, an attorney has a duty to represent her clients zealously, which includes refraining from contradicting her client's legal arguments and/or undermining her client's interests by publicly declaring the lawyer's own personal disagreement with the legal position or alleged behavior of her client. These standards apply even after termination of the representation

69. In Khiali-Gul's case, it took you until November 2008 to withdraw formally from representing him. In the case of Alsawam, it took you until April 2009 to withdraw.

a. Why did it take you that long to formally withdraw from those cases?

RESPONSE: As I explained in my motions to withdraw in both cases, "[a]t no time since leaving the Federal Defender's office" had I "counseled or advised" either detainee nor had I "continued to represent [them] in any respect."

70. During your time at Morrison & Foerster, did you express any desire to represent terrorists?

RESPONSE: Please see my response to Question 63.

71. During your time at Morrison & Foerster, did you have the option not to represent terrorists?

RESPONSE: Please see my response to Question 63.

72. Do you believe that terrorists should be tried in civilian courts?

RESPONSE: It is the decision of the Executive Branch whether to treat someone who is detained in an armed conflict as an enemy combatant, to try them in the criminal justice system, or to try them for violations of the laws of war in a military commission. It would be inappropriate for me to comment on this policy question as a pending judicial nominee and a sitting federal judge. My role in the judicial system is to consider any legal claims brought before me.

73. What is an example of a time that you changed your mind in light of new evidence?

RESPONSE: Whenever I am ruling upon a matter, I set aside my personal views and make my decision based on the facts, the law, and the arguments that the parties have made. The facts in a case may change over the course of litigation, and thus my view of any legal issue may also change as the case progresses.

74. Do disparate outcomes imply disparate treatment?

RESPONSE: I cannot say, in the abstract, whether or not "disparate outcomes imply disparate treatment." As a federal judge for the last decade, it has been my duty to adjudicate individual claims in specific cases and controversies, including claims of discrimination. When I have

jurisdiction to do so, I resolve properly filed legal disputes concerning discrimination based on the arguments that the parties make, the established facts of the particular case, and the applicable law.

75. Have you ever read the scholarship of Derrick Bell?

RESPONSE: I am aware of the thesis of some of Derrick Bell's writings.

a. Do you endorse his writings?

RESPONSE: As a judicial nominee and sitting federal judge, it would be inappropriate for me to comment on my personal views, if any, about the writings of Derrick Bell or any other author. As a judge, it is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law. As a federal judge for almost a decade, I have never based a decision on something Professor Bell—or any other academic—wrote, and the same would be true if I were fortunate enough to be confirmed to the Supreme Court. The facts and the law control the outcome of cases.

b. Do you agree with his statement: “the rule of consistency functions as an agent of white privilege because it undermines the most effective means of promoting racial equality”?

RESPONSE: Please see my response to Question 75a.

76. Have you ever read works of critical race theory? If so, please provide a list of such works.

RESPONSE: Critical race theory has not come up in my work as a judge, and it is not a theory I have studied or relied on—nor would I rely on it if I were confirmed to the Supreme Court. As a judge, it is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law; academic theories have not formed the basis of any decisions I have reached in my near-decade on the bench, and the same would be true if I were fortunate to be confirmed to the Supreme Court.

77. Why do you want to be a Justice of the Supreme Court?

RESPONSE: I have dedicated my career to public service. Serving on the Supreme Court would be the capstone of a professional life that has been spent promoting constitutional values and ensuring equal justice under the law.

78. Do you believe the allegations that were pressed against Justice Kavanaugh during his Supreme Court nomination?

RESPONSE: I have nothing but the highest esteem for Justice Kavanaugh and all of my prior, current, and potentially future judicial colleagues. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on the processes used to evaluate any other nominees.

79. Do you believe that the hearings to consider the nomination for Robert Bork to be Associate Justice of the U.S. Supreme Court were fair?

RESPONSE: I have nothing but the highest esteem for Judge Bork and all of my prior, current, and potentially future judicial colleagues. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on the processes used to evaluate any other nominees.

80. Do you have any objection to the U.S. Sentencing Commission producing documents to this committee that have been requested in connection with your nomination?

RESPONSE: I have no control over the documents in the possession of the U.S. Sentencing Commission. I have provided to the Committee all records in my possession that are responsive to the Committee's Questionnaire.

81. What is your understanding of superprecedent?

RESPONSE: As I explained at the hearing, I am not familiar with a Supreme Court decision that has used the term "super precedent." All Supreme Court decisions are precedential and entitled to respect under *stare decisis* principles, and in revisiting any precedent, the Court applies the factors it has articulated for determining whether to overrule a prior decision. Those factors include the quality of the decision's reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to "rob[]" the decision "of significant application or justification." *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2478–2479 (2018).

82. What Supreme Court cases do you feel comfortable stipulating are correctly decided?

RESPONSE: As a sitting federal judge, all of the Supreme Court's pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the Code of Conduct and positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on the merits or demerits of the Supreme Court's binding precedents.

I have previously noted three exceptions to this general principle that a judge should not comment on the Supreme Court's precedents.

Brown v. Board of Education warrants this special status because that decision overruled the manifest injustice of *Plessy v. Ferguson*, which had given rise to legally enforceable segregation in various places in the United States by endorsing 'separate but equal' as consistent with the Constitution's Equal Protection Clause. The underlying premise of the *Brown* decision—i.e., that "separate but equal is inherently unequal"—is beyond dispute, and judges can express their agreement with that principle without calling into question their ability to apply the law faithfully to cases raising similar issues. Therefore, just as other nominees for judicial office and other

sitting federal judges have done, I can confirm that *Brown* was rightly decided without calling into question my duties under the Code of Conduct.

Loving v. Virginia also falls into the exception. *Loving* reaffirmed the rejection of the “notion that the mere ‘equal application’ of a statute containing racial classifications” comports with the Fourteenth Amendment, *Loving v. Virginia*, 388 U.S. 1, 8 (1967), and as such, it is a direct outgrowth of *Brown*. Therefore, just as other nominees for judicial office and other sitting federal judges have done, I can confirm that *Loving* was rightly decided without calling into question my duties under the Code of Conduct.

Finally, *Marbury v. Madison* is an exception. *Marbury* warrants this special status because the principle of judicial review that that decision established—i.e., its holding that, per the design of our Constitution, “[i]t is emphatically the province and duty of the judicial department to say what the law is[.]” *Marbury v. Madison*, 5 U.S. 137, 177 (1803)—is a foundational finding that is beyond dispute. See Federalist No. 78 (Alexander Hamilton) (“The interpretation of the laws is the proper and peculiar province of the courts.”). Therefore, just as other nominees for judicial office and other sitting federal judges have done, I can confirm that *Marbury* was rightly decided without calling into question my duties under the Code of Conduct.

83. What Supreme Court cases do you feel comfortable stipulating were incorrectly decided?

RESPONSE: As I explained in my response to Question 84, as a sitting federal judge, the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the Code of Conduct and positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on the merits or demerits of the Supreme Court’s binding precedents.

Consistent with my answer to Question 84, I can confirm that *Brown* correctly overruled the manifest injustice of *Plessy v. Ferguson*. The Supreme Court has also explained, for example, that *Korematsu v. United States*, 323 U.S. 214 (1944), was “gravely wrong the day it was decided” and “has been overruled in the court of history.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). The Supreme Court has itself stated in overturning its prior decisions that its prior cases were wrongly decided, and those new decisions are themselves precedent entitled to respect under *stare decisis* principles. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“*Bowers* [*v. Hardwick*] was not correct when it was decided, and it is not correct today.”).

84. Under what circumstances is it appropriate for the government to consider the race of individuals or racial composition of organizations when issuing grants of money?

RESPONSE: Our Constitution expressly guarantees that no person or group shall be denied equal protection of the law. The Fourteenth Amendment prohibits states from denying any person equal protection of the laws and the Fifth Amendment prevents the federal government from doing so. The Supreme Court has held that all race-based classifications are subject to “strict scrutiny”—the most rigorous form of review. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Under strict

scrutiny, a law or program—including grant programs—will generally be struck down unless the government can show that it is narrowly tailored to serve a compelling governmental interest. I cannot comment on the propriety of the government’s consideration of race in the abstract; as a judge, it is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law.

85. Please list all cases where you interpreted a legal text according to its original meaning?

RESPONSE: In my more than 570 written opinions, I have frequently interpreted the language of legal provisions. In each case that required interpretation of legal language, I began with the text of the provision at issue and adhered to precedent to determine the meaning of that language as the drafters intended. For example, I have decided more than 45 cases in which I determined the meaning of a statute. *See, e.g., Osvatics v. Lyft*, 535 F. Supp. 3d 1 (D.D.C. 2021); *EqualRights Center v. Uber Technologies, Inc.*, 2021 WL 981011 (D.D.C. Mar. 15, 2021); *Las Americas Immigrant Advocacy Center v. Wolf*, 2020 WL 7039516 (D.D.C. Nov. 30, 2020); *United States v. Lee*, 451 F. Supp. 3d 1 (D.D.C. 2020); *Government of Guam v. United States*, 341 F. Supp. 3d 74 (D.D.C. 2018); *Otay Mesa Property, L.P. v. Department of the Interior*, 344 F. Supp. 3d 355 (D.D.C. 2018); *Alliance of Artists & Recording Companies, Inc. v. General Motors Co.*, 306 F. Supp. 3d 422 (D.D.C. 2018); *R.J. Reynolds Tobacco Co. v. Department of Agriculture*, 130 F. Supp. 3d 356 (D.D.C. 2015); *Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127 (D.D.C. 2015); *Z St., Inc. v. Koskinen*, 44 F. Supp. 3d 48 (D.D.C. 2014).

86. You previously sat on the board of Montrose Christian School, which abided by a statement of beliefs that included traditional marriage and defense of the unborn. In your prior testimony to this committee, you distanced yourself from these positions, saying that you did not “necessarily agree with all of the statements [of belief]” and were “not aware of” the statement.

- a. When you were a member of the board of that school, were you aware of the statement of beliefs?

RESPONSE: I served on the inaugural advisory board of Montrose Christian School—a now-defunct kindergarten through 12th grade private school—from the fall of 2010 to the fall of 2011, prior to my nomination and confirmation as a federal district judge. I was aware that Montrose Christian School was affiliated with Montrose Baptist Church. I was not aware that the school had a public website or that any statement of beliefs was posted on the school’s website at the time of my service. My service on the advisory school board primarily involved planning for school fund-raising activities for the benefit of enrolled students. I did not receive any compensation for my service.

- b. When did you first become aware of the statement of beliefs?

RESPONSE: I became aware of the statement of beliefs in 2016, during the period of time when there was public reporting of consideration of my appointment to fill Justice Scalia’s seat and of my connection to the school.

- c. Which of these statements do you not agree with?

RESPONSE: In order to maintain public confidence in the judiciary, judges refrain from speaking about personal or religious beliefs because those beliefs have no bearing on their rulings. In every case, I set aside any personal or religious views I may have, if any, and therefore I do not speak about such views.

- d. Do you believe that traditional marriage is an important institution that promotes stable relationships and the raising of children?

RESPONSE: Please see my response to Question 86c.

- e. Do you believe that the unborn are worthy of protection?

RESPONSE: Please see my response to Question 86c.

- f. Do you believe that human life is intrinsically valuable?

RESPONSE: Please see my response to Question 86c.

- g. Are there any other organizations that you are affiliated with whose mission you do not agree with?

RESPONSE: In my personal capacity, I am involved with various organizations. In order to maintain public confidence in the judiciary, judges refrain from speaking about personal beliefs because those beliefs have no bearing on their rulings. In every case, I set aside any personal views I may have, if any, and therefore I do not speak about such views.

87. Have you ever represented a criminal defendant who told you that he was guilty?

RESPONSE: As an appellate attorney, who was serving as an Assistant Federal Public Defender, all of my clients had been convicted of crimes. Communications between an attorney and a client are privileged and confidential.

88. Do you believe that a criminal defense attorney can represent to a court that his or her client is factually innocent if he or she knows that the client is factually guilty?

RESPONSE: Defense counsel must act zealously within the bounds of the law and applicable rules to protect the client's confidences and the unique liberty interests that are at stake in criminal prosecution. Defense counsel should not knowingly make a false statement of fact or law or offer false evidence, to a court, lawyer, witnesses, or third party. However, it is not a false statement for defense counsel to suggest inferences that may reasonably be drawn from the evidence. In addition, while acting to accommodate legitimate confidentiality, privilege, or other defense concerns, defense counsel should correct a defense representation of material fact or law that defense counsel knows is, or later learns was, false. Thus, according to standards set by the American Bar Association, and in light of criminal defense counsel's constitutionally recognized role in the criminal process, defense counsel's duty of candor may be tempered by competing ethical and constitutional obligations.

89. When evaluating antitrust cases, how would you define a relevant market?

RESPONSE: The Supreme Court has defined the relevant market as “the area of effective competition.” *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285, 201 L. Ed. 2d 678 (2018). “Typically this is the ‘arena within which significant substitution in consumption or production occurs.’” *Id.* (quoting Areeda & Hovenkamp § 5.02). “But courts should combin[e] different products or services into a single market when that combination reflects commercial realities.” *Id.* (internal quotation marks omitted). If I were asked to define the relevant market, I would apply the Supreme Court’s precedents regarding the definition of the relevant market to the facts before me.

90. What was your role in drafting the Fair Sentencing Act Amendment?

RESPONSE: The Fair Sentencing Act was passed by Congress and signed by President Obama in 2010, the same year that I joined the United States Sentencing Commission as Vice Chair and Commissioner. The bipartisan Sentencing Commission as a body then undertook to evaluate whether any changes to Sentencing Guidelines should occur as a result of Congress’s passage of this law. The individual Commissioners voted on whether to implement changes, after which the Commission staff drafted proposed changes. The Commissioners then reviewed the proposed changes and unanimously voted to approve them.

91. You were quoted in the book *Supreme Discomfort* as saying, upon meeting Justice Thomas, “I just sat there the whole time thinking: ‘I don’t understand you. You sound like my parents. You sound like the people I grew up with.’ But the lessons he tended to draw from the experience of the segregated South seemed to be different than those of everybody I know.”

a. Is this quotation accurate? If not, explain.

RESPONSE: I am not familiar with the book *Supreme Discomfort* but have no reason to believe this quotation is not accurate.

b. What did you mean by this statement?

RESPONSE: I have nothing but the highest esteem for Justice Thomas and all of my prior, current, and potentially future colleagues on the bench. This quote is from many years ago; as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment.

c. Do you believe that individuals who share a common racial or cultural background must have the same political views?

RESPONSE: No

92. A Boston Globe report entitled “Harvard students end sit-in protest, demand more Afro-American faculty” describes your alleged role participating in a sit-in protest.

- a. Have you ever planned, organized, or participated in a sit-in protest? If so, please list all such occasions and the causes you were promoting.

RESPONSE: To the best of my recollection, as a college student more than 30 years ago, I participated in at least one protest with other members of the Black Students Association related to the dearth of full-time faculty in the African-American Studies Department at Harvard University. Additionally, I participated in protest activities my freshman year of college after a fellow student hung a confederate flag outside his dorm room window.

- b. You are reported as planning a protest at a Harvard football game to demand more black faculty members at the school. Is this accurate? If not, please describe the facts surrounding these events.

RESPONSE: Please see my response to Question 92a. The November 17, 1990 Boston Globe article that was provided along with my Senate Judiciary Questionnaire attachments notes that the protest involved wearing black colors to a varsity football game, rather than the school colors (crimson and white), and was focused on the lack of full-time faculty in the Afro-American Studies Department.

- c. You are reported as saying, "We can embarrass the university in front to the alumni." Is this accurate?

RESPONSE: Please see my response to Question 92a.

- d. Have you ever advocated for any entity to hire or promote individuals based on race or gender?

RESPONSE: No.

- e. During your time on the Harvard Board of Overseers, have you advocated for the University to hire or promote more faculty members of specific racial categories?

RESPONSE: The Harvard Board of Overseers does not make decisions about faculty hiring.

- f. Under what circumstances do you believe it is appropriate to disrupt an event in order to shame or embarrass leaders of an institution?

RESPONSE: The First Amendment to the Constitution guarantees the right to free speech and assembly. It would be inappropriate under Canon 3 of the Code of Conduct for Judges for me, as a pending judicial nominee and a sitting federal judge, to provide personal views on this question. As a judge, it is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law, and the same would be true if I were fortunate to be confirmed to the Supreme Court

- g. Do you permit protestors to interrupt your proceeding in court?

RESPONSE: Protestors have never interrupted proceedings in my courtroom.

93. Judge Silberman recently sent an email to all federal judges drawing attention to the recent disruption of a panel on the freedom of speech at Yale Law School.

a. Did you receive this email?

RESPONSE: As a federal judge, I was included on the distribution list to which Judge Silberman sent this email.

b. Would you consider hiring as a clerk any individual or participated in this protest?

RESPONSE: Please see my response to Question 37 where I describe my process for considering law clerks.

c. Would you consider hiring as a clerk any individual who planned, attended, or otherwise participated in a protest that shut down a law school event?

RESPONSE: Please see my response to Question 37 where I describe my process for considering law clerks.

94. Do you acknowledge that censorship of conservative voices by Big Tech companies like Google, Twitter, and Meta (formerly Facebook) present real social concerns?

RESPONSE: As a judicial nominee and sitting federal judge, it would be inappropriate for me to offer my personal views about this issue. As a judge, it is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law. Related questions are the focus of ongoing litigation, and may well come before me in the future.

95. To your knowledge, has anyone ever filed a complaint against you with a bar association of which you were a member?

RESPONSE: No.

96. To your knowledge, has anyone ever filed a complaint against you with your employer's human resource department? If so, what was the nature of the complaint?

RESPONSE: No.

97. If confirmed, would you consider the political views of your clerks when making hiring decisions?

RESPONSE: As a judge, I have always strived to hire smart, capable clerks from a wide variety of backgrounds, and with diverse experiences and interests. This involves a holistic evaluation of many criteria including, but not limited to: an applicant's educational

achievement, work experience, letters of recommendation, life experiences, challenges overcome, my interview with them, and their skills working with others.

98. The Supreme Court decides many statutory cases, often invoking canons of statutory construction, dictionary definitions, legislative history, and other sources of interpretive guidance. Do you feel bound by whatever methods the Court uses in interpreting statutes? That is, are interpretive rules laid down by the Court holdings that operate as precedents in future cases involving statutory interpretation?

RESPONSE: In interpreting statutes, the Court has used a variety of interpretive canons to discern the meaning of the statutory text. The application of these canons depends on the particular context of the case. Consistent with Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract regarding what aspect of a Court's interpretive analysis of a statute would operate as precedent in future statutory interpretation cases.

99. Do you believe that judges have any role advancing social justice? If so, please explain.

RESPONSE: For an explanation of my judicial approach, please see my response to Question 1a. The role of a judge is to evaluate legal claims and to determine the merits of those claims based on arguments presented by the parties, in light of applicable law, including the binding precedents of the Supreme Court and the text of the statute or constitutional provision involved. They should not decide cases based on their personal views or policy preferences. Judges are not policymakers. They have limited authority, and they must always stay in their limited, judicial lane.

100. Prior to your confirmation hearing, had you personally read, cover to cover, the following legal texts:

- a. Declaration of Independence?

RESPONSE: Yes.

- b. The U.S. Constitution?

RESPONSE: Yes.

- c. The Federalist Papers?

RESPONSE: Some portions, but not cover to cover.

- d. William Blackstone's Commentaries on the Laws of England?

RESPONSE: Some portions, but not cover to cover.

- e. Joseph Story's Commentaries on the U.S. Constitution?

RESPONSE Some portions, but not cover to cover.

f. Antonin Scalia and Bryan Garner's Reading Law: The Interpretation of Legal Texts?

RESPONSE: Some portions, but not cover to cover. I have also referenced, where appropriate in my decisions, portions of this book that were relevant to the issues upon which I was ruling.

g. The Federal Rules of Civil Procedure?

RESPONSE: Yes

h. The Federal Rules of Criminal Procedure?

RESPONSE: Yes

i. The Federal Rules of Evidence?

RESPONSE: Yes

101. What is your understanding of the term "natural law"?

RESPONSE: I understand natural law to refer to principles derived from nature that govern human conduct. By contrast, I understand positive law to refer to enacted legal texts, such as the Constitution, federal statutes, and treaties.

102. When, if ever, should an appellate judge rely on his or her personal experience to help decide a case?

RESPONSE: Please see my responses to Question 99.

103. Please state whether you agree or disagree with the following statement and explain why: "Absent binding precedent, judges should interpret statutes based on the meaning of the statutory text, which is that which an ordinary speaker of English would have understood the words to mean, in their context, at the time they were enacted."

RESPONSE: Please see my response to Question 1a.

104. Do you believe that morality plays a role in the interpretation of legal texts?

RESPONSE: Please see my responses to Question 99.

105. Are there circumstances when you believe judges should consider the policy results of their decisions when deciding a case? When might those circumstances arise?

RESPONSE: As I stated at my hearing, judges should not be policymakers. Judges interpret law; they do not make it. "It is Congress's job to enact policy and it is th[e] Court's job to follow the policy Congress has prescribed." *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018).

106. Have you ever written anything that no longer reflects your current views? If so, please describe.

RESPONSE: I have written many things before I attended law school, before I became an attorney, and before I became a judge. Each of those subsequent experiences has contributed to a better understanding of the law and our legal system.

107. Other than Justice Breyer, which current or former Supreme Court Justice do you most admire, and why?

RESPONSE: Please see my response to Question 42.

108. With which current Supreme Court Justice's opinions do you most commonly agree? Please exclude Justice Breyer.

RESPONSE: As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to address this question. All of the Supreme Court's pronouncements are binding on me, regardless of who wrote the opinion.

109. Have you ever been confronted with a legal question that required you to conduct historical research to understand the meaning of the legal text in question? If so, please describe.

RESPONSE: In drafting the Supreme Court amicus brief that I filed on behalf of my clients, who were former federal judges, in the matter of *Boumediene v. Bush*, Nos. 06–1195, 06–1193 (2006), I conducted historical research about the scope of habeas relief and the admissibility of evidence obtained by torture at the time of the founding.

110. Please provide an example of the Supreme Court applying strict scrutiny before 1910.

RESPONSE: I am not aware of an example.

111. Do parents have a constitutional right to have a say in their children's education?

RESPONSE: The Supreme Court has held that parents have the right to direct their children's education and upbringing. *See Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“[Plaintiff’s] right thus to teach and the right of parents to engage [Plaintiff] so to instruct their children, we think, are within the liberty [of the Fourteenth Amendment].”); *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“[W]e have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the right[] . . . to have children . . . [and] to direct the education and upbringing of one’s children . . .”) (internal citations omitted).

112. Have you ever taken a position in litigation on behalf of a client that was pro-life?

RESPONSE: I have filed only one brief where my clients' views on the issue of abortion were known to me, and that was the amicus brief I filed on behalf of clients in *McGuire v. Reilly* (regarding the constitutionality of a Massachusetts buffer zone law). I have not handled a case

involving the issue of the right to abortion, and I am not aware of the beliefs of all my prior clients related to this issue.

113. Do you believe that United States criminal justice system is accurately described by the phrase “mass incarceration”?

RESPONSE: As a sitting circuit judge, my current role in the justice system is to evaluate the facts and legal issues in the cases and controversies that come before me, and to apply the law faithfully to resolve the issues before me. It would be inappropriate for me to comment on or opine about general policy questions.

114. Have you ever had any personal experience or contact with victims of child pornography?

RESPONSE: During my time at the Sentencing Commission, I personally interacted with victims of child pornography. In addition, during my time as a district judge, and pursuant to the statute that allows victims to participate in sentencing hearings, I have received and reviewed compelling statements from victims of this horrific crime and have also presided over a trial during which victims testified.

115. If confirmed, do you commit that neither you, nor your spouse, nor your dependents, will hold or trade individual stocks?

RESPONSE: I am not aware of any law that prohibits judges, their spouses, or dependents from holding individual stocks. In general, 28 U.S.C. § 455 prohibits judges from hearing cases that involve a party in which they, their spouses or their minor children have a legal or equitable interest. Being a federal judge is a position of public trust and I recognize how important it is for judges to adhere to the highest ethical standards, and I have done so for the decade that I have served on the federal bench. It would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to opine further on any subject of political controversy.

116. What influence did Justice Scalia have on your jurisprudence?

RESPONSE: Justice Scalia, like many other Supreme Court Justices, wrote opinions for the Supreme Court that served as governing precedent in cases that I have decided. Justice Scalia is also widely credited as a founder of the originalist approach to constitutional interpretation, which has become a primary tool for interpreting provisions of the Constitution. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me.

117. In your student note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 Harv. L. Rev. 1711 (1996), you asserted that sex offender regulations were based “upon unreliable assessments of the convict’s predilection to commit future crimes.”

a. What was the empirical basis for this claim at the time you made it?

RESPONSE: My law review note was published more than 25 years ago, and thus I do not have an independent recollection of what evidence I used to support that statement. The question quotes a sentence from my law review note, and it appears, based on the footnote at the end of that sentence, that I cited a few law review pieces in support of that contention.

- b. Do you continue to believe that sex offender registration laws are based on unreliable assessments of the convict's predilection to commit future crimes? Please provide appropriate citations to support your answer.

RESPONSE: My law review note was published more than 25 years ago. As a judicial nominee and sitting federal judge, it would be inappropriate for me to comment on my personal beliefs, if any, about this or any other policy matter. As a federal judge for almost a decade, I resolve each case on an individual basis by assessing the parties' legal arguments based on the factual record and applicable law, including relevant statutes and binding precedent.

118. Do you believe that laws regulating where sex offenders may reside are punitive?

RESPONSE: As a sitting circuit judge and a federal judicial nominee, it would be inappropriate for me to opine on this policy issue. My personal policy preferences play no role in the performance of my duties; in every case that I have handled, I have considered only the parties' arguments, the relevant facts, and the law as I understand it, including and especially the binding precedents of the Supreme Court and the D.C. Circuit.

119. Do you believe it is appropriate for state regulators to require drivers' licenses to include indications of an individual's status as a sex offender?

RESPONSE: As a sitting circuit judge and a federal judicial nominee, it would be inappropriate for me to opine on this policy issue. My personal policy preferences play no role in the performance of my duties; in every case that I have handled, I have considered only the parties' arguments, the relevant facts, and the law as I understand it, including and especially the binding precedents of the Supreme Court and the D.C. Circuit.

120. During your time on the U.S. Sentencing Commission, you stated that you found the "category of nonsexually motivated child pornography offenders" to be "just so interesting."

- a. What did you mean by this?

RESPONSE: The partial quote you have referenced does not fairly reflect my comments as delivered, and the full quote from that Sentencing Commission hearing demonstrates my underlying surprise that an expert witness had testified that a population of such offenders existed at all.

I served on the U.S. Sentencing Commission from 2010 to 2014. The Commission is a bipartisan, independent agency that was created by Congress to reduce sentencing disparities and promote transparency and proportionality in sentencing. It also

continuously establishes and amends sentencing guidelines for the judicial branch and assists the other branches in developing effective and efficient crime policy. The Commission is bipartisan by design, and during my tenure, it almost always acted unanimously.

During my tenure, the Commission analyzed, evaluated, and held public hearings about the federal sentencing guidelines for child pornography offenses. On February 15, 2012, the Commission held a public hearing, attended by seven Commissioners, to hear from seven expert witnesses on child pornography offenders and child pornography offenses. The quote referenced was part of a question that I posed to one of the expert witnesses, who had testified at the hearing that there were categories of people who obtain child pornography, but were not sexually motivated by it. My question was an attempt to better understand that expert witness's testimony.

My full question was: "I was just going to say as a follow-up to that, Ms. McCarthy, is it your experience that this category of nonsexually motivated child pornography offenders is very small? Because you had them broken out in your slide: the nonsexually motivated. And that I found just so interesting, because I assumed that everyone who was involved in this kind of activity was sexually motivated. So the people who are in this for either the collection, or the people who are loners and find status in their participation in the community, but would be categorized as nonsexually motivated, how many are we talking about?"

- b. Do you believe there is such a thing as a "nonsexually motivated child pornography offender"? If so, please explain.

RESPONSE: Please see my response to Question 120a.

- 121. During your time on the U.S. Sentencing Commission, you stated that you had "mistakenly [sic] assumed that child pornography offenders are pedophiles" and wanted to "understand this category of nonpedophiles who obtain child pornography."

- a. What did you mean by it?

RESPONSE: The partial quote you have referenced was part of a question that I posed to the expert panel of witnesses, who had just testified during the same February 15, 2012 public hearing referenced in my answer to Question 122a. The expert witnesses had just testified about the categories of people who obtain child pornography, but are not sexually motivated by it. My question was an attempt to better understand the testimony of the panel of experts.

According to the transcript from the public hearing, my full question was: "I had mistakenly [sic] assumed that child pornography offenders are pedophiles. So I'm trying to understand this category of nonpedophiles who obtain child pornography. And are those the people who you are saying are the nonsexually motivated offenders? [] Do I have that right?"

- b. Do you believe that there are child pornography offenders that are not pedophiles? Please explain.

RESPONSE: This question is not relevant to the work I do as a federal judge. As a federal judge, I am concerned only with the proper resolution of cases to which I have been assigned.

122. During your time on the U.S. Sentencing Commission, you stated that some people are into child pornography because they “find status in their participation in the community” and so “would be categorized as nonsexually motivated.”

- a. What did you mean by this?

RESPONSE: Please see my response to Question 120a.

123. What evidence can you point to in your record to establish that you will adequately protect the interests of victims of child pornography?

RESPONSE: As a mother and as a judge, I have taken cases involving child pornography incredibly seriously. I have had a number of these cases and I have seen the evidence first-hand. These are some of the most difficult cases that a judge has to deal with because it involves pictures of the sexual abuse of children. I have heard directly from the victims whose lives have been irrevocably harmed by this crime.

In every child pornography case I have presided over, it is important to me to make sure that the children's perspective and the children's voices are represented. What that means is that for every child pornography defendant who comes before me, I tell them about the former child sex abuse victims who will never have a normal adult relationship because of their abuse and the former child sex abuse victims who went into prostitution or fell into drugs because they were trying to suppress the hurt that was done to them. I also tell them about the victim who has developed agoraphobia and cannot leave her house because she thinks that everyone she meets would have seen her pictures on the internet. I also made it clear to every such defendant who came before me—even if the defendant claimed they “only” received or distributed child pornography, and did not engage in its production—that their conduct resulted in real harm to children.

As a federal judge for almost a decade, I took child pornography cases extremely seriously, and in every child pornography case I handled, the defendant was sentenced to serve time in prison. I also imposed sentences involving lengthy periods of supervised release and many additional restraints with the goal of ensuring that defendants do not reoffend.

124. When, if ever, is it appropriate for a judge to consider foreign law when interpreting provisions of the U.S. Constitution?

RESPONSE: It is not proper for judges to rely on foreign law in determining the meaning of the U.S. Constitution.

125. Can you identify any other Supreme Court Justice in modern history who has taken the position that he or she does not have a judicial philosophy?

RESPONSE: I am aware that some nominees for the Supreme Court, including Chief Justice Roberts and Justice Kagan, did not identify an overarching judicial philosophy to which they subscribed when asked about it during their confirmation hearings. With respect to my judicial philosophy, please see my response to Question 1a.

126. Did you ever provide legal advice or representation on any issue related to gay marriage? If so, please describe the nature of these representations.

RESPONSE: No.

127. What is the significance of the Ninth Amendment? What historical sources would you look to when evaluating its meaning?

RESPONSE: The Supreme Court has, at times, suggested that the Ninth Amendment, which provides that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people[,]” is a source for unenumerated rights. *See, e.g., Roe v. Wade*, 410 U.S. 113, 152–53 (1973). If presented with a case that implicates the Ninth Amendment, I will consider all the parties’ legal arguments, and I would interpret the Constitution in a manner that is consistent with the methods of interpretation that the Supreme Court employs when it undertakes to interpret constitutional provisions.

128. Do you believe that men may become pregnant or give birth?

RESPONSE: Respectfully, I am not aware that any prior Supreme Court nominee has been asked to explain whether men can become pregnant or answer related questions, for example, about biological differences between men and women. And I am aware that the reason these questions are being posed to me is because there are active conversations happening in the public sphere—among policymakers and others—regarding LGBTQ individuals, especially transgender individuals, and their participation in various activities.

This is precisely why I, as a federal judge and as a nominee, must decline to answer these questions. It would be inappropriate for me to opine in the abstract on legal issues that are or could be in litigation, including legal issues regarding who is protected under the Constitution and our civil rights laws, or the scope of that protection. I can tell you that as a federal judge for almost a decade, it has been my duty to adjudicate individual claims in specific cases and controversies, including claims of sex discrimination. When I have jurisdiction to do so, I resolve properly filed legal disputes concerning sex discrimination based on the arguments that the parties make, the established facts of the particular case, and the applicable law.

Finally, I would note that I am pleased to be the sixth woman nominated to serve on the United States Supreme Court.

129. Do you believe it is appropriate to teach kindergarten children about LGBTQ sexual identities?

RESPONSE: As a judicial nominee and sitting federal judge, it would be inappropriate for me to comment on my personal views, if any, about this or any other policy matter. As a federal judge for almost a decade, I resolve each case on an individual basis by assessing the parties’

legal arguments based on the factual record and applicable law, including relevant statutes and binding precedent.

130. Have you ever supported the idea of biologically male transgender athletes competing against women and girls in athletic contests?

RESPONSE: As a judicial nominee and sitting federal judge, it would be inappropriate for me to comment on my personal views, if any, about this or any other policy matter. As a federal judge for almost a decade, I resolve each case on an individual basis by assessing the parties' legal arguments based on the factual record and applicable law, including relevant statutes and binding precedent.

131. Do you own any foreign real estate?

RESPONSE: No.

132. Do you believe there is a fair ideological balance in leading law schools?

RESPONSE: Consistent with positions taken by prior nominees, as a pending judicial nominee and a sitting federal judge it would be inappropriate for me to comment on a matter of public policy. Moreover, my personal views are irrelevant to my work as a judge. Under the Code of Conduct for United States Judges and established standards of judicial ethics, a judge's own personal views regarding a matter must not have any bearing on her interpretation and application of the law.

133. Do you believe there is a fair ideological balance in leading law firms?

RESPONSE: Consistent with positions taken by prior nominees, as a pending judicial nominee and a sitting federal judge it would be inappropriate for me to comment on a matter of public policy. Moreover, my personal views are irrelevant to my work as a judge. Under the Code of Conduct for United States Judges and established standards of judicial ethics, a judge's own personal views regarding a matter must not have any bearing on her interpretation and application of the law.

134. If confirmed, what do you hope your lasting achievement will be from your service on the U.S. Supreme Court?

RESPONSE: I have dedicated my career to public service, and being a Justice on the Supreme Court is the capstone of a judicial career. If I am fortunate enough to be confirmed to Supreme Court, I hope to write opinions that the average person can understand, and that I can inspire confidence in the law and in the judiciary.

135. Did Justice Breyer ever communicate with you about his retirement or hope that you would replace him on the U.S. Supreme Court?

RESPONSE: No. The only communication that I have had with Justice Breyer was after the President announced my nomination; he called to congratulate me.

136. Do you believe “power” is a relevant consideration when adjudicating cases?

RESPONSE: Please see my responses to Question 99.

137. Do you believe it is appropriate for minors to undergo transition therapy or sex reassignment surgery?

RESPONSE: As a judicial nominee and sitting federal judge, it would be inappropriate for me to comment on my personal views, if any, about this or any other policy matter. As a federal judge for almost a decade, I resolve each case on an individual basis by assessing the parties’ legal arguments based on the factual record and applicable law, including relevant statutes and binding precedent.

138. Do you consider yourself a capitalist?

RESPONSE: In every case I set aside any personal views and make determinations as an impartial judge. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to express any personal views on economic policy.

139. Do you consider yourself a Marxist?

RESPONSE: In every case I set aside any personal views and make determinations as an impartial judge. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to express any personal views on economic policy.

140. Have you sat on any board or held any official position at any primary or secondary school that teaches critical race theory or critical race studies?

RESPONSE: It is my understanding that critical race theory or critical race studies are academic subjects taught in some law schools. To my knowledge, I have not served on the board of any primary or secondary school that teaches “critical race theory or critical races studies.”

141. What does the term “anti-racism” mean to you?

RESPONSE: In general, I understand the term “anti-racism” to indicate an opposition to racism.

142. Do you support reparations for slavery?

RESPONSE: As a judicial nominee and sitting federal judge, it would be inappropriate for me to comment on my personal views, if any, about reparations or any other policy matter. As a judge, it is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law.

143. Does the President of the United States have any non-delegable functions?

RESPONSE: The Supreme Court has held that “the President ‘cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,’ because Article II ‘makes a single President responsible for the actions of the Executive Branch.’ *Clinton v. Jones*, 520 U.S. 681, 712–713 (1997) (Breyer, J., concurring in judgment).” *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 496–497 (2010).

144. Have you required any of your clerks or staff in chambers to wear masks or receive a COVID-19 vaccine?

RESPONSE: Between March 2020 and the present, my chambers has followed the COVID-19 policies established by the U.S. District Court for the District of Columbia, and after my elevation in June of 2019, we adhered to similar policies established by the U.S. Court of Appeals for the D.C. Circuit. These policies have evolved over time, to include teleworking during the spring and early summer of 2020; maximizing telework and ensuring social distancing; wearing masks in public areas of the courthouse; wearing masks in private areas of the courthouse, including chambers; and providing either proof of vaccination or being subject to testing/additional masking requirements.

145. Under what circumstances may the executive branch assert privilege to withhold documents from production?

RESPONSE: As a general matter, the Supreme Court has recognized that advice to the President and deliberative communications and materials may fall within the scope of executive privilege. As the Court explained, “the privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution. *United States v. Nixon*, 418 U.S. 683, 708 (1974).

146. Do you believe that America is a force for good in the world?

RESPONSE: Absolutely. As I said during the hearing, I love our country and the Constitution, and the rights that make us free. My parents were educated in racially segregated schools in Florida, and just one generation later, I am under consideration to join the highest court. My journey could only happen in this country, and that is a testament to America’s hope and promise.

147. Do you believe that the Framers of the Constitution were racist?

RESPONSE: I have a great deal of respect and admiration for the Framers of the Constitution. As I stated during my hearing, I love our country and the Constitution, and the rights that make us free. As a federal judge for almost a decade, I am committed to upholding and defending the Constitution. While America has not always lived up to its ideals, the American story is about our country always striving to become that “more perfect union.”

148. Under what circumstances should a federal court abstain from adjudicating a claim that is also pending before a state court?

RESPONSE: Please see my response to Question 18.

149. Under which of the following circumstances do you believe a judge should grant compassionate release to an incarcerated individual, on the basis that they possess a health condition that makes them more susceptible to disease infection?

- a. The incarcerated individual has mental health needs
- b. The incarcerated individual is asthmatic
- c. The incarcerated individual is overweight

RESPONSE: Congress passed the First Step Act in 2018, which modified the federal statute governing “compassionate release.” Now, when a defendant requests a modification of an imposed term of imprisonment, Congress has instructed that courts “may reduce the term of imprisonment. . . after considering the factors set forth in section 3553(a) to the extent that they are applicable” if the court finds that “extraordinary and compelling reasons warrant such a reduction.” 18 U.S.C. § 3582(c)(1)(A)(i). The statute also mandates consideration of the applicable policy statements of the U.S. Sentencing Commission. Congress has required a fact-specific, individualized inquiry in every case.

150. In *United States v. Wiggins*, you wrote, “The obvious increased risk of harm that the COVID-19 pandemic poses to individuals who have been detained in the District’s correctional facilities reasonably suggests that each and every criminal defendant who is currently in D.C. DOC [Department of Correction] custody—and who thus cannot take independent measures to control their own hygiene and distance themselves from others—should be released.”

- a. Do you stand by this writing?
- b. Do you still believe that all criminal defendants in D.C. custody should have been released during the COVID-19 pandemic?

RESPONSE: In *U.S. v. Wiggins*, 19-CR-258, 2020 WL 1868891 (D.D.C. Apr. 10, 2020), I denied the criminal defendant’s motion for release prior to sentencing. Immediately after the statement quoted above, I wrote that the judiciary was limited in the steps it could take to respond to COVID-19-related concerns, and noted that “[T]he constraints on judicial authority derive both from the fact that existing statutes mandate an individualized assessment of a detained person’s flight risk and dangerousness prior to such person’s release into the community, and also from the recognition that the act of releasing dangerous and/or potentially non-compliant criminal defendants into the community itself poses substantial risks to probation officers, law enforcement, and the public at large.” Ultimately, I denied the defendant’s motion for release because I determined that “no conditions of release could assure the safety of the community if this individual [was] not held in custody” under the pre-sentencing detention statute, 18 U.S.C. § 3143(a)(1).

As a district court judge, I sentenced more than 100 defendants. In each case, I engaged in the fact-specific, individualized inquiry that Congress has mandated federal judges undertake in order to ensure that the sentence I imposed satisfied the purposes of punishment set forth by

Congress. I have granted and denied petitions in these cases based solely on whether the facts of a specific case met the applicable standards set forth by Congress.

151. You delivered a talk entitled “Supreme Court as Gatekeeper: Screening Petitions for ‘Original’ Writs of Habeas Corpus in the Wake of the AEDPA,” in November 2001, shortly after completing your clerkship with Justice Breyer. In your talk, you said that “because Congress has severely restricted the lower federal court’s [sic] ability to consider successive petitions, the Supreme Court should reevaluate and adjust the criteria it uses to screen petitions for writs of habeas that are filed directly with it.”

- a. If you are confirmed to the Supreme Court, do you plan to take steps to “reevaluate and adjust” these criteria?

RESPONSE: In November of 2001, I gave a job talk in connection with a potential academic position at a law school. Such academic theories or issues have never played any role in my judging. To the extent that this question asks how I would rule in any future case, it would be inappropriate for me to comment.

- b. If so, how do you plan to manage the flood of spurious habeas petitions that would inevitably follow?

RESPONSE: Please see my response to Question 151a.

152. You penned a senior thesis at Harvard titled, “*The Hand of Oppression*”: *Plea Bargaining Processes and the Coercion of Criminal Defendants*,” in which you stated that plea “bargaining is both coercive and unacceptable” (pg. 2) and that the practice is “inherently coercive.” (pg. 82).

- a. Do you stand by that conclusion today?

RESPONSE: My academic thesis was written 30 years ago, when I was a senior in college. The views I expressed were primarily based upon observations that I had made during a summer internship—before I attended law school, before I became an attorney, and before I became a judge. Since then, I have had extensive experience with the actual workings of the criminal justice system in a variety of capacities. In my work as a judge, I have ratified plea bargains and accepted guilty pleas, and I now understand plea bargaining to be an important part of the administration of criminal justice.

- b. Assuming you do not, what changed your mind?

RESPONSE: Please see my response to Question 152a.

153. Do you believe that 1619, rather than 1776, should be thought of as America’s original beginning?

RESPONSE: No. While America has not always lived up to its ideals, the American story is about our country always striving to become that “more perfect union.”

154. The Justice for whom you clerked and whom you would replace if you are confirmed, Justice Breyer, has stated that judges should “apply the [Constitution’s] underlying values” rather than the text. He has also written that “[t]he more the Court relies on text-based methods alone to interpret statutes, the easier it will be for legislators to avoid responsibility for a badly written statute.” President Biden has stated that he is looking to replace Justice Breyer with somebody who shares his philosophy.

a. Do you agree with Justice Breyer’s characterizations?

b. If not, please state precisely where you disagree with Justice Breyer.

RESPONSE: I follow the methods of statutory and constitutional interpretation that the Supreme Court has employed. I look at the relevant provision of the Constitution, statute, or other applicable legal authority. I work to discern those words’ meaning as intended by the people who wrote them. I focus on original public meaning; I look at history and practice at the time the document was created to understand what those who created the text intended; I also look at precedent to understand how the text has been previously interpreted and applied. As a lower court judge, I am bound by precedent. If I am fortunate enough to be confirmed to the Supreme Court, I would be bound by *stare decisis*. I do not decide cases based on my personal views or policy preferences. As a sitting federal judge and a pending judicial nominee, it would be inappropriate for me to criticize the views or opinions of particular Justices.

155. In *Committee on the Judiciary v. McGahn*, the D.C. Circuit found that you had impermissibly permitted the House of Representatives to sue to enforce a subpoena, despite the fact that no statute gave the House a cause of action to do so. How has that reversal affected your approach to jurisdictional analysis going forward?

RESPONSE: On October 15, 2020, the D.C. Circuit granted rehearing *en banc* and vacated the divided panel’s determination finding that the U.S. House of Representatives Committee on the Judiciary did not have a cause of action. *Committee on Judiciary of U.S. House of Representatives v. McGahn*, No. 19–5331, Order at 1 (D.C. Cir. Oct. 15, 2020). Thereafter, the parties reached a settlement and filed a joint motion to dismiss the appeal and vacate the panel opinion, which was granted on July 13, 2021. As a result, under the current posture of the case, my trial court opinion remains good law.

156. When the Supreme Court takes the significant step of overturning a case of significant historical provenance, such as the detestable decision in *Plessy v. Ferguson* authorizing Jim Crow laws, should subsequent courts be particularly skeptical about calls to overturn that reversal and return to the old standard?

RESPONSE: All Supreme Court decisions are precedential and entitled to respect under *stare decisis* principles, and in revisiting any precedent, the Court applies the factors it has articulated for determining whether to overrule a prior decision. Those factors include the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to “rob[]” the decision “of significant application

or justification.” *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Fed. of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018).

157. In February of last year, in *Gateway City Church v. Newsom*, the Supreme Court granted relief on the emergency docket. It was just one paragraph, and it said, “The Ninth Circuit’s failure to grant relief was erroneous. This outcome is clearly dictated by this Court’s decision in *South Bay United Pentecostal Church v. Newsom*,” which was itself an opinion on the emergency application docket. The Court did the same thing in April. In another emergency application case, *Tandon v. Newsom*, the Court said, “The Ninth Circuit’s failure to grant an injunction pending appeal was erroneous. This Court’s decisions have made the following points clear.” The Court then went on to cite, over the course of four pages, six different cases that were decided on the emergency applications docket. The Court said these were binding precedents that dictated the instant case. Do you agree with the Court that cases decided on the emergency application docket are entitled to *stare decisis*?

RESPONSE: All Supreme Court decisions are precedential and entitled to respect under *stare decisis* principles.

158. In their legal briefs in the consolidated cases before the Supreme Court brought by Students for Fair Admissions—No. 20–1199 and No. 21–707—both Harvard and UNC have been clear that race-based affirmative action is part of their academic “mission.” According to Harvard’s website, your role on the Board of Overseers is to help Harvard achieve its “overarching academic mission.” Do you agree that a reasonable observer might conclude that you gave advice about race-based affirmative action in your role on the board at Harvard and thus your “impartiality might reasonably be questioned”? 28 U.S.C. §455(a).

RESPONSE: As I stated during the hearing, if confirmed, I plan to recuse myself from the case *Students for Fair Admissions v. President and Fellows of Harvard College*.

I have served as a federal judge for almost a decade, and I have a demonstrated record of faithfully applying the law of recusal during that time. Justice Ginsburg described the process that Supreme Court justices follow in deciding whether to recuse, which involves reading the statute, reviewing precedents, and consulting with colleagues. If confirmed, I commit to following this recusal process and faithfully applying the law of recusal.

**Nomination of the Honorable Ketanji Brown Jackson to
be an Associate Justice of the Supreme Court
Questions for the Record
Submitted March 24, 2022**

QUESTIONS FROM SENATOR COTTON

1. During her confirmation hearing for the Supreme Court, Justice Elana Kagan said that sometimes the Founders laid down specific provisions in the Constitution, “[b]ut there are a range of other kinds of provisions in the Constitution of a much more general kind, and those provisions were meant to be interpreted over time, to be applied to new situations and new factual contexts . . . And I think that they laid down--sometimes they laid down very specific rules, sometimes they laid down broad principles.” Do you agree with Justice Kagan's position? If so, how do you determine whether a provision in the Constitution is a “very specific rule” or a “broad principle”?

RESPONSE: There are some provisions in the Constitution that set forth specific rules. For example, the Constitution states that a person must be at least thirty-five years old to be President of the United States. As to clear provisions of this sort, the Constitution can be interpreted based on the text alone. Other provisions are broader, and thereby establish principles that need to be interpreted and applied to the circumstances in the case before them. An example of this is “unreasonable searches and seizures” or “due process of law.” In all cases, I would interpret the constitutional provision at issue using the interpretive tools that the Supreme Court has employed.

2. During your confirmation hearing, you repeatedly referred to precedent and the need for predictability in the law. Under what circumstances is it appropriate for the Supreme Court to overturn its own precedents?

RESPONSE: As I have previously explained, *stare decisis* is a bedrock legal principle that ensures consistency and impartiality of judgments. The Supreme Court has articulated factors to consider in determining whether to overrule a prior decision, including the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to “rob[]” the decision “of significant application or justification.” See *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); see also, e.g., *Janus v. American Fed. Of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018). The application of these factors is case specific. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on on how these factors might apply in a given case and when it would be appropriate for the Court to overturn a precedent. If I am confirmed, and if I am asked to revisit a particular precedent in the context of a specific case, I would evaluate the parties’ arguments, the relevant law, the factual record, and would consider the views of my colleagues.

3. Are justices of the Supreme Court bound by precedent, or are they able to make their own decision in each case about whether to follow, distinguish, or overrule precedent?

RESPONSE: Please see my response to Question 2. As I explained, *stare decisis* is a bedrock legal principle that ensures consistency and impartiality of judgments, and the Supreme Court has articulated factors to consider in determining whether to overrule a prior decision. Those factors are themselves precedent of the Court and are thus entitled to respect under *stare decisis* principles.

4. Please describe what you believe to be the Supreme Court's holding in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010).

RESPONSE: The Supreme Court held in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), that a public law school may condition its funding and provision of facilities to a student group on the group's agreement to open eligibility for membership and leadership to all students.

5. If a judge believes that the clear text of a statute calls for an unjust result but one that does not violate the Constitution or other law, is it more appropriate for the judge to interpret the statute in a manner that is, in their view, "more just" but inconsistent with the clear text of the statute, or should the judge interpret the law according to the clear text, point out the unjust result, and allow Congress to remedy the issue by amending the statute?

RESPONSE: Under Supreme Court precedent, if "statutory text is plain and unambiguous," a judge "must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). I follow that rule regardless of any personal views or policy preferences I may have. As I stated at my hearing, judges should not be policymakers. Judges interpret law; they do not make it. "It is Congress's job to enact policy and it is th[e] Court's job to follow the policy Congress has prescribed." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018).

6. Is it ever justifiable to commit arson as part of a protest?

RESPONSE: No.

7. Should an athlete be allowed to compete in sports on the basis of their purported "gender identity," as opposed to their biological sex? For example, should a male be allowed to participate in female sports if he "identifies" as a female, in contradiction to his biologically determined sex?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on this question, as questions about this topic are the subject of ongoing litigation.

8. Do you believe that man-made pollution contributes to climate change?

RESPONSE: As Justice Barrett has previously pointed out, with respect to the Court's decision in *Janus v. AFSCME*, the Supreme Court has described "climate change" as a "controversial subject[]" and "sensitive political topic[]." 138 S. Ct. 2448, 2476 (2018).

Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further matters that could be the subject of future litigation. Moreover, my personal views on this subject, if any, are irrelevant. If a case comes before me involving environmental regulation, I will carefully review the record and apply the relevant law to the facts before me.

9. Is it possible for men to become pregnant?

RESPONSE: Respectfully, I am not aware that any prior Supreme Court nominee has been asked to explain whether men can become pregnant or answer related questions, for example, about biological differences between men and women. And I am aware that the reason these questions are being posed to me is because there are active conversations happening in the public sphere—among policymakers and others—regarding LGBT individuals, especially transgender individuals, and their participation in various activities.

This is precisely why I, as a federal judge and as a nominee, must decline to answer these questions. It would be inappropriate for me to opine in the abstract on legal issues that are or could be in litigation, including legal issues regarding who is protected under the Constitution and our civil rights laws, or the scope of that protection. I can tell you that as a federal judge for almost a decade, it has been my duty to adjudicate individual claims in specific cases and controversies, including claims of sex discrimination. When I have jurisdiction to do so, I resolve properly filed legal disputes concerning sex discrimination based on the arguments that the parties make, the established facts of the particular case, and the applicable law.

Finally, I would note that I am pleased to be the sixth woman nominated to serve on the United States Supreme Court.

10. Do you believe that there is a difference between equity and equality? If so, please explain what you believe to be the difference.

RESPONSE: According to Black's Law dictionary, there are multiple definitions of the terms "equity" and "equality." My belief, if any, regarding the difference between these two terms is irrelevant to my job as a judge. As a judicial officer, it is my duty to adjudicate individual claims, including claims of violation of the Equal Protection Clause, that are filed by persons who are authorized to litigate such cases or controversies in federal court. When I have jurisdiction to do so, I resolve properly filed legal disputes concerning race discrimination and other unlawful conduct based on the arguments that the parties make, the established facts of the particular case, and the applicable law, and I do not draw upon, reference, or consider my personal views, if any, regarding equity or equality.

11. Do you believe that parents have a right to direct the upbringing of their children?

RESPONSE: The Supreme Court has held that parents have the right to direct their children's education and upbringing pursuant to the substantive Due Process Clause. *See Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("[Plaintiff's] right thus to teach and the right of parents to engage [Plaintiff] so to instruct their children, we think, are within the liberty [of the Fourteenth Amendment]."); *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("[W]e have

held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the right[] . . . to have children . . . [and] to direct the education and upbringing of one’s children” (internal citations omitted)).

12. Do you believe that parents have a right to know what curriculum is being taught to their children in school?

RESPONSE: The Supreme Court recognized the right to direct the education and upbringing of one’s children in *Meyer v. Nebraska*, 262 U.S. 390 (1923). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on questions about curriculum in school, a matter that is the subject of ongoing litigation.

13. During your confirmation to your current role as a Circuit Court Judge, I asked you whether civil rights are guaranteed to all Americans, or only to specific sub-sets of Americans. In your response, you said that civil rights statutes contain provisions that specifically define the scope of protections afforded by those acts. Do you believe that the Civil Rights Act of 1964 protects all Americans from discrimination based on their race, or does it only protect Americans of specific races?

RESPONSE: Our Constitution guarantees that no person or group will be denied equal protection of the law. Consistent with that guarantee, Congress has enacted several civil rights laws to protect individuals from discrimination on the basis of a protected status, including race, color, religion, sex, and national origin. Such laws, including the relevant provisions of the Civil Rights Act of 1964, apply to all Americans.

14. In your Judiciary Questionnaire, you stated that, if confirmed to the Supreme Court, you would continue your present practice of using a recusal list to identify and avoid potential conflicts of interest. How often and in what manner do you update or maintain that list?

RESPONSE: I have served as a federal judge for almost a decade, and during that time, I have a demonstrated record of faithfully applying the law of recusal. I commit to updating my list as appropriate. Justice Ginsburg described the process that Supreme Court justices follow in deciding whether to recuse, which involves reading the statute, reviewing precedents, and consulting with colleagues. If confirmed, I commit to following this recusal process and faithfully applying the law of recusal.

15. Is it ever justifiable to loot private property as part of a protest?

RESPONSE: No.

16. Are there times in which United States courts should cite to the court decisions of foreign countries in determining the meaning of United States law? If so, please explain when citing to foreign governments is appropriate.

RESPONSE: Unless properly directed by Congress, U.S. courts should not rely on the court decisions of foreign countries in determining the meaning of U.S. law.

17. Are there any crimes for which the Constitution allows the death penalty?

RESPONSE: Under our constitutional system, it is the role of legislative bodies to determine the applicable penalties for conduct that they have declared unlawful. By statute, Congress and state legislatures have determined that the death penalty is an appropriate sentence for certain crimes under certain circumstances. The Supreme Court upheld the death penalty as constitutional in *Gregg v. Georgia*, 428 U.S. 153 (1976).

18. Was the death penalty considered cruel and unusual punishment when the Eighth Amendment was adopted?

RESPONSE: The Supreme Court has upheld the death penalty as constitutional under the Eighth Amendment and has recently stated that a proper analysis of an Eighth Amendment challenge to a state's method of execution should include an examination of "the original and historical understanding of the Eighth Amendment." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1126 (2019).

19. If the American people dislike the death penalty, can they vote for representatives who will eliminate the death penalty through legislation?

RESPONSE: Yes. Policy considerations about the imposition of the death penalty are determinations for each community and its elected representatives to make by enacting death penalty statutes. Congress and many state legislatures have determined by statute that the death penalty is an appropriate sentence for certain crimes under certain circumstances. The role of a court is limited to reviewing those statutes in specific cases to determine their constitutionality.

20. Please describe what you believe to be the Supreme Court's holding in *Greer v. United States*, 593 U.S. ____ (2021).

RESPONSE: In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Supreme Court held that in order for an individual to be convicted of a felon-in-possession offense, the Government must prove not only that the defendant knew he possessed a firearm but also that he knew he was a felon when he possessed the firearm. In *Greer v. United States*, 141 S. Ct. 2090 (2021), the Supreme Court held that in "felon-in-possession cases, a *Rehaif* error is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon." 141 S. Ct. at 2100. If a defendant makes such an argument, he is entitled to relief if the court determines that the defendant "has carried the burden of showing a 'reasonable probability' that the outcome of the district court proceeding would have been different." *Id.*

21. Is the Second Amendment only meant to protect hunting?

RESPONSE: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that self-defense is the core of the Second Amendment, which confers a fundamental individual right to keep and bear arms.

22. Please describe what you believe to be the Supreme Court's holding in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021).

RESPONSE: Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, et seq. (“Section 2”) prohibits voting laws or practices that “den[y] or abridge[e] . . . the right of any citizen of the United States to vote on account of race or color . . . as provided in subsection (b).” 52 U.S.C. § 10301(a). Subsection 2(b) provides that “[a] violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a).” *Id.* § 10301(b).

In *Brnovich v Democratic National Committee*, 141 S. Ct. 2321 (2021), the Court established five non-exhaustive guideposts for courts to consider in the “totality of the circumstances analysis” of a potential Section 2 violation: (1) the “size of the burden imposed by a challenged voting rule”; (2) “the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982”; (3) “[t]he size of any disparities in a rule’s impact on members of different racial or ethnic groups”; (4) “the opportunities provided by a State’s entire system of voting when assessing the burden imposed by a challenged provision”; and (5) “the strength of the state interests served by a challenged voting rule.” *Brnovich*, 141 S. Ct. at 2338–39. After considering these factors, the Court held that the Arizona laws being challenged did not violate Section 2.

23. Is it ever justifiable for a judge to impose a lighter sentence because she agrees with the political cause that an arsonist was expressing in a protest when he set fire to a building?

RESPONSE: No. Courts have a duty of independence, meaning that judges must resolve cases and controversies in a manner that is consistent with what the law requires, despite the judge’s own personal views of the matter. This is so especially with respect to cases and controversies that pertain to controversial political issues.

24. Please describe what you believe to be the Supreme Court’s holding in *Americans for Prosperity Foundation v. Bonta*, 594 U.S. ____ (2021).

RESPONSE: In *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), the Supreme Court invalidated a requirement that charitable organizations operating in California provide the state attorney general’s office with the names and addresses of their largest donors. The Court did “not doubt that California has an important interest in preventing wrongdoing by charitable organizations,” 141 S. Ct. at 2385–86, but found “a dramatic mismatch” between this interest and the disclosure regime at issue, *id.* at 2386. The Court held that the disclosure requirement was invalid because it burdened donors’ First Amendment rights and was not narrowly tailored to serve California’s interest.

25. Should an inmate be housed with other inmates on the basis of their purported “gender identity,” as opposed to their biological sex? For example, should a male be housed with female inmates if he “identifies” as a female, in contradiction to his biologically determined sex?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a

sitting federal judge, to comment further on this question, as questions about this topic are the subject of ongoing litigation.

26. If a judge issues a sentence, and the criminal exhausts all their appeals and the sentence is upheld, should the sentence be carried out, or should it be ignored?

RESPONSE: In a criminal matter, if a defendant has exhausted all appeals, the defendant's sentence will be carried out, subject to executive clemency and other mechanisms for early release enacted by the legislature, including under the First Step Act, 18 U.S.C. § 3582.

27. Does the United States have a right to control its borders and decide who can and can't enter the country?

RESPONSE: The Constitution explicitly assigns Congress significant responsibility for crafting our immigration laws. Additionally, in *Arizona v. United States*, 567 U.S. 387 (2012), the Supreme Court held that the federal government has authority to determine immigration policy based on its "inherent power as sovereign to control and conduct relations with foreign nations," as well as the implications that immigration policy has for "trade, investment, tourism." *Arizona*, 567 U.S. at 395.

28. Congress has passed bills that were signed into law that set limits on how many immigrants are allowed to come to the United States every year. Does a new president have the authority to say he just doesn't like those laws and will ignore them, or is he still bound by those laws?

RESPONSE: The Constitution requires that the President "take Care that the Laws be faithfully executed[.]" U.S. Const. art. II, § 3. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

29. As a judge, you've had the privilege to welcome new American citizens by administering their oath of citizenship. Approximately how many naturalization ceremonies would you say you've presided over in your career?

RESPONSE: I have presided over approximately nine naturalization ceremonies.

30. Who has more of a right to be in the United States: New citizens who followed the rules, waited their turn, and came in the right way, or illegal aliens whose very first act in the United States was to break our laws and continue breaking them every day that they remain here illegally?

RESPONSE: Article I, Section 8 of the Constitution grants Congress authority "[t]o establish a uniform [r]ule of [n]aturalization." Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

31. Can a state decide to prohibit the federal government from enforcing our immigration laws within the state, or in certain locations?

RESPONSE: In *Arizona v. United States*, 567 U.S. 387 (2012), the Supreme Court held that states generally lack authority to regulate immigration. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on the scope and application of *Arizona* because they are the subject of ongoing litigation.

32. You said in your hearing that you have never studied Critical Race Theory. Did you ever take any courses at Harvard or any continuing legal education classes in which Critical Race Theory was a topic?

RESPONSE: To the best of my recollection, no.

33. You said in your hearing that your previous speeches touting the use of Critical Race Theory in sentencing was in the context of sentencing policy, not individual sentencing decisions. As a former member of the Sentencing Commission, do you believe that the Sentencing Commission should employ Critical Race Theory as part of sentencing policy decisions?

RESPONSE: Respectfully, this is not an accurate statement about the two prior speeches I gave. I gave two speeches in 2015—one to law clerks, one to law students—about federal sentencing policy, in an effort to get younger lawyers engaged and interested in the topic. For example, as part of my effort to appeal to a wide number of young lawyers, I stated the following:

I have also had the good fortune of being able to teach a seminar on federal sentencing as an adjunct professor at a law school in my area, and in my class, I have one basic goal—to persuade my students to think about federal sentencing not as an oddly narrow area of focus that is tacked on to criminal law, but instead, as a vast area of inquiry that is well worth studying all on its own. In fact, if you were to take my class, you would hear me tout criminal sentencing as among the “don’t-miss” courses and subjects in law school, not just because I teach it, but because I, for one, believe that sentencing law and policy is one of the most important things that any budding lawyer—for that matter, any seasoned practitioner—can study.

....

I also try to convince my students that sentencing is just plain interesting on an intellectual level, in part because it melds together myriad types of law—criminal law, of course, but also administrative law, constitutional law, critical race theory, negotiations, and to some extent, even contracts. And if that’s not enough to prove to them that sentencing is a subject worth studying, I point out that sentencing policy implicates and intersects with various other intellectual disciplines as well, including philosophy, psychology, history, statistics, economics, and politics.

Let me be clear that while that portion of my speech was an effort to appeal to the varied interests young lawyers might have in order to interest them in federal sentencing, critical race

theory played no role in my actual work on the Sentencing Commission, just like it has played no role in my work as a judge.

On the Sentencing Commission, I worked on a bipartisan basis with my fellow Commissioners to uphold the mission of the agency—to “establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes”; “advise and assist Congress and the executive branch in the development of effective and efficient crime policy”; and “collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.”

As a judge, I have applied the statutes enacted by Congress—including 18 U.S.C. § 3553(a)—in every decision I made, including sentencing decisions. Academic theories have played no role in my judicial decision-making.

34. Should judges base their legal interpretations on policy justifications, or on the text of the law as it was understood at the time that it was passed?

RESPONSE: The Supreme Court has stated that “our job is to interpret the words” of a statute “consistent with their ‘ordinary meaning . . . at the time Congress enacted the statute.’” *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)) (alteration in original). Courts are not “free to rewrite clear statutes” based on their “policy concerns.” *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019).

35. During your confirmation hearing, you were asked about your sentencing of child pornography offenders. You told Senator Graham that “in every case,” you ensured that these criminals faced “lengthy periods of supervision and restrictions on their computer use.” You were also asked specifically about your sentencing of Wesley Hawkins in 2013. Please list the restrictions that you placed on Hawkins's computer use and internet access as a result of your sentencing him in that child pornography case.

RESPONSE: In *United States v. Hawkins*, No. 3-cr-244 (D.D.C. 2013), I sentenced the defendant to six years (or 73 months) of supervised release after he was released from prison. As part of his supervised release, I imposed special conditions on the defendant, including that he be monitored by Radio Frequency for a period of 90 days, comply with the Sex Offender Registration requirements for convicted sex offenders, have no unsupervised contact with minors under the age of 18 without the written approval of the U.S. Probation Office, not work or volunteer in any capacity in a place where he might come in direct contact with children, participate in a program of sex offender assessment and treatment, and submit to polygraph testing as directed by the U.S. Probation Office. I also ordered, pursuant to the Adam Walsh Child Protection and Safety Act of 2006, that the defendant submit to a search of his person, property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects at any time by any law enforcement or probation officer with reasonable suspicion concerning unlawful conduct or a violation of a condition of supervision.

36. From 2013–2019, did you require Wesley Hawkins to have monitoring software installed on his electronic devices to ensure that he was not continuing to offend after his child pornography conviction?

RESPONSE: Please see my response to Question 35.

37. In any of your cases in which you have sentenced an offender for crimes related to child pornography, have you ever failed to require that electronic monitoring software be installed on the criminal's electronic devices as a condition of their supervised release following their prison term?

RESPONSE: In all of the cases I have presided over involving child pornography charges, I have considered the recommendations of the parties and the U.S. Probation Office concerning the various aspects of the sentence to be imposed, in accordance with the requirements Congress has set forth in statutes. Upon consideration of the parties' recommendations and all of the factors set forth in 18 U.S.C. § 3553(a), I have imposed a term of imprisonment, lengthy terms of supervised release, and many additional restraints that are available in the law with the goal of ensuring that defendants do not reoffend.

38. Have you ever sentenced someone convicted of child pornography offenses to a sentence above the guideline range? If so, please list each such case.

RESPONSE: In each of the more than 100 sentencings I have conducted, including those involving child pornography offenses, I followed the law as set forth by Congress. Consistent with 18 U.S.C. § 3553(a), I considered the specific factors in the statute, including but not limited to: the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” “to afford adequate deterrence,” and “to protect the public from further crimes of the defendant”; the sentencing range established by the Sentencing Guidelines; “any pertinent policy statement” of the Sentencing Commission; and “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” I also considered victim statements and the sentencing recommendations of the government, defense counsel, and U.S. Probation Office. I employed this methodology in each of the matters I handled that involved child pornography charges. In the eleven child pornography cases I handled, I did not impose a sentence above the guidelines range; however, in eight of the eleven cases the sentence I imposed was consistent with or above the recommendations submitted by the government or U.S. Probation Office.

39. On April 17, 2019, you ordered that Wesley Hawkins return to BOP custody to stay in a Residential Reentry Center for 180 days, in accordance with the recommendation of a “Probation Petition.” You also ordered that monitoring software be installed on his electronic devices nearly six years after his previous conviction for child pornography. Please provide the Committee with a copy of the “Probation Petition” with which you concurred in that case.

RESPONSE: I am unable to provide the “Probation Petition” because this record is the property of the U.S. District Court for the District of Columbia, and I am no longer a member of that court. I would additionally note that it is common practice for “Probation Petitions” like the one

filed in Mr. Hawkins' case to be treated confidentially given that they contain sensitive information about a defendant and his supervision.

40. At any point after January 27, 2022 and before noon on March 23, 2022, did you review any written communications, record materials, or other materials related to the facts surrounding your April 17, 2019 order that Wesley Hawkins must spend six months in a Residential Reentry Center?

RESPONSE: No.

41. At any point after January 27, 2022 and before noon on March 23, 2022, did you have any conversations related to the facts surrounding your April 17, 2019 order that Wesley Hawkins must spend six months in a Residential Reentry Center?

RESPONSE: No.

42. What do you understand to be the authority granted to Congress under the Coinage Clause in Article I of the Constitution?

RESPONSE: Article I, section 8, Clause 5 of the Constitution says that "Congress shall have power to coin [m]oney, regulate the [v]alue thereof, and of foreign [c]oin, and fix the [s]tandard of [w]eights and [m]easures."

43. The Coinage Clause of Article I of the Constitution was understood to refer to physical coin money at the time that the Founders wrote the Constitution. How would you go about determining whether the Coinage Clause also grants the government the power to create non-physical money, such as digital currency or cryptocurrency?

RESPONSE: I would approach a case presenting this question in the same manner that I have handled every other case. As a district and circuit judge, I have considered only the parties' arguments, the relevant facts, and the law as I understand it, including the text of any applicable statutes and the binding precedents. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

44. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), Justice Scalia wrote in the majority opinion that the Supreme Court should not think of itself as "a committee of philosopherkings." What do you believe that the Court meant by that?

RESPONSE: Justice Scalia was explaining in that quote that the role of judges is limited to interpreting the law, and judges should not impose their personal policy views.

45. Should the Supreme Court base its rulings about the U.S. Constitution and U.S. laws on the text of those laws, or should they decide cases based on how foreign governments and foreign citizens will feel about the result?

RESPONSE: As prior nominees have stated, foreign law should not be used as binding precedent or legal authority to interpret the United States Constitution. But foreign law can be consulted in limited circumstances, just as law review articles or treatises can be consulted. Courts have also considered the interpretations of other signatory parties as evidence of a treaty's meaning. *See Water Splash v. Menon*, 137 S. Ct. 1504, 1512 (2017) (“[T]his Court has given ‘considerable weight’ to the views of other parties to a treaty.”)

46. Are treaties always self-executing, or does Congress sometimes have to pass additional laws to give effect to those international agreements?

RESPONSE: The Supreme Court has distinguished between “self-executing” and “non-self-executing” treaties. A “self-executing” treaty has effect as domestic law, whereas a “non-self-executing” treaty does not. *Medellin v. Texas*, 552 U.S. 491 (2008). A non-self-executing treaty “addresses itself to the political, not the judicial department” and, to the extent U.S. law is not already consistent with the treaty, requires further action by Congress—usually in the form of implementing legislation—“before it can become a rule for the Court.” *Foster & Elam v. Neilson* 27 U.S. 253, 314 (1829); *see also Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect.”); *Medellin*, 552 U.S. 491 (rejecting claim that a Presidential Memorandum made an International Court of Justice order binding on state courts).

47. How should courts determine whether a treaty is self-executing?

RESPONSE: Determining whether a treaty is self-executing “begins with its text.” *Medellin v. Texas*, 552 U.S. 491, 506 (2008). When the treaty’s text does not clearly indicate whether it is self-executing, the Supreme Court has considered extrinsic factors, such as the view of the President in light of the Executive’s role in foreign affairs, and whether other signatory nations interpret the treaty as binding in their domestic courts. *Id.*, 552 U.S. 491

48. Under 8 U.S.C. Sec. 1231, are aliens who have illegally reentered the United States entitled to release while awaiting deportation?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on this question, which relates to issues that are the subject of ongoing litigation.

49. Please describe what you believe to be the Supreme Court's holding in *Cedar Point Nursery v. Hassid*, 594 U.S. ____ (2021).

RESPONSE: In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), the Supreme Court held that a California regulation granting labor organizations a “right to take access” to an agricultural employer’s property for up to three hours per day, 120 days per year, in order to solicit support for unionization, constituted a *per se* physical taking under the Fifth and Fourteenth Amendments to the Constitution.

50. How do you expect the Supreme Court's holding in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 594 U.S. ____ (2021) to affect class certification in class-action lawsuits?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on the scope and impact of *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 594 U.S. ____ (2021), which might be the subject of future litigation.

51. Under *United States v. Arthrex, Inc.*, 594 U.S. ____ (2021), can administrative law judges wield unreviewable authority?

RESPONSE: In *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), the Supreme Court observed that Administrative Patent Judges had the power to render a final decision on behalf of the United States, without review of a superior or any other principal officer in the Executive Branch. As such, the Court determined that these judges exercise power that conflicts with the requirements of the Appointments Clause, which is designed to preserve political accountability, and pursuant to which only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch. Thus, the Court concluded that decisions by Administrative Patent Judges must be subject to review by the Director of the Patent and Trademark Office.

52. Please describe what you believe to be the Supreme Court's holding in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

RESPONSE: In *Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court considered free speech and free exercise claims challenging the actions of the Colorado Civil Rights Commission, which were brought by a baker who declined to bake a wedding cake for a same sex marriage. The Court held that the Colorado Civil Rights Commission's hostile and disparate consideration of the baker's sincere religious objection violated the Free Exercise Clause

53. Please describe what you believe to be the Supreme Court's holding in *Terry v. United States*, 593 U.S. ____ (2021).

RESPONSE: The Supreme Court held that a person convicted for possession with intent to distribute crack cocaine sentenced under 21 U.S.C. § 841(b)(1)(C) was not eligible for a sentence reduction under the First Step Act, because his offense of conviction, which did not have a mandatory minimum, was not a "covered offense" under the Act.

54. What are the implications for policing in the Supreme Court's ruling in *Torres v. Madrid*, 592 U.S. ____ (2021)?

RESPONSE: The Supreme Court previously noted that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). In *Torres v. Madrid*, the Supreme Court clarified that "[t]he application of physical force to the body of a

person with intent to restrain is a seizure, even if the force does not succeed in subduing the person.” 141 S. Ct. 989, 994. The Court found that a seizure occurs “when an officer shoots someone who temporarily eludes capture after the shooting.” *Id.* at 993–94. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on the implications that *Torres* may have on policing as that issue could be the subject of future litigation.

55. Under *Van Buren v. United States*, 593 U.S. ____ (2021), when does an individual “exceed authorized access” under the Computer Fraud and Abuse Act?

RESPONSE: The Supreme Court held that under Section 1030(e)(6) of the Computer Fraud and Abuse Act, “an individual ‘exceeds authorized access’ when he accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders, or databases—that are off limits to him.” *Van Buren v. United States*, 141 S. Ct. 1648, 1662 (2021).

56. Under *Pereida v. Wilkinson*, 592 U.S. ____ (2021), how should courts determine whether an alien's offense is “disqualifying” for the purpose of a removal order?

RESPONSE: In *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021), the Supreme Court held that noncitizens seeking relief from removal orders bear the burden of proving all aspects of their eligibility, including that they have not been convicted of any disqualifying criminal offense. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on issues concerning the application of *Pereida* because they are the subject of ongoing litigation.

57. How does the Supreme Court's opinion in *Caniglia v. Strom*, 593 U.S. ____ (2021) impact your understanding of *Cady v. Dombrowski*, 413 U.S. 433 (1973) in the context of firearm seizures?

RESPONSE: The Supreme Court has recognized the home as the area of greatest Fourth Amendment protection. In *Caniglia v. Strom*, the Court held that the “community caretaking” exception to the Fourth Amendment’s warrant requirement set forth in *Cady v. Dombrowski* does not extend to the home. As such, a police seizure of a gun owner’s guns from his home violated his Fourth Amendment right against warrantless searches and seizures.

58. Please describe what you believe to be the holding in *Edwards v. Vannoy*, 593 U.S. ____ (2021).

RESPONSE: The Supreme Court held that the jury-unanimity rule set forth in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) does not apply retroactively to cases on federal collateral review.

59. If an illegal alien residing in the United States is granted Temporary Protected Status, does that make that alien eligible to apply for lawful permanent resident status?

RESPONSE: Under the Immigration and Nationality Act and current Supreme Court precedent, receipt of Temporary Protected Status does not necessarily make a noncitizen eligible to apply to become a lawful permanent resident.

60. What is your view of arbitration as a litigation alternative in civil cases?

RESPONSE: The Federal Arbitration Act (“FAA”) provides that arbitration provisions in “any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The Supreme Court has held that the FAA preempts state law and requires courts to “place arbitration agreements on an equal footing with other contracts and enforce them according to their terms.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal citations omitted); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (stating that the FAA was enacted “to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on this question, because this issue could be the subject of future litigation.

61. Please describe what you believe to be the Supreme Court's holding in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

RESPONSE: In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court rejected the argument that 8 U.S.C. § 1182(f) “confers only a residual power to temporarily halt the entry of a discrete group of [noncitizens] engaged in harmful conduct” and instead held that this provision vests “broad discretion” in the President “to suspend the entry” of noncitizens based on a finding that their entry “would be detrimental to the interests of the United States.” The Court also held that the plaintiffs were unlikely to succeed on an Establishment Clause challenge to a proclamation under § 1182(f), where the “entry policy” at issue was “plausibly related” to a constitutionally permissible governmental objective (i.e., protecting the country and improving vetting processes).

62. How will the Supreme Court's holding in *United States Fish and Wildlife Service v. Sierra Club*, 592 U.S. ____ (2021) affect the application of the deliberative process privilege?

RESPONSE: The deliberative process privilege protects from public disclosure information that reflects an agency’s preliminary and predecisional thinking about a problem, as distinguished from the agency’s final decision. In *United States Fish and Wildlife Service v. Sierra Club*, the Supreme Court considered whether the deliberative process privilege protects draft biological opinions assessing the risks posed by a U.S. Environmental Protection Agency (“EPA”) proposed rule. Those draft opinions were never finalized, and after subsequent EPA actions, the U.S. Fish and Wildlife Service issued a final biological opinion of “no jeopardy.” As the Court noted, documents are “predecisional” if they were generated before the agency’s final decision on the matter, and are “deliberative” if they were prepared to help the agency formulate its position. The Court held that the draft biological opinions reflected a preliminary view and not a

final decision about the likely effect of the U.S. EPA's proposed rule. The Court noted that a decision's "real operative effect" is an indication of its finality, and stated that this "effect" is an assessment of legal consequences that flow from an agency's action. As such, the Court evaluated not whether the drafts had an effect on U.S. EPA's decision-making in assessing whether they were predecisional, but rather whether they were treated as final, and determined that the U.S. Fish and Wildlife Services had not treated them as final. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on the potential impact that this case will have on deliberative process privilege as that issue could be the subject of future litigation.

63. Please describe what you understand to be the difference between a right and a fundamental right.

RESPONSE: The Supreme Court has explained that certain rights are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The Supreme Court has described the concept of fundamental rights in various contexts, and while all of the uses suggest an important principle that warrants a high degree of protection I do not understand there to be a single universal meaning. For example, the Court has sometimes called freedom of speech and free exercise of religion fundamental. The Court has said that protections in the Bill of Rights that are "fundamental to the American scheme of justice" (such as the right to trial by jury in a serious criminal case) were made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *See Duncan v. Louisiana*, 392 U.S. 947 (1968). In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the plurality said that the Second Amendment's individual right to keep and bear arms for self defense was applicable to the States because it is "a provision of the Bill of Rights that protects a right that is fundamental from an American perspective." *McDonald*, 561 U.S. at 791. The Court has also referred to voting rights as "fundamental." *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."). In substantive due process cases, "fundamental rights" are rights protected by the Constitution and "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks and citations omitted).

64. What standard of scrutiny should be applied to government actions that infringe on the rights protected by the Second Amendment?

RESPONSE: In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court's plurality opinion said that the Second Amendment's individual right to keep and bear arms for self defense was applicable to the States because it is "a provision of the Bill of Rights that protects a right that is fundamental from an American perspective." *McDonald*, 561 U.S. at 791. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal

judge, to comment further on what the Supreme Court has said on matters that are the subject of ongoing litigation.

65. Under the Supreme Court's holding in *Ratzlaf v. United States*, 510 U.S. 135 (1994), are courts allowed to consult legislative history to interpret a law if the text of the law is clear?

RESPONSE: In *Ratzlaf*, the Court stated: “[W]e do not resort to legislative history to cloud a statutory text that is clear.” 510 U.S. at 147–48. I follow that statement in my jurisprudence. I have consulted legislative history if and only if the statute is ambiguous, and I have not resolved a statutory ambiguity based solely on the legislative history of the statute.

66. In statutory construction, is it the task of the courts to carry out the will of Congress, or to follow the text of the law and leave it to Congress to clearly express its will in the text?

RESPONSE: As the Supreme Court has stated, “[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). If the text of the statute is clear, the Court “must apply the statute according to its terms.” *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

67. Public news reports described your preparation for your confirmation hearing as including “moot” rounds organized by the White House. Did any individual affiliated with the group “Demand Justice” and not employed by the United States Federal Government participate in your preparation for the hearing or advise you on your preparation?

RESPONSE: No.

68. Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.

RESPONSE: My answers to each question are my own. Consistent with the practice of past nominees, I drafted answers to these questions with the assistance of attorneys from the Office of the White House Counsel as well as my current and former chambers staff.

69. Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please also identify the department or agency with which those officials are employed.

RESPONSE: Please see my response to Question 68.

Senator John Kennedy
Questions for the record

1. You served on the advisory board at Montrose Christian School. The school website contained language suggesting that “Christians should oppose all forms of sexual immorality, including adultery, homosexuality, and pornography.” Does service on a board promoting traditional values disqualify a nominee from impartial service as a member of the federal judiciary?

RESPONSE: I served on the inaugural advisory board of Montrose Christian School—a now-defunct kindergarten through 12th grade private school—from the fall of 2010 to the fall of 2011, prior to my nomination and confirmation as a federal district judge. I was aware that Montrose Christian School was affiliated with Montrose Baptist Church. I was not aware that the school had a public website or that any statement of beliefs was posted on the school’s website at the time of my service. My service on the advisory school board primarily involved planning for school fund-raising activities for the benefit of enrolled students. I did not receive any compensation for my service.

Article VI of the Constitution forbids any religious test for appointment to any public office, including an appointment to judicial service. That provision states, in relevant part, that “all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” Per the oath of office and the Code of Conduct, a judge is required to set aside all personal beliefs, including any religious beliefs, when she undertakes to rule in the cases to which she is assigned.

2. The Montrose Christian School’s website also indicated that “[m]arriage is the uniting of one man and one woman in covenant commitment for a lifetime.” Does service on a board that promotes traditional marriage disqualify a nominee from impartial service as a member of the federal judiciary?

RESPONSE: Please see my response to Question 1.

3. The Montrose Christian School’s website also argued that people “should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death.” Does service on a board that promotes pro-life values disqualify a nominee from impartial service as a member of the federal judiciary?

RESPONSE: Please see my response to Question 1.

4. Chief Justice Roberts wrote in a recent opinion that the Court “must balance the importance of having constitutional questions decided against the importance of having them decided right.” What factors would you consider if asked to overturn existing precedent?

RESPONSE: As I have previously explained, *stare decisis* is a bedrock legal principle that ensures consistency and impartiality of judgments. The Court has articulated factors to consider in determining whether to overrule a prior decision, including the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has

proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to “rob[]” the decision “of significant application or justification.” *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Fed. Of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018).

5. Do you believe the meaning of the Constitution is immutable or does it evolve over time?

RESPONSE: While courts must apply established constitutional principles to new circumstances, the meaning of the Constitution itself is fixed and does not evolve over time.

6. Do you embrace textualism as part of your judicial methodology for analyzing and resolving cases?

RESPONSE: As a lower court judge, I have issued nearly 50 opinions that involve some form of statutory interpretation. Based on my past practice, I give the statute’s text controlling weight. I have considered the meaning of the terms that the legislature used, the structure of the statute as a whole, and other traditional tools of statutory construction, including canons of statutory interpretation. *See, e.g., All. of Artists & Recording Cos., Inc. v. Gen. Motors Co.*, 162 F. Supp. 3d 8 (D.D.C. 2016), *aff’d*, 947 F.3d 849 (D.C. Cir. 2020). I also apply governing precedents regarding the appropriate method of interpretation in light of the particular circumstances of the case (e.g., the rule of lenity in the criminal context, *Chevron* deference, etc.). If and only if a statute is ambiguous, I have also occasionally consulted the legislative history of a statute, as the Supreme Court permits, to assess the original intent of the legislative body that enacted the provision at issue. And I have not resolved a statutory ambiguity based solely on the legislative history of the statute.

7. Do you embrace originalism as part of your described judicial methodology for analyzing and resolving cases?

RESPONSE: I would interpret the Constitution in a manner that is consistent with the methods of interpretation that the Supreme Court employs when it undertakes to interpret constitutional provisions. That includes reviewing the text of the constitutional provision, any relevant history, and any applicable precedent. The Court has recently interpreted various constitutional provisions by attempting to ascertain the original meaning of the words used as understood by the public at the time of the Founding. *See, e.g., United States v. Jones*, 132 S. Ct. 945, 949 (2012) (Fourth Amendment); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 353 (2010) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42–57 (2004) (Sixth Amendment); *Alden v. Maine*, 527 U.S. 706, 715–724 (1999) (Eleventh Amendment). And while the Court has primarily evaluated the original public meaning of the text of the constitutional provision at issue, *see Jones*, 132 S. Ct. at 949, 953; *Heller*, 554 U.S. at 576–77, its binding precedents also sometimes refer to the original intent of the Framers, *see Crawford*, 541 U.S. at 53–54, 59, 61.

The prevailing interpretive frame for interpreting the Constitution is to look back through history and determine what the words meant at the time of the founding. There are some provisions in the Constitution that set forth specific rules. For example, the Constitution states that a person must be at least thirty-five years old to be President of the United States. As to clear provisions

of this sort, the Constitution can be interpreted based on the text alone. Other provisions of the Constitution, like the protection against unreasonable searches and seizures or the protection of due process of law, are not clear from the text alone. As to those provisions, the Court looks at them in the context of history and in the structure of the Constitution. They look at the circumstances of the case in comparison to what the words meant at the time that they were adopted, and they analogize to current circumstances. It is a process that seeks to understand the core foundational principles in the Constitution as captured by the text as originally intended, and to apply those principles to modern circumstances.

8. Do you embrace purposivism as part of your judicial methodology for analyzing and resolving cases?

RESPONSE: Please see my response to Question 6. A court interpreting a statute seeks to understand the intention of the legislature that enacted the law. The Supreme Court has explained that “[n]o legislation pursues its purposes at all costs,” and “[e]very statute [proposes], not only to achieve certain ends, but also to achieve them by particular means.” *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 637 (2012) (citations and internal quotation marks omitted). Accordingly, “[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Park ‘N Fly, Inc. v. Dollar Park & Flu, Inc.*, 469 U.S. 189, 194 (1985). If the “statutory text is plain and unambiguous,” the Court “must apply the statute according to its terms.” *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). A court may also discern Congress’ purpose by considering the structure of the statute as a whole, other traditional tools of statutory construction, and any statutory provision setting forth the purpose of the statute.

9. Do you believe judges should look beyond a law’s text, even if clear, to consider its purposes and consequences?

RESPONSE: Under Supreme Court precedent, a court’s interpretation of an unambiguous statutory provision begins with the text, and ends there as well. *See, e.g., Nat’l Ass’n of Mfrs. v. Department of Defense*, 138 S. Ct. 617, 631 (2018).

10. Please describe the analysis will you use, if confirmed, to evaluate whether a law or regulation infringes on an individual’s rights under the Second Amendment.

RESPONSE: One genius of the Framers was to set out enduring principles in the Constitution that could be applied to new circumstances. In the modern world, the Supreme Court is called on to do that. But the sources of the law that the Court appropriately brings to bear are the same: text, history, structure, and precedent. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment “confer[s] an individual right to keep and bear arms,” 554, U.S. at 622, but this right “is not unlimited” and is “not a right to keep and carry any weapon for any weapon whatsoever in any manner whatsoever and for whatever purpose,” *id.* at 626. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

11. The Supreme Court relies on a list of factors to determine whether overturning precedent is prudent in the context of stare decisis. How many factors are necessary to provide a special justification for overturning precedent? Is one factor alone ever sufficient?

RESPONSE: As explained above, the Court has articulated factors to consider in determining whether to overrule a prior decision, including the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to “rob[]” the decision “of significant application or justification.” *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Fed. Of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018). The application of these factors is case specific. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on how the factors should apply. If I am confirmed, and if I am asked to revisit a particular precedent in the context of a specific case, I would evaluate the parties’ arguments, the relevant law, the factual record, and would consider the views of my colleagues.

12. Please explain the difference between judicial review and judicial supremacy.

RESPONSE: Judicial review refers to the power of the judiciary to assess the legality of decisions made by the executive and legislative branch. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Judicial supremacy refers to the idea that the Supreme Court is the final arbiter on the meaning of constitutional provisions. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (explaining that, while “[i]t is for Congress in the first instance to ‘determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,’ and its conclusions are entitled to much deference[,] . . . the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution.” (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966))); *see also* Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 Colum. L. Rev. 1137 (2011) (explaining the doctrine of judicial supremacy).

13. Should courts consider the statements of a president as part of legislative history in construing a statute?

RESPONSE: A court may rely on legislative history if and only if the statute is ambiguous. *See, e.g., Milner v. Department of Navy*, 562 U.S. 562, 574 (2011) (“Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.”); *United States v. Woods*, 571 U.S. 31, 46 n.5 (2013) (explaining that legislative history “need not be consulted when . . . the statutory text is unambiguous”). Accordingly, if the text is clear, then no piece of legislative history should determine the construction of the statute. When the Supreme Court has reviewed legislative history, it has found some sources more authoritative than others. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on the consideration of

presidential statements as part of legislative history because that matter could be the subject of future litigation.

14. Does the Ninth Amendment protect individual rights or does it provide structural protection applicable to the people?

RESPONSE: The Supreme Court has, at times, suggested that the Ninth Amendment, which provides that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people[,]” is a source for unenumerated rights. *See, e.g., Roe v. Wade*, 410 U.S. 113, 152–53 (1973). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on the scope of the Ninth Amendment because that issue could be the subject of future litigation.

15. The First, Second, Fourth, Ninth, and Tenth Amendments include references to “the people.” Who is included within the meaning of ‘the people’?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on this question because it implicates issues that could be the subject of future litigation.

16. Does ‘the people’ capture non-citizens or illegal immigrants?

RESPONSE: Please see my response to Question 15.

17. Does the Fourth Amendment guarantee privacy rights to illegal immigrants?

RESPONSE: Please see my response to Question 15.

18. Since the Ninth Amendment references “the people,” could the Supreme Court find support there for expanding constitutional rights for illegal immigrants?

RESPONSE: Please see my response to Question 15.

19. Is the structure of the Bill of Rights helpful for understanding the meaning of the Ninth Amendment?

RESPONSE: If confirmed, I would interpret the Constitution in a manner that is consistent with the methods of interpretation that the Supreme Court employs when it undertakes to interpret constitutional provisions. The structure of the Constitution can also play a role in understanding the meaning of the Constitution, including the Bill of Rights. If called upon to interpret a constitutional provision, I would adhere to the methods of analysis that the Supreme Court employs, without regard to any personal view of how the Constitution should be interpreted.

20. Is Founding-era history useful for understanding the meaning of the Ninth Amendment?

RESPONSE: Please see my response to Question 19.

21. If you adhere to Justice Breyer's view of active liberty, is the Ninth Amendment evolving?

RESPONSE: Please see my response to Question 19.

22. In *Oregon v. Gonzales*, 546 U.S. 243 (2006), the Supreme Court ruled that physician-assisted suicide is not prohibited under the Constitution. The Court, on the other hand, has not determined that the ability to die by physician-assistance is fundamental. Does the Constitution support an individual right to die?

RESPONSE: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court concluded that the Fourteenth Amendment does not protect the right to assisted suicide. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on this issue because it could be the subject of future litigation. .

23. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court determined that the right to assisted suicide is not a fundamental liberty interest protected by the Fourteenth Amendment since its practice has been offensive to our national traditions and practices. Do evolving social standards of acceptance for practices like assisted suicide suggest that the meaning of the Due Process Clause changes over time?

RESPONSE: The Supreme Court has said that "in all due process cases" it "examin[es] our Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997). I agree with statements Justice Kavanaugh and Justice Kagan made during their confirmation processes recognizing that *Glucksberg* provides "the starting point" and "the primary test" for consideration of any due process liberty claim.

24. Could the Privileges or Immunities Clause within the Fourteenth Amendment be a source of unenumerated rights?

RESPONSE: The Supreme Court has, at times, suggested that the Privileges and Immunities Clause of Article IV, section 2, which states that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States[.]" is a source for unenumerated rights. *Saenz v. Roe*, 526 U.S. 489, 501–02 (1999). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on because the scope of the Privileges and Immunities Clause could be the subject of future litigation.

25. Could the right to terminate a pregnancy be among the 'privileges or immunities' of citizenship?

RESPONSE: The Supreme Court has recognized a right to abortion under the Fourteenth Amendment's Due Process Clause, subject to limitations as articulated in *Roe* and *Casey*. See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further because questions about this particular issue may be the subject of future litigation..

26. Will you rely on the Consumer Welfare Standard, if confirmed, to evaluate cases involving antitrust law?

RESPONSE: The consumer welfare standard has been described differently by different courts and scholars. The Supreme Court has stated that “the principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 539 (2013) (quoting 1 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 100, p. 4 (3d ed. 2006)). If confirmed, I will apply the Supreme Court’s binding precedents to cases involving antitrust law.

27. In an opinion you wrote on the D.C. Circuit, you interpreted *FCC v. Fox*, 556 U.S. 502 (2009) to require a clear statement in explanation of a rule change, which is more exacting than the standard the Supreme Court set forth. Please explain why you departed from this standard as a circuit judge bound by Supreme Court precedent.

RESPONSE: I respectfully disagree with the premise of the question, as my opinion was consistent with Supreme Court and D.C. Circuit precedent. My opinion in *American Federation of Government Employees v. Federal Labor Relations Authority (AFGE v. FLRA)*, 25 F.4th 1 (D.C. Cir. 2022), read in full, does not “require a clear statement in explanation of a rule change,” nor does it “depart[] from” the Supreme Court’s standard. Instead, it applies the Administrative Procedure Act and the Supreme Court’s longstanding requirement that an administrative agency must forthrightly acknowledge when it seeks to change a longstanding policy. The petitioners were public-sector labor unions that challenged a policy statement by the FLRA that changed the existing threshold at which collective bargaining was required for certain public-sector employer-initiated changes. *Id.* at 2.

The panel for which I wrote unanimously concluded that we needed not reach the petitioners’ broader claim at the policy statement was contrary to the statute because the FLRA’s new policy statement was procedurally unsound. *Id.* at 4. First, the policy statement was internally inconsistent in its description of the old policy and the problems that prompted the policy change. *Id.* at 5–7. Second, the policy statement incorrectly claimed that the FLRA’s new policy was supported by its failure to explain its earlier policy at its time of adoption. *Id.* at 7–8. Third, the policy statement asserted that its longstanding standard was categorically inconsistent with the statute—an assertion directly rejected by an earlier decision of the D.C. Circuit. *Id.* at 8–9. Fourth, the policy statement made a specific and unsupported factual assertion that the new policy would be more predictable without providing any reasoning or basis for that counterintuitive prediction. *Id.* at 9–10. Finally, the policy statement asserted that, under D.C. Circuit authority, it must adopt a new standard to conform to that used by the NLRB, but it failed to grapple with its own precedents that had specifically explained its decision to adopt a different standard. *Id.* at 10–12. In short, the policy statement’s unreasoned adoption of a new standard was arbitrary and capricious for several interlocking reasons. My opinion so holding was consistent with Supreme Court and D.C. Circuit precedent.

28. What is the original holding of *Chevron*?

RESPONSE: *Chevron* deference refers to the Supreme Court’s requirement that “a court review[ing] an agency’s construction of the statute which it administers” must defer to the

agency's authoritative interpretation of that statute in certain circumstances. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). In order to determine whether or not to defer under *Chevron*, courts must employ a two-step process. The court decides, first, "whether Congress has directly spoken to the precise question at issue[.]" using "traditional tools of statutory construction[.]" *Chevron*, 467 U.S. at 842, 843 n.9. "If the intent of Congress is clear," the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. But "if the statute is silent or ambiguous with respect to the specific issue," the court must proceed to determine whether the agency's interpretation is "based on a permissible construction of the statute[.]" *id.* at 843, and, if so, the court must defer to the agency's interpretation.

29. How have subsequent cases changed the *Chevron* doctrine?

RESPONSE: The Supreme Court has held that an agency's statutory interpretation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). More recently, the Court held a judicial interpretation of an ambiguous statute does not foreclose *Chevron* deference to a subsequent (contrary) agency interpretation. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). According to the Court, *Chevron* recognizes that an agency is "the authoritative interpreter (within the limits of reason) of such statutes," *id.* at 983, and that "allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court's interpretation to override an agency's," *id.* at 982. Subsequently, the Court held that *Chevron* deference extends to an agency's interpretations of statutory provisions defining the scope of the agency's own authority. *City of Arlington, TX v. Fed. Commc'ns Comm'n*, 569 U.S. 290 (2013). In *King v. Burwell*, 576 U.S. 473, 485–86 (2015), the Court noted that the Internal Revenue Service (IRS) did not have "expertise in crafting health insurance policy of this sort[.]" and therefore, it did not apply the *Chevron* framework to the IRS's interpretation of the tax-credit provisions of the Affordable Care Act.

30. How does the judicial branch decide when an agency exercised more authority than Congress delegated or otherwise exercised its rulemaking powers?

RESPONSE: The Administrative Procedure Act provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706. The Supreme Court has explained that this inquiry "naturally begins with a delineation of the scope of the [agency's] authority and discretion." *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 415–416 (1971). In that case, the Court went on to examine "whether on the facts the [agency's] decision can reasonably be said to be within" the range of options available under the delineated statutory authority. *Id.* at 416. Next, the Court observed that "[s]crutiny of the facts does not end, however, with the determination that the [agency] has acted within the scope of [its] statutory authority. Section 706(2)(A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To make this finding, the court must consider whether

the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.* Further, the Court explained that “[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.” *Id.* Finally, the Court explained that “[t]he final inquiry is whether the Secretary’s action followed the necessary procedural requirements.” *Id.* at 417.

31. How does the Constitution limit the powers of Congress? Please provide examples.

RESPONSE: “Congress’ authority is limited to those powers enumerated in the Constitution.” *United States v. Lopez*, 514 U.S. 549, 566 (1995). Accordingly, the Constitution “withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.” *Id.* In addition, the Constitution prohibits Congress from denying individuals certain rights. For instance, the First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

32. Please describe the modern understanding of the Commerce Clause.

RESPONSE: According to the Supreme Court, Congress’ power under the Commerce Clause is broad, but it is not unlimited. The Court has held that Congress may regulate only three categories of activity pursuant to Commerce Clause: (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce” and activities that threaten such instrumentalities, persons or things, and (3) activities that “substantially affect interstate commerce[.]” *United States v. Lopez*, 514 U.S. 549, 558–59 (1995); *see also Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012).

33. Please provide an example of activity Congress cannot regulate under the Commerce Clause.

RESPONSE: In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court concluded that Congress could not regulate a person’s criminal possession of a firearm in a place that he knows or has reason to know is a school zone under the Commerce Clause. *See also United States v. Morrison*, 529 U.S. 598 (2000) (invalidating a provision of the Violence Against Women Act that gave victims of gender-motivated violence a federal cause of action against the perpetrator). These cases established that Congress may not regulate non-economic activity based solely on the activity’s aggregate effect on interstate commerce. Under *Lopez* and *Morrison*, courts must evaluate the nature of the activity that Congress seeks to regulate and the link between that activity and interstate commerce.

34. Should Due Process in the Fourteenth Amendment and Fifth Amendment be interpreted differently? Please explain.

RESPONSE: The Supreme Court has interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments to impose substantive constraints on government conduct. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to

comment further on the scope of protections under these provisions could be the subject of future litigation..

35. In *Gundy v. United States*, 588 U.S. ____ (2019), justices in dissent indicated willingness to limit the non-delegation doctrine, arguing that Congress can only delegate authority that is non-legislative in nature. Does the Constitution limit the power to define criminal offenses and corresponding sentences to Article I?

RESPONSE: *Gundy v. United States*, 139 S. Ct. 2116 (2019) is binding Supreme Court precedent. In that case the Court explained that “we have held, time and again, that a statutory delegation is constitutional as long as Congress ‘lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.’” *Gundy*, 139 S. Ct. at 2123 (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S.394, 409 (1928)) (alterations in original). In *Gundy*, the Court held that the delegation of authority to the Attorney General to specify the applicability of certain requirements to sex offenders convicted before enactment of the Sex Offender Registration and Notification Act and to prescribe rules for the registration of those sex offenders “falls well within constitutional bounds,” *id.* at 2124, because Congress had provided an intelligible principle. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on questions about how the non-delegation doctrine should be applied in specific contexts because the issue could be the subject of future litigation.

36. Please describe how courts determine whether an agency’s action violates the Major Questions doctrine.

RESPONSE: In *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), the Supreme Court stated that it “expect[s] Congress to speak clearly if it wishes to assign ... decisions of vast ‘economic and political significance’ to an agency.” *Id.* at 324; *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). The scope and application of what has been referred to as the “major questions doctrine” could be a subject of future litigation, and as such, it would not be appropriate for me as a sitting judge and a nominee to opine.

37. Please describe your understanding of the anti-commandeering doctrine.

RESPONSE: The Constitution grants specific, enumerated powers to Congress, with the remaining legislative power being reserved to the States, or to the people, pursuant to the Tenth Amendment. The enumerated powers do not include the power to issue direct orders to state governments and officials. On this basis, the Supreme Court has determined that the concept of “statehood” imposes limits on the federal Government’s power and under the anti-commandeering doctrine Congress cannot directly compel a state’s legislature to enact laws, or force state officials to carry out a federal regulatory scheme. *See New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997). As the Court has noted, the States “did not consent to become mere appendages of the federal government” when they ratified the Constitution. *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 751 (2002).

38. Does the meaning of ‘cruel and unusual change over time? Why?

RESPONSE: The Supreme Court has repeatedly stated that the Eighth Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

39. Does solitary confinement constitute ‘cruel and unusual’ punishment?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on the meaning of “cruel and unusual punishments” under the Eighth Amendment, which could be the subject of future litigation.

40. Is the death penalty constitutional?

RESPONSE: The Supreme Court upheld the death penalty as constitutional in *Gregg v. Georgia*, 428 U.S. 153 (1976). If confirmed, I would respect that precedent as I would all binding Supreme Court precedents.

41. How can Congress require through its criminal contempt statute that a federal prosecutor must convene a grand jury for an individual cited with contempt of Congress since the Supreme Court in *Nixon v. United States*, 683, 693 (1974) said “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.”

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on whether or to what extent Congress can direct the Executive Branch to prosecute violations of the criminal code raises constitutional questions, which could be the subject of future litigation.

42. Please describe which presidential aides, if any, are entitled to “absolute immunity” from congressional subpoenas.

RESPONSE: In *Committee on the Judiciary v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019), a case that was before me at the district court level, the Department of Justice claimed that the President has the power to prevent certain former staff members from appearing for questioning in response to a valid legislative subpoena, even against the will of the former staff member to whom the subpoena is directed—i.e., even when the former staff member would otherwise be required by law to respond to the subpoena, would willingly do so, and would be able to invoke executive privilege in the context of such questioning, where appropriate. *McGahn* was a lengthy opinion because it required me to resolve cross-motions for summary judgment concerning “three legal contentions of extraordinary constitutional significance.” 451 F. Supp. 3d at 152 (internal quotation marks and citation omitted). In particular, I held that (1) the inter-branch subpoena dispute between the President and the House Judiciary Committee was a justiciable matter that the Judiciary Committee had Article III standing to pursue in federal court; (2) the Judiciary Committee had a cause of action to seek enforcement of its subpoena; and (3) the President does not have the power to prevent his aides from responding to legislative subpoenas on the basis of absolute testimonial immunity. On appellate review, over the course of two

opinions, a divided panel of the D.C. Circuit reversed my rulings on the standing and cause of action issues, but the entire D.C. Circuit granted en banc review twice, and has now vacated both panel reversals. To date, the en banc D.C. Circuit has affirmed my conclusion that the House Judiciary Committee has standing to adjudicate its subpoena enforcement claims in federal court notwithstanding the inter-branch nature of the dispute. The *McGahn* case settled before the D.C. Circuit reached the absolute immunity question. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further to the extent the question is asking about topics that could become the subject of future litigation.

43. What restrictions on First Amendment activities can owners of a private shopping center put on their property?

RESPONSE: The First Amendment prohibits the government from abridging free speech. The Supreme Court recognized in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), that private owners of shopping center are not governmental actors and held that they may—as a matter of federal constitutional law—impose restrictions. The Court stressed that the invitation of the public to use the mall for designated purposes does not deprive it of its private character. *PruneYard Shopping Ctr.*, 447 U.S. at 81.

44. Do private social media companies create any type of forum that protects speech against restrictions in the context of the First Amendment?

RESPONSE: As a judicial nominee and sitting federal judge, it would be inappropriate for me to offer my views about this abstract legal question. As a judge, it is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law. Related questions are the focus of ongoing litigation, and may well come before me in the future.

45. How does the Supremacy Clause interact with the Adequate and Independent State grounds doctrine?

RESPONSE: The Supremacy Clause, U.S. Const. Art. VI cl. 2, provides that the U.S. Constitution is “the Supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” This means that protections granted by the Constitution are binding on states, “notwithstanding” what a state’s constitution provides. The adequate and independent state ground doctrine provides that when a litigant petitions the Supreme Court to review the judgment of a state court which rests upon both federal and state law, the Supreme Court does not have jurisdiction over the case if the state ground is adequate to support the judgment and is independent of federal law. *See Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *see also Michigan v. Long*, 463 U.S. 1032 (1983) (“It is, of course, incumbent upon this Court to ascertain for itself whether the asserted non-federal ground independently and adequately supports the judgment.” (internal quotation marks omitted)).

46. Please explain why the Fifth Amendment's Due Process Clause does not require the federal government to provide notice and a hearing to an individual before their name is added to a federal "no-fly" list.

RESPONSE: Because the federal government's procedures and actions associated with "no-fly" lists have been the subject of litigation, and are likely to be the subject of future litigation, it would be improper for me to opine here. As a judicial nominee and a sitting judge, I have an ethical obligation to avoid any suggestion that I have pre-judged this matter or made any commitment to a particular result.

47. What's the textual source informing the different standards of review for determining whether state laws or regulations violate constitutional rights?

RESPONSE: The Supreme Court has adopted different standards of review for determining whether state laws or regulations violate constitutional rights. As a sitting federal judge, all of the Supreme Court's precedents are binding on me, and consistent with the positions taken by other pending judicial nominees, it would be inappropriate for me to comment on the merits or demerits of any of the Supreme Court's binding precedents.

48. Please describe the legal basis that permits federal courts to issue a universal injunction.

RESPONSE: Federal Rule of Civil Procedure 65 governs injunctions. The Supreme Court has noted that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). The Supreme Court has in certain instances declined to stay nationwide injunctions, *see Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088–89 (2017) (declining to stay portions of nationwide preliminary injunction). Questions about the authority of courts to issue nationwide injunctions is the subject of ongoing litigation, it would be improper for me as a sitting judge to comment further.

49. When does a woman's right to due process under *Roe v. Wade* and the Fourteenth Amendment yield to a child's right to equal protection?

RESPONSE: The Supreme Court has recognized a right to abortion under the Fourteenth Amendment's Due Process Clause, subject to limitations as articulated in *Roe* and *Casey*. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Consistent with the positions taken by other judicial nominees and in light of the limitations imposed by the Code of Conduct for United States Judges, it is my duty as a nominee and as a sitting judge to refrain from offering an opinion on abstract legal questions, especially where—as here—they relate to matters that are the subject of ongoing litigation. Future litigants are entitled to come before me knowing that I have not prejudged their issue or committed to any particular result.

50. Is birth the moment when equal protection under law is activated for an individual?

RESPONSE: Please see my response to Question 49.

51. Please explain your position on eliminating the Supreme Court's shadow docket.

RESPONSE: I understand the phrase “shadow docket” to refer to how some commentators have referred to the Court’s emergency docket. I have learned during my time as a district court judge and as a court of appeals judge that it is important in our adversarial system to hear arguments from all sides in a case, and to issue thorough written decisions that explain the arguments and the facts considered. I also understand that the Supreme Court must at times issue decisions quickly to provide answers to the parties in emergency circumstances, and that the Court has long employed procedures for ruling quickly in certain cases. If confirmed, I would consult with my colleagues and give careful consideration to this issue.

52. Is it appropriate to evaluate judicial nominees based on clients they represented or arguments used to further a client’s interests as part of the Senate’s advice and consent function?

RESPONSE: As a sitting judge and pending judicial nominee, it would be inappropriate for me to comment on the propriety of any questions the U.S. Senate might ask a nominee in connection with the Senate’s exercise of its constitutional advise and consent power.

Senator Thom Tillis
Questions for the Record
Senate Judiciary Committee Hearing for the Nomination of Ketanji Brown Jackson to be
an Associate Justice of the Supreme Court of the United States

I. Judicial Philosophy

1. How would you describe your judicial philosophy?

RESPONSE: Over the course of my almost decade on the bench, I have developed a methodology that I use to ensure that I am ruling impartially and adhering to the limits on my judicial authority. I first ensure that I am proceeding from a position of neutrality by setting aside any personal views and clearing my mind of any preconceived notions about how the case might come out. Next, I consider the parties' arguments and the record, to understand all of the facts, claims, and arguments. The final step is interpretation and application of the law to the facts in the case, where I am particularly mindful of the constraints on judicial authority. I assess the question of jurisdiction, and ask whether I even have the power to hear the case. If I do have jurisdiction, I look at the relevant provision of the Constitution, statute, or other applicable legal authority. I work to discern those words' meaning as intended by the people who wrote them. I focus on original public meaning; I look at history and practice at the time the document was created to understand what those who created the text intended; I also look at precedent to understand how the text has been previously interpreted and applied. As a lower court judge, I am bound by precedent. If I am fortunate enough to be confirmed to the Supreme Court, I would be bound by *stare decisis*. I do not decide cases based on my personal views or policy preferences. I observe these limits in recognition of the fact that judges have limited authority, and I must always stay in my limited, judicial lane.

2. Do you believe that your judicial philosophy involves being open-minded?

RESPONSE: Yes. As I said at the hearing, I begin in each case by setting aside any personal views and clearing my mind of any preconceived notions about how the case might come out. It is very important that judges rule without fear or favor, and doing so is central to how I decide cases.

3. What is the difference between precedent and super precedent?

RESPONSE: As I explained at the hearing, I am not aware of any Supreme Court case that has used the term "super precedent." All Supreme Court decisions are precedential and entitled to respect under *stare decisis* principles, and in revisiting any precedent, the Court applies the factors it has articulated for determining whether to overrule a prior decision. Those factors include the quality of the decision's reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to "rob[]" the decision "of significant application or justification." *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Fed. Of State, County., & Municipal Employees*, 138 S. Ct. 2448, 2478 (2018).

4. Are cases safe from reconsideration only when they are super precedent?

RESPONSE: Please see my response to Question 3.

5. What is your level of familiarity with originalism?

RESPONSE: I am familiar with originalism. As I stated at the hearing, originalism is an interpretive frame often employed by the Supreme Court in interpreting the Constitution, and as a judge for nearly ten years, I have read and applied many cases from the Supreme Court applying originalism.

6. Do you look to a statute's text/structure or the purpose of a statute?

RESPONSE: In interpreting a statute, I give the statute's text controlling weight. I consider the meaning of the terms that the legislature used, the structure of the statute as a whole, and other traditional tools of statutory construction, including canons of statutory interpretation. *See, e.g., Alliance of Artists & Recording Companies, Inc. v. General Motors Company*, 162 F. Supp. 3d 8 (D.D.C. 2016), *aff'd*, 947 F.3d 849 (D.C. Cir. 2020). I also apply governing precedent regarding the appropriate method of interpretation in light of the particular circumstances of the case (e.g., the rule of lenity in the criminal context, *Chevron* deference, etc.). If and only if a statute is ambiguous, I have also occasionally consulted the legislative history of a statute, as the Supreme Court permits, to assess the original intent of the legislative body that enacted the provision at issue.

7. Why do some observers label the Emergency Order Docket the Shadow Docket?

RESPONSE: I am aware that some observers have chosen that label, but I cannot speak to why they have done so.

8. Is there anything shadowy about the emergency orders sought?

RESPONSE: I have learned during my time as a district court judge and as a court of appeals judge that it is important in our adversarial system to hear arguments from all sides in a case, and to issue thorough written decisions that explain the arguments and the facts considered. I also understand that the Supreme Court must at times issue decisions quickly to provide answers to the parties in emergency circumstances, and that the Court has long employed procedures that allow it to rule quickly in certain circumstances. If confirmed, I would consult with my colleagues and give careful consideration to this issue.

9. What is your favorite Federalist Paper and why?

RESPONSE: I have always particularly appreciated Federalist 51 because it discusses the Framers' intent regarding separation of powers. Checks and balances play an essential role in our constitutional scheme, because liberty can only be achieved, and retained, through the stratification of government power. The Framers carefully and deliberately divided the powers of government among the three branches, and they also authorized each branch to relate to, and work in concert with, the others, so as to serve as a check on the others' accumulation of power. In Federalist 51, James Madison explained that "the great security against a gradual

concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means and personal motives to resist encroachments of the others.” The Federalist No. 51 (James Madison); *see also Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (“The men who met in Philadelphia in the summer of 1787 . . . viewed the principle of separation of powers as a vital check against tyranny.”). And the structure of our constitutional system prevents autocracy while also promoting “a workable government.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also id.* (“While the Constitution diffuses power to better secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government[,]” and “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”). Thus, the system of separate powers, accompanied by checks and balances, is a foundational component of our governmental scheme that promotes core constitutional values, by design. *See Myers v. United States*, 272 U.S. 52, 292–93 (1926) (Brandeis, J., dissenting) (“Checks and balances were established in order that this should be ‘a government of laws and not of men.’” . . . The purpose of the doctrine of the separation of powers was “not to promote efficiency but to preclude the exercise of arbitrary power . . . by means of the inevitable friction incident to the distribution of the governmental powers among three departments,” in order “to save the people from autocracy.”)

10. What is the counter-majoritarian difficulty?

RESPONSE: According to Alexander Bickel, the counter-majoritarian difficulty is that the Supreme Court, through its use of judicial review, can undermine majority rule by declaring legislative acts unconstitutional. *See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–23 (1962).

11. Are courts undemocratic when they undo the will of elected officials?

RESPONSE: When courts invalidate unconstitutional or otherwise invalid acts by elected officials, they fulfill the role that the Supreme Court precedent has made clear is proper for courts in our constitutional system of governance. *See Marbury v. Madison*, 5 U.S. 137 (1803). The Supreme Court has made clear, however, that it is a serious step to invalidate an Act of Congress, and statutes are reviewed with a presumption of constitutionality. *See United States v. Davis*, 139 S. Ct. 2319, 2332 n.6 (2019).

12. Was Justice Kagan correct when she said “we are all originalists” at her confirmation hearing?

RESPONSE: The prevailing frame for interpreting the Constitution is to look back through history and determine what the words meant at the time of the founding. There are some provisions in the Constitution that set forth specific rules. For example, the Constitution states that a person must be at least thirty-five years old to be President of the United States. As to clear provisions of this sort, the Constitution can be interpreted based on the text alone. Other provisions of the Constitution, like the protection against unreasonable searches and seizures or the protection of due process of law, are not clear from the text alone. As to those provisions, the Court looks at them in the context of history and in the structure of the Constitution. They look at the circumstances of the case in comparison to what the words meant at the time that they were

adopted, and they analogize to current circumstances. It is a process that seeks to understand the core foundational principles in the Constitution as captured by the text as originally intended, and to apply those principles to modern circumstances.

13. When should precedent be overruled?

RESPONSE: *Stare decisis* is a bedrock legal principle that ensures consistency and impartiality of judgments. The Supreme Court has articulated factors to consider in determining whether to overrule a prior decision, including the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to “rob[]” the decision “of significant application or justification.” *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Fed. Of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2478 (2018).

- a. In *Ramos v. Louisiana* (2020) Justice Kavanaugh listed examples of when every justice has called for the overruling of precedent. Which justice’s factors do you agree the most with?

RESPONSE: In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court overruled *Apodaca v. Oregon*, 406 U.S. 404 (1972), and held that criminal defendants have a right to a unanimous jury verdict. In his concurring opinion, Justice Kavanaugh explained that “[t]he *stare decisis* factors identified by the Court in its past cases include” “the quality of the precedent’s reasoning; the precedent’s consistency and coherence with previous or subsequent decisions”; “changed law since the prior decision”; “changed facts since the prior decision”; “the workability of the precedent”; “the reliance interests of those who have relied on the precedent”; and “the age of the precedent.” *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring). Justice Kavanaugh’s description of the factors considered by the Court are substantially similar to how the Court has described the factors in other cases. *See also, e.g., Janus v. American Fed. Of State, County, & Municipal Employees.*, 138 S. Ct. 2448, 2478 (2018); *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992). The application of these factors is case specific. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on how the factors might apply. If I am confirmed, and if I am asked to revisit a particular precedent in the context of a specific case, I would evaluate the parties’ arguments, the relevant law, the factual record, and would consider the views of my colleagues.

- b. Does the original meaning of the Constitution override *stare decisis* when they are in conflict?

RESPONSE: As explained in my response to Question 3, the Supreme Court has articulated factors to consider in determining whether to overrule a prior decision, including the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal

developments have left the rule behind; and whether facts underlying the decision have changed as to as to “rob[]” the decision “of significant application or justification.” *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Fed. Of State, County, & Municipal Employees.*, 138 S. Ct. 2448, 2478 (2018). The application of these factors is case specific. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, as a pending judicial nominee and a sitting federal judge it would be inappropriate for me to comment further on how the factors should apply. If I am confirmed, and if I am asked to revisit a particular precedent in the context of a specific case, I would evaluate the parties’ arguments, the relevant law, the factual record, and would consider the views of my colleagues.

14. Regarding severability—

- a. Should courts defer to Congress and strike only the unconstitutional portion of the law allowing the other sections to stand, or should they strike the entire law down?

RESPONSE: Whether to sever the unconstitutional portions of statute from the remainder of the is decided on a case-by-case basis applying the Supreme Court’s severability jurisprudence. The Court has stated that the “touchstone” for its severability analysis is legislative intent. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 321 (2006). As a general matter, the Court applies “a strong presumption of severability” and will sever the unconstitutional portion of the statute if “the remainder of the statute is capable of functioning independently and thus would be fully operative as law.” *Barr v. Am. Association of Political Consultants, Inc.*, 140 S. Ct. 2335, 2350 (2020) (opinion of Kavanaugh, J.) (internal quotation marks omitted).

- b. How do we tell what Congress’ intent was?

RESPONSE: Please see my response to Question 14a.

15. Please explain the Oath Clause. Does the Oath Clause fix the Constitutional meaning in time and thus only the Constitution’s meaning at that time is allowed?

RESPONSE: The Oath Clause, Article VI, Clause 3, states: “The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on the proper interpretation of the Oath Clause as it could be the subject of future litigation.

16. Do the words of the Constitution or instead does the history of the Constitution fix its meaning?

RESPONSE: Please see my response to Question 12.

17. Is the Constitution an intergenerational project?

RESPONSE: The Constitution applies to every generation of Americans, and can be and has been amended by generations that came after the Framers.

18. Regarding your responses to QFRs for the D.C. Circuit - Do you believe in original public meaning as your judicial philosophy?

RESPONSE: In my responses to QFRs for the D.C. Circuit, I noted that I did not have a judicial philosophy per se, other than to apply the same method of thorough analysis to every case, regardless of the parties. As I explained at the hearing, part of that analysis is to interpret and apply the law to the facts of the case, mindful of the constraints on judicial authority. I assess the question of jurisdiction, and ask whether I even have the power to hear the case. If I do have jurisdiction, I look at the relevant provision of the Constitution, statute, or other applicable legal authority. I work to discern those words' meaning as intended by the people who wrote them. I focus on original public meaning; I look at history and practice at the time the document was created to understand what those who created the text intended; I also look at precedent to understand how the text has been previously interpreted and applied. As a lower court judge, I am bound by precedent. If I am fortunate enough to be confirmed to the Supreme Court, I would be bound by *stare decisis*. I do not decide cases based on my personal views or policy preferences. I observe these limits in recognition of the fact that judges have limited authority, and I must always stay in my limited, judicial lane.

19. Does the Constitution concentrate power at the local level or the national level?

RESPONSE: The Constitution creates a system of dual sovereignty in which certain powers are enumerated and provided to the federal government, whereas the powers that are not delegated to the United States or denied to the States, are reserved to the States or the people. *See New York v. United States*, 505 U.S. 144, 163 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

20. Outside of the amendment process, does the Constitution change? If so, how so?

RESPONSE: Courts must apply established constitutional principles to new circumstances, but the meaning of the Constitution itself is fixed and does not change or evolve.

21. Is the President's refusal to enforce a law absent a constitutional concern proper?

RESPONSE: The Constitution requires that the President "take Care that the Laws be faithfully executed[.]" U.S. Const. art. II, § 3. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

22. Is the doctrine of Separation of Powers an essential part of our Constitution?

RESPONSE: The separation of powers plays an essential role in our constitutional scheme, because liberty can only be achieved, and retained, through the stratification of government power. The Framers carefully and deliberately divided the powers of government among the

three branches, and they also authorized each branch to relate to, and work in concert with, the others, so as to serve as a check on the others' accumulation of power. In Federalist 51, James Madison explained that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means, and personal motives to resist encroachments of the others." The Federalist No. 51 (James Madison); *see also* *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) ("The men who met in Philadelphia in the summer of 1787 . . . viewed the separation of powers as a vital check against tyranny."). And the structure of our constitutional system prevents autocracy while also promoting "a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also id.* ("While the Constitution diffuses power to better secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government[,]" and thereby "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). Thus, the system of separate powers, accompanied by checks and balances, is a foundational component of our governmental scheme that promotes core constitutional values, by design. *See Myers v. United States*, 272 U.S. 52, 292–93 (1926) (Brandeis, J., dissenting) ("Checks and balances were established in order that this should be 'a government of laws and not of men.'" . . . The purpose [of the doctrine of the separation of powers] was "not to promote efficiency but to preclude the exercise of arbitrary power . . . by means of the inevitable friction incident to the distribution of the governmental powers among three departments," in order "to save the people from autocracy.").

23. Should judges weigh public opinion when making decisions?

RESPONSE: No. Consistent with Supreme Court precedent, judges should analyze the text, structure, and history of the constitutional provision and the Court's precedents interpreting it to determine how to apply the constitutional language to the facts at issue. Likewise, courts should employ the tools of statutory interpretation that the Supreme Court has indicated are proper while always beginning with the statutory text.

24. Are there some areas or doctrines of law that judicial review should not extend to?

RESPONSE: The Supreme Court has held that political questions are not justiciable. *See, e.g., Baker v. Carr*, 369 U.S. 186, 209 (1962). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

25. Was *Marbury* a textual decision?

RESPONSE: *Marbury* held that, per the design of our Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is," and the Court cited "expressions of the constitution" in support. *See Marbury v. Madison*, 5 U.S. 137, 177–79 (1803). *Marbury*'s holding is a foundational finding that is beyond dispute. *See* Federalist No. 78 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts.").

a. If yes, what is your basis for this answer?

RESPONSE: Please see answer to Question 25.

26. Does Federalist 78 describe or endorse judicial review?

RESPONSE: In No. 78, Alexander Hamilton asserted that “The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.”

27. Do you agree with some liberal scholars who claim that it is immoral to choose original intent over social welfare, broadly conceived?

RESPONSE: As a sitting judge, it is my job to faithfully apply the law, not to evaluate social welfare or to impose my views morality.

28. What are the theories of incorporation for the Bill of Rights?

RESPONSE: The Supreme Court has held that those provisions of the Bill of Rights whose “guarantee is fundamental to *our* scheme of ordered liberty and system of justice” are incorporated against the States by the Due Process Clause of the Fourteenth Amendment. *McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 764 (2010). This is known as selective incorporation. Justice Black contended that the entirety of the Bill of Rights should be incorporated against the States via the Privileges or Immunities Clause of the Fourteenth Amendment, which is known as “total incorporation.” *Id.* at 762. The Supreme Court has never embraced total incorporation.

29. Does selective incorporation rely on the prioritization of some rights deemed sufficiently fundamental to enforce against the states but not others?

RESPONSE: Please see answer to Question 28.

30. Why are some rights important enough to be in the Bill of Rights but not important enough to be applied to the states?

RESPONSE: As Justices Kagan and Barrett explained, it is not appropriate for a judicial nominee to “grade” particular cases. It would therefore not be appropriate for me to opine on the Supreme Court’s incorporation precedents.

31. What factors should be used in deciding whether to grant relief on the Court’s emergency order (“shadow”) docket?

RESPONSE: Please see my response to Question 8.

32. Do these factors remain consistent across all substantive areas of law or do some areas of law warrant a lower threshold for emergency relief?

RESPONSE: Please see my response to Question 8.

33. When is it appropriate to deny relief on the emergency order docket?

RESPONSE: Please see my response to Question 8.

34. As Justice Breyer wrote this month, are there “problems inherent in a system that allows for the imposition of the death penalty?”

RESPONSE: I do not know exactly what Justice Breyer meant by that language and it would be inappropriate for me to comment further. Under our constitutional system, Congress determines the applicable penalties for conduct that it has declared unlawful, and, by statute, it has determined that the death penalty is an appropriate sentence for certain federal crimes under certain circumstances. My personal views on the death penalty, if any, are irrelevant to my work as a judge. Notwithstanding any personal views on this issue, as a sitting federal circuit court judge, I am required to apply the Supreme Court’s binding precedent regarding the death penalty and I would respect those precedents should I be confirmed to serve as an Associate Justice on the Supreme Court.

35. Justice Kagan in argument last month in *Ysleta del Sur Pueblo v. Texas* pondered whether the Supreme Court should “‘toss out’ all substantive canons—a set of legal principles that are indeed ‘all over the place.’” Would “tossing out” these substantive canons uproot statutory interpretation?

RESPONSE: As a sitting judge, it would not be appropriate for me to offer an opinion on the effects of a hypothetical decision by the Supreme Court. I would follow the Supreme Court’s statutory interpretation precedents in any case analyzing the meaning of a statute.

II. Administrative Law

36. Does agency deference enable administrative absolutism?

RESPONSE: Under Supreme Court precedent, “a court review[ing] an agency’s construction of the statute which it administers” must defer to the agency’s authoritative interpretation of that statute in certain circumstances. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). An agency’s statutory interpretation “qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). *Chevron* is the established precedent of the Supreme Court. I am bound by the Supreme Court’s precedents, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions. Consistent with that Code and the positions taken by other pending judicial nominees, it would be inappropriate for me, as a sitting judge and a pending judicial nominee, to comment on matters that could be the subject of future litigation. In addition, in evaluating whether an agency action is arbitrary and capricious under the Administrative Procedure Act, the Supreme Court has said it is appropriate to defer to agency expertise. *See, e.g., Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976) (“Because analysis of the relevant documents ‘requires a high level of technical expertise,’ we must defer to ‘the informed discretion of the responsible federal agencies.’”). *See also Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) (“When examining this

kind of scientific determination . . . a reviewing court must generally be at its most deferential”); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989).

37. Does agency deference violate a judge’s duty under Article III by compelling them to forgo their independent judgment?

RESPONSE: Under Supreme Court precedent, “a court review[ing] an agency’s construction of the statute which it administers” must defer to the agency’s authoritative interpretation of that statute in certain circumstances. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). An agency’s statutory interpretation “qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *United States v. Mead Corporation*, 533 U.S. 218, 226–27 (2001). *Chevron* is the established precedent of the Supreme Court. As a sitting judge and a Supreme Court nominee, I am bound by the Supreme Court’s precedents, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions. Consistent with that Code and the positions taken by other pending judicial nominees, it would be inappropriate for me, as a sitting judge and a pending judicial nominee, to comment on matters that could be the subject of litigation.

38. Is agency deference contrary to the text of the APA that instructs “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action”? 5 U.S.C. Section 706.

RESPONSE: Please see my response to Question 37.

39. Is agency deference contrary to the standard of de novo review?

RESPONSE: Please see my response to Question 37.

40. What is Brand X deference?

RESPONSE: The Supreme Court has held that a judicial interpretation of an ambiguous statute does not foreclose *Chevron* deference to a subsequent (contrary) agency interpretation. *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). According to the Court, *Chevron* recognizes that an agency is “the authoritative interpreter (within the limits of reason) of such statutes,” and that “allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court’s interpretation to override an agency’s.” *Id.* at 983.

41. Does Brand X deference allow an agency to effectively overrule judicial precedents?

RESPONSE: Please see my response to Question 40.

42. How do we ensure an independent co-equal judiciary if it must defer to another branch’s judgment?

RESPONSE: Checks and balances play an essential role in our constitutional scheme. The Framers carefully and deliberately divided the powers of government among the three branches, and they also authorized each branch to relate to, and work in concert with, the others, so as to serve as a check on the others' accumulation of power. In Federalist 51, James Madison explained that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means, and personal motives to resist encroachments of the others." The Federalist No. 51 (James Madison); *see also Buckley v. Valeo*, 424 U.S. 1, 121 (1976) ("The men who met in Philadelphia in the summer of 1787 . . . viewed the separation of powers as a vital check against tyranny."). And the structure of our constitutional system prevents autocracy while also promoting "a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also id.* ("While the Constitution diffuses power to better secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government[,] and thereby "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). Thus, the system of separate powers, accompanied by checks and balances, is a foundational component of our governmental scheme that promotes core constitutional values, by design. *See Myers v. United States*, 272 U.S. 52, 292–93 (1926) (Brandeis, J., dissenting) ("Checks and balances were established in order that this should be 'a government of laws and not of men.'" . . . The purpose [of the doctrine of the separation of powers] was "not to promote efficiency but to preclude the exercise of arbitrary power . . . by means of the inevitable friction incident to the distribution of the governmental powers among three departments," in order "to save the people from autocracy.").

In various contexts, the Supreme Court has also recognized that it is appropriate for it to defer to Congress. For example, the Court has deferred to the Senate's interpretation of its own rules for determining when it is in session, *National Labor Relations Board v. Canning*, 573 U.S. 513, 550 (2014), and to military personnel choices made by Congress under its constitutional authority to raise and support armies, *Rostker v. Goldberg*, 453 U.S. 57, 71–72 (1981).

43. Does agency deference run contrary to Federalist No. 51 where James Madison wrote, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. . . . experience has taught mankind the necessity of auxiliary precautions."

RESPONSE: Please see my response to Question 42.

44. What is the Chevron doctrine?

RESPONSE: The *Chevron* doctrine refers to the Supreme Court's requirement that "a court review[ing] an agency's construction of the statute which it administers" must defer to the agency's authoritative interpretation of that statute in certain circumstances. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). An agency's statutory interpretation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corporation*, 533 U.S. 218, 226–27 (2001). In order to determine whether or not

to defer under *Chevron*, courts must employ a twostep process. The court decides, first, “whether Congress has directly spoken to the precise question at issue[.]” *Chevron*, 467 U.S. at 842, 843 n.9. “If the intent of Congress is clear,” the court “must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43. But “if the statute is silent or ambiguous with respect to the specific issue,” the court must proceed to determine whether the agency’s interpretation is “based on a permissible construction of the statute[.]” *id.* at 843, and, if so, the court must defer to the agency’s interpretation.

45. What are the various Chevron steps?

RESPONSE: Please see my response to Question 44.

46. Does Chevron improperly favor the government?

RESPONSE: *Chevron* is the established precedent of the Supreme Court. As a sitting judge and a Supreme Court nominee, I am bound by the Supreme Court’s precedents, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions. Consistent with that Code and the positions taken by other pending judicial nominees, it would be inappropriate for me, as a sitting judge and a pending judicial nominee, to comment on the merits or flaws of the Supreme Court’s precedents.

47. Should Chevron apply when the government’s interpretation “tends to favor the government’s own pecuniary interests?”

RESPONSE: *Chevron* is the established precedent of the Supreme Court, and questions about its scope and application could be the subject of future litigation. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

48. What is the Major Questions Doctrine?

RESPONSE: In *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. 302, 324 (2014), the Supreme Court stated that it “expect[s] Congress to speak clearly if it wishes to assign ... decisions of vast ‘economic and political significance; to an agency.’” See also *Food & Drug Administration v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120, 160 (2000). The scope and application of what has been referred to as the “major questions doctrine” could be a subject of future litigation, and as such, it would not be appropriate for me as a sitting judge and a nominee to opine.

49. Justice Breyer wrote some decades ago that allocation of responsibility should be based on “institutional capacities and strengths.” So, doesn’t this mean that Congress and not agencies should decide major policy matters? An example being a major matters like a workplace vaccine mandate?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a

sitting federal judge, to comment further on matters that could be the subject of future litigation or to comment on threshold policy questions.

50. Is the Major Questions Doctrine a substantive canon or constitutional canon?

RESPONSE: The characterization, scope, and application of what has been referred to as the “major questions doctrine” could be a subject of future litigation, and as such, it would not be appropriate for me as a sitting judge and a nominee to opine.

51. Is Major Questions Doctrine a doctrine of interpretation or canon of construction?

RESPONSE: Please see my response to Question 50.

52. What is constitutional avoidance?

RESPONSE: The Supreme Court has explained that, under the doctrine of constitutional avoidance:

“[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score. This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations. The doctrine seeks in part to minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections. It is not designed to aggravate that friction by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate. Thus, those who invoke the doctrine must believe that the alternative is a serious likelihood that the statute will be held unconstitutional. Only then will the doctrine serve its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made. For similar reasons, the statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a ‘fair’ one.”

Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998) (internal quotation marks and citations omitted).

53. What is the clear statement rule?

RESPONSE: Some form of “clear statement rules” are discussed in a number of areas of law. Without more context, it is not possible for me to respond to this question.

54. Is the Major Questions Doctrine a non-delegation canon or constitutional standard?

RESPONSE: The characterization, scope, and application of what has been referred to as the “major questions doctrine” could be a subject of future litigation, and as such, it would not be appropriate for me as a sitting judge and a nominee to opine.

55. Does Article I vest legislative power solely in Congress?

- a. If no, what constitutional text suggests it can be vested elsewhere?
- b. If yes, how can Congress delegate this vesting to the executive branch?

RESPONSE: As the Supreme Court recently explained in *Gundy v. United States*, 139 S. Ct. 2116 (2019):

Article I of the Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” §1. Accompanying that assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch “powers which are strictly and exclusively legislative.” *Wayman v. Southard*, 23 U.S. 1, 10 Wheat. 1, 42–43, 6 L. Ed. 253 (1825). But the Constitution does not “deny[] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s].” *Yakus v. United States*, 321 U.S. 414, 425, 64 S. Ct. 660, 88 L. Ed. 834 (1944) (internal quotation marks omitted). Congress may “obtain[] the assistance of its coordinate Branches”—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws. *Mistretta v. United States*, 488 U.S. 361, 372, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). “[I]n our increasingly complex society, replete with ever changing and more technical problems,” this Court has understood that “Congress simply cannot do its job absent an ability to delegate power under broad general directives.” *Ibid.* So we have held, time and again, that a statutory delegation is constitutional as long as Congress “lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.” *Ibid.* (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S. Ct. 348, 72 L. Ed. 624, Treas. Dec. 42706 (1928); brackets in original).

Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegatee’s use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides.

Id. at 2123. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on matters that could be the subject of future litigation.

56. What is an “intelligible principle”?

RESPONSE: In *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019), the Supreme Court explained that:

[T]his Court has held that a delegation is constitutional so long as Congress has set out an “intelligible principle” to guide the delegatee’s exercise of authority. *J. W. Hampton, Jr., & Co.*, 276 U. S., at 409, 48 S. Ct. 348, 72 L. Ed. 624; see *supra*, at ___, 204 L. Ed. 2d, at 528. Or in a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegatee “the general policy” he must pursue and the “boundaries of

[his] authority.” *American Power & Light*, 329 U. S., at 105, 67 S. Ct. 133, 91 L. Ed. 2d 103. Those standards, the Court has made clear, are not demanding. “[W]e have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’” *Whitman*, 531 U. S., at 474–475, 121 S. Ct. 903, 149 L. Ed. 2d 1 (quoting *Mistretta*, 488 U. S., at 416, 109 S. Ct. 647, 102 L. Ed. 2d 714 (Scalia, J., dissenting)).

III. Effect of forum shopping and due process that national injunctions raise

57. Where is the power to grant injunctions in the Constitution?

RESPONSE: Article III, section 2 of the Constitution provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority.” Art. III, § 2. “The Judiciary Act of 1789 conferred on the federal courts jurisdiction over ‘all suits . . . in equity.’” *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting Judiciary Act of 1789, § 11, 1 Stat. 78). The Supreme Court has “long held that the ‘jurisdiction’ thus conferred . . . is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.” *Id.* (quotation marks omitted).

58. What factors do you consider in whether to grant a preliminary injunction?

RESPONSE: The Supreme Court has stated that “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

59. What factors do you consider in whether to grant a permanent injunction?

RESPONSE: The Supreme Court has stated that a plaintiff seeking a permanent injunction “must demonstrate (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

60. What is *Grupo Mexicano de Desarrollo S. A. v. Alliance Bond Fund, Inc.* (1999)?

RESPONSE: *Grupo Mexicano de Desarrollo S. A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), is a Supreme Court decision that addressed “whether, in an action for money damages, a United States District Court has the power to issue a preliminary injunction preventing the defendant from transferring assets in which no lien or equitable interest is claimed.” *Id.* at 310. The Court explained that, because “the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence,” a court’s equitable authority to award relief is generally confined to relief “traditionally accorded by courts of equity” in 1789. *Id.* at 319, 322. The Court held that the district court lacked

“authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents’ contract claim for money damages.” *Id.* at 333.

61. Must equity development be tied to the tradition of equity?

RESPONSE: The Supreme Court has recognized that because “the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence,” a court’s equitable authority to award relief is generally confined to relief “traditionally accorded by courts of equity” in 1789, absent additional authority granted by Congress. *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319, 322 (1999).

62. Are respect, dignity, or vindication justiciable remedies that can be awarded by federal courts?

RESPONSE: Whether a claimed injury would be redressable by a federal court depends on the circumstances of the case. In some circumstances, the Supreme Court has recognized that a dignitary harm may be redressable. The Court has explained, for example, that a suit for libel to protect one’s “good name” reflects the “basic concept of the essential dignity and worth of every human being.” *Gertz v. Welch, Inc.*, 418 U.S. 323, 341 (1974) (internal quotation marks omitted). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract on what may be justiciable remedies for a federal court to award in a particular case.

63. What is the rightful position principle?

RESPONSE: I am not familiar with this phrase and I do not believe the Supreme Court has referred to the “rightful position principle.”

64. Should damage awards be increased to account for attorney fees, even though that can leave a plaintiff with less relief than they feel they deserve?

RESPONSE: The appropriate amount of damages in a case is context specific and depends on a range of factors, including the law governing the claim and the record before the court. As a sitting federal judge and as a nominee, it would not be appropriate for me to comment in the abstract about the appropriateness of a damages award. If the issue comes before me as a case or controversy, I will consider the facts presented, the arguments of the parties, and the relevant law.

IV. Civil Procedure

65. Please explain the importance of *Ex parte Young*, in particular with respect to modern jurisprudence.

RESPONSE: State sovereign immunity generally deprives federal courts of subject matter jurisdiction over suits brought by private parties against unconsenting States. *See, e.g., Hans v. Louisiana*, 134 U.S. 1 (1980). The Supreme Court has recognized, however, that state sovereign

immunity does not bar suit in an action seeking prospective injunction relief against state officers for violations of federal law. See *Ex parte Young*, 209 U.S. 123 (1908). The Court has described the doctrine as “necessary to ‘permit the federal courts to vindicate federal rights.’” *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 254–55 (2011) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984)).

66. What is the writ of erasure?

RESPONSE: I do not believe that the Supreme Court has referred to “the writ of erasure” in any opinion. I understand that some academics have used the phrase the “writ-of-erasure fallacy” to refer to the “assumption that a judicial pronouncement of unconstitutionality has canceled or blotted out a duty enacted statute.” See Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 937 (2018).

67. Is *Bivens* an example of judicial activism?

RESPONSE: The Supreme Court held in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), that, “even absent statutory authorization, it would enforce a damages remedy” under the Fourth Amendment “to compensate persons injured by federal officers who violated the prohibition against unreasonable search and seizures,” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017) (discussing *Bivens*). As a sitting judge and a pending judicial nominee, it would not be appropriate for me to opine on this question. as Justices Kagan and Barrett explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

68. Should *Bivens* be extended in new circumstances?

RESPONSE: The Supreme “Court has urged caution before extending *Bivens* remedies into any new context,” and the Court’s precedents state “that a *Bivens* remedy will not be available if there are special factors counseling hesitation in the absence of affirmative action by Congress.” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (internal quotation marks omitted). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

69. Does a *Bivens* extension violate the separation of powers per *Mesa*?

RESPONSE: The Supreme Court held in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), that, “even absent statutory authorization, it would enforce a damages remedy” under the Fourth Amendment “to compensate persons injured by federal officers who violated the prohibition against unreasonable search and seizures,” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017) (discussing *Bivens*). The Supreme “Court has urged caution before extending *Bivens* remedies into any new context,” and the Court’s precedents state “that a *Bivens* remedy will not be available if there are special factors counseling hesitation in the absence of affirmative action by Congress.” *Id.* at 1857 (internal quotation marks omitted). In *Hernandez v. Mesa*, 140 S. Ct. 735, 749 (2020), the Court declined to extend *Bivens* to allow “damages actions for injury inflicted abroad by Government officers.” The question of whether *Bivens* should be extended

into new contexts is the subject of ongoing litigation, and as a sitting judge and pending nominee it would be inappropriate for me to comment on an issue that may come before me.

70. Does Bivens usurp legislative power?

RESPONSE: Please see my response to Question 69.

71. What are the various abstention doctrines?

RESPONSE: Although the Supreme Court has stated that it has a “virtually unflagging obligation” to exercise the jurisdiction given it by Congress, *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), the Court has developed a number of abstention doctrines “where denying a federal forum would clearly serve an important countervailing interest . . . [such as] regard for federal-state relations,” *id.* Thus, for example, the Court has held that federal courts should refrain from hearing cases that would interfere with pending state criminal proceedings, *see Younger v. Harris*, 401 U.S. 37 (1971); from hearing cases in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret state law, *see Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941); from rendering decisions that would interfere unnecessarily with a complex state regulatory scheme, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); from deciding cases which are duplicative of a pending state proceeding, *see Colorado River*; 424 U.S. at 819; and from exercising jurisdiction in certain circumstances where a federal suit follows a state suit, *see Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

72. Does abstention promote federalism and deference to state power?

RESPONSE: The Supreme Court has recognized that federal court abstention in appropriate circumstances “is a contribution of the courts in furthering the harmonious relation between state and federal authority.” *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941) (internal quotation marks omitted).

73. Does each branch of government interpret the Constitution?

RESPONSE: Each branch of government may interpret the Constitution, and all members of Congress and the President take an oath to defend the Constitution. But “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

74. Is the judiciary the most powerful branch of the federal government? If no, what branch is?

RESPONSE: As a sitting judge, it would not be appropriate for me to offer an opinion on the relative power of the judicial branch versus the other branches of government. Each of the three branches has different powers and duties spelled out in the Constitution.

75. Which branch did the Framers design to be the most powerful?

RESPONSE: Please see my response to Question 74.

76. What does Alexander Hamilton mean in Federalist No. 78 when he says the judiciary is the “weakest branch”?

RESPONSE: Federalist No. 78 explains: “The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” Thus, the Supreme Court may have the final word as a matter of law, but it lacks control over how the political branches respond to it.

77. Is the judiciary the weakest branch today?

RESPONSE: Please see my response to Question 74.

78. Where does standing doctrine arise from?

RESPONSE: Under Article III of the Constitution, “[t]he judicial Power of the United States” “extends only to ‘Cases’ and ‘Controversies.’” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) (quoting U.S. Const., art. III, §§ 1, 2). The Supreme Court has explained that “[s]tanding to sue is a doctrine rooted in the traditional understanding of a case or controversy.” *Id.* at 338.

79. What is Article III standing?

RESPONSE: Under Article III of the Constitution, “[t]he judicial Power of the United States” “extends only to ‘Cases’ and ‘Controversies.’” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) (quoting U.S. Const., art. III, §§ 1, 2). The Supreme Court has explained that “[s]tanding to sue is a doctrine rooted in the traditional understanding of a case or controversy.” *Id.* at 338. The “irreducible constitutional minimum” requirements for standing to invoke the power of a federal court to resolve, as necessary to demonstrate that the plaintiff’s legal claim presents a remediable case or controversy that gives rise to jurisdiction under Article III, are: (1) that the plaintiff has suffered an injury in fact that is “concrete and particularized” and “actual or imminent”; (2) that the asserted injury is fairly traceable to the defendant’s action, and (3) that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defenders Of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted).

80. Are there other requirements of standing?

RESPONSE: The Supreme Court has developed other limits on a federal court’s exercise of jurisdiction that are not grounded in the text of Article III, but the Court has determined that the exercise of a court’s jurisdiction over certain cases and controversies is restricted on these grounds nonetheless. *See, e.g., Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 12 (2004) (explaining that “prudential standing encompasses the general prohibition on a litigant’s raising another person’s legal rights, [and] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches” (internal quotation marks and citation omitted)). However, the Supreme Court has recently reiterated that federal courts must hear cases that have been properly brought, and that “a federal court’s obligation to hear and decide cases within its jurisdiction is virtually unflagging.” *Lexmark International, Inc.*

v. Static Control Components, Inc., 572 U.S. 118, 126 (2014) (internal quotation marks and citation omitted).

81. Did *TransUnion LLC v. Ramirez* (2021) change standing doctrine, and if so how did it?

RESPONSE: The Supreme Court has explained that in order for an injury to be “concrete” for purposes of Article III, the injury must be “real, and not abstract.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016) (internal quotation marks omitted). In *Spokeo*, the Court explained that, “[i]n determining whether an intangible harm constitutes injury in fact,” courts should “consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” *Id.* at 340–41. The Court applied these principles in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), to determine whether plaintiffs had “concrete” injuries for purposes of bringing suit under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, which created a cause of action for consumers to sue and recover damages for certain statutory violations. The Court held that plaintiffs whose inaccurate “credit reports were provided to third-party businesses suffered a concrete harm,” because this injury had a “close relationship” to “the reputational harm associated with the tort of defamation.” *Id.* at 2208. But plaintiffs “whose credit reports were not provided to third-party businesses did not suffer a concrete harm and thus” did not have standing. *Id.* at 2214. The Court further held that no plaintiffs had standing to bring claims “pertaining to the format of TransUnion’s mailings,” which the Court held to be “bare procedural violation[s], divorced from any concrete harm.” *Id.* (quoting *Spokeo*, 578 U.S. at 341).

82. Can Congress confer standing for a widely shared but specific and concrete injury?

RESPONSE: The Supreme Court has explained that “[a] federal court is not a forum for generalized grievances.” *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). The Court “enforce[s] that requirement by insisting that a plaintiff satisfy” the requirements of Article III standing, including that the plaintiff establish an “injury in fact” that is “concrete and particularized.” *Id.* “Congress may ‘elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.’” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204–05 (2021) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340–41 (2016)). But Congress “may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.” *Id.* “Congress’s creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether” a plaintiff has established the requirements of Article III. *See id.* at 2205.

83. Does standing depend on the type of claim brought?

RESPONSE: The Supreme Court has stated that “standing is not dispensed in gross,” *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), and that a plaintiff must “demonstrate standing separately for each form of relief sought.” *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 185 (2000).

84. Is standing determined without considering the nature of a plaintiff’s claim?

RESPONSE: Please see my response to Question 83.

85. Is standing jurisprudence hostile to suits seeking to redress executive wrongdoing?

RESPONSE: The Supreme Court has regularly recognized plaintiffs’ standing to challenge alleged unlawful actions by the Executive Branch. *See, e.g., Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2196 (2020); *Bennett v. Spear*, 520 U.S. 154, 170–71 (1997). As a sitting federal circuit court judge, my current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law, including the binding precedents of the Supreme Court.

86. Has standing doctrine transformed from a tool of judicial modesty to a tool of judicial aggrandizement?

RESPONSE: As explained above, under Article III of the Constitution, “[t]he judicial Power of the United States” “extends only to ‘Cases’ and ‘Controversies.’” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) (quoting U.S. Const., art. III, §§ 1, 2). The Supreme Court has explained that “[s]tanding to sue is a doctrine rooted in the traditional understanding of a case or controversy.” *Id.* at 338. As a sitting federal circuit court judge, my current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law, including the binding precedents of the Supreme Court.

87. What is third-party standing?

RESPONSE: The Supreme Court has recognized that “a party ‘generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.’” *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (internal quotation marks omitted). The Court has “not treated this rule as absolute, however,” and has “recogniz[ed] that there may be circumstances where it is necessary to grant a third party standing to assert the rights of another.” *Id.* at 129–30. The Court has “asked whether the party asserting the right has a close relationship with the person who possesses the right,” and “whether there is a hindrance to the possessor’s ability to protect his own interests.” *Id.* at 130.

88. Is this doctrine applied consistently?

RESPONSE: As a sitting federal circuit court judge, my current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law, including the binding precedents of the Supreme Court. It would be inappropriate for me to comment on whether I believe this doctrine has been applied consistently.

89. Can I challenge a law when application of the law violates another’s constitutional rights?

RESPONSE: Please see my response to Question 87. The Supreme Court has in some circumstances recognized third-parties’ standing to sue to vindicate another’s constitutional rights. *See, e.g., Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (holding professional fundraiser could raise First Amendment challenge on behalf of third parties); *Craig v. Boren*, 429 U.S. 190, 195–96 (1976) (holding alcohol vendor could raise equal protection challenge to gender-based law on behalf of third parties). Consistent with the Code of

Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

90. What is the difference between an injury in law and an injury in fact?

RESPONSE: The Supreme Court in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), recognized that “Congress may enact legal prohibitions and obligations,” “[a]nd Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations.” *Id.* at 2205. “But under Article III, an injury in law is not an injury in fact.” *Id.* “Only those plaintiffs who have been *concretely harmed* by a defendant’s statutory violation” have an injury-in-fact under Article III and may sue the defendant “over that violation in federal court” if Article III’s other requirements are satisfied. *See id.*

91. Why is an injury in law not sufficient for standing?

RESPONSE: Federal courts are courts of limited jurisdiction, and the Supreme Court has explained that Article III “requires a concrete injury even in the context of a statutory violation.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016). Although “Congress may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law,” the Court has recognized that “Congress’s creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021).

92. Are harms to reputation “concrete” for standing analysis?

RESPONSE: In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the Supreme Court recognized that some “intangible harms can” be “concrete” for purposes of Article III, and that “[c]hief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts,” including “reputational harms.” *Id.* at 2204.

93. Are there some injuries that do not have a remedy?

RESPONSE: A plaintiff may have an injury that is nonetheless not “likely” to be “redressed by a favorable decision” in the case. *Lujan v. Defenders of Wildlife*, 50 U.S. 554, 561, 568–70 (1992) (internal quotation marks omitted). In that circumstance, even if the plaintiff were injured, the plaintiff would lack Article III standing and could not invoke the jurisdiction of the federal courts for a remedy. *See id.*

94. How do you reconcile *Dep’t of Commerce v. NY* (2019) with *Simon v. Linda R.S.* (1973) in the sense that one case found standing and the other did not when both dealt with the effect of government action on numerous third parties?

RESPONSE: In *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), the Supreme Court concluded that plaintiffs had standing to sue to challenge a question on the United States census because the plaintiffs had “met their burden of showing that third parties will likely react in predictable ways” to the census question, citing evidence developed at trial. *Id.* at 2566. In

Linda R.S. v. Richard D., 410 U.S. 614 (1973), the Court held that the plaintiff lacked standing to challenge a state statute where she “made no showing that her failure to secure [child] support payments results from the nonenforcement [of the statute] as to her child’s father.” *Id.* at 618. Whether a particular plaintiff has met their burden to establish standing is a case-specific inquiry. As a sitting federal circuit court judge, my current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law, including the binding precedents of the Supreme Court.

95. Does the political question doctrine override other justiciability doctrines?

RESPONSE: “In general, the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid.’” *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012) (citation omitted). The Supreme Court has described the “political question doctrine” as a “narrow exception to that rule.” *Id.* at 195. The Court has “explained that a controversy ‘involves a political question . . . where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’” *Id.* (citations omitted).

96. Is there a consistent test that can be applied to prevent the political question doctrine from being manipulated?

RESPONSE: The Supreme Court has “explained that a controversy ‘involves a political question . . . where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’” *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (citation omitted). As a sitting federal circuit court judge, my current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law, including the binding precedents of the Supreme Court.

97. Could Congress jurisdiction strip courts of their ability to hear cases in one topical area?

RESPONSE: Article III authorizes Congress to create the lower federal courts, *see* U.S. Const. art. III, § 2, and that “greater power . . . includes its lesser power to limit the jurisdiction of those Courts.” *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (plurality op.) (internal quotation marks omitted). The Supreme Court has recognized that “Congress has the power (within limits) to tell the courts what classes of cases they may decide.” *See City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). Other constitutional constraints, such as the separation of powers, may impose limits on Congress’s power to strip federal court jurisdiction. *See, e.g., Patchak*, 138 S. Ct. at 904–05; *see also Bowles v. Russell*, 551 U.S. 205, 212 (2007) (“Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.”). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

98. Can Congress remove jurisdiction specifically to determine the outcome of a particular case?

RESPONSE: The Court has held that Congress “may not ‘retroactively comman[d] the federal courts to reopen final judgements.’” *Bank Markazi v. Peterson*, 578 U.S. 212, 226 (2016) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995)). In *Patchak v. Zinke*, 138 S. Ct. 897 (2018), a plurality of the Court stated that “Congress violates Article III . . . when it compels findings or results under old law,” but that “Article III does not prohibit Congress from enacting new laws that apply to pending civil cases.” *Id.* at 905, 909 (plurality op.) (internal quotation marks omitted); *see also Bank Markazi*, 578 U.S. at 230 (“[A] statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts.”). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

99. Can Congress repeal legislation which gave federal jurisdiction over a matter, even if it changes the outcome of a case currently on appeal?

RESPONSE: The Court has stated that “[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.” *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995).

100. Can Congress create statutes requiring cases be brought to a specific court, giving that court exclusive jurisdiction over a topical area?

RESPONSE: Congress may “tell the courts what classes of cases they may decide,” so long as Congress does not violate other provisions of the Constitution. *See City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). Congress has enacted several statutes that require certain cases to be brought to a specific court. *See, e.g.*, 28 U.S.C. § 1491 (providing United States Court of Federal Claims with exclusive jurisdiction over certain claims against the government).

101. If a defendant has a constitutional defense to agency review, may that defendant skip agency review and proceed in federal district court?

RESPONSE: “Administrative review schemes commonly require parties to give the agency an opportunity to address an issue before seeking judicial review of that question.” *Carr v. Saul*, 141 S. Ct. 1352, 1359 (2021). Whether and to what extent a plaintiff must exhaust a challenge before an agency before proceeding in federal court depends on the particular agency and statutory or constitutional provisions involved. *See id.* Consistent with Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract on whether a defendant with a constitutional defense could skip agency review and proceed in federal district court.

102. Is there specific statutory language necessary for jurisdiction stripping?

RESPONSE: Please see my response to Question 97. The Supreme Court has not identified specific statutory language as necessary for jurisdiction stripping. In the agency context the Court has explained that there is a “[p]resumption favoring judicial review of administrative action.” *See Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984). Thus, for a statute

to preclude judicial review, there must be “‘clear and convincing evidence’ of congressional intent.” See *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070 (2020) (quoting *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 64 (1993)).

103. Is there limit to what jurisdiction Congress can remove from the judiciary?

RESPONSE: Please see my response to Question 97.

104. Does an original jurisdiction matter between two states mandate Supreme Court review?

RESPONSE: Article III, section 2, gives the Supreme Court both original and appellate jurisdiction. The Court shall exercise original jurisdiction “[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be [a] Party.” Since 1789, Congress has further defined this grant of jurisdiction by providing that the Supreme Court shall have “original *and exclusive* jurisdiction of all controversies between two or more States,” but that it shall have “original but not exclusive jurisdiction” of most other categories of cases arising under Article III, section 2. See 28 U.S.C. § 1251. The Court has understood itself to have discretion to decline to accept cases falling within the terms of its original jurisdiction, even where its jurisdiction is exclusive. See *Texas v. New Mexico*, 462 U.S. 554, 570 (1983).

105. When can Congress amend existing law and change what law courts apply to a pending case?

RESPONSE: The Supreme Court has stated that, in criminal cases, the Ex Post Facto Clause of the constitution “flatly prohibits retroactive application of penal legislation.” See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994); see U.S. Const. art. I, § 1, cl. 3. In civil cases, the Court has stated that there is a general “presumption against retroactive legislation.” See *id.* But the Court has explained that, “[a]bsent a violation of” a constitutional provision—such as the Takings Clause or the Due Process Clause—“the potential unfairness of retroactive civil litigation is not a sufficient reason for a court to fail to give a statute its intended scope.” *Id.* The Court has stated that “[w]hen a case implicates a federal statute enacted after the events in suit, the court’s first task is to determine whether Congress has expressly prescribed the statute’s proper reach.” *Id.* at 280. “If Congress has done so . . . there is no need to resort to judicial default rules” such as the presumption against retroactive legislation. *Id.* “When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect,” meaning “it would impair rights a party possessed when it acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Id.* “If the statute would operate retroactively,” the “traditional presumption” against retroactivity “teaches that it does not govern absent clear congressional intent favoring such a result.” *Id.* ; see also *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). Whether Congress intended for a given statute to apply retroactively, and whether that retroactive application would be consistent with other constitutional principles, is case specific. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract on when Congress could do so.

106. When can Congress preempt Erie considerations?

RESPONSE: In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Supreme Court stated that federal courts exercising diversity jurisdiction must apply the substantive law of the state, and that “[t]here is no federal general common law.” Through legislation, Congress can preempt state law. *See, e.g., American Trucking Associations, Inc. v. City of Los Angeles*, 569 U.S. 641, 655 (2013). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract on when Congress could do so.

107. When can federal courts use state law to fill in meaning or gaps of federal law to provide meaning?

RESPONSE: In some statutory schemes, Congress has incorporated certain State law into federal law, and directed that state law applies where “federal law does not address the relevant issue.” *See, e.g., Parker Drilling Management Services, Ltd. v. Newton*, 139 S. Ct. 1881, 1886 (2019) (discussing The Outer Continental Shelf Lands Act). In addition, in determining the applicable statute-of-limitations period for a federal cause of action that does not provide one, the Court has stated it will “generally ‘borrow’ the most closely analogous state limitations period.” *See Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 414–15 (2005). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract on when federal courts might use state law to fill in gaps in federal law.

108. Does Erie eliminate any federal common law?

RESPONSE: In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Supreme Court stated that “[t]here is no federal general common law.” “Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision.” *Rodriguez v. Federal Deposit Ins. Co.*, 140 S. Ct. 713, 717 (2020). “These areas have included admiralty disputes and certain controversies between States.” *Id.* “[B]efore federal judges may claim a new area for common lawmaking, strict conditions must be satisfied,” including “one of the most basic: In the absence of congressional authorization, common lawmaking must be necessary to protect uniquely federal interests.” *Id.* (internal quotation marks omitted).

109. What is a uniquely federal interest?

RESPONSE: The U.S. Supreme Court has described cases involving “uniquely federal interests” as those “narrow areas [that are] . . . concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.” *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (citation omitted).

110. If Congress does not explicitly provide a cause of action in a statute, when can the court create one?

RESPONSE: As I explained at the hearing, because a judge’s duty is to impose the law as written, as a general matter, courts cannot create a cause of action if Congress has not provided for one. In some circumstances, the Supreme Court has recognized implied causes of action. In

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), for example, the Court “held that, even absent statutory authorization, it would enforce a damages remedy to compensate persons injured by federal officers who violated the [Fourth Amendment’s] prohibition against unreasonable search and seizures.” See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017) (discussing *Bivens*). The Court has since explained, however, that “expanding the *Bivens* remedy is now considered a ‘disfavored’ judicial activity,” and courts should not extend the *Bivens* remedy to a new context “if there are special factors counselling hesitation in the absence of affirmative action by Congress.” *Id.* at 1857 (internal quotation marks omitted).

The Court has also in some circumstances recognized implied causes of action under a statute, though it has similarly “expressed caution” in doing so. See *id.* at 1855. In determining whether to recognize an implied cause of action under a statute, the Court has explained that “the ‘determinative’ question is one of statutory intent,” and “[i]f the statute itself does not display an intent to create a private remedy, then a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Id.* at 1856 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)). Because questions over whether and under what circumstances courts may imply causes of action under the Constitution or a statute are the subject of ongoing litigation, it would be improper for me as a sitting judge to opine in the abstract on when a court may appropriately imply a cause of action.

111. If Congress creates a complex scheme of public enforcement, does Congress intend concurrent private enforcement?

RESPONSE: Please see my response to Question 110.

112. What branch of government can waive sovereign immunity?

RESPONSE: The Supreme Court has recognized that Congress may waive the United States’ sovereign immunity through legislation. See *Federal Aviation Administration v. Cooper*, 566 U.S. 284, 290–91 (2012).

113. Is there a historical source justifying sovereign immunity?

RESPONSE: The Supreme Court has stated that “[i]t is an established principle of jurisprudence,” “that the sovereign cannot be sued . . . without its consent and permission.” See *United States v. Lee*, 106 U.S. 196, 227 (1882). The Court has traced this principal to historical sources, including “English authorities from the earliest . . . times.” *Id.* (discussing historical sources).

114. What does congressional silence on a matter mean to you as a judge?

RESPONSE: Whether and to what extent congressional silence matters is context dependent. In evaluating the President’s authority to act, for example, the Supreme Court has stated that “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers,” and “Presidential authority can derive support from congressional inertia, indifference, or acquiescence.” *Medellin v. Texas*, 552 U.S. 491, 524

(2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952)). In evaluating an agency’s interpretation of a statute it is charged with administering, the Court has stated that statutory silence or ambiguity on a subject can suggest that Congress intended for the agency to have discretion to fill the statutory gap. See *National Cable & Telecommunications Assoc. v. Brand X Internet Services.*, 545 U.S. 967, 996–97 (2005). The Court has “frequently cautioned that [i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.” *United States v. Wells*, 519 U.S. 482, 496 (1997) (internal quotation marks omitted). As a sitting federal circuit court judge, my current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law, as I understand it, including the binding precedents of the Supreme Court. If a case involving congressional silence were to come before me, I would apply the Court’s precedents on the subject.

115. Are there some rights so important they must have a remedy?

RESPONSE: Federal judges can only decide properly presented cases and controversies under Article III, and courts cannot ignore this requirement, even as to the most fundamental of rights. Thus, a plaintiff may have an injury that is nonetheless not “likely” to be “redressed by a favorable decision” in the case, and the plaintiff would therefore lack Article III standing sufficient to invoke the jurisdiction of the federal courts, no matter the right at stake. *Lujan v. Defenders of Wildlife*, 50 U.S. 554, 561, 568–70 (1992) (internal quotation marks omitted).

116. How do you reconcile the Eleventh Amendment with Article III’s Diversity Clause?

RESPONSE: In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996), the Supreme Court explained that “[a]lthough the text of the [Eleventh] Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition ... which it confirms.” *Id.* (internal quotation marks omitted). The Court explained that that presupposition rests on two parts: “first, that each State is a sovereign entity in our federal system; and second, that [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.” *Id.* (internal quotation marks omitted). “For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States.” *Id.* (internal quotation marks omitted).

117. Does Article III’s Diversity Clause enable federal question jurisdiction suits against states?

RESPONSE: The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. The Supreme Court has held that State sovereign immunity neither derives from, nor is limited by, the text of the Eleventh Amendment, but rather derives from the structure of the Constitution itself. States therefore retain such immunity “except as altered by the plan of the Convention or certain constitutional Amendments.” *Alden v. Maine*, 527 U.S. 706, 713 (1999). States therefore have immunity in federal courts even when a suit

presents a federal question. *See id.* at 714. The Eleventh Amendment, however, does not extend to suits brought by the federal government. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n.14 (1996). The Court has recognized that state sovereign immunity may also be waived or abrogated in some circumstances. For example, States may waive their sovereign immunity and consent to be sued in federal courts in certain circumstances. *See, e.g., Lardes v. Board of Regents of University System Of Georgia*, 535 U.S. 613, 618–19 (2002). And in certain circumstances, Congress may abrogate the Eleventh Amendment and authorize suits against States in federal courts. *See Seminole Tribe*, 517 U.S. at 55–56.

118. Under what circumstances may federal question jurisdiction suits be brought against states in federal court?

RESPONSE: The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. The Supreme Court has held that State sovereign immunity neither derives from, nor is limited by, the text of the Eleventh Amendment, but rather derives from the structure of the Constitution itself. States therefore retain such immunity “except as altered by the plan of the Convention or certain constitutional Amendments.” *Alden v. Maine*, 527 U.S. 706, 713 (1999). States therefore have immunity in federal courts even when a suit presents a federal question. *See id.* at 714. The Eleventh Amendment, however, does not extend to suits brought by the federal government. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n.14 (1996). The Court has recognized that state sovereign immunity may also be waived or abrogated in some circumstances. For example, States may waive their sovereign immunity and consent to be sued in federal courts in certain circumstances. *See, e.g., Lardes v. Board of Regents of University System Of Georgia*, 535 U.S. 613, 618–19 (2002). And in certain circumstances, Congress may abrogate the Eleventh Amendment and authorize suits against States in federal courts. *See Seminole Tribe*, 517 U.S. at 55–56. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

119. Can a foreign country sue a state directly under the Eleventh Amendment?

RESPONSE: In *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), the U.S. Supreme Court found that the doctrine of sovereign immunity prohibits suits by foreign countries against states unless the state specifically consents to such a suit.

120. How does Congress validly abrogate state sovereign immunity?

RESPONSE: In determining whether Congress has validly abrogated a States’ sovereign immunity, the Supreme Court “ask[s] two questions”: (1) “whether Congress has ‘unequivocally expresse[d] its intent to abrogate the immunity,’” and “whether Congress has acted pursuant to a valid exercise of power.” *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996) (internal quotation marks omitted). The Court has addressed which of Congress’s powers authorize it to abrogate state sovereign immunity in several cases. The Court has recognized, for example, that Section 5 of the Fourteenth Amendment authorizes Congress to abrogate, by appropriate

legislation, state sovereign immunity. *Id.* at 59. By contrast, the Court has held that Congress’s Article I’s power “to regulate Commerce” “gives Congress no authority to abrogate state sovereign immunity.” *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 627 (1999) (internal quotation marks omitted).

121. May the Supreme Court instruct Congress how to abrogate state sovereign immunity in federal question jurisdiction suits?

RESPONSE: Please see my response to Question 120.

122. What are the three exceptions to the Anti-Injunction Act?

RESPONSE: The Anti-Injunction Act, 28 U.S.C. § 2283, provides that “[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”

123. Is a state court violating a federal right considered impairing jurisdiction?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

124. What are the reasons for the abstention doctrine?

RESPONSE: The Supreme Court has developed a number of abstention doctrines “where denying a federal forum would clearly serve an important countervailing interest . . . [such as] regard for federal-state relations,” *Quackenbush v. Allstate Insurance Company*, 517 U.S. 706, 716 (1996). The Court has recognized that federal court abstention in appropriate circumstances “is a contribution of the courts in furthering the harmonious relation between state and federal authority.” *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941) (internal quotation marks omitted).

125. Does abstention promote respect for federalism?

RESPONSE: Please see my response to Question 124.

126. Should federal courts invoke *Younger* abstention in cases with parallel federal and state proceedings?

RESPONSE: The Supreme Court has recognized that “a federal court’s obligation to hear and decide” cases within its jurisdiction “is virtually unflagging.” *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976)). In *Younger*, the Court recognized an “exception” to this general rule, and stated that a federal court “should decline to enjoin” a state criminal prosecution. *See id.* (discussing *Younger*). The Court has since stated that *Younger* abstention is appropriate only in three “exceptional” categories of cases: (1) “ongoing state criminal prosecutions”; (2) “certain civil enforcement proceedings”; and (3) “civil proceedings involving

certain orders . . . uniquely in furtherance of the state courts ability to perform their judicial functions.” *Sprint Communications, Inc.*, 571 U.S. at 78 (stating that these categories “define *Younger*’s scope”). The Court has stated that *Younger* does not apply in all circumstances where there are “parallel state and federal proceedings.” *Id.* at 81–82. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on abstract legal issues about when *Younger* should be invoked by federal courts.

127. Should federal courts invoke *Younger* abstention in cases with two private plaintiffs?

RESPONSE: Please see my response to Question 126.

128. In *Ford Motor Co v. Montana Eighth Judicial District Ct.* (2021), the opinion defines the personal jurisdiction test as to “require only that the suit arise out of or relate to the defendant’s contacts with the forum.” Does “arise out of or relate to” mean the same thing?

RESPONSE: The Supreme Court has stated that “[t]he first half of that standard asks about causation; but the back half, after the ‘or,’ contemplates that some relationships will support jurisdiction without a causal showing.” *Ford Motor Company v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1026 (2021).

129. In class action litigation, what is commonality? What kind of situation suffices?

RESPONSE: Federal Rule of Civil Procedure 23(a)(2) requires a plaintiff to show that “there are questions of law or fact common to the class.” The Supreme Court has explained that commonality requires a plaintiff to demonstrate that their claims “depend upon a common contention” that “must be of such a nature that is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart v. Dukes*, 564 U.S. 338, 350 (2011). “What matters to class certification . . . is not the raising of common ‘questions,’” but rather “the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation.” *Id.* (internal quotation marks omitted). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract on what kinds of situations might satisfy this test.

130. Does there need to be common answers to go with the common questions necessary to meet Federal Rule of Civil Procedure 23(a)(2)?

RESPONSE: Please see my response to Question 129.

131. Are class action requirements a form of pleading standards?

RESPONSE: In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), the Supreme Court stated that “Rule 23 does not set forth a mere pleading standard.” Instead, a plaintiff “must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” *Id.* (emphasis in original).

132. Can procedural interpretations affect a party's substantive rights?

RESPONSE: A judicial determination relating to a question of procedure could impact a party's ability to pursue or obtain relief in a given case. For example, the Supreme Court has "recognized in more than a few decisions . . . that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *United States v. L.A. Trucker Lines, Inc.*, 344 U.S. 33, 36–37 (1952).

133. What is the Adequate and Independent state ground test?

RESPONSE: The adequate and independent state ground doctrine provides that when a litigant petitions the Supreme Court to review the judgment of a state court which rests upon both federal and state law, the Supreme Court does not have jurisdiction over the case if the state ground is adequate to support the judgment and is independent of federal law. *See Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *see also Michigan v. Long*, 463 U.S. 1032, 1038 (1983) ("It is, of course, incumbent upon this Court . . . to ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the judgment." (internal quotation marks omitted)).

134. Does this test respect federalism?

RESPONSE: The Supreme Court has explained that "[r]espect for the independence of state courts" is a "cornerstone[]" of the "Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

V. General Constitutional Questions

135. Does the President possess the power to remove officers of independent agencies?

RESPONSE: In *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), the Supreme Court evaluated the structure of the Consumer Financial Protection Bureau, an independent regulatory agency, led by a Director who serves for a longer term than the President and who cannot be removed by the President except for inefficiency, neglect, or malfeasance. The Court held that this structure violated the separation of powers, and that the Director must be removable by the President at will.

In that decision, the Court described its prior holdings this way:

Under our Constitution, the "executive Power"—all of it—is "vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, §1, cl. 1; *id.*, § 3. Because no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance. Ten years ago, in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010), we reiterated that, "as a general matter," the Constitution gives the President "the authority to remove those who assist him in carrying out his duties," *id.*, at 513–514, 130 S. Ct. 3138. "Without such power, the President could not be held fully

accountable for discharging his own responsibilities; the buck would stop somewhere else.” *Id.*, at 514, 130 S. Ct. 3138.

The President’s power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States*, 272 U.S.52, 47 S. Ct. 21, 71 L. Ed. 160 (1926). Our precedents have recognized only two exceptions to the President’s unrestricted removal power. In *Humphrey’s Executor v. United States*, 295 U.S.602, 55 S. Ct. 869, 79 L. Ed. 1611 (1935), we held that Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause. And in *United States v. Perkins*, 116 U.S. 483, 6 S. Ct. 449, 29 L. Ed. 700, (1886), and *Morrison v. Olson*, 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988), we held that Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties.

Id. at 2191–92.

136. Does the President have removal power over the entire executive branch?

RESPONSE: Please see my response to Question 135.

137. In *Humphrey’s Executor v. FTC*, the Supreme Court held the President does not have “illimitable power of removal.” This decision was justified at the time because the Federal Trade Commission (FTC) was a body created by Congress to perform quasi-legislative and judicial functions.

RESPONSE: This appears to be an observation rather than a question.

138. Does the FTC enforce antitrust laws?

RESPONSE: The U.S. Federal Trade Commission (FTC) enforces the Federal Trade Commission Act, which gives the FTC authority to remedy anticompetitive conditions that run “counter to the public policy declared in the Sherman and Clayton Acts...” *See Fashion Originators’ Guild of America, Inc. v. FTC*, 312 U.S. 457, 463 (1941); *see also* 15 U.S.C. § 45. It also enforces certain sections of the Clayton Act.

139. Is law enforcement an inherently executive function?

RESPONSE: The Constitution requires that the President “take Care that the Laws be faithfully executed[.]” U.S. Const. art. II, § 3.

140. If the FTC possesses executive power, shouldn’t the President have power to remove officers who exercise executive power?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

141. What is meant by “the executive power”?

RESPONSE: Article II of the Constitution vests “[t]he executive power” in the President, who has the responsibility to “take Care that the Laws be faithfully executed[.]” U.S. Const. art. II, § 3.. In an early case exploring executive power, the Supreme Court explained that the President “is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the senate, to appoint the most important of them, and to fill vacancies. He is declared to be the commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the constitution, and the creation by acts of congress, of executive departments, which have varied in number . . . who are familiarly called ‘cabinet ministers.’ These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called; and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that ‘he shall take care that the laws be faithfully executed.’” *In re Neagle*, 135 U.S. 1, 63–64 (1890).

The Court subsequently noted that “[u]nlike an administrative commission confined to the enforcement of the statute under which it was created, or the head to a department when administering a particular statute, the President is a constitutional officer charged with taking care that a ‘mass of legislation’ be executed. Flexibility as to mode of execution to meet critical situations is a matter of practical necessity. This practical construction of the ‘Take Care’ clause, advocated by John Marshall, was adopted by this Court in *In re Neagle*, *In re Debs* and other cases cited supra.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 702 (1952) (Vinson, J., dissenting). The Supreme Court has more recently explained that “[a]gencies make rules (“Private cattle may be grazed on public lands X, Y, and Z subject to certain conditions”) and conduct adjudications (“This rancher’s grazing permit is revoked for violation of the conditions”) and have done so since the beginning of the Republic. These activities take ‘legislative’ and ‘judicial’ forms, but they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the ‘executive Power.’ Art. II, § 1, cl. 1.” *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

142. Is any executive power not vested solely in the President?

RESPONSE: Please see my response to Question 141.

143. What does the vesting clause vest in the President?

RESPONSE: Please see my response to Question 141.

144. Is the vesting clause a grant of power to the President?

RESPONSE: Please see my response to question 141.

145. Is the phrase “shall be vested” an express declaration of the mandatory location of certain powers?

RESPONSE: Please see my response to Question 141.

146. What does the Take Care Clause mean?

a. E.g., is it a grant of discretionary power or a duty to the President?

RESPONSE: The Constitution requires that the President “take Care that the Laws be faithfully executed[.]” U.S. Const. art. II, § 3. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on abstract legal questions or on matters that could be the subject of future litigation.

147. Is the President’s executive power defeasible by Congress?

RESPONSE: Please see my response to Question 141.

148. Do you agree with Justice Breyer about the constitutionality of the death penalty?

RESPONSE: The Supreme Court upheld the death penalty as constitutional in *Gregg v. Georgia*, 428 U.S. 153 (1976). As a sitting federal judge, I am required to apply the Supreme Court’s binding precedent regarding the death penalty, and I would respect those precedents should I be confirmed to serve as an Associate Justice on the Supreme Court.

149. Is the President or Congress preeminent for the area of foreign affairs?

RESPONSE: The Constitution assigns functions to both the President and the Congress in foreign affairs. Under Article I, the Constitution assigns Congress the power to regulate commerce with foreign nations, to declare war, to raise and support armies and provide and maintain a navy. Art. I, § 8, cl. 3, 11–13. Under Article II, the Constitution makes the President Commander in Chief of the Army and Navy of the United States. Art. II, § 2, cl. 1. The President is given the power to make treaties, but “by and with the Advice and Consent of the Senate” and “provided two thirds of the Senators present concur[.]” Art. II, § 2, cl. 2. Similarly, the Constitution provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors[.]” Art. II § 2, cl. 2. How these authorities apply in a given situation depends upon the factual circumstances. For example, in *Zivotofsky v. Kerry*, 576 U.S. 1 (2015), the Supreme Court determined that the President has the exclusive authority to recognize a foreign sovereign.

150. *Clinton v. N.Y.* (1998) struck down the Line Item Veto Act. Is there a way for Congress to confer discretion upon the executive to withhold appropriated funds, even funds appropriated for a specific purpose?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on abstract legal questions or on matters that could be the subject of future litigation.

151. Who is an “officer of the United States”?

RESPONSE: According to the Supreme Court, officers—as distinct from employees or contractors—are government officials who “exercise significant authority pursuant to the laws of the United States.” *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980 (2021) (internal quotation marks and citations omitted).

152. Is a better standard to use the original public meaning, which suggests that an “officer” encompasses any government official with responsibility for an ongoing governmental duty?

RESPONSE: As a sitting federal circuit court judge, my current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law, including the binding precedents of the Supreme Court. Consistent with the positions taken by prior nominees, it would be inappropriate for me as a sitting judge and pending judicial nominee to opine on an abstract legal principle.

153. Are tax collectors, disaster relief officials, customs officials, and administrative judges “officers” of the United States?

RESPONSE: In *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), the Supreme Court held that Administrative Patent Judges have the power to render a final decision on behalf of the United States without review of a superior or any other principal officer in the Executive Branch. As such, the Court determined that these judges exercise power that conflicts with the requirements of the Appointments Clause that are designed to preserve political accountability, whereby only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch. The Court concluded that decisions by Administrative Patent Judges must be subject to review by the Director of the Patent and Trademark Office. In *Freytag v. Commission*, 501 U.S. 868 (1991), the Court held that the special trial judges of the United States Tax Court are officers. In *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Court held that the Securities and Exchange Commission’s administrative law judges are officers of the United States.

Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

154. Is the Appointments Clause a safeguard against the “diffusion of accountability” the Framers feared?

RESPONSE: The Supreme Court recently noted that “[t]oday, thousands of officers wield executive power on behalf of the President in the name of the United States. That power acquires its legitimacy and accountability to the public through ‘a clear and effective chain of command’ down from the President, on whom all the people vote.” *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021).

155. Does Article II create a unitary executive?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on abstract legal questions or on matters that could be the subject of future litigation.

156. Can the President remove “officers” at will?

RESPONSE: Please see my response to Question 135.

157. Does Congress have constitutional authority to impose a deadline for a constitutional amendment?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

158. What constitutional amendments apply abroad?

RESPONSE: The extraterritorial reach of the Constitution is a complicated subject that depends heavily on the context of the U.S. Government action at issue, the nature of the constitutional protection sought, and whether U.S. persons are involved or affected, among other considerations. As general guidance, the Supreme Court has observed that “questions of extraterritoriality turn on objective factors and practical concerns, not formalism,” *Boumediene v. Bush*, 553 U.S. 723, 764 (2008); and noted that the question of whether a constitutional amendment may have an extraterritorial application in a particular case may be “sensitive and may have consequences that are far reaching,” *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (*per curiam*).

The Supreme Court addressed the applicability of constitutional protections to foreign citizens outside the U.S. recently in *Agency for Int’l Dev. v. All. For Open Soc’y Int’l, Inc.*, 140 S. Ct. 2082 (2020). The majority in that case stated as a general proposition that “foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution.” *Id.* at 2086.

Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

159. If you list any, please explain why do some amendments apply abroad and not others?

RESPONSE: Please see my response to Question 158.

160. Does Section 1 of the Twenty Third Amendment prevent D.C. statehood?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on legal issues in the abstract or on matters that could be the subject of future litigation.

161. What is the Marks rule?

RESPONSE: In *Marks v. United States*, 430 U.S. 188 (1977), the Court stated that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’” *Id.* at 193.

162. Does the Marks rule shift costly interpretive burdens to later courts, privilege outlier views among the Justices, and discourage desirable compromises?

RESPONSE: It would not be appropriate for me to opine on this question; as Justices Kagan and Barrett explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

VI. Substantive Due Process

163. Should rights be viewed through a broad level of generality or a narrow level of generality?

RESPONSE: I cannot answer an abstract question because Article III requires that judges consider only questions of law that are presented in the context of particular cases and controversies.

164. What constitutional rights do felons retain?

RESPONSE: In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court determined that states could bar individuals convicted of criminal offenses from voting, consistent with the Fourteenth Amendment. The specific rights retained or lost as a result of a felony conviction vary state by state.

165. Doesn’t due process just mean a fair process or procedure?

RESPONSE: The Supreme Court has long held that the Due Process Clauses of the Fifth and Fourteenth Amendments protect both procedural due process and substantive due process. The Clause states that no person shall be deprived of “life, liberty, or property, without due process of law,” and the Supreme Court has concluded that the provision for “liberty” necessarily includes certain “fundamental rights and liberties which are, objectively, 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 quotation marks and citations omitted).

166. How can substantive rights spring from the words “due process”?

RESPONSE: Please see my response to Question 165.

167. Isn’t it distorting to the original meaning of “liberty” in the Due Process Clause by stretching its meaning beyond the matter of deprivation of liberty by imprisonment?

RESPONSE: Please see my response to Question 165.

168. Aren't *Lochner* and *Griswold* the same judicial activism involving substantive due process?

RESPONSE: As a pending judicial nominee and a sitting federal judge, any personal views that I might have regarding of the scope of substantive due process have no bearing on the constitutional analysis that I would undertake in any case that implicates these issues. Under binding Supreme Court precedent, the substantive due process clause protects unenumerated rights that are “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 quotation marks and citations omitted), and the government’s regulation of such unenumerated personal rights may be subject to heightened scrutiny. The Supreme Court has not afforded the same protection to the unenumerated economic rights that were initially recognized in *Lochner*. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483 (1955). The Court has held that the government can regulate in a manner that restricts economic freedom if the regulation at issue is rationally related to a legitimate government interest. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

169. Doesn't the Fourteenth Amendment protect only the rights listed in the Constitution?

RESPONSE: As Justice Kavanaugh observed during his confirmation process, “it is well settled that the Constitution protects unenumerated rights.” Other Supreme Court nominees have also discussed the Supreme Court’s recognition that the Constitution protects unenumerated rights. Cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), recognize an unenumerated right to privacy that encompasses the right to marital privacy and to use contraception. *Obergefell v. Hodges*, 576 U.S. 644 (2015), and *Loving v. Virginia*, 388 U.S. 1 (1967), affirm a constitutional right to marry, and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), recognize the right to have children and to direct their education. In *Saenz v. Roe*, 526 U.S. 489 (1999), the Supreme Court affirmed a right to travel. In *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court has recognized a right to abortion subject to limitations as articulated. The Supreme Court has also “assumed, and strongly suggested” that there is a “right to refuse unwanted lifesaving medical treatment.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

170. Should the Constitution be read to embody a “presumption of liberty”?

RESPONSE: It would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to offer any personal views on this abstract topic. Moreover, in my role as a judge, I am not guided by personal views, but by adherence to the text of the Constitution and to the methods of interpretation that the Supreme Court employs when interpreting its provisions.

171. Is the Ninth Amendment a source for unenumerated rights?

RESPONSE: The Supreme Court has, at times, suggested that the Ninth Amendment—which provides that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people[,]” is a source for unenumerated rights. See, e.g., *Roe v. Wade*, 410 U.S. at 152–53.

172. How can you tell what is an unenumerated right?

RESPONSE: When considering rights protected under the Due Process Clauses of the Fifth and Fourteenth Amendments, the Supreme Court considers whether the right 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 quotation marks and citations omitted).

173. What level of scrutiny does an unenumerated right draw?

RESPONSE: The level of scrutiny applicable depends on whether the right is fundamental. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

174. Is the Ninth Amendment an ink blot?

RESPONSE: No.

175. What is a fundamental right?

RESPONSE: The Supreme Court has explained that certain rights are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The Supreme Court has described the concept of fundamental rights in various contexts, and while all of the uses suggest an important principle that warrants a high degree of protection I do not understand there to be a single universal meaning. For example, the Court has sometimes called freedom of speech and free exercise of religion fundamental. The Court has said that protections in the Bill of Rights that are “fundamental to the American scheme of justice” (such as the right to trial by jury in a serious criminal case) were made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *See Duncan v. Louisiana*, 391 U.S. 145 (1968). In *McDonald v. City of Chicago*, the plurality said that the Second Amendment’s individual right to keep and bear arms for self defense was applicable to the States because it is “a provision of the Bill of Rights that protects a right that is fundamental from an American perspective.” 561 U.S. 742, 791 (2010). The Court has also referred to voting rights as “fundamental.” *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”). In substantive due process cases, “fundamental rights” are rights protected by the Constitution and “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks and citations omitted).

176. How can we tell what is or is not a fundamental right?

RESPONSE: Please see my response to Question 175.

177. How do we tell a principle of justice so rooted in the traditions and consciences of our people as to be deemed fundamental?

RESPONSE: Please see my response to Question 175. As Justice Gorsuch noted during his confirmation process, the Supreme Court has explored this concept “[i]n a number of opinions over many years.” And, as Justice Gorsuch also noted, insofar as your question implicates issues that may come before me as a judge in the future, it would be inappropriate for me to comment further on matters that could be the subject of future litigation.

178. Does the judicial creation of a fundamental right violate separation of powers principles by codifying judicial policy preferences?

RESPONSE: As a pending judicial nominee and a sitting federal judge, any personal views that I might have regarding fundamental rights have no bearing on the constitutional analysis that I would undertake in any case that implicates these issues. Under binding Supreme Court precedent, the substantive due process clause protects unenumerated rights that are “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 quotation marks and citations omitted).

179. What is the theory of “reverse incorporation”?

RESPONSE: The Supreme Court has not used the phrase “reverse incorporation.” To the best of my knowledge, it may be used to refer to the application of the Fourteenth Amendment’s Equal Protection jurisprudence to the federal government under the Due Process Clause of the Fifth Amendment.

VII. Criminal Procedure

180. What are the goals of our criminal procedure system?

RESPONSE: Our country is founded on the primacy of the Rule of Law, and part of what the Rule of Law entails, as enshrined in our Constitution, is ensuring that our laws are enforced equally and impartially. Every person who has come into my courtroom, whether in a civil or criminal case, has received a fair hearing—and a clear understanding of why they either won or lost their case, based on the law and the facts.

As a judge, I evaluate individual cases and controversies, not systems writ large. And I would take the same approach if confirmed to the Supreme Court. When the Court takes a criminal case, it has to look carefully at what the Constitution or the relevant statute requires and apply those to specific evidence in the case before it. Neutral and fair adjudication of cases, both civil and criminal, is central to the Rule of Law and public confidence in our judicial system. And ultimately, the Rule of Law and confidence in our judicial system make all of our communities safer.

181. What does the word “unreasonable” mean in the Fourth Amendment?

RESPONSE: The Fourth Amendment to the Constitution states that, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported

by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Supreme Court has determined the appropriate inquiry for the Fourth Amendment’s protections is to evaluate: whether “a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Furthermore, the Supreme Court has assessed whether there is a reasonable expectation of privacy in a thing that the government has seized, analogizing to the time of the Founding. *See, e.g., Carpenter v. United States*, 138 S. Ct. 2206, 2213–14 (2018).

Because the scope of what “unreasonable” means in the Fourth Amendment might be the subject of future litigation, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further.

182. When does a defendant on direct review get the benefit of retroactivity?

RESPONSE: The Supreme Court has held that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]” *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

183. When does a defendant on collateral review get the benefit of retroactivity?

RESPONSE: Collateral review is designed to ensure that courts conduct their proceedings in a manner consistent with the constitutional standards then in existence, “not to provide a mechanism for the continuing reexamination of final judgments based on later emerging legal doctrine.” *Sawyer v. Smith*, 497 U.S. 227, 234 (1990). In *Teague v. Lane*, 489 U.S. 288 (1989), the plurality concluded that, when a decision announces a new rule of criminal procedure, the rule is not applicable on collateral review to cases that are already final unless the rule (1) is substantive – that is, it forbids criminal punishment of certain conduct or prohibits a certain category of punishment for a class of defendants, or (2) is a “watershed” rule of criminal procedure that is central to an accurate determination of innocence or guilt. The full Court adopted *Teague*’s retroactivity analysis in *Penry v. Lynaugh*, 492 U.S. 302 (1989). The Supreme Court recently stated that “no new rules of criminal procedure can satisfy the watershed exception.” *Edwards v. Vannoy*, 593 U.S. __ (2021) (slip op. at 15).

184. Regarding the Katz test, should the subjective prong remain?

RESPONSE: In *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court held that the government violated the Fourth Amendment when it recorded the defendant’s conversations in a public phone booth. Justice Harlan’s concurrence announced a “twofold requirement” for the Fourth Amendment’s protections: “first that a person have exhibited an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” *Katz*, 389 U.S. at 361 (Harlan, J., concurring). The Supreme Court has recognized Justice Harlan’s concurrence as establishing the controlling test. *See Smith v. Maryland*, 442 U.S. 735, 739–40 (1979).

Katz is a precedent of the Supreme Court and as such is entitled to respect. It would be inappropriate for me, as a pending judicial nominee and a sitting judge, to opine as to whether its subjective prong is proper.

185. If the subjective prong is taken seriously, can the government eliminate privacy expectations and render the 4th Amendment inapplicable by simply announcing its intention to conduct Orwellian surveillance?

RESPONSE: Please see my response to Question 184.

186. Do non-governmental intrusions undermine our right to be free of governmental intrusions? E.g., a private technology company maintains personal location information voluntarily shared by customers that it analyzes for government purposes such as in *Carpenter*.

RESPONSE: In *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018), the Supreme Court held that an individual had a reasonable expectation of privacy in cell-site location information that the government obtained through his wireless carrier. This question calls for my views on a matter of public policy. It would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to offer an opinion on the matter. My current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties' legal arguments based on the law, including the binding precedents of the Supreme Court and the D.C. Circuit. Should I be confirmed to serve as an Associate Justice on the Supreme Court, I would approach the analysis of any question properly before me in a similar fashion, including by applying the binding precedents of the Supreme Court.

187. For the objective prong of *Katz*, if society is not prepared to recognize an expectation of privacy as "reasonable," does this neuter the *Katz* test or Fourth Amendment protections?

RESPONSE: Please see my response to Question 184.

188. Is the *Katz* test descriptive or normative?

- a. E.g., did it ask, "What privacy expectations do people actually have" or "what expectations should they have"?

RESPONSE: Please see my response to Question 184.

189. Should internet users have a reasonable expectation of privacy in their browsing history?

RESPONSE: The Supreme Court recently addressed reasonable expectations of privacy in *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018), when it held that an individual had a reasonable expectation of privacy in cell-site location information that the government obtained through his wireless carrier. As a sitting federal circuit court judge, my current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties' legal arguments based on the law, including the binding precedents of the Supreme Court and the D.C. Circuit. Should I be confirmed to serve as an Associate Justice on the Supreme Court, I would

approach the analysis of any question properly before me in a similar fashion, including by applying the binding precedents of the Supreme Court.

In addition, because the parameters of a reasonable expectation of privacy could be the subject of future litigation, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further.

190. Is a reasonable expectation of privacy ubiquitous? Are there areas where there is no expectation of privacy?

a. If there are no areas where there is an expectation of privacy, please list those areas.

RESPONSE: The Supreme Court has held there is no expectation of privacy for activities in “open fields,” *Oliver v. United States*, 466 U.S. 170 (1984); for prisoners in their cells, *Hudson v. Palmer*, 468 U.S. 517 (1984); and in phone numbers a person has dialed, *Smith v. Maryland* (1979), 442 U.S. 735, among other circumstances.

191. Is there a distinction between actual search (dispatching law enforcement officers to enter private premises and root through private papers and effects) and an order merely requiring a party to look through its own records and produce specified documents?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on abstract legal issues or on matters that could be the subject of future litigation..

192. Does Fourth Amendment protection turn on whose property was searched/seized since the Amendment reads “individuals to be secure from unreasonable searches of their persons, houses, papers, effects”?

RESPONSE: The Supreme Court has reasoned that “the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” *Katz v. United States*, 389 U.S. 347, 351 (1967). The Supreme Court has further stated that a “‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). In addition, the Supreme Court has stated that “in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable.” *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).

193. Is bailment theory a better way to protect Fourth Amendment papers/effects because bailment does not eliminate protections because the papers/effects are shared with third parties because bailment law can show a property interest?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a

sitting federal judge, to comment further on matters of public policy or questions of constitutional theory in the abstract.

194. Explain the expectation of privacy in *Bond v. United States* (2000)? Was this reasonable?

RESPONSE: In *Bond v. United States*, 529 U.S. 334 (2000), the Supreme Court held that a government agent's physical manipulation of an individual's bag constituted a violation of the individual's Fourth Amendment rights after discussing that a bus passenger "clearly expects that his bag may be handled" but "does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." *Id.* at 338–39. The Supreme Court concluded that this expectation of privacy was "one that society is prepared to recognize as reasonable." *Id.* at 338.

Bond is a precedent of the Supreme Court and as such is entitled to respect. It would be inappropriate for me, as a pending judicial nominee and a sitting judge, to opine as to whether or not its holding is reasonable.

195. Did *Kyllo* strengthen the warrant requirement by negating the use of technology for investigatory purposes?

RESPONSE: In *Kyllo v. United States*, 533 U.S. 27 (2001), the Supreme Court held that a police officer must obtain a warrant to use a thermal-imaging device aimed at a private home from a public street to detect criminal activity.

196. What are the requirements for a warrant?

RESPONSE: The Supreme Court has stated that warrantless searches and seizures "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). To satisfy the warrant requirement, the government must: (1) establish to an impartial judicial officer that there is probable cause to make an arrest, conduct a search, or seize evidence, instrumentalities, or fruits of a crime; and (2) particularly describe in the warrant the person, place, or thing to be searched or seized. *See* Fed. R. Crim. P. 41.

197. What is probable cause?

RESPONSE: The Fourth Amendment requires the establishment of probable cause for a permissible search or seizure. To determine probable cause, a judge must assess the "totality of the circumstances" and "make a practical, common-sense decision whether . . . there is a fair probability" to believe that a person committed a crime or that "contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

198. What is the totality of circumstances for determining probable cause?

RESPONSE: The Supreme Court recognized that probable cause is "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Courts may not

view each fact “in isolation, rather than as a factor in the totality of the circumstances.” *Maryland v. Pringle*, 540 U.S. 366, 372 n.2 (2003).

199. How are claims of excessive force evaluated?

RESPONSE: The Supreme Court has held that the Fourth Amendment prohibits officers from using excessive force when making an arrest, investigatory stop, or seizure. *Graham v. Connor*, 490 U.S. 386 (1989). A claim of excessive force under the Fourth Amendment turns on whether the force applied was “objectively reasonable.” *Id.* at 397. That analysis requires reviewing “the facts and circumstances of [a] particular case” and balancing the individual’s Fourth Amendment interests against the relevant government interests. *Id.* at 396. A court must weigh that question “from the perspective of a reasonable officer on the scene,” including “what the officer knew at the” moment he used force. *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015). Relevant factors include, but are not limited to: “the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff’s injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.” *Id.*

200. Is reasonableness of force determined without regard to whether officers violated the Fourth Amendment before applying the force?

RESPONSE: Please see my response to Question 199.

201. Does this protect police officers?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters of policy or abstract legal issues.

202. Is the awareness of the suspect required for the hot pursuit doctrine to apply?

RESPONSE: In *Lange v. California*, 141 S. Ct. 2111 (2021), the Supreme Court held that the pursuit of a fleeing misdemeanor suspect did not categorically qualify as an exigent circumstance allowing warrantless entry to a suspect’s home and that the applicability of this exception is “case-specific” and turns on “the facts on the ground.” Because particular questions around the “hot pursuit” doctrine could be the subject of future litigation, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further.

203. How do courts determine a suspect’s subjective mindset?

RESPONSE: As a judicial officer, it is my duty to adjudicate individual claims that are filed by persons who are authorized to litigate such cases or controversies in federal court. When I have jurisdiction to do so, I resolve properly filed legal disputes concerning the lawfulness of conduct based on the arguments that the parties make, the established facts of the particular case, and the applicable law, giving due weight to Supreme Court precedent. Whether and individual had a subjective expectation of privacy may be the subject of future litigation, and as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me comment further.

204. Why are pervasively regulated industries in the special needs doctrine permitted to be searched without a warrant but similar industries still require a warrant before being that searched?

RESPONSE: The Supreme Court has recognized that a search unsupported by a warrant or probable cause may be reasonable when “special needs” make the warrant and probable cause requirements impractical. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). In sustaining special needs searches, the Court “employed a balancing test that weighed the intrusion on the individual's interest in privacy against the ‘special needs’ that supported the program.” *Id.* at 77–78. Because the scope of the application of the “special needs doctrine” could be the subject of future litigation, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further.

205. Was the Bill of Rights explicit as to remedies for violations of the Fourth Amendment?

RESPONSE: The Supreme Court has addressed appropriate remedies for violations of the Fourth Amendment in a number of cases, including *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Because the scope of the remedies for Fourth Amendment violations could be the subject of future litigation, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further.

206. If no, should Congress or judges provide the remedy?

RESPONSE: Please see my response to Question 205.

207. What is the constitutional basis for the “Exclusionary Rule”?

RESPONSE: As the Supreme Court recently explained, the exclusionary rule was created by the Supreme Court as “a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation.” *Davis v. United States*, 564 U.S. 229, 231–32 (2011). The Court has previously stated that “the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments.” *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

208. Does it promote judicial integrity to allow evidence in that allows the justice system to reach a true verdict?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters of policy or abstract legal issues.

209. Doesn't society benefit when wrong-doers are convicted for their wrong-doing?

RESPONSE: The Rule of Law is essential to a functioning society, and that includes holding people accountable when they violate our laws. It also includes ensuring that our laws are enforced equally and impartially. Neutral and fair adjudication of cases is central to the Rule of Law and public confidence in our judicial system. And ultimately, the Rule of Law and confidence in our judicial system make all of our communities safer.

210. Does the exclusionary rule deter police misconduct?

RESPONSE: As the Supreme Court recently explained, the exclusionary rule was created by the Supreme Court as “a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation.” *Davis v. United States*, 564 U.S. 229, 231–32 (2011).

211. How does standing apply to Fourth Amendment violations?

RESPONSE: The Supreme Court has held that the test for capacity to claim the protection of the Fourth Amendment is “whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.” *Rakas v. Illinois*, 439 U.S. 128 (1978).

212. Does attenuation allow introduction of evidence that otherwise would be fruit of the poisonous tree?

RESPONSE: Under the attenuation doctrine, “[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that ‘the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.’” *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016).

213. How does the attenuation doctrine work?

RESPONSE: In *Brown v. Illinois*, 422 U.S. 590 (1975), the Supreme Court identified three factors to consider in determining whether the causal chain is sufficiently attenuated: (1) the “temporal proximity” between the unconstitutional conduct and the discovery of the evidence, (2) the “presence of intervening circumstances,” and (3) the “purpose and flagrancy of the official misconduct.” *Id.* at 603–04.

214. What is the test for the independent source doctrine?

RESPONSE: The Supreme Court has held that evidence is admissible, despite a Fourth Amendment violation, when it is discovered through a source independent of the illegal activity. *Murray v. United States*, 487 U.S. 533 (1988). In *Murray*, the Court states that the “ultimate question . . . is whether the” independent source—a search pursuant to warrant—“was in fact a genuinely independent source of the information and tangible evidence at issue.” *Id.* at 542.

215. What is the test for the inevitable discovery doctrine?

RESPONSE: The Supreme Court has held that evidence is admissible, despite a Fourth Amendment violation, when it would inevitably have been discovered through independent, lawful means. *Nix v. Williams*, 467 U.S. 431 (1984).

216. What are possible alternatives to the exclusionary rule?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters of policy or abstract legal issues.

217. Does *Kastigar* immunity bar the government from all prosecutions?

RESPONSE: In *Kastigar v. United States*, 406 U.S. 441 (1972), the Supreme Court held that a federal statute’s “explicit proscription of the use in any criminal case of ‘testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)’” was coextensive with the Fifth Amendment’s privilege against self-incrimination. *Id.* at 453. The grant of such immunity, therefore, was “sufficient to compel testimony over a claim of the privilege.” *Id.* Because the scope of the Fifth Amendment’s privilege against self-incrimination could be the subject of future litigation, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further.

218. When does *Miranda* apply?

RESPONSE: In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court determined that “without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.” *Id.* at 467. The Court therefore held that “to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.” *Id.*

As a sitting federal circuit court judge, my current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law, including the binding precedents of the Supreme Court and the D.C. Circuit. Should I be confirmed to serve as an Associate Justice on the Supreme Court, I would approach the analysis of any question properly before me in a similar fashion, including by applying the binding precedents of the Supreme Court. Additionally, because the scope and applicability of *Miranda* warnings are the subject of ongoing litigation, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further.

219. Under *Miranda*, what is custody?

RESPONSE: The Supreme Court has stated that, to determine whether a defendant is in “custody” for purposes of *Miranda*, a court should assess whether, under the totality of the circumstances, “a reasonable person” in the suspect’s position would “have felt he or she was not at liberty to terminate the interrogation and leave.” *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

220. Under *Miranda*, what is an interrogation?

RESPONSE: The Supreme Court has stated that “the term ‘interrogation’ under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other

than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

221. What are alternatives to the Miranda rule?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters of policy or abstract legal issues.

222. What is the Ker-Frisbie doctrine?

RESPONSE: In *Frisbie v. Collins*, 342 U.S. 519 (1952), the Supreme Court reiterated its support for the rule announced in *Ker v. Illinois*, 119 U.S. 436 (1886), that “the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court’s jurisdiction by reason of a forcible abduction.” *Frisbie*, 342 U.S. at 522 (internal quotation marks omitted).

223. Is the role of the Supreme Court to only decide cases and controversies that come before it or to ensure the government behaves lawfully?

RESPONSE: “Article III of the Constitution limits the exercise of the judicial power to ‘Cases’ and ‘Controversies.’” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted). A federal court may entertain a suit only by a plaintiff who has suffered a concrete “injury in fact,” and the court may grant relief only to remedy “the inadequacy that produced [the plaintiff’s] injury.” *Gill v. Whitford*, 138 S. Ct. 1916, 1929–30 (2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)).

224. What is the Payton rule in Fourth Amendment jurisprudence?

RESPONSE: In *Payton v. New York*, 445 U.S. 573 (1980), the Supreme Court held that the Fourth and Fourteenth Amendments “prohibit[s] the police from making a warrantless and nonconsensual entry into a suspect’s home in order to make a routine felony arrest.” *Id.* at 576.

225. Can a Terry stop be used to search for evidence?

RESPONSE: In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that police may, based on a reasonable suspicion, stop and briefly detain a person to investigate possibly criminal behavior even though there is not probable cause to make an arrest. The Court also held that an officer may make a protective frisk or search for weapons where he has reason to believe that the person is armed and dangerous.

226. Do officers need probable cause and a warrant to search a phone prior to arrest?

RESPONSE: The Supreme Court has addressed whether a cell phone could be searched when seized incident to arrest, holding that in such circumstances “a warrant is generally required before such a search.” *Riley v. California*, 573 U.S. 373, 401 (2014). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be

inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on abstract legal issues or hypotheticals.

227. Are there legitimate government interests to prevent remote wiping of data?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on abstract legal or policy issues.

VIII. Regarding academic publications, articles, public statements, and editorial pieces.

228. Can you walk me through your writing process?

RESPONSE: I draft my opinions consistent with my judicial methodology. The specific drafting process will vary somewhat from case-to-case, depending on the circumstances. In general, after reviewing all of the appropriate inputs for judicial decision making (including the parties' briefs, any amicus arguments, the record, and the oral arguments), and after discussing the matter with my colleagues in conference, I generally task the assigned law clerk to draft a detailed outline of the opinion. After receiving and reviewing that draft, I return to the parties' briefing, any bench memos, and any argument transcript. At this and other points in this process, I may find it necessary to conduct further legal research in the caselaw or relevant treatises. After this, I revise the outline of the opinion with the assistance of my law clerks. Once I am satisfied that the outline captures the structure and order of the analysis, with the assistance of my law clerks I draft the opinion. Once I am satisfied with the substance and style of the opinion, my law clerks assist me with proofreading and cite-checking the opinion.

As a judge on the D.C. Circuit, my writing process also included circulating a draft of the opinion to the other members of the panel and discussing any responses. After that, the opinion would also be circulated to the full court before being released.

229. Have you shared your personal views in any of these writings?

RESPONSE: Consistent with my methodology, I proceed with every case from a position of neutrality by first setting aside any preconceived notions and personal views regarding the parties and matters at issue in any case presented to me. Doing so at the outset of a case allows me to observe the constraints on my judicial authority and ensure that I consider only those inputs that are relevant to deciding a particular case or controversy. As a result, I have never considered or relied upon my own personal views in any case.

230. If you have shared personal views, do you use this same philosophy to review cases and publish opinions?

RESPONSE: Under the Code of Conduct for United States Judges and established standards of judicial ethics, a judge's own personal views regarding a matter must not have any bearing on her interpretation and application of the law. I abide by the Code of Conduct for United States Judges when I review cases and publish opinions. Furthermore, as I noted at the hearing, I have a methodology to ensure that I am ruling impartially that I have employed in my almost decade on the bench. I first ensure that I am proceeding from a position of neutrality by setting aside any

personal views and clearing my mind of any preconceived notions about how the case might come out.

231. Do you believe that Supreme Court Justices should share their personal views to the public?

RESPONSE: Under the Code of Conduct for United States Judges and established standards of judicial ethics, a judge's own personal views regarding a matter must not have any bearing on her interpretation and application of the law. I share Justice Barrett's concern about giving my personal views because I would not want any litigant to have the misimpression that my personal views would have any effect on my legal rulings.

232. If no, do you think it was wrong for Justice Breyer to make various public statements stating that the issue of capital punishment should be revisited?

RESPONSE: It would not be appropriate for me to comment on the conduct or statements of other Justices.

233. As a federal judge one of your main roles is to write and publish court opinions. Can describe your writing process when it comes to drafting court opinions?

RESPONSE: I draft my opinions consistent with my judicial methodology. The specific drafting process will vary somewhat from case-to-case, depending on the circumstances. I will generally begin drafting after argument has been held, if argument was indeed held in the case. After that, I will return to the parties' briefing, any bench memos, and any argument transcript. At this and other points in this process, I may find it necessary to conduct further legal research in the caselaw or relevant treatises. After this, I will draft an outline of the opinion with the assistance of my law clerks. Once I am satisfied that the outline captures the structure and order of the analysis, with the assistance of my law clerks I will proceed to draft the opinion. Once I am satisfied with the substance and style of the opinion, my law clerks assist me with proofreading and cite-checking the opinion.

As a judge on the D.C. Circuit, my writing process also included circulating a draft of the opinion to the other members of the panel and discussing any responses. After that, the opinion would also be circulated to the full court before being released.

234. You wrote various opinions as a District Court Judge. How does your process for writing the District and Circuit Court Opinions differ?

RESPONSE: Please see my response to Question 233.

IX. Professional Interactions

235. Can you provide an instance when you had to confront another judge or colleague to resolve a predicament?

RESPONSE: I have the upmost respect for my colleagues and value their thoughts in collective decision making. For example, during the COVID-19 pandemic my colleagues and I worked together to determine how best to hear cases in wake of court closures.

X. Transparency

236. Do you believe in transparency in the court? Why or why not?

RESPONSE: I believe strongly in the value of public confidence in the judiciary, and I believe that public confidence is enhanced when the public understands the reasons that a judge has rendered his or her ruling. For that reason, as a judge, I have endeavored to explain the arguments that I have considered, the facts that I have reviewed, and my legal reasoning.

237. Do you believe that federal judges and Supreme Court Justices should be able to own and trade stock?

RESPONSE: I am not aware of any law that prohibits federal judges or Supreme Court Justices, from holding individual stocks. In general, 28 U.S.C. § 455 prohibits judges from hearing cases that involve a party in which they, their spouses or their minor children have a legal or equitable interest. Being a federal judge is a position of public trust and I recognize how important it is for judges to adhere to the highest ethical standards, and I have done so for the decade that I have served on the federal bench. It would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to opine further on a policy question.

238. Do you commit to recusing yourself from any cases that may have connections to the stocks you own?

RESPONSE: I have served as a federal judge for almost a decade, and I have a demonstrated record of faithfully applying the law of recusal during that time. As Justice Barrett explained, the question of recusal is a threshold question of law that must be addressed in the context of the facts of each case. Justice Ginsburg described the process that Supreme Court Justices follow in deciding whether to recuse, which involves reading the statute, reviewing precedents, and consulting with colleagues. As I explained at the hearing, I commit to following the recusal process and faithfully applying the law of recusal if confirmed. Additionally, as I committed in my Senate Judiciary Questionnaire, I would seek guidance from judicial ethics officials to structure my limited financial investments to minimize the potential for conflicts.

XI. Safe Injection Sites

239. Do you believe that Safe Injection Facilities like the one in New York are shielded from legal action?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that are the subject of ongoing litigation or on matters that could be the subject of future litigation.

240. Do you think that these sites violate Section 856 of the Controlled Substance Act, 21 U.S.C. 856?

RESPONSE: Please see my response to Question 239.

241. If a case challenging the legality of injection sites comes before you, what precedent will you use to review and rule on the case?

RESPONSE: Please see my response to Question 239.

242. As you are probably aware, the Supreme Court is currently hearing oral arguments of two cases: Ruan v. United States and Kahn v. United States. Both doctors were convicted of unlawful drug distribution. Mr. Ruan and Kahn both petitioned for a writ of certiorari to the Supreme Court, which were granted.

- a. What factors will you take into consideration when reviewing petitions for a writ of certiorari?

RESPONSE: Supreme Court Rule 10 provides that “certiorari will be granted only for compelling reasons.” Factors that might suggest certiorari is warranted include whether there is a conflict amongst the federal courts of appeals, and whether the case involves an important federal question. *See id.* In determining whether to grant certiorari, I would carefully consider Rule 10, the parties’ briefings, the views of any amici, the relevant law, and the views of my colleagues.

- b. Would you review previously granted writs of certiorari when evaluating new cert petitions?

RESPONSE: Please see my response to Question 242a.

XII. Precedent

243. Do you believe that Supreme Court can overrule a longstanding Supreme Court decision?

RESPONSE: *Stare decisis* is a bedrock legal principle that ensures consistency and impartiality of judgments. The Court has articulated factors to consider in determining whether to overrule a prior decision, including the quality of the decision’s reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to “rob[]” the decision “of significant application or justification.” *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Fed. of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018). The application of these factors is case specific. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract on how the factors should apply. If I am confirmed, and if I am asked to revisit a particular precedent in the context of a specific case, I would evaluate the parties’ arguments, the relevant law, and the factual record, and would consider the views of my colleagues.

244. If confirmed as a Justice, what process would you take when reviewing on whether to overturn a previous decision by the Supreme Court?

RESPONSE: Please see my response to Question 243.

245. Do you believe that *Roe v. Wade* was rightfully decided?

RESPONSE: As I explained at the hearing, *Roe v. Wade* is a precedent of the Supreme Court entitled to respect under *stare decisis* principles. As a sitting federal judge, all of the Supreme Court's pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by prior nominees, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court's binding precedents.

246. What level of consideration should be given to precedent when considering an abortion case before the Supreme Court?

RESPONSE: All Supreme Court decisions are precedential and entitled to respect under *stare decisis* principles, and in revisiting any precedent, the Court applies the factors it has articulated for determining whether to overrule a prior decision. Those factors include the quality of the decision's reasoning; whether and to what extent the decision has been relied upon; whether its rule has proven unworkable; whether legal developments have left the rule behind; and whether facts underlying the decision have changed as to as to "rob[]" the decision "of significant application or justification." *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *see also, e.g., Janus v. American Fed. of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018).

247. Do you use the "open minded" philosophy when reviewing abortion cases?

RESPONSE: My approach to cases is the same regardless of the subject matter of the case.

248. COVID-19 has and continues to impact health care delivery across the country. Like many, I've advocated for making a majority of the temporary telehealth flexibilities and waivers.

The Supreme Court ruled 6 to 3 in January 2021 *FDA v. American College of Obstetricians and Gynecologists, et al.* that women who want to be prescribed abortion pills must complete an in-person consultation with a physician while the Fourth Circuit reviewed the case.

However, in December 2021, the Biden Administration and the Food and Drug Administration (FDA) announced plans to permanently remove the long-standing in-person dispensing requirement of abortion pills that had been temporarily waived due to the pandemic.

- a. What procedure should agencies have to follow when rescinding or changing a rule disseminated by a previous administration?

RESPONSE: Under section 1 of the Administrative Procedure Act ("APA"), an agency is generally required to use the same processes to repeal a rule as it used to promulgate the rule. *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015). Thus, if the agency issued the rule after engaging in notice and comment rulemaking pursuant to section 553 of the APA, it must ordinarily go through the notice and comment process in order to repeal the rule. However, if the rule in question did not require notice-and-

comment rulemaking in the first place (if, for instance, it was an interpretive rule), then the agency need not use the notice-and-comment process to repeal the rule. *See id.* at 102 (holding that courts may not impose any additional procedural requirements on agencies beyond those set forth in the APA); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (same).

The Supreme Court has further emphasized that, when an agency changes its policy position on a matter, the agency must provide a “reasoned explanation for its action[,]” “display awareness that it is changing position[,]” and “show that there are good reasons for the new policy.” *FCC v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that are the subject of ongoing litigation or on matters that could be the subject of future litigation.

b. Do you believe that dispensing abortion pills like mifepristone impose an undue burden on women?

RESPONSE: The Supreme Court has recognized a right to abortion subject to limitations as articulated in *Roe* and *Casey*. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on matters that could be the subject of future litigation.

c. Do you believe that a doctor or pharmacy that dispenses abortion pills via online consultations rather than in person can be held legally liable for any harm?

RESPONSE: Please see my response to Question 248b.

249. Two of the primary roles of a Supreme Court Justice are to uphold the Constitution and interpret the law as it has been written. What precedent would you use to review a case that challenges dispensing of abortion pills without medical consultation?

RESPONSE: Please see my response to Question 248b.

250. In *McCullen v. Coakley*, the Supreme Court unanimously struck down as unconstitutional an amended version of the Massachusetts law that you had supported. In that case the court held that the amended Massachusetts law burdened pro-life advocates’ free speech rights substantially more than was necessary to further the government’s interest in maintaining public safety. Do buffer zone laws burden pro-life speech more than permitted?

RESPONSE: It would be inappropriate for me to opine on buffer zone laws generally, as they vary location to location and some laws are the subject of active litigation. In *McCullen v. Coakley*, 573 U.S. 464 (2014), the Supreme Court unanimously invalidated a Massachusetts law that generally banned speakers—including those engaging in peaceful and consensual speech—from public sidewalks and walkways within 35 feet of abortion clinics. A five-justice majority held that the law was content-neutral, but failed because it was not narrowly tailored, given other

options for protecting clinic access without criminalizing peaceful use of the public sidewalks for speech. In other words, the majority concluded that the law impermissibly burdened speech in the vicinity, without regard to the speech's content or viewpoint.

251. Isn't allowing pro-life protestors the ability to engage in conversation and leafleting on public streets and sidewalks, exactly the transmission of ideas the First Amendment is meant to protect?

RESPONSE: It would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on my personal views, if any, about this issue. As a judge, it is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law.

252. Are enumerated First Amendment free speech rights greater than unenumerated abortion rights?

RESPONSE: The Supreme Court has held that the Constitution protects enumerated rights, including First Amendment rights, and certain unenumerated rights, including a right to abortion subject to limitations as articulated in *Roe* and *Casey*. See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). It would be inappropriate for me, as a judicial nominee and a sitting federal judge, to offer my views about this abstract legal question. As a judge, it is my duty to adjudicate individualized cases and controversies based on the facts of a particular case and the applicable law. Related questions are the focus of ongoing litigation, and may well come before me in the future.

XIV. Intellectual Property

253. Under present patent law, in your opinion do you think that inventorship and ownership rights should be extended to a non-human artificial intelligence?

RESPONSE: There are important and novel interpretive questions regarding whether non-human artificial intelligence may qualify as an "inventor" within the meaning of the Patent Act. The U.S. Patent and Trademark Office has taken the position in recent litigation that non-human artificial intelligence is not eligible for protection as an inventor. See, e.g., *Thaler v. Hirshfeld*, No. 20-cv-903, 2021 WL 3934803 (E.D. Va. Sept. 2, 2021), *appeal docketed*, No. 21-2347 (Fed. Cir.). Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on ongoing litigation. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

254. Under present copyright law, in your opinion do you think that a non-human artificial intelligence system should be granted authorship and ownership status?

RESPONSE: There are important and novel interpretive questions regarding whether non-human artificial intelligence may qualify as an "author" within the meaning of the Copyright Act. The U.S. Copyright Office has recently taken the position that non-human artificial intelligence is not eligible for protection as an author. See Letter from U.S. Copyright Office

Review Board to Ryan Abbott (Feb. 14, 2022) (affirming the Copyright Office’s interpretation that human authorship is required). That position is the subject of ongoing dispute. *See id.* at 4–7. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

255. Should materials created by a non-human artificial intelligence system be eligible for copyright protection?

RESPONSE: This question calls for my views on matters of public policy entrusted to Congress. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further given ongoing disputes over this legal question.

256. In light of artificial intelligence-related inventions, in your opinion, is there any need for new forms of intellectual property protections – e.g., sui generis rights for datasets or databases used to train artificial intelligence or for trained artificial intelligence models?

a. As part of your answer, please explain the current protections afforded under various types of intellectual property law, and why they are or are not sufficient?

RESPONSE: Intellectual property protections for artificial intelligence programs and models, and for the databases and datasets used to train them, implicate cutting-edge questions of patent, copyright, and trade secrets law. As a general matter, models and training processes may be eligible for patent protection if they are determined to meet the requirements of the Patent Act, *see* 35 U.S.C. §§ 101–03, and databases and datasets may be eligible for copyright protection as compilations under the Copyright Act, *see* 17 U.S.C. § 103. Importantly, these matters are subject to ongoing dispute. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further.

257. To what extent can or should any of these legal protections be supported by technical measures?

RESPONSE: The Digital Millennium Copyright Act provides for use of technical measures to control access to protected works and prohibits the circumvention of such measures. *See* 17 U.S.C. § 1201. A copyright’s owner may choose to employ such measures, and whether to expand their use and application is a policy question for Congress. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on these policy questions.

258. In your opinion, what factors should be taken into account when determining whether technical measures used to support certain legal rights potentially impinge upon other rights?

Incentivizing U.S. innovation is vital to the prosperity of our country and specifically our economic growth. Central to this is securing intellectual property, via patents, trademarks, copyrights, and the like.

RESPONSE: The Digital Millennium Copyright Act, which provides for use of technical measures to control access to protected works, also provides for certain limits on those technical control measures in order to protect other rights. For instance, the statute specifies that it does not affect rights to fair use, free speech, and a free press, and further provides certain exemptions from its technical measure provisions for nonprofit libraries, archives, and educational institutions. 17 U.S.C. § 1201(c), (d). To the extent this question is asking about other factors beyond those discussed in the relevant statutes and case law, it calls for my views on matters of public policy entrusted to Congress. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

259. In the case of patents, in your opinion, how do you foresee ensuring certainty and predictability for patent holders in light of current patent eligibility?

RESPONSE: Patents play an important role in ensuring technological progress by pairing public disclosure of important innovations with protections for inventors' incentives to innovate. The structure of our patent system is determined by Congress pursuant to its authority under the Constitution's Patent and Copyright Clause. U.S. Const. art. I, § 8, cl. 8. The courts must adjudicate disputes regarding that statutory structure, and in doing so must give effect to Congress's enactments in order to provide clarity and predictability for all parties. Although it would be inappropriate to comment on the current state of the Supreme Court's precedents in this area, I would note that the Federal Circuit and innovators have not hesitated to ask for clarification when they need it. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

260. What are the defined judicial exceptions to patentable eligibility?

It's imperative to protect U.S. intellectual property from theft by other countries and maintain strong domestic patent rights.

RESPONSE: The Patent Act outlines four categories of copyrightable material: processes; machines; manufactures; and compositions of matter. 35 U.S.C. § 101. In interpreting the statute, the Supreme Court has identified three judicial exceptions, which preclude patentability for (1) abstract ideas, (2) laws of nature, and (3) natural phenomena. *See Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 71 (2012). Moreover, under the *Mayo-Alice* framework, even an invention implicating these exceptions may in certain circumstances be subject to patent protection where it constitutes a "patent-eligible application[]" of an otherwise unpatentable concept. *Alice*, 573 U.S. at 217 (quoting *Mayo*, 566 U.S. at 78).

261. What are your thoughts regarding anti-suit injunction, especially its potential to negatively impact the litigation of patent rights domestically?

RESPONSE: I am aware of a recent increase in the use of anti-suit injunctions in the context of standard-essential patent enforcement. I also understand that Congress is considering legislation on the topic. Because this is a policy issue entrusted to Congress and subject to an ongoing policymaking process, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to take a position. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

262. In your view, are copyrights a form of property to which the Takings Clause applies?

RESPONSE: The Supreme Court has said that “[c]opyrights are a form of property.” *Allen v. Cooper*, 140 S. Ct. 994, 1004 (2020); *cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (holding that trade secrets are property subject to the Takings Clause). The Takings Clause in turn prohibits appropriating “private property . . . for public use, without just compensation.” U.S. Const. amend. V. The precise operation of the Takings Clause with respect to copyrights is subject to ongoing litigation. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further.

263. Are patents a form of property to which the Takings Clause applies?

RESPONSE: The Supreme Court has expressed “no doubt” that the grant of a patent confers upon the patentee a property right subject to the Takings Clause of the Constitution. *See James v. Campbell*, 104 U.S. 356, 357–58 (1881). The Supreme Court recently considered constitutional challenges to inter partes review (IPR) proceedings, which permit the United States Patent and Trademark Office (PTO) to reconsider an already-issued patent claim. *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 138 S. Ct. 1365 (2018). The Court held that IPR proceedings do not violate Article III or the Seventh Amendment, but warned that the decision “should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.” *Id.* at 1379. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

264. Does the Constitution’s recognition of Congress’s authority to grant these exclusive rights to Authors and Inventors under Article 1, Section 8, instead of under the Bill of Rights, merit different treatment of this right from other enumerated rights? Why or why not?

Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the appropriate use of digital content and technologies.

RESPONSE: Article I, section 8, clause 8 of the Constitution gives Congress authority to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” I am unaware of any precedent indicating that this constitutional provision creates a freestanding individual right. Instead, it creates an enumerated power for Congress to pass laws under which certain rights may be extended. In this way, the rights contemplated by this provision—rights conferred by

Congress—are different from those protections against the government enumerated in the Bill of Rights

265. What experience do you have with copyright law?

RESPONSE: I presided over two lawsuits implicating copyright law during my time as a district judge. First, in *Alliance of Artists & Recording Cos. v. General Motors Co. (Alliance of Artists I)*, 162 F. Supp. 3d 8 (D.D.C. 2016), *Alliance of Artists & Recording Cos. v. General Motors Co. (Alliance of Artists II)*, 306 F. Supp. 3d 413 (D.D.C. 2018), and *Alliance of Artists & Recording Cos. v. General Motors Co. (Alliance of Artists III)*, 306 F. Supp. 3d 422 (D.D.C. 2018), I considered various motions in a suit claiming that certain audio recording devices installed in consumer automobiles constituted prohibited “digital audio recording devices” within the meaning of the Audio Home Recording Act of 1992, *see* 17 U.S.C. §§ 1001 *et seq.* After carefully reviewing the text, context, structure, and history of the provision, I ultimately held that the disputed devices did not fall within the statute’s scope and were instead material objects that contained data and information not incidental to music recorded on them—the critical question under the statute. My decision was affirmed on its merits. *See Alliance of Artist and Recording Cos. v. DENSO Int’l Am., Inc.*, 947 F.3d 849 (D.C. Cir. 2020).

Second, in *Buchanan v. Sony Music Entertainment*, No. 18-cv-3028, 2020 WL 2735592 (D.D.C. May 26, 2020), I considered claims of infringement against record companies and a movie studio. In that case, I carefully applied the statute and granted the defendants’ motions to dismiss for failure to state a claim. *Id.* at *1. My decision was affirmed on its merits. *See Buchanan v. Sony Music Entertainment Inc.*, 836 F. App’x 16 (D.C. Cir. 2021) (mem.).

266. How many cases have you heard where copyright law was an issue in the case? What was the outcome in these cases?

RESPONSE: Please see my response to Question 265.

267. Could you explain when a state action would be subject to express preemption under Section 301(a) of the Copyright Act and when it may be subject to review under conflict preemption?

RESPONSE: Section 301(a) of the Copyright Act provides that “legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified” in the Copyright Act “are governed exclusively” by the Act. 17 U.S.C. § 301(a). I presided over one case involving section 301 preemption in my time as a district judge. *See Buchanan v. Sony Music Entertainment*, No. 18-cv-3028, 2020 WL 2735592, at *8–9 (D.D.C. May 26, 2020). As a result of section 301(a)’s express preemption, some state common law or statutory rights that once paralleled the federal copyright scheme were preempted. Whether any particular state law claim is preempted by federal copyright law turns on how close the claim is to the protections afforded by federal copyright law. The role of conflict preemption, under which state law is preempted where it is “physical[ly] impossible” to comply with both state and federal requirements, *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (citation omitted), is less settled. Some courts of appeals have held that conflict preemption remains in effect under section 301. *See, e.g., In re Jackson*, 972 F.3d 25, 34 n.6 (2d Cir. 2020). But because the precise

role of that doctrine has not been addressed by the Supreme Court and is subject to debate, *see, e.g.,* Guy A. Rub, *A Less-Formalistic Copyright Preemption*, 24 J. INTELL. PROP. L. 329, 349–55 (2017), it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to take a position. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

268. Under what circumstances do courts find that copyright law preempts state regulatory schemes?

The American Law Institute (ALI), of which you are an elected council member, has undertaken efforts to develop a Restatement of Copyright law. I have expressed concern that these

Restatements have traditionally focused on areas of common law because judicial rulings across different jurisdictions may vary and ALI's interpretations are predisposed to assembly, to analysis, and summaries. While I agree that copyright law must be modernized to be more responsive to current technologies, copyright markets, and business practices, such reforms should take place in a transparent manner that accounts for different perspectives – not behind closed doors with limited public input.

RESPONSE: Please see my response to Question 267. Additionally, although the Supreme Court has not endorsed a specific test for preemption under section 301(a), lower courts have adopted a multi-step test that looks to whether a given state-law claim falls within the subject matter of the Copyright Act and whether the right asserted is essentially the same as that afforded by a federal copyright infringement or instead includes additional elements. *See, e.g., Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 893 (2d Cir. 2011); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003 (9th Cir. 2001).

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269. What weight have you placed on Restatements in your career?

RESPONSE: Unlike precedent, Restatements do not bind the courts. In certain circumstances they can, however, serve as legitimate inputs informing a court's analysis. For example, a Restatement can be a "a useful starting point for defining . . . general common law." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 542 (1999); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 755 (1998) (same) (citing Restatement (Second) of Agency (1957)). In my judicial decisions, I have at various points cited to Restatements, often for general propositions and often accompanied by citations to relevant caselaw. *See, e.g., Smith v. United States*, 121 F. Supp. 3d 112, 124 (D.D.C. 2015) (citing Restatement (Second) of Torts § 46 (1965)), *aff'd*, 843 F.3d 509

(D.C. Cir. 2016). Beyond that, the weight I have afforded a given proposition from a given Restatement as applied to a specific legal analysis has varied based on the relevant context. This is consistent with the Supreme Court's use of Restatements. *See, e.g., Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211, 213–14, 217 (2002) (citing 3 Restatement (Second) of Contracts § 359 (1979); Restatement of Restitution (1936)).

270. Do you believe that federal laws that preempt state laws require restating in the same way that common laws do?

Statutory damages have become increasingly important in cases of online copyright infringement, where it may be difficult to determine the scope of harm or actual damages.

RESPONSE: A judge's task when considering a challenge based on a law enacted by Congress is to give effect to the words of the statute. The American Law Institute's Restatements of Law are neither authoritative nor controlling, even in areas of pure common law, and reliance on their guidance has been subject to academic debate. *See* Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205 (2007). Federal statutes generally do not require restating.

271. What factors do you think are most important when calculating statutory damages?

RESPONSE: The Copyright Act provides for statutory damages as an alternative award to actual damages for violations of registered copyrights. 17 U.S.C. §§ 412, 504(a). Generally, each instance of infringement is a separate violation under the statute and may be awarded between \$750 and \$30,000 per instance. *Id.* § 504(c)(1). Moreover, where a plaintiff sustains its burden of proving that infringement was willful, damages may increase to up to \$150,000, and where an infringer sustains its burden in proving that its infringement was innocent, damages may be reduced to \$200 per infringement. *Id.* § 504(c)(2). An important consideration in calculating statutory damages within the statutory ranges, embodied in the statute itself, is the culpability of the infringement. The more willful an infringement, the greater the damages available.

272. Should awards be calibrated to some type of actual harm?

RESPONSE: The Supreme Court has observed that section 504's text reflects Congress's intent "to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits." *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935). Indeed, statutory damages may be appropriate "[e]ven for uninjurious and unprofitable invasions of copyright" where "the court . . . deems it just [to] impose a liability within statutory limits to sanction and vindicate the statutory policy." *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 233 (1952). It would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to offer an opinion on matters of public policy, including whether the statute should be modified to limit statutory damages to be calibrated to actual harm. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

273. Should deterrence be a factor in the courts calculation?

RESPONSE: Some courts consider deterrence as a factor in calculating statutory damages under the Copyright Act. *See, e.g., Broad. Music, Inc. v. Evie's Tavern Ellenton, Inc.*, 772 F.3d 1254, 1261 (11th Cir. 2014). But this approach appears not to have been addressed by the Supreme Court and is the subject of academic debate. *See* Oren Bracha & Talha Syed, *The Wrongs of Copyright's Statutory Damages*, 98 TEX. L. REV. 1219, 1235–49, 1250–52 (2020). Because the propriety of deterrence as a factor in calculating statutory damages for copyright infringement is a matter of ongoing litigation, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to take a position. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues

274. Should there be a punitive calculation, especially for willful infringement?

RESPONSE: Section 504 contemplates increased penalties for willful, rather than negligent or innocent, infringement. And some courts have described statutory damages as serving “both compensatory and punitive purposes.” *See, e.g., L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998). As with deterrence, however, this rationale for calculating damages has never been addressed by the Supreme Court and is subject to academic debate. *See* Oren Bracha & Talha Syed, *The Wrongs of Copyright's Statutory Damages*, 98 TEX. L. REV. 1219, 1233–35 (2020). Because the propriety of punitive effect as a factor in calculating statutory damages for copyright infringement is a matter of ongoing litigation, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to take a position. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

275. Should judges be permitted to waive statutory damages in certain cases?

The fair use doctrine has been described as “a fundamental linchpin of the U.S. copyright system.”

RESPONSE: Section 504 grants a court discretion to “reduce the award of statutory damages to a sum of not less than \$200.” 17 U.S.C. § 504(c)(2). Because this question calls for my position on an issue of statutory interpretation—whether a district court could, in some circumstances, waive statutory damages completely—that has not been addressed by the Supreme Court, it would be inappropriate for me to take a position. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

276. Could you explain why it is so important and outline the four fair use factors?

RESPONSE: The Supreme Court has explained that “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts’” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. Constitution art. 1, § 8, cl. 8). “The fair use doctrine thus ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’” *Id.* at 577 (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)). The four factors outlined in the statutory provision codifying the fair use doctrine are: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit

educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107.

277. In general, do certain factors “count” more than others?

Some say that there is a hidden fifth “fair use” factor – whether the judge likes you or your case.

RESPONSE: The Supreme Court has indicated that the final factor, the effect of the use upon the potential market for or value of the copyrighted work, “is undoubtedly the single most important element of fair use.” *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985).

278. Is impartiality and lack of bias important to you?

RESPONSE: Yes. It is very important. As I noted at the hearing, I have a methodology to ensure that I am ruling impartially that I have employed in my almost decade on the bench. I first ensure that I am proceeding from a position of neutrality by setting aside any personal views and clearing my mind of any preconceived notions about how the case might come out. Next, I consider the parties’ arguments and the record, to understand all of the facts, claims, and arguments. The final step is interpretation and application of the law to the facts in the case, where I am particularly mindful of the constraints on judicial authority.

279. How do you ensure that your views are perceived as impartial and fair when issuing decisions?

Justice Breyer’s *Google v. Oracle* decision took a novel approach to fair use analysis by first presuming copyrightability of computer code, then looking to the “nature of the work” as a dominant factor in the courts decision that in this particular factintensive inquiry, Google’s actions were fair use.

RESPONSE: In addition to applying my methodology in every case, as noted in my response to Question 278, I take great care to account for all of the arguments made to me, and to explain why each must fail or prevail. By doing this, I hope to ensure that the parties appearing before me and the public know that I have heard them and considered every point they have made.

280. What impact do you think this decision has had and will have on how courts interpret copyright questions relating to software and fair use?

RESPONSE: I understand that *Google v. Oracle* formally reserved the question of copyrightability of the sort of code at issue in that case. It focused instead on the application of the fair use doctrine to the particular facts of that case. Because the copyrightability question remains subject to ongoing dispute and because the fair use inquiry is fact intensive and limited to the circumstances before the Court, it would be inappropriate under Canon 3 of the Code of Conduct for United States Judges for me to provide personal views. Moreover, as Justices Kagan and Barrett explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

281. What impact do you think this decision has on other types of works?

RESPONSE: The *Google v. Oracle* decision addressed the application of the fair use doctrine in a particular fact-intensive context. Its implications for other types of copyrightable or potentially copyrightable works are currently the subject of debate. Because its application in other contexts would require me to speculate about cases not before me, it would be inappropriate for me to provide personal views. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

282. Should computer code be treated differently from other types of works, whether as part of a fair use analysis or otherwise?

Over time the number of copyright takedown notices has skyrocketed. Some have raised concerns about fraudulent and abusive notices that may restrain fair use, free speech, or misuse the notice-and-takedown process. Others have noted that courts' interpretation of the "good faith" requirement to send notices may preclude automated notice sending, placing too great a burden on rightsholders.

RESPONSE: Although Congress has adopted a definition of computer program in the Copyright Act, 17 U.S.C. § 101, it remains an open question whether computer code is or should be treated differently from other types of works under the Copyright Act. Given the ongoing debate, it would be inappropriate for me to state a personal position. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

283. In an increasingly automated world, how can courts appropriately evaluate concepts like "good faith" or "bad faith" that apply to machine-driven actions?

RESPONSE: I understand the Digital Millennium Copyright Act provides a safe harbor for internet service providers where they move to take down allegedly infringing material upon receipt of a good faith notification of the infringing material. *See* 17 U.S.C. § 512(c)(1)(C), (c)(3)(A)(v). The Supreme Court has not yet addressed a case raising the question of how best to determine whether a particular takedown notice was made in good faith. Nor can I, in the abstract, opine on the appropriate standard to apply when assessing whether automated takedown notices are made in good faith. Indeed, whether to change the statutory standard in this area is a policy question for Congress. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

284. Do you have experience addressing free speech and intellectual property issues, including copyright?

RESPONSE: I have not considered a case involving the intersection of intellectual property and free speech. However, I am aware that interests of intellectual property can at times be in tension with free expression. For instance, the fair use doctrine serves to protect free expression that might be limited by copyright protection. *See Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003).

285. How should courts resolve the ideological tension between whether information should be free or whether commoditizing information provides the incentives and resources for it to be generated in the first place?

The legislative history of the Digital Millennium Copyright Act shows that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office recently reported courts have conflated statutory provisions and created a “high bar” for “red flag knowledge, effectively removing it from the statute...” It also reported that courts have made the traditional common law standard for “willful blindness” harder to meet in copyright cases.

RESPONSE: As a sitting federal circuit court judge, my current role in the justice system is to evaluate the facts of cases and controversies that parties with standing to adjudicate legal claims present, and I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law, as I understand it, including the binding precedents of the Supreme Court. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment in the abstract on how courts should resolve this question.

286. In your opinion, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?

RESPONSE: When I undertake to determine the meaning of statutory text, I start with a comprehensive evaluation of the statute’s text, using traditional tools of statutory construction, including a close textual analysis of the words and structure of the statute. *See, e.g., Alliance of Artists & Recording Companies, Inc. v. General Motors Company*, 162 F. Supp. 3d 8 (D.D.C. 2016), *aff’d*, 947 F.3d 849 (D.C. Cir. 2020). I have also occasionally employed canons of construction. Use of these tools ordinarily results in a conclusion regarding the meaning of the statutory provision. However, if I find that the statutory text is ambiguous insofar as it is susceptible to more than one meaning, I reconsider the parties’ arguments and may consult the legislative history, as the Supreme Court permits, in an effort to ascertain the will of Congress. I have never resolved a statutory ambiguity based solely on the legislative history of the statute.

287. What experiences do you have addressing intermediary liability for online service providers?

RESPONSE: I have not been presented with intermediary liability issues in any case that has been assigned to me. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

XV. Antitrust

288. Do you agree that reliable, predictable, intellectual property rights promote vigorous, dynamic competition to the benefit of consumers?

RESPONSE: The Founders recognized that intellectual property protections would be important to the economic and cultural vitality of the United States, and that recognition is embodied in the Article I, section 8, clause 8 of the Constitution. Congress, under that provision, is empowered to make intellectual property policy designed to promote vigorous, dynamic competition while incentivizing innovation. If I were called to decide a case involving this area of law, I would carefully apply the relevant constitutional provisions, enactments of Congress, and precedent.

289. Do you agree that universities, companies and small inventors that commit time, resources and capital to engage in risky R&D activities to develop the next generation of standards and that seek to be rewarded for their successful innovations to obtain fair and adequate compensation for the use of their patented technologies should be allowed and encouraged to assert their IP rights in good faith without being labeled as “patent trolls” or chilled by threats of antitrust enforcement action or private antitrust litigation?

The Supreme Court in *Trinko* stated that “[n]o court should impose a duty to deal that it cannot explain or adequately and reasonably supervise,” since this risks the court “assum[ing] the day-to-day controls characteristic of a regulatory agency.” 540 U.S. 398, 415 (2004).

RESPONSE: Inventors and innovators who commit time, resources, and capital to develop patentable inventions and go through the process of patenting such inventions are legally entitled to enforce their patent rights under the statutes that Congress has enacted. At the same time, the interactions of our intellectual property and antitrust laws are complex. As a sitting judge and a judicial nominee, it would be inappropriate for me to take a general position on how those bodies of law might in some future case intersect. If I were called to decide a case involving these issues, I would carefully apply the relevant statutes, constitutional provisions, and precedent.

290. Do you think that worldwide injunctions on issues involving patents or patent licenses issues are appropriate? Why or why not?

RESPONSE: The appropriate scope of injunctive relief in patent cases is the subject of active dispute among commentators and of ongoing litigation. As a pending judicial nominee and a sitting federal judge, it would be inappropriate under Canon 3 of the Code of Conduct for United States Judges, given ongoing disputes over this legal question, for me to provide my personal views regarding this question of public policy.

291. In light of *Trinko*, is it appropriate to relegate to a national regulatory authority parties’ extraterritorial contract negotiations?

RESPONSE: *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), examined the interactions between the Sherman Act and the Telecommunications Act. I understand this question to ask how that analysis might apply in a hypothetical situation. As a sitting judge and a judicial nominee, it would be inappropriate for me to take a general position on those interactions in the abstract. If I were called to decide a case involving these issues, I would carefully apply the relevant statutes, constitutional provisions, and precedent.

292. Outside of FRAND cases, would you agree that it is rare for national courts to seek to reform or create private contractual arrangements that extend beyond their national borders? What about with respect to patents that are outside the courts' jurisdiction?

RESPONSE: I do not have sufficient information on which to base the answer to this question.

293. What role does international comity have in such injunctive or decisions regarding patent licensing outside the United States?

RESPONSE: I understand this question to refer to the issue of how courts should approach injunctive and other relief in cases involving international patent licensing, and specifically to the role of international comity in that analysis. To my knowledge, the Supreme Court has not spoken to this issue, and it is the subject of active dispute among commentators and of ongoing litigation. See, e.g., Eli Greenbaum, *No Forum to Rule Them All: Comity and Conflict in Transnational FRAND Disputes*, 94 WASH. L. REV. 1085 (2019). As a pending judicial nominee and a sitting federal judge, it would be inappropriate under Canon 3 of the Code of Conduct for United States Judges, given ongoing disputes over this legal question, for me to provide my personal views. If I were called to decide a case involving these issues, I would carefully apply the relevant statutes, constitutional provisions, and precedent.

294. What are your thoughts on the best way to analyze patent licensing issues?

Recent antitrust bills, stemming from a House Antitrust staff report, are premised on the concept that big tech platforms act as “gatekeepers” and thus require new legislation targeting their conduct and providing access at a reasonable price.

RESPONSE: In analyzing any patent licensing issue, I would apply the Supreme Court's precedents to the case before me. It would not be appropriate for me as a sitting judge to comment on any pending legislation.

295. Please explain the essential facilities doctrine in antitrust jurisprudence.

RESPONSE: The Seventh Circuit has explained that the essential facilities doctrine addresses a situation where “a monopolist's control of an essential facility (sometimes called a ‘bottleneck’) can extend monopoly power from one stage of production to another, and from one market into another. Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms.” *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983). The Supreme Court “ha[s] never recognized such a doctrine,” and thus far it has “[f]ou]nd no need either to recognize it or to repudiate it.” *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004).

296. Should this doctrine extend to private, unregulated facilities (in contrast to public sector or private regulated facilities)?

RESPONSE: The proper scope and application of the essential facilities doctrine could be the subject of future litigation. Therefore, it would be improper for me as a sitting judge and pending nominee to opine on this question.

297. Can restraints of trade be reasonable, even if it may be anticompetitive, because it reflects an important property right?

RESPONSE: As Justice Barrett noted, it would not be appropriate for me, as a sitting judge and as a judicial nominee, to offer an opinion on a hypothetical. In any case before me, I would consider the positions of the parties, the facts, and Supreme Court case law to decide the case.

298. Should courts view property rights—including common law unfair competition, trademark, patents, or copyrights—as restricting or enhancing competition?

In *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Supreme Court relied on economic reasoning, marking a turning point in antitrust jurisprudence where the court turned to economic theory to inform its interpretation and application of the Sherman Act.

RESPONSE: As Justice Barrett noted, it would not be appropriate for me, as a sitting judge and as a judicial nominee, to offer an opinion on a hypothetical. It would also not be not appropriate for a sitting judge or judicial nominee to discuss what courts “should” do. In any case before me, I would consider the positions of the parties, the facts, and Supreme Court case law, including *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), if relevant, to decide the case.

299. What experience do you have deciding antitrust cases?

RESPONSE: As a federal judge, I have not decided any antitrust cases, but a limited number of cases involving antitrust have been assigned to me. See *United States v. MacAndrews & Forbes Holdings, Inc.*, No. 13-cv-0926, 2013 WL 4101650 (D.D.C. July 1, 2013). For example, one antitrust case that came before me involved the contemplated merger of DraftKings, Inc. and FanDuel, Ltd., two well-known fantasy sports sites. The FTC filed suit in opposition to the merger and alleged that if the two companies combined the resulting entity would control more than 90 percent of the U.S. market for paid daily fantasy sports contests. After I held a hearing on the matter, DraftKings and FanDuel abandoned the contemplated merger, and the FTC dismissed the suit. See *Federal Trade Commission v. DraftKings, Inc.*, No. 1:17-cv-01195, Stipulation of Dismissal, ECF No. 50 (D.D.C. July 13, 2017).

300. What role does or should economic theory have in your judicial decision making?

RESPONSE: Judges apply judicial precedent and judicial reasoning to make decisions. To the extent that precedent incorporates economic theory, it would be appropriate to apply the economic theory as articulated in those precedents. It would not be appropriate for a sitting judge or judicial nominee to address hypotheticals.

301. Please describe the consumer welfare standard.

RESPONSE: The consumer welfare standard has been described differently by different courts and scholars. The Supreme Court has stated that “the principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 539 (2013) (quoting 1 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 100, p. 4 (3d ed. 2006)).

302. What other avenues are there for courts to consider when administering the antitrust laws?

RESPONSE: When applying the antitrust laws, it is appropriate for the courts to consider the Constitution, the relevant statutes, relevant precedents, the arguments of the parties and amici, and the facts and circumstances of the particular case.

XVI. Technology

303. What role do you think technology should have in the judicial administration system?

RESPONSE: The judiciary has incorporated, and I expect will continue to incorporate, evolving technologies into its operations. For example, during the course of the Covid-19 pandemic, courts employed video-conferencing software to hold oral arguments. Beyond that, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on a question of policy.

304. How have you seen technology change the practice of law over your career?

RESPONSE: Over the course of my career, advances in technology have affected the practice of law in myriad ways. This ranges across almost all areas of legal practice, from research databases to timekeeping software, from communications technology to word processing.

305. In what ways do you think it will evolve in the future?

RESPONSE: Over the years, various technological tools—research databases, timekeeping software, communications technology, and word processing software—have continued to become more sophisticated. Beyond that, as a pending judicial nominee and a sitting federal judge, I am not in a position to speculate about the future of the legal profession as it relates to these technological changes.

306. What role do you think artificial intelligence, machine learning, and other technologies should play in the judicial system?

RESPONSE: The judiciary has incorporated, and I expect will continue to incorporate, evolving technologies into its operations. For example, during the course of the Covid-19 pandemic, courts employed video-conferencing software to hold oral arguments. Beyond that, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on a question of policy.

307. What are some of the pros and cons of such technologies?

RESPONSE: As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on a question of policy and ongoing debate.

308. Do you think such technologies should play a role in a judge's decision making, including sentencing?

RESPONSE: As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on a question of policy and ongoing debate.

309. To the extent that technologies do already play a role, where do you draw the line between where they stop augmenting your work on the case and where your human judgment begins?

RESPONSE: As a judge, I have employed technologies for tasks such as word processing, legal research, communication, and at various points to hold hearings. In every case, I employ my judicial methodology to ensure that I consider only those inputs that are relevant to deciding a particular case or controversy. As to any broader question of policy, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment in the abstract on the proper role of technology in judicial decision-making.

310. Do you have concerns that biases in the technologies could directly or indirectly impact your decision making to achieve outcomes that you wouldn't have desired?

RESPONSE: Please see my response to Question 309.

311. Do you have any personal experience with biases based on technologies that you can share?

RESPONSE: As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to comment on the question of biases in technology, which is a matter of public debate and about which there is or may be ongoing litigation. In any specific case or controversy, pursuant to my judicial methodology, I would not consider or rely upon my own personal views.

XVII. Second Amendment

The Founders felt so strongly about protecting our individual rights that they passed the Bill of Rights to enshrine our individual rights into the Constitution.

The Second Amendment was added to ensure that our individual right to bear arms “shall not be infringed” by an overbearing federal government. There are long-standing, well-coordinated efforts by liberal activists to strip away our Second Amendment rights.

But, since they cannot get their gun control agenda through Congress, they have instead focused on getting federal judges confirmed who will chip away at the Second Amendment.

Multiple organizations praised your nomination as a win for their cause. While I recognize you may not associate yourself with every group that supports you, I am also concerned that organizations who advocate for taking away our Second

Amendment rights are so actively supportive of your nomination.

312. What in your judicial and professional career do you think has led these organizations to believe that you will side with their restrictive views of the Second Amendment?

RESPONSE: I am not aware of the activities that private groups and individuals might be undertaking to advocate for or against my confirmation. Any public advocacy by any individual or group for or against my confirmation will be irrelevant to my work if I am confirmed to the Supreme Court, just as public advocacy related to my prior nominations has played no role in my work as a federal trial court and circuit court judge for the last decade. Moreover, I understand that my role as a judge is a limited one—fairly and impartially applying the law to the facts of any case that has been properly presented—and I take my duty to be independent very seriously.

313. What is the holding in *District of Columbia v. Heller*? Do you believe this case was rightly decided, and does it do enough to protect Americans’ Second Amendment rights?

RESPONSE: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment “confer[s] an individual right to keep and bear arms.” This precedent is entitled to respect under the doctrine of *stare decisis*. As Justices Kagan and Barrett explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

314. What kind of weapons qualify as “dangerous and unusual” under *Heller*?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, as a pending judicial nominee and a sitting federal judge it would be inappropriate for me to comment on matters that are the subject of ongoing litigation.

315. There are some who view our Second Amendment rights as “second-class right[s].” Do you agree that our Second Amendment rights are equal to all others provided in the Constitution?

RESPONSE: The Supreme Court has held that the Second Amendment confers “an individual right to keep and bear arms.” *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). The Court has also clarified that the individual constitutional right to keep and bear arms is “not unlimited, just as the First Amendment’s right of free speech [is] not[.]” *Id.* To my knowledge, the Supreme Court has not concluded that the right to own a firearm receives less protection than the other individual rights that are specifically enumerated in the Constitution.

316. Is the Second Amendment a “constitutional orphan” as described by Justice Thomas?

RESPONSE: Please see my response to Question 315.

317. What level of scrutiny should govern Second Amendment cases?

RESPONSE: Please see my response to Question 314.

318. Does the Constitution enshrine a right to carry a gun for self-defense?

RESPONSE: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that self-defense is the core of the Second Amendment, which confers an individual right to bear arms. That decision is a precedent of the Supreme Court entitled to respect under the doctrine of *stare decisis*.

319. Is it ever constitutional for a court to deprive an individual of their Second Amendment rights, without due process, and confiscate their firearms? If so, what level of due process is required?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would not be appropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on issues such as this one, which may be subject to litigation and come before the Supreme Court.

320. Is the point of a constitutional right that an American citizen does not have to satisfy a government official with a good reason before exercising constitutional right?

RESPONSE: Please see my response to Question 319.

321. What is the constitutional authority that allows local sheriffs to require permits for certain types of firearms but not others? Do these types of laws unduly infringe the Second Amendment?

RESPONSE: Please see my response to Question 319.

322. What is the constitutional authority by which the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) may regulate the exercise of Second Amendment rights? In what ways is the ATF limited in its rulemaking or its agency guidance due to the fundamental nature of our Second Amendment rights?

RESPONSE: Please see my response to Question 319.

323. In *Baisden v. Barr*, you granted summary judgment against an individual seeking to purchase a firearm in part because the individual did not have a specific plan to purchase a firearm. Can you please elaborate why standing is available for an individual with a specific plan to purchase a firearm, but not to one with a general interest in owning a firearm? How specific does one's plan have to be in order to trigger an injury under the Second Amendment and Supreme Court precedence?

RESPONSE: In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), the Supreme Court held that to support Article III standing, “an invasion of a legally protected interest” must be “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Additionally, in *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009), the Supreme Court held that “‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury” requirement. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on how this controlling precedent may apply in a hypothetical case.

XVIII. Court Packing

The legitimacy and independence of the judicial branch is of utmost importance. That's part of why I view my role vetting judicial nominees to be one of my most important responsibilities as a Senator, and why I am deeply concerned about proposals to expand the Court.

As a sitting member of the Court, Justice Breyer called expanding the Supreme Court "risky." While serving as a justice, Justice Ginsburg said that expanding the court would "make the court look partisan," and that "[n]ine seems to be a good number."

324. Do you agree with Justice Ginsburg that the Supreme Court should not be expanded, but instead remain at nine justices?

RESPONSE: I agree with Justice Barrett, who stated at her confirmation hearing that "the size of the Supreme Court is a question left open for Congress." Answering this policy question, which the Constitution has placed in Congress' hands, might suggest that I do not understand the limited role of a judge, which is to rule on cases and controversies that come before the court.

325. Do you share the concerns of Justice Ginsburg that expanding the Supreme Court would "make the court look partisan?" Why or why not?

RESPONSE: Please see my response to Question 324.

326. Would court packing encourage people's faith in an independent judiciary?

RESPONSE: Please see my response to Question 324.

327. Do you believe we have Obama judges or Trump judges, Bush judges or Clinton judges in the federal judiciary?

RESPONSE: I agree with Chief Justice Roberts that federal judges are "an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them." Every federal judge swears an oath to administer justice without respect to persons, and to do equal right to the poor and to the rich, and to faithfully and impartially discharge and perform all duties incumbent upon them under the Constitution and laws of the United States.

328. If not, and all we have is "an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them." E.g., an independent judiciary that we should all be thankful for, then why would we need court packing?

RESPONSE: Please see my response to Question 324.

329. Wouldn't court packing by one party encourage a future president of the other party to ignore its rulings because he considered them invalid?

RESPONSE: Please see my response to Question 324.

330. Isn't court packing the dangerous game that both Justices Breyer and Ginsburg warned us about?

RESPONSE: Please see my response to Question 324.

XIX. Election Law

As Speaker of the North Carolina House, I led legislation which instituted common sense reforms to our election system. This included efforts to improve integrity in our elections and provide peace of mind to North Carolinians that our elections are conducted fairly. As a result of my experience, I strongly believe that election laws should primarily be set by the states.

In recent years, a false narrative of voter suppression has been leveled against Republicans who have pursued election integrity measures, and who have pushed back against efforts to have a federal takeover of our elections.

331. Under Article I, Section 4, what is the appropriate balance between the federal government and the states as it relates to administration of elections?

RESPONSE: Article I, Section 4 of the Constitution provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” The appropriate extent to which Congress should “make or alter such Regulations” on the administration of federal elections is a policy question and, as a sitting judge and judicial nominee, it would be inappropriate for me to offer an opinion on that question.

332. Do you believe that the Court’s current jurisprudence strikes the correct balance between state and federal control over elections?

RESPONSE: As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. As Justices Kagan and Barrett explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases, and the same is true for areas of jurisprudence.

333. When does the “Purcell principle” permit federal courts to intervene in election-related challenges?

RESPONSE: The Supreme Court has held that, under the “Purcell principle,” federal courts should “ordinarily not alter the election rules on the eve of an election.” *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205, 1207 (2020).

334. Do you agree that voter ID is a reasonable measure for states to enact to ensure the integrity of their elections?

RESPONSE: The Supreme Court has held that voter identification laws are not per se unconstitutional. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). To the extent this question calls for my views on a matter of public policy, as a sitting judge, it would be inappropriate for me to offer an opinion on the matter.

XX. Campaign Finance

335. What was the holding of *Citizens United*?

RESPONSE: In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court held that a federal law violated the First Amendment where it prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an ‘electioneering communication’ or for speech expressly advocating the election or defeat of a candidate.

336. Was *Citizens United* correctly decided?

RESPONSE: As Justices Kagan and Barrett explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

337. In what ways does the First Amendment right to free speech extend to political contributions?

RESPONSE: The Supreme Court has held that “[t]he right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute.” *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 191 (2014). “Congress may regulate campaign contributions to protect against corruption or the appearance of corruption.” *Id.*

338. Should those who make political contributions be provided with privacy to express their political views?

RESPONSE: The Supreme Court has held that disclosure requirements may be “justified based on a governmental interest in ‘provid[ing] the electorate with information’ about the sources of election-related spending.” *Citizens United v. Federal Election Commission*, 558 U.S. 310, 367 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)). However, disclosure requirements may violate the First Amendment in particular instances where “a group could show a reasonable probability that disclosure of its contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.” *Id.* (internal quotation marks omitted).

339. Shouldn’t individuals have the right to freely express their political views without threat or intimidation?

RESPONSE: As a sitting judge, it is my role to evaluate the particular facts of cases and controversies that parties with standing to adjudicate legal claims present. I resolve each case on an individual basis by assessing the parties’ legal arguments based on the law, including those alleging violations of free speech rights.

XXI. Redistricting.

North Carolina has the distinction of appearing before the Supreme Court in each of the past four decades regarding redistricting. Much of the case law regarding redistricting under the Voting Rights Act is the result of cases brought against North Carolina maps.

Most recently, the Supreme Court ruled in *Rucho v. Common Cause* that claims of improper partisan redistricting are political questions, meaning that federal courts cannot intervene. Instead, these decisions must be left up to the American people and their elected representatives.

In February, the North Carolina Supreme Court struck down congressional and state legislative maps based on provisions in the state constitution.

Just two weeks ago, the Supreme Court declined to hear an appeal of the North Carolina Supreme Court ruling that struck down those maps. The case left unanswered new questions about the role of state courts in redistricting.

340. Please describe your understanding of the justiciability of political questions.

RESPONSE: The Supreme Court has listed several factors that may render a political question non-justiciable: “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of the court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments of one question.” *Baker v. Carr*, 369 U.S. 186, 217 (1962).

341. What factors do federal courts currently determine whether an issue is a political question or not?

RESPONSE: Please see my response to Question 340.

342. Do you agree with the current jurisprudence of the political question doctrine?

RESPONSE: As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. As Justices Kagan and Barrett explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases, and the same is true for areas of jurisprudence.

343. What is your understanding of the current state of the political doctrine question as it relates to congressional redistricting?

RESPONSE: In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Supreme Court held that the political question doctrine does not preclude courts from adjudicating malapportionment claims with respect to congressional redistricting. In *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019),

the Supreme Court held that partisan gerrymandering claims brought under the Constitution are non-justiciable political questions in federal court.

344. What is the current rule for whether or not a congressional redistricting plan is unconstitutional as an impermissible political gerrymander?

RESPONSE: In *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), the Supreme Court held that partisan gerrymandering claims brought under the Constitution are non-justiciable in federal court.

345. What is the current rule for whether or not a congressional redistricting plan is unconstitutional as an impermissible racial gerrymander?

RESPONSE: The Supreme Court has held that to establish a racial gerrymandering claim, a plaintiff must first “prove that ‘race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.’” *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). “[I]f racial considerations predominated over others,” the burden shifts to the State “to prove that its race-based sorting of voters serves a ‘compelling interest’ and is ‘narrowly tailored’ to that end.” *Id.* at 1464.

346. Please describe your understanding of the ruling in *Common Cause v. Rucho*.

RESPONSE: Please see my response to Question 344.

347. Do you believe that *Common Cause v. Rucho* was correctly decided? Why or why not?

RESPONSE: As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. As Justices Kagan and Barrett explained, it is not appropriate for a judicial nominee to “grade” or give a “thumbs-up or thumbs-down” to particular cases.

348. Does the Constitution grant power to state courts to draw congressional districts?

RESPONSE: Because this issue is the subject of ongoing litigation, as a sitting judge and a judicial nominee, it would be appropriate for me to opine on it.

349. What is the extent of a state court’s authority to reject rules adopted by a state legislature for use in conducting federal elections?

RESPONSE: Please see my response to Question 348.

350. If a State Supreme Court finds that a congressional redistricting plan violates a provision of the state constitution, under what circumstances may the US Supreme Court consider the constitutionality of that congressional plan?

RESPONSE: Please see my response to Question 348.

XXII. Law Enforcement

In recent years, there have been calls to defund and to abolish the police. This rhetoric is not only irresponsible, it is downright dangerous. Our brave men and women in blue put their lives on the line each and every day, not knowing if they'll return to their loved ones, so that we can stay safe.

I'm deeply concerned about the anti-police views that have become common place in our country today, and I am committed to doing everything I can to support the brave men and women in blue who protect and serve our communities.

I have introduced legislation which would increase penalties for those who assault and kill, or attempt to assault and kill, a law enforcement officer.

In reviewing your record, I noted several cases where a criminal assaulted a law enforcement officer, but where you granted lower sentences.

351. For example, in *United States v. Jenkins*, a criminal pleaded guilty to assaulting a law enforcement officer, which was his third conviction for assaulting law enforcement officers. The government recommended a 30-month sentence, and the criminal requested a 21-month. You decided to go even lower, and sentence this repeat offender to 18 months in prison. Can you please explain your reasoning for this sentence?

RESPONSE: I have a great deal of respect for members of the law enforcement community—which includes several of my family members. As I testified at my hearing, as someone who has had family members on patrol and in the line of fire, I care deeply about public safety. I know what it is like to have loved ones who go off to protect and to serve, and the fear of not knowing whether or not they are going to come home again because of crime in the community.

Sentencing individuals who have been found guilty of violating our laws was one of the most serious responsibilities I had as a federal district court judge. In each of the more than 100 sentencings I have conducted, I followed the law as set forth by Congress. Consistent with 18 U.S.C. § 3353(a), I considered the specific factors in the statute, including but not limited to: the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” “to afford adequate deterrence,” and “to protect the public from further crimes of the defendant”; the sentencing range established by the Sentencing Guidelines; “any pertinent policy statement” of the Sentencing Commission; and “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” I also considered victim statements and the sentencing recommendations of the government, defense counsel, and U.S. Probation Office.

352. In another case, *United States v. Weeks*, you sentenced a criminal with a prior conviction for assaulting a police officer. During sentencing, the government requested a 24-month sentence, in part due to his conviction for assaulting an officer. You sentenced the criminal

to 12 months despite this prior conviction. Can you please explain your reasoning for this sentence?

RESPONSE: Please see my response to Question 351.

353. How does your experience as a district court judge shape your views of how we punish those who assault and kill law enforcement officers? Do you believe that federal law sufficiently punishes those who assault and kill law enforcement officers?

RESPONSE: I have a great deal of respect for members of the law enforcement community—which includes several of my family members. However, consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on the propriety of the penalties that Congress has prescribed for any crimes.

Congress has authorized a policymaking branch of the Judiciary—the United States Sentencing Commission—to make proposals concerning sentencing reforms; additionally, with Congress’ consent, the Commission promulgates sentencing guidelines for federal judges to use when imposing sentences in individual cases. After *Booker*, judges have a duty to calculate and consider the applicable sentencing guidelines in every federal criminal case, and to impose a sentence that is sufficient but not greater than necessary to comply with the purposes of punishment, as 18 U.S.C. § 3553(a) requires. Holding people accountable who violate our laws is essential to a functioning society. Sentencing individuals who have been found guilty of violating our laws was one of the most serious responsibilities I had as a federal district court judge, and in each case I applied the laws and factors set forth by Congress in reaching sentencing decisions. Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on the propriety of the penalties that Congress has prescribed for any crimes.

354. What is an appropriate sentence for an individual who assaults a law enforcement officer? What about an individual who kills a law enforcement officer?

RESPONSE: Please see my response to Questions 353.

XXIII. Qualified Immunity

In order to do their job properly, the law enforcement community must continue to have qualified immunity. Removing the legal protections provided by qualified immunity risks undermining law enforcement and making our communities less safe. This is even more important as we continue to face rising crime across the country.

The anti-police movement in this country has cried loudly to eliminate qualified immunity. This would leave our brave law enforcement officers without legal protection in the face of antipolice activists and their eager trial lawyers.

Removing qualified immunity would make us less safe, and would disrespect the sacrifice of our law enforcement community.

355. Please describe the current state of Supreme Court precedent as it relates to qualified immunity for law enforcement officials.

RESPONSE: Under the doctrine of qualified immunity, “government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). While there need not be a prior case directly on point, a right is “clearly established” only when existing precedent has “placed the statutory or constitutional question beyond debate.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).

356. What is the process by which you determine whether a constitutional right is “clearly established” for the purposes of a qualified immunity claim?

RESPONSE: The Supreme Court has addressed this issue and has determined that, while there need not be a prior case directly on point, a right is “clearly established” only when existing precedent has “placed the statutory or constitutional question beyond debate.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018). In a case requiring me to determine whether a constitutional right is “clearly established” for the purposes of a qualified immunity claim, I would assess the arguments that the parties make, the established facts of the particular case, and the applicable law, giving due weight to relevant Supreme Court precedent. I have previously evaluated assertions of qualified immunity on a number of occasions, including in *Kyle v. Bedlion*, 177 F. Supp. 3d 380 (D.D.C. 2016), in which I found that qualified immunity protected a police officer who had arrested the plaintiff for assault on a police officer.

357. Do you believe that the current state of the law provides sufficient legal protection for our brave, hardworking men and women in blue who put their lives at risk each and every day?

RESPONSE: I have a great deal of respect for members of the law enforcement community. As I testified at my hearing, as someone who has had family members on patrol and in the line of fire, I care deeply about public safety. I know what it is like to have loved ones who go off to protect and to serve and the fear of not knowing whether or not they are going to come home again because of crime in the community.

Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on this policy question. Instead, it is my duty to adjudicate individual claims that are filed by persons who are authorized to litigate such cases or controversies in federal court. When I have jurisdiction to do so, I resolve properly filed legal disputes concerning the lawfulness of conduct based on the arguments that the parties make, the established facts of the particular case, and the applicable law, giving due weight to Supreme Court precedent.

358. In how many district court cases did you grant qualified immunity to law enforcement officials? In how many district court cases did you deny qualified immunity to law enforcement officials?

RESPONSE: I have issued more than 570 written opinions over the near-decade I have spent as a federal judge. I have granted qualified immunity to law enforcement officials when the facts

and the law required it, and I have denied qualified immunity when the facts and the law required it.

359. Of your district court rulings on qualified immunity, how many were reversed at the appellate level?

RESPONSE: None.

XXIV. Freedom of Religion

Religious liberty and free exercise of religion are foundational to the United States. Many of those who immigrated to America in our earliest days came to this country so they could freely practice their faith.

Despite this foundational commitment to free exercise of religion, there are those who would force people of deeply held religious beliefs to violate their conscience. It is important that we have a justice on the court who will respect our religious liberties, and who will defend the First Amendment.

360. Does the First Amendment serve as a restraint solely on government endorsement of religion, or does it affirmatively protect the religious practice and belief of Americans of faith?

RESPONSE: The First Amendment of the Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[,]” and it expressly protects a fundamental and foundational right to religious liberty. This extends to the affirmative protection of religious exercise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to opine further while the scope of that right is actively litigated.

361. What is your understanding of the current jurisprudence of cases related to the ministerial exemption for employees of religious institutions? What level of protection is currently afforded to religious entities to employ those who best represent their values?

RESPONSE: The Supreme Court has held that the Free Exercise Clause and the Establishment Clause protect against government intrusion on certain decisions of religious organizations, such as the hiring or firing of ministers, through employment discrimination laws. *See, e.g., Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

362. What was holding of *Fulton v. City of Philadelphia*?

RESPONSE: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that the City’s refusal to contract with a religious provider of foster-care services, unless the provider agreed to certify same-sex couples as foster parents on the same basis as opposite-sex couples, violated the Free Exercise Clause.

363. Do you believe that *Fulton* was correctly decided? Why or why not?

RESPONSE: As a pending judicial nominee and as a sitting federal judge, I am bound by the Supreme Court’s precedents. Consistent with the positions taken by other pending judicial nominees, it would be inappropriate for me to comment on the merits or demerits of the Supreme Court’s binding precedents.

364. What does *Fulton* mean for free exercise of religion and the ability of religious-affiliated organizations to practice their deeply held religious beliefs? How will you apply this case if you are confirmed and confronted with a case involving free exercise of religion?

RESPONSE: Please see my response to Question 363. If confirmed, I would evaluate each case on an individual basis by assessing the parties’ legal arguments based on the facts and applicable law.

XXV. Sanctuary Cities and Immigration Enforcement

In recent years, state and local jurisdictions across the country have embraced dangerous policies where they will refuse to cooperate with federal officials to enforce our immigration laws. By declining to comply with a detainer request, or even communicate with federal immigration authorities, these sanctuary city policies represent a threat to our communities.

The Trump Administration attempted to put a stop to this by withholding certain grants from state and local governments that enacted sanctuary city policies.

I have introduced two pieces of legislation to stop sanctuary city policies, the Justice for Victims of Sanctuary Cities Act and the Immigration Detainer Enforcement Act.

I feel strongly that those who choose to ignore federal immigration law are placing our communities in danger.

365. Does the Constitution place authority for immigration policy with the federal government or the States?

RESPONSE: The Constitution explicitly assigns to Congress significant responsibility for crafting our immigration laws. Additionally, in *Arizona v. United States*, 567 U.S. 387, 395 (2012), the Supreme Court held that the federal government has authority to determine immigration policy based on its “inherent power as sovereign to control and conduct relations with foreign nations,” as well as the implications that immigration policy have for “trade, investment, tourism.” Because issues concerning the scope and application of *Arizona v. United States* are the subject of ongoing litigation, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment further on this question.

366. Can state and local governments to defy federal immigration law? Why or why not?

RESPONSE: Please see my response to Question 365.

367. When does a condition placed on federal grant funding trigger the anti-commandeering doctrine?

RESPONSE: The Supreme Court has repeatedly held that Congress may use its spending power to “grant federal funds to the States, and may condition such a grant upon the States’ taking certain actions that Congress could not require them to take.” *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 576 (2012) (“*NFIB I*”) (citations omitted); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 686 (1999); *South Dakota v. Dole*, 483 U.S. 203, 207, 210 (1987). So “when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds,” state officials “can fairly be held politically accountable for choosing to accept or refuse the federal offer.” *NFIB I*, 567 U.S. at 578. But “when pressure turns into compulsion, the legislation runs contrary to our system of federalism.” *NFIB I*, 567 U.S. at 577–78 (citation omitted).

368. What is the extent of executive authority to set immigration policy in the absence of explicit congressional authorization?

RESPONSE: Consistent with the Code of Conduct for United States Judges and the positions taken by prior nominees, it would be inappropriate for me, as a pending judicial nominee and a sitting federal judge, to comment on this question, which implicates matters that are the subject of ongoing litigation.

369. To what extent may the executive branch broadly limit the enforcement of immigration law, such as de-prioritizing certain individuals for removal?

RESPONSE: Please see my response to Question 368.

370. Is it permissible for the executive branch to issue parole to broad populations? How does a grant of parole for broad populations comply with the statute’s requirement that parole only be available on a case-by-case basis?

RESPONSE: Please see my response to Question 368.

371. Under current precedent, how long may the federal government detain an individual who is eligible for removal, but whose home country refuses to accept them? Is their continued detention better characterized as a due process violation or an enforcement of immigration law?

RESPONSE: In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court applied the canon of constitutional avoidance to limit the length of time a noncitizen who is subject to a final removal order may be detained under 8 U.S.C. § 1231 (a)(6). The Court concluded that if removal is not effectuated during the 90-day removal period provided in Section 1231(a)(6), the government may continue detention under section 1231(a)(6) only where the noncitizen is significantly likely to be removed in the reasonably foreseeable future. In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the Supreme Court declined to extend the canon of constitutional avoidance to require bond hearings for noncitizens detained pursuant to 8 U.S.C. §§1225(b) and 1226(c). The Court found that these provisions unambiguously prohibit bond hearings regardless of whether detention has continued for an extended period of time. Because issues concerning the constitutional limits to detention under these statutory provisions are the subject of active litigation, it would be inappropriate for me, as a pending judicial nominee and sitting federal judge, to comment further on this question.

XXVI. Dark Money

372. Judge Jackson have you ever had any interaction with the following groups or entities? If you so, please fully detail your involvement or interaction with said entity.

- a. Arabella Advisors
- b. Tides Foundation
- c. 1630 Fund
- d. North Foundation
- e. People for the American Way
- f. Unrig the Courts
- g. 51 for 51
- h. Demos Action
- i. Take Back the Court
- j. Demand Justice
- k. Indivisible
- l. People's Parity Project
- m. Stand Up America
- n. Just Democracy Coalition

RESPONSE: Chris Kang, who I understand is currently affiliated with Demand Justice, is among the many people who offered me congratulations on my nomination to the D.C. Circuit in 2021. Mr. Kang had formerly served as chief judicial nominations counsel to President Obama in 2012, when I was nominated to be a U.S. District Judge. Other than the 2021 communication with Chris Kang, I have not had contact with Demand Justice or anyone who is, to my knowledge, currently associated with Demand Justice. I have not had any contact with any of the other listed organizations.

XXVII. Patent Eligibility

373. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

RESPONSE: The Supreme Court has set forth a two-step framework for “distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts.” *Alice Corporation Pty. v. CLS Bank International*, 573 U.S. 208, 217 (2014) (citing *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S. Ct. 1289 (2012)). A court must first “determine whether the claims at issue are directed to one of those patent-ineligible concepts.” *Id.* If the court determines that the claims are directed to a patent-ineligible concept, the court must then “consider the elements of each claim both individually and ‘as an ordered combination’ to determine whether the additional elements ‘transform the nature of the claim’ into a patent-eligible application.” *Id.* (quoting *Mayo Collaborative Services*, 132 S. Ct. at 1297, 1298). Consistent with the positions taken by prior nominees, it would be inappropriate for me as a sitting judge and current judicial nominee to express a personal opinion on the current state of eligibility jurisprudence.

374. How would you apply current patent eligibility jurisprudence to the following hypotheticals. Please avoid giving non-answers and actually analyze these hypotheticals.

- a. ABC Pharmaceutical Company develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?

RESPONSE: The structure of our patent system is determined by Congress pursuant to its authority under the Constitution’s Patent and Copyright Clause. U.S. Const. art. I, § 8, cl. 8. In furtherance of this grant, Congress has created a patent system that encourages “the creation and disclosure of new, useful, and nonobvious advances in technology and design” by granting inventors “the exclusive right to practice the invention for a period of years.” *Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.*, 139 S. Ct. 628, 632 (2019). The Patent Act outlines four categories of patent eligibility: processes, machines, manufactures, and compositions of matter. 35 U.S.C. § 101. In interpreting the statute, the Supreme Court has identified three judicial exceptions, which preclude patentability for (1) abstract ideas, (2) laws of nature, and (3) natural phenomena. *See Alice Corporation Pty. Ltd. v. CLS Bank International*, 573 U.S. 208, 216 (2014); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 71 (2012). Moreover, under the *Mayo-Alice* framework, even an invention implicating these exceptions may in certain circumstances be subject to patent protection where it constitutes a “patent-eligible application[] of” an otherwise unpatentable concept. *Alice*, 573 U.S. at 217 (quoting *Mayo*, 566 U.S. at 78).

The key question, then, for this and each of the following hypotheticals appears to be whether “the elements of each claim both individually and ‘as an ordered combination’” are sufficient “additional elements” to “‘transform the nature of the claim’ into a patent-eligible application.” *Id.* (quoting *Mayo*, 566 U.S. at 78). However, this question calls for me analyze an abstract hypothetical and it would be inappropriate for me to opine on this matter as a pending judicial nominee and sitting judge. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

- b. FinServCo develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should FinServCo's business method standing alone be eligible? What about the business method as practically applied on a computer?

RESPONSE: Please see my response to Question 374a.

- c. HumanGenetics Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if HumanGenetics Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?

RESPONSE: Please see my response to Question 374a.

- d. BetterThanTesla ElectricCo develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should BetterThanTesla's billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?

RESPONSE: Please see my response to Question 374a.

- e. Natural Laws and Substances, Inc. specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?

RESPONSE: Please see my response to Question 374a.

- f. A business methods company, FinancialServices Troll, specializes in taking conventional legal transaction methods or systems and implementing them through a computer process or artificial intelligence. Should such implementations be patent eligible? What if the implemented method actually improves the expected result by, for example, making the methods faster, but doesn't improve the functioning of the computer itself? If the computer or artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?

RESPONSE: Please see my response to Question 374a.

- g. BioTechCo discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art.

Should BioTechCo be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if BioTech Co invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?

RESPONSE: Please see my response to Question 374a.

- h. Assuming BioTechCo's diagnostic test is patent eligible, should there exist provisions in law that prohibit an assertion of infringement against patients receiving the diagnostic test? In other words, should there be a testing exemption for the patient health and benefit? If there is such an exemption, what are its limits?

RESPONSE: Please see my response to Question 374a.

- i. Hantson Pharmaceuticals develops a new chemical entity as a composition of matter that proves effective in treating TrulyTerribleDisease. Should this new chemical entity be patent eligible?

RESPONSE: Please see my response to Question 374a.

- j. Stoll Laboratories discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should Stoll Labs be able to patent the natural law that superconductive materials in space have higher superconductive temperatures? What about the space applications of superconductivity that benefit from this effect?

RESPONSE: Please see my response to Question 374a.

375. Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

RESPONSE: Patents play an important role in ensuring technological progress by pairing public disclosure of important innovations with protections for inventors' incentives to innovate. The structure of our patent system is determined by Congress pursuant to its authority under the Constitution's Patent and Copyright Clause. U.S. Const. art. I, § 8, cl. 8. The courts must referee disputes about that statutory structure, and in doing so must give effect to Congress's enactments in order to provide clarity and predictability for all parties. The Patent Act outlines four categories of patent eligibility: processes, machines, manufactures and compositions of matter. 35 U.S.C. § 101. In interpreting the statute, the Supreme Court has identified three judicial exceptions, which preclude patentability for (1) abstract ideas, (2) laws of nature, and (3) natural phenomena. *See Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 71 (2012). Although it would be

inappropriate to comment on the current state of the Supreme Court's precedents in this area, I would note that the Federal Circuit and innovators have not hesitated to ask for clarification when they need it. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

XXVIII. Patent Venue

376. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.

a. Do you see “judge shopping” and “forum shopping” as a problem in litigation?

RESPONSE: In *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), a unanimous Supreme Court addressed the issue of forum shopping in patent cases and narrowed the venue rules for such cases. Prior to that decision, patent owners could file infringement suits in any federal jurisdiction in which the accused infringer was subject to personal jurisdiction. In *TC Heartland*, the Court held that venue for patent infringement suits lies solely in either the state of incorporation of the alleged infringer, or where the alleged infringer has committed acts of infringement and has a regular and established place of business. *See id.* at 1517. As a pending judicial nominee and a sitting federal judge, it would be inappropriate under Canon 3 of the Code of Conduct for Judges for me to provide personal views of these issues. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

RESPONSE: Please see my response to Question 376a.

c. Do you think it is ever appropriate for judges to engage in “forum selling” by proactively taking steps to attract a particular type of case or litigant?

RESPONSE: Please see my response to Question 376a.

d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

RESPONSE: Please see my response to Question 376a.

377. In just three years, the Court of Appeals for the Federal Circuit has granted no fewer than 19 mandamus petitions ordering a particular sitting district court judge to transfer cases to a different judicial district. The need for the Federal Circuit to intervene using this

extraordinary remedy so many times in such a short period of time gives me grave concerns.

- a. What should be done if a judge continues to flaunt binding case law despite numerous mandamus orders?

RESPONSE: As a pending judicial nominee and a sitting federal judge, it would be inappropriate under Canon 3 of the Code of Conduct for Judges for me to provide personal views of this issue. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

- b. Do you believe that some corrective measure beyond intervention by an appellate court is appropriate in such a circumstance?

RESPONSE: Please see my response to Question 377a.

378. When a particular type of litigation is overwhelmingly concentrated in just one or two of the nation's 94 judicial districts, does this undermine the perception of fairness and of the judiciary's evenhanded administration of justice?

RESPONSE: In *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), a unanimous Supreme Court addressed the issue of forum shopping in patent cases and narrowed the venue rules for such cases. Prior to that decision, patent owners could file infringement suits in any federal jurisdiction in which the accused infringer was subject to personal jurisdiction. In *TC Heartland*, the Court held that venue for patent infringement suits lies solely in either the state of incorporation of the alleged infringer, or where the alleged infringer has committed acts of infringement and has a regular and established place of business. *See id.* at 1517. More generally, Congress specifies the appropriate venue for various types of cases by statute. As a pending judicial nominee and a sitting federal judge, it would be inappropriate under Canon 3 of the Code of Conduct for Judges for me to provide personal views of these policy issues. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

- a. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

RESPONSE: Please see my response to Question 378.

- b. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

RESPONSE: Please see my response to Question 378.

379. Mandamus is an extraordinary remedy that the court of appeals invokes against a district court only when the petitioner has a clear and indisputable right to relief and the district

judge has clearly abused his or her discretion. Nearly every issuance of mandamus may be viewed as a rebuke to the district judge, and repeated issuances of mandamus relief against the same judge on the same issue suggest that the judge is ignoring the law and flouting the court's orders.

- a. If a single judge is repeatedly reversed on mandamus by a court of appeals on the same issue within a few years' time, how many such reversals do you believe must occur before an inference arises that the judge is behaving in a lawless manner?

RESPONSE: As a pending judicial nominee and a sitting federal judge, it would be inappropriate under Canon 3 of the Code of Conduct for Judges for me to provide personal views of these issues. If confirmed, I would carefully apply the text of relevant statutes, constitutional provisions, and precedent to any case implicating these issues.

- b. Would five mandamus reversals be sufficient? Ten? Twenty?

RESPONSE: Please see my response to Question 379a.

**QFR Questions for the Record from Senator Marsha Blackburn
to Judge Ketanji Brown Jackson
Nominee to be an Associate Justice of the United States Supreme Court**

1. During your confirmation hearing, you detailed the reasoning behind your decision in *Make the Road New York v. McAunbnan*, which the D.C. Circuit reversed. How had the D.C. Circuit and the Supreme Court of the United States interpreted “sole and unreviewable” (from the relevant statute) and other similar instances of clear and definitive language in law prior to your decision?

RESPONSE: The question presented in *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), was one of first impression. Neither the D.C. Circuit nor the Supreme Court had interpreted “sole and unreviewable discretion” from the relevant statute in prior cases.

2. Could you explain how your reasoning in this decision, regarding how the Administrative Procedure Act interacts with a statute that grants “sole and unreviewable discretion,” is supported by precedent? If it is a novel idea, please explain your justification for applying that standard.

RESPONSE: In *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), I interpreted the statutory language of section 1225(b)(1)(A)(iii)(I) of the Immigration and Nationality Act as granting DHS ‘sole and unreviewable discretion’ to designate categories of unauthorized noncitizens for expedited removal, but that the procedural requirements of the APA remained applicable, in light of long-standing D.C. Circuit precedent that judicial review of agency procedures may be required despite broadly worded delegations of authority.. *See, e.g., Delta Air Lines, Inc. v. Export-Import Bank of the U.S.*, 718 F.3d 974, 977 (D.C. Cir. 2013) (per curiam) (explaining that a “statute can confer on an agency a high degree of discretion, and yet a court might still have an obligation to review the agency’s exercise of its discretion to avoid abuse, especially on procedural grounds” (internal quotation marks omitted)); *Texas All. for Home Care Servs. v. Sebelius*, 681 F.3d 402, 408 (D.C. Cir. 2012) (noting that “the court must heed the APA’s basic presumption of judicial review’ that ‘will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress’” (quoting *Banzhaf v. Smith*, 737 F.2d 1167, 1168–69 (D.C. Cir. 1984)); *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) (explaining that “[t]he mere fact that a statute grants broad discretion to an agency does not render the agency’s decisions completely nonreviewable under the ‘committed to agency discretion by law’ exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised.”). The D.C. Circuit disagreed and reversed my decision. *Make the Road, New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

3. Do you believe that defendants who have been convicted of possessing child sexual exploitation material but have never molested a child, are better served by medical or psychological treatment rather than prison?

RESPONSE: As a federal judge for almost a decade, I took child pornography cases extremely seriously, and in every child pornography case I handled, the defendant was sentenced to serve time in prison. In each of the more than 100 sentencings I have conducted, including those

involving child pornography offenses, I followed the law as set forth by Congress. Consistent with 18 U.S.C. § 3553(a), I considered the specific factors in the statute, including but not limited to: the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” “to afford adequate deterrence,” and “to protect the public from further crimes of the defendant”; the sentencing range established by the Sentencing Guidelines; “any pertinent policy statement” of the Sentencing Commission; and “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” I also considered victim statements and the sentencing recommendations of the government, defense counsel, and U.S. Probation Office. Each sentence I imposed represented my judgment as to the appropriate resolution of the matter.

4. While you served as vice chair of the United States Sentencing Commission, the Commission issued a report in 2012 that recommended Congress revise the penalty structure governing offenses for distribution of child sexual exploitation material. As a judge presiding over the trials and sentencing of child pornography cases, did the Commission’s recommendations to Congress or your input into the Commission’s report serve as a factor in your sentencing decisions?

RESPONSE: No. As a federal district court judge, I sentenced more than 100 criminal defendants, and in each of the sentencings I conducted, I followed the law as set forth by Congress. Consistent with 18 U.S.C. § 3553(a), I considered the specific factors in the statute, including but not limited to “the nature and circumstances of the offense and the history and characteristics of the defendant.” I also considered the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” “to afford adequate deterrence,” and “to protect the public from further crimes of the defendant”; the sentencing range established by the Sentencing Guidelines; “any pertinent policy statement” of the Sentencing Commission; and “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” In addition, I considered victim statements and the sentencing recommendations of the government, defense counsel, and Probation Office. Each sentence I imposed represented my judgment as to the appropriate resolution of the matter.

5. Is it improper for federal judges to express their personal views on the cases that come before them?

RESPONSE: Under the Code of Conduct for United States Judges and established standards of judicial ethics, a judge’s own personal views regarding a matter must not have any bearing on her interpretation and application of the law. I share Justice Barrett’s concern about giving my personal views because I would not want any litigant to have the misimpression that my personal views would have any effect on my legal rulings.

6. Is it improper for federal judges to editorialize on the parties’ arguments or use op-ed style rhetoric in judicial opinions?

RESPONSE: Under the Code of Conduct for United States Judges and established standards for judicial ethics, a judge should act at all times in a manner that promotes public confidence in the

integrity and impartiality of the judiciary. I have always valued using clear, precise, and comprehensible language in my opinions to help ensure the parties understand the ruling and my reasoning.

7. In your judicial opinion for *Committee on the Judiciary v. McGahn*, you characterized the Department of Justice's arguments as supporting unlimited and unchecked executive power. You included suggestive statements such as, "Presidents are not kings" and, "they do not have subjects, bound by loyalty or blood." Is it improper for a judge to suggest that the Department of Justice was claiming monarchical powers through this kind of op-ed style rhetoric?

RESPONSE: In every case in which I issue a written opinion, it is of significant importance to me that the often complex legal questions presented by the parties are explained in such a way that not only the parties involved, but the general public understands the facts and the relevant law that I have considered and the analysis and reasoning underlying my final decisions. In my view, writing with such clarity ensures that the judiciary remains transparent and approachable to all Americans and bolsters public confidence in the institution. As a result, I have at times employed language that evokes imagery, allegories, or metaphors to explain complicated legal arguments and issues. Such an approach is consistent with many other judges and justices, including Justice Antonin Scalia. *See, e.g., Maryland v. King*, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting) ("Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection."); *see also* Meghan J. Ryan, *Justice Scalia's Bottom-Up Approach to Shaping the Law*, 25 WM. & MARY BILL RTS. J. 297 (2016) (describing Justice Scalia's "use of metaphors, colloquialisms, and humor . . . to create rapport with his audience").

8. In *Make the Road New York v. McAleenan*, you suggested that the Department of Homeland Security's position was "a terrible proposal" that "reeks of bad faith" and "demonstrates contempt for the authority that the Constitution's Framers have vested in the judicial branch." Is it improper for a judge to criticize the government's argument through this kind of op-ed style rhetoric?

RESPONSE: Please see my response to Question 7.

9. Does the use of this caustic, op-ed style rhetoric in *Make the Road New York v. McAleenan* and *Committee on the Judiciary v. McGahn* signal your personal views on these cases?

RESPONSE: Consistent with my methodology, I start from a position of neutrality by setting aside any preconceived notions and personal views regarding the parties and matters at issue in any cases before me. Doing so at the outset of a case allows me to observe the constraints on my judicial authority and ensure that I consider only those inputs that are relevant to deciding a particular case or controversy. As a result, I have never considered or relied upon my own personal views in any case, including in *Make the Road New York v. McAleenan* and *Committee on the Judiciary v. McGahn*.

10. During your confirmation hearing, you discussed the role of the courts in determining how constitutional protections in the Bill of Rights apply to new and modern technology. What is

the role of the courts in determining how the Second Amendment's protections apply to modern firearms? How would you undertake that exercise?

RESPONSE: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment “confer[s] an individual right to keep and bear arms[.]” This right “is not unlimited” and is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* However, the Court has determined that *Heller* provides a “clear statement that the Second Amendment ‘extends . . . to . . . arms . . . that were not in existence at the time of the founding.’” *Caetano v. Massachusetts*, 577 U.S. 411 (2017) (per curiam) (internal citations omitted) (rejecting the argument that “stun guns are not protected because they ‘were not in common use at the time of the Second Amendment’s enactment’”). One genius of the Framers was to set out enduring principles in the Constitution that could be applied to new circumstances, and in the modern world, the Supreme Court is called on to do that. As a current federal judge and a nominee, it would not be appropriate for me to comment further on issues that may be subject to litigation and come before the Supreme Court.

11. Does the Constitution protect rights that are not expressly enumerated in the Constitution?

RESPONSE: Cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), recognize an unenumerated right to privacy that encompasses the right to marital privacy and to use contraception. *Obergefell v. Hodges*, 576 U.S. 644 (2015), and *Loving v. Virginia*, 388 U.S. 1 (1967), affirm a constitutional right to marry, and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), recognize the right to have children and to direct their education. In *Saenz v. Roe*, 526 U.S. 489 (1999), the Supreme Court affirmed a right to travel. In *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court has recognized a right to abortion subject to limitations as articulated. The Supreme Court has also “assumed, and strongly suggested” that there is a “right to refuse unwanted lifesaving medical treatment.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). See generally *id.* at 721 (noting the “long line of cases” recognizing these liberties specially protected by the Due Process Clause).

12. How does the Supreme Court determine and recognize 1) a fundamental right, and 2) an unenumerated right?

RESPONSE: When considering substantive rights protected under the Due Process Clauses of the Fifth and Fourteenth Amendments, the Court considers whether the right is “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks and citations omitted). The Supreme Court has explained that certain rights are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The Supreme Court has described the concept of fundamental rights in various contexts, and while all of the uses suggest an important principle that warrants a high degree of protection I do not understand there to be a single universal meaning. For example, the Court has sometimes called freedom of speech and free exercise of religion fundamental. The Court has said that protections in the Bill of Rights that are “fundamental to the American scheme of justice” (such as the right to trial by

jury in a serious criminal case) were made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *See Duncan v. Louisiana* (1968). In *McDonald v. City of Chicago* (2010), the plurality said that the Second Amendment’s individual right to keep and bear arms for self defense was applicable to the States because it is “a provision of the Bill of Rights that protects a right that is fundamental from an American perspective.” The Court has also referred to voting rights as “fundamental.” *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

13. In *Alliance of Artists and Recording Companies v. General Motors*, you ruled against the nonprofit alliance that sought to collect royalties for copyright owners from car companies that were utilizing a recording technique that allowed for music to be stored within the vehicle’s internal systems. While I understand that the law does not always keep pace with emerging technologies, it’s important for me to understand how you see the modern IP landscape. Can discuss how you see the viability of exemptions for broadcasters that fail to pay royalties to artists featured on their radio stations?

RESPONSE: The Constitution entrusts design and modernization of the intellectual property landscape to Congress. In *Alliance of Artists and Recording Companies v. General Motors*, as in all of my cases involving issues of statutory interpretation, I undertook to faithfully apply the law as enacted by Congress. In that vein, I understand that Congress has enacted a statute exempting certain nonsubscription broadcast transmissions of audio recordings from its definition of copyright infringement. I also understand that there is proposed legislation on this topic, and as a sitting judge it would be inappropriate for me to offer an opinion on the matter.