Senator Lindsey Graham, Ranking Member
Questions for the Record
Ms. Brandy R. McMillion
Nominee to be United States District Judge for the Eastern District of Michigan

1. **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 statement or the context in which it was made. However, I disagree that any judicial decision should be based on a judge's personal opinions, values, or beliefs. Judges are duty bound to apply all relevant Supreme Court and circuit precedent to the facts of the cases before them. The individual opinions or values of a particular judge are irrelevant to any determination of the court.

2. **When asked why he wrote opinions that he knew the Supreme Court would reverse, Judge Stephen Reinhardt's response was: "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

   Response: I am not familiar with Judge Reinhardt's comment or the context in which it was made. However, I respectfully disagree with this statement. Judges are duty bound to apply all relevant Supreme Court precedent to the cases before them. If fortunate to be confirmed as a district judge, I will faithfully apply all relevant Supreme Court and Sixth Circuit precedent to the facts of the cases before me.

3. **Dr. Rajenda Bothra and several of his colleagues were prosecuted in the Eastern District of Michigan for a massive healthcare fraud scheme. After he spent approximately three years in detention, a jury acquitted him and several of his codefendants of all charges. The media subsequently described this case as "one of the biggest losses for the U.S. Attorney's Office in more than 10 years."**

   Were you involved in this case?

   Response: Yes

   If yes,

   a. **What was your role in this case?**

      Response: From 2018 to present, I was one of the assigned AUSAs to represent the United States in a health care fraud/drug diversion investigation and prosecution of six doctors who were charged with operating a multi-million-dollar health care fraud scheme and diverting thousands of opioids in a four-year conspiracy. This case was initiated out of the Opioid Fraud Abuse and Detection Unit, started by Attorney General Jeff Sessions, in which I was one of 12 prosecutors nationwide

focusing on prosecuting medical professionals that were contributing to the opioid epidemic.

b. Please explain what happened in this case?

Response: The case was indicted by a grand jury in 2019. However, due to the complexities of the case, the COVID-19 pandemic and courthouse closures, the case was not tried until 2021. Dr. Bothra was detained pending trial as a risk of flight. He filed eight bond motions, six of which were appealed to the Sixth Circuit, and all were affirmed in favor of detention. At trial, I, along with another AUSA, presented evidence on the lack of medical necessity of the procedures performed and the invalidity of the prescriptions issued by the doctors working at the clinic. Two of the defendants entered guilty pleas and testified at trial on their involvement in the health care fraud conspiracy and the drug diversion conspiracy. The remaining four defendants were acquitted after a six-week trial. Post-trial, one defendant filed a motion arguing he was entitled to his litigation expenses and attorney's fees. Under the Hyde Amendment, the court denied his motion, finding that the defendant was not entitled to any relief because the government's prosecution was not vexatious, frivolous, or in bad faith.

4. Please describe the relevant law governing when a federal court may entertain and grant a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court.

Response: Title 28 United States Code, Section 2254 provides:

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

28 U.S.C § 2254(a). The application for the writ cannot be granted unless the applicant first exhausts all state court remedies; however, it can be denied without said exhaustion. 28 U.S.C. § 2254(b). Additionally, any application based on claims of the merits of a state court proceeding cannot be granted unless the adjudication of the claim resulted in a decision that was contrary to federal law or unreasonable in light of the evidence presented in the state. 28 U.S.C. § 2254(d).

5. Please describe the relevant law governing how a prisoner in custody under sentence of a federal court may seek and receive relief from the sentence.

Response: Title 28 United States Code, Section 2255 provides:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the

> sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

28 U.S.C § 2255(a). Although not widely used, a prisoner also has the right to challenge the constitutionality of their conviction or sentence under 28 U.S.C. § 2241 in a civil action against the warden of the facility in which they are housed. These civil suits are filed in the jurisdiction where the prison is located. *See* 28 U.S.C. §2241(d).

6. **Please explain the facts and holding of the Supreme Court decisions in *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*.**

Response: In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023), the Supreme Court issued a consolidated opinion addressing both the Harvard College and University of North Carolina's admissions programs. The Court held that both colleges' race-based admissions programs violated the Equal Protection Clause of the Fourteenth Amendment. *Id*. at 2147. The Court also found that the programs employed race in a negative and stereotypical manner – and doing so was in direct contravention to prior precedent set in *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id*. at 2169-70. As required by *Grutter*, the admission programs had no logical endpoint. *Id*. at 2172-73. Because of this, the Court held that the admission programs cannot be reconciled with the guarantees of the Equal Protection Clause and therefore were unconstitutional. *Id*. at 2176.

7. **Have you ever participated in a decision, either individually or as a member of a group, to hire someone or to solicit applications for employment?**

Response: Yes.

If yes, please list each job or role where you participated in hiring decisions.

Response: While in private practice, I served on the firm's hiring committee, soliciting applications for summer associates. I also serve on the hiring committee at the United States Attorney's Office, evaluating candidates for positions as both Assistant United States Attorneys and support staff.

8. **Have you ever given preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?**

Response: No.

9. Have you ever solicited applications for employment on the basis of race, ethnicity, religion, or sex?

Response: No.

10. Have you ever worked for an employer (such as a law firm) that gave preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?

If yes, please list each responsive employer and your role at that employer. Please also describe, with respect to each employer, the preference given. Please state whether you played any part in the employer's decision to grant the preference.

Response: While employed at Pepper Hamilton, LLP, the firm participated in the Wolverine Bar Association Summer Clerkship Program. This program is designed to increase the number of minority law students employed in summer clerkships. I interviewed candidates on behalf of the firm as a part of that program. However, there were no preferences given to employ a minority student over any other non-minority student as a part of this program.

11. Under current Supreme Court and Sixth Circuit precedent, are government classifications on the basis of race subject to strict scrutiny?

Response: Yes. Classifications based on race call for enhanced safeguards under the Equal Protection Clause. Under current precedent, the Supreme Court has held that race-based classifications are subject to strict scrutiny. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). "Such [racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Id*. This strict scrutiny analysis applies regardless of whether the classification is a burden or benefit to a particular racial group. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023); *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

12. Please explain the holding of the Supreme Court's decision in *303 Creative LLC v. Elenis*.

Response: In *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023), the Supreme Court held that the Free Speech Clause of the First Amendment prohibits compelled speech. Colorado's Anti Discriminatory Act (CADA) prohibited businesses that sell goods or services to the public from discriminating on the basis of sexual orientation, among other characteristics. A Colorado graphic design business owner wanted to expand her business to include web design but did not want to create websites for same-sex couples because of her religious beliefs. She challenged CADA in federal court as a violation of

her First Amendment rights. After the district court granted summary judgment in favor of the state and the Tenth Circuit affirmed, the Supreme Court reversed finding that the First Amendment protects all persons to be free to "think and speak as they wish, not as the government demands." *Id*. at 2322.

13. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), Justice Jackson, writing for the Court, said: "*If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein*."

Is this a correct statement of the law?

Response: I am unaware of any case that has overruled *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), which held that public schools cannot require Jehovah Witness students to salute the American flag.

14. How would you determine whether a law that regulates speech is "content-based" or "content-neutral"? What are some of the key questions that would inform your analysis?

Response: If a law regulates speech based on its content and what is actually expressed, it is content-based. However, if the law regulates only the time, place, and manner of communication, without regard to the substance of the message, it is content-neutral. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "The inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id*.

15. What is the standard for determining whether a statement is not protected speech under the true threats doctrine?

Response: True threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). In *Black*, the Supreme Court held that banning this type of speech is not a violation of the First Amendment. It is not necessary that the speaker actually carry out the threats because the prohibition on true threats is meant to protect the fear of violence, possibilities of threatened violence and intimidation. *Id*. In criminal cases involving true threats, the government must prove that the defendant has some subjective understanding of the threatening nature of the threats. *Counterman v. Colorado*, 143 S. Ct. 2106 (2023). But the First Amendment requires no more than a recklessness *mens rea* standard. *Id*. at 2113.

16. Under Supreme Court and Sixth Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?

Response: There is a distinction between adjudicative facts and legislative facts. Adjudicative facts are facts of a particular case – facts about the parties or the issues to which the law is applied. *Marshall v. Bramer*, 828 F.2d 355, 357 (6th Cir. 1987). Legislative facts are facts "which have relevance to legal reasoning ..., whether in the formulation of a legal principle or ruling by a judge ... or in the enactment of a legislative body." *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002). In *Pullman-Standard v. Swint*, the Supreme Court noted the "vexing nature of the distinction between questions of fact and questions of law." 456 U.S. 273, 288 (1982). There is no particular "rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Id*. Appellate courts are often presented with determinations on this issue. First, with "purely legal" questions, the court will typically review those legal issues de novo. *See Singh v. Rosen*, 984 F.3d 1142, 1148 (6th Cir. 2021) (citing *U.S. Bank Nat'l Ass'n ex rel. CWCapital Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 965 (2018)). With "purely factual" questions, the court will typically review those for clear error. *Id*. Courts follow more of a case-by-case analysis when addressing mixed questions of law and fact. "If a question is more fact intensive, they typically review the question with deference; if it is more legal, they typically review it de novo." *Id*. at 1148 (*citing Guerrera-Lasprilla v. Barr*, 140 S.Ct. 1062 (2020)). These issues are most often decided at the circuit level, however, if fortunate to be confirmed as a district judge, I will faithfully apply all relevant Supreme Court and Sixth Circuit precedent in this area.

17. Which of the four primary purposes of sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important?

Response: A just sentence is one that is sufficient but not greater than necessary to meet all the aims of sentencing. *See* 18 U.S.C. § 3553(a). The statute does not weigh any one purpose over the others. If fortunate to be confirmed as a district judge, when determining a sentence, I will consider all the § 3553(a) factors and neutrally apply each to the facts and the defendant before me.

18. Please identify a Supreme Court decision from the last 50 years that you think is particularly well-reasoned and explain why.

Response: I have not studied all Supreme Court precedent from the last 50 years to determine which, if any, are more reasoned than another. Additionally, as a judicial nominee, it would generally be inappropriate for me to opine or comment on the correctness of the opinion of any court. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply any and all applicable Supreme Court precedent to the facts of the case before me.

19. Please identify a Sixth Circuit judicial opinion from the last 50 years that you think is particularly well-reasoned and explain why.

Response: I have not studied all Sixth Circuit precedent from the last 50 years to determine which, if any, are more reasoned than another. Additionally, as a judicial nominee, it would generally be inappropriate for me to opine or comment on the correctness of the opinion of any court. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply any and all applicable Sixth Circuit precedent to the facts of the case before me.

20. Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.

Response: This statute prohibits an individual from picketing or parading outside of a courthouse, judicial building or the home of a judge, witness, juror or court officer, when the intent in doing so is to obstruct justice or attempt to influence the judge, witness, juror or court officer.

21. Is 18 U.S.C. § 1507 constitutional?

Response: I am unaware of any Supreme Court or Sixth Circuit precedent that has held 18 U.S.C. § 1507 to be unconstitutional. However, in *Cox v. Louisiana*, 379 U.S. 559 (1965), the Supreme Court upheld a similarly worded state statute that was modeled after 18 U.S.C. § 1507. There, the Court held that the Louisiana picketing statute "on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." *Id*. at 564. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply all applicable Supreme Court and Sixth Circuit precedent when analyzing the constitutionality of any statute.

22. Please answer the following questions yes or no. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer:

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

Response: Under the Code of Judicial Conduct, it is generally inappropriate for a judicial nominee to comment on the correctness of any opinion of any court. Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. However, there are a small number of cases and areas of law that are so well settled and unlikely to be litigated further, that an opinion on those areas is not likely to erode public confidence in the judicial system. Consistent with past judicial nominees, I believe that I can opine on the correctness of this case and do believe that *Brown v. Board of Education* was correctly decided.

b. Was *Loving v. Virginia* correctly decided?

Response: Under the Code of Judicial Conduct, it is generally inappropriate for a judicial nominee to comment on the correctness of any opinion of any court.

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. However, there are a small number of cases and areas of law that are so well settled and unlikely to be litigated further, that an opinion on those areas is not likely to erode public confidence in the judicial system. Consistent with past judicial nominees, I believe that I can opine on the correctness of this case and do believe that *Loving v. Virginia* was correctly decided.

c. Was *Griswold v. Connecticut* correctly decided?

Response: Under the Code of Judicial Conduct, it is generally inappropriate for a judicial nominee to comment on the correctness of the opinion of any court. Deference to the judgments and rulings of courts depends on public confidence in the integrity and impartiality of judges. In cases dealing with areas of the law that could potentially be litigated further, an opinion on those decisions would be inappropriate because I would not want any potential litigant to think that I have prejudged any issue that may be presented to the court. Consistent with past judicial nominees, I cannot opine on the correctness of this case. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply *Griswold v. Connecticut* to any applicable case presented before me.

d. Was *Roe v. Wade* correctly decided?

Response: Please see my response to Question 22c. However, I will note that the Supreme Court overruled *Roe v. Wade* in *Dobbs v. Jackson Women's Health*. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply *Dobbs v. Jackson Women's Health* to any applicable case presented before me.

e. Was *Planned Parenthood v. Casey* correctly decided?

Response: Please see my response to Question 22c. However, I will note that the Supreme Court overruled *Planned Parenthood v. Casey* in *Dobbs v. Jackson Women's Health*. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply *Dobbs v. Jackson Women's Health* to any applicable case presented before me.

f. Was *Gonzales v. Carhart* correctly decided?

Response: Please see my response to Question 22c. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply *Gonzales v. Carhart* to any applicable case presented before me.

g. Was *District of Columbia v. Heller* correctly decided?

Response: Please see my response to Question 22c. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply *District of Columbia v. Heller* to any applicable case presented before me.

h. Was *McDonald v. City of Chicago* correctly decided?

Response: Please see my response to Question 22c. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply *McDonald v. City of Chicago* to any applicable case presented before me.

i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?

Response: Please see my response to Question 22c. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* to any applicable case presented before me.

j. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?

Response: Please see my response to Question 22c. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply *New York State Rifle & Pistol Association v. Bruen* to any applicable case presented before me.

k. Was *Dobbs v. Jackson Women's Health* correctly decided?

Response: Please see my response to Question 22c. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply *Dobbs v. Jackson Women's Health* to any applicable case presented before me.

l. Were *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* correctly decided?

Response: Please see my response to Question 22c. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* to any applicable case presented before me.

m. Was *303 Creative LLC v. Elenis* correctly decided?

Response: Please see my response to Question 22c. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply *303 Creative LLC v. Elenis* to any applicable case presented before me.

23. What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?

Response: If fortunate to be confirmed as a district judge, I would apply the legal standards set forth in *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *District of Columbia v. Heller*, 554 U.S. 570 (2008) and its progeny. In *Bruen*, the Supreme Court held:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 142 S. Ct. at 2126 (citation omitted). The court is required to "assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id*. at 2131. And that historical inquiry will often involve reasoning by analogy where present-day firearm regulations must be "relatively similar" to historical regulations. *Id*. at 2132.

24. 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: Not to my knowledge.

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: Not to my knowledge.

25. 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: Not to my knowledge.

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: Not to my knowledge.

26. 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?

Response: No.

b. Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.

Response: None.

c. 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, or any other such Arabella dark-money fund that is still shrouded.

Response: Not to my knowledge.

d. 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, or any other such Arabella dark-money fund that is still shrouded.

Response: Not to my knowledge.

27. 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: Not to my knowledge.

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

Response: Not to my knowledge.

28. 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: Not to my knowledge.

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: Not to my knowledge.

29. Please describe the selection process that led to your nomination to be a United States District Judge, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).

Response: On February 4, 2021, I submitted an application to Senator Debbie Stabenow's office for an opening on the United States District Court in the Eastern District of Michigan. On March 11, 2021, I interviewed with the bipartisan Eastern District of Michigan Judicial Advisory Committee. On August 20, 2021, I submitted an update to my application to Senator Debbie Stabenow's office and again interviewed with the Judicial Advisory Committee on April 14, 2022. I first communicated and interviewed with the White House Counsel's Office on April 21, 2023. Since April 22, 2023, I have been in contact with attorneys from the Office of Legal Policy at the Department of Justice and the White House Counsel's Office about my nomination and the confirmation process.

30. During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: Not to my knowledge.

31. During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: Not to my knowledge.

32. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: Not to my knowledge.

33. During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundations, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: Not to my knowledge.

34. During your selection process did you talk with any officials from or anyone directly associated with Fix the Court, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: Not to my knowledge.

35. Since you were first approached about the possibility of being nominated, did anyone associated with the Biden administration or Senate Democrats give you advice about which cases to list on your committee questionnaire?

a. If yes,

i. Who?

ii. What advice did they give?

iii. Did they suggest that you omit or include any particular case or type of case in your questionnaire?

Response: I provided a draft of my Senate Judiciary Questionnaire to the Office of Legal Policy for feedback and comment. I was advised to include cases and other legal work that represented the breadth of my practice and experience.

36. 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 29.

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

Response: I received these questions from the Office of Legal Policy at the Department of Justice on August 2, 2023. I conducted research and a review of my files to develop my responses. I submitted a draft of my responses to the Office of Legal Policy, received limited feedback, and finalized my responses for submission.

Senate Judiciary Committee
Nominations Hearing
July 26, 2023
Questions for the Record
Senator Amy Klobuchar

Brandy McMillion, nominee to be U.S. District Court Judge for the Eastern District of Michigan

Federal district court judges manage a large number of cases at one time that touch a wide range of areas of the law, while also ensuring that the litigants who appear before them feel that they have had their day in court.

- **How have you approached areas of the law that you were unfamiliar with, and what in your background has prepared you to manage a federal district court judge's docket?**

  Response: When I was promoted to Chief of the General Crimes Unit (GCU) at the United States Attorney's Office, I was tasked with intake and managing all the office's reactive cases. This required me to work with numerous agencies on various aspects of federal law. Moreover, as a commercial litigation associate for over 9 years, I was often confronted with different areas of practice that required learning new areas of the law. I approached each of these situations the same – by thoroughly researching the applicable law and getting up to speed on any unfamiliar areas of law. If I am so fortunate to be confirmed as a district court judge, I will do the same and fully review all pleadings of the parties to be adequately prepared so that the litigants understand the importance that I will place on their matters in my court.

  I also believe that my experience as a Senior Litigation Associate, Deputy Chief of the Health Care Fraud Unit and Chief of the General Crimes Unit at the US Attorney's Office has aptly prepared me to manage a significant docket. In each of these roles, I have been responsible for my own work and the supervision of other's caseloads. As GCU Chief, I am responsible for managing 14 different AUSAs and combined dockets can exceed over 600 cases at any given time. I am diligent in managing my cases while ensuring that I provide adequate attention to each matter that I work on and supervise.

Senator Mike Lee
Questions for the Record
Brandy R. McMillion, Nominee to the United States District Court for the Eastern District of Michigan

1. How would you describe your judicial philosophy?

Response: If fortunate to be confirmed as a district judge, I will diligently prepare, approach each case with an open mind, review all court filings and arguments of the parties, consider binding Supreme Court and Sixth Circuit precedent, and faithfully and impartially apply the law to the facts of the cases before me. I will treat all parties fairly, and with the respect and dignity that they deserve.

2. What sources would you consult when deciding a case that turned on the interpretation of a federal statute?

Response: If fortunate to be confirmed as a district judge, I would be bound by any Supreme Court and Sixth Circuit precedent setting forth methods of statutory interpretation. In interpreting a statute for which there is no binding Supreme Court or Sixth Circuit precedent, I would first start with the text of the statute. If the language of the statute is unambiguous, then the plain meaning of the statute must be applied. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If it is ambiguous, I would then look to Supreme Court and Sixth Circuit precedent interpreting similar federal statutes, persuasive authority (such as other circuit opinions), and any applicable canons of construction.

3. What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?

Response: If fortunate to be confirmed as a district judge, I would be bound by any Supreme Court and Sixth Circuit precedent setting forth methods of constitutional interpretation. If there is no binding precedent on the matter, I would start with the text of the Constitution. If the language of the provision is unambiguous, then the plain meaning of the provision must be applied. If it is ambiguous, I would look to Supreme Court and Sixth Circuit precedent interpreting constitutional provisions to guide my analysis, such as *District of Columbia v. Heller*, 545 U.S. 570 (2008) and *Crawford v. Washington*, 541 U.S. 36 (2004). In so doing, I would consider precedent interpreting analogous constitutional provisions, persuasive authority (such as other circuit opinions), and any applicable canons of construction.

4. What role do the text and original meaning of a constitutional provision play when interpreting the Constitution?

Response: In interpreting the Constitution, you first look to the text for its unambiguous meaning. Additionally, the Supreme Court has found that in interpreting certain constitutional provisions, you look to the original meaning of the provision. *See e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (analyzing

challenges to the Second Amendment based on the original meaning of the text); *Crawford v. Washington*, 541 U.S. 36 (2004) (applying the original meaning of the text when analyzing the Confrontation Clause).

5. How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?

Response: In statutory interpretation, you start with reading the statutes and if it is unambiguous, the inquiry ends there. If the language of the statute is unambiguous then the plain meaning of the statute must be applied. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If it is ambiguous, I would then look to Supreme Court and Sixth Circuit precedent interpreting federal statutes, persuasive authority (such as other circuit opinions), and any applicable canons of construction.

a. Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: In applying the "plain meaning" in statutory interpretation, the Supreme Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020); *see also District of Columbia v. Helle*r, 554 U.S. 570, 634-35 (2008) (constitutional rights are enshrined with the scope they were understood to have when the people adopted them).

6. What are the constitutional requirements for standing?

Response: Article III of the Constitution limits the court to determine actual cases and controversies which require an injury in fact, causation and redressability. To properly assert standing, a party must allege that it has a genuine stake in the outcome of a case because (1) there is a concrete and particularized injury; (2) that injury is traceable to the allegedly unlawful action; and (3) the injury is redressable by a favorable judicial decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

7. Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?

Response: In addition to the enumerated powers in the Constitution, Article I, Section 8 of the Constitution grants Congress the power to make laws that are necessary and proper to carry out other federal powers granted therein. Congress has broad authority to determine what is "necessary" for implementing federal powers. *See McCullough v. Maryland*, 17 U.S. 316 (1819).

8. Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?

Response: The Supreme Court has held that Congress can enact law without specifically referencing a constitutional provision. *See Nat'l Fed. Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). However, "[i]f no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution." *Id*. at 535. If fortunate to be confirmed as a district judge, I would approach interpreting that law as I would any other federal statute – first looking to binding Supreme Court and Sixth Circuit precedent. If there were no binding precedent, I would look to the plain meaning of the text. If the constitutionality of the statute could not be resolved by binding Supreme Court and Sixth Circuit precedent, I would then look to persuasive authority (such as other circuit opinions and precedent interpreting similar statutes) and any applicable canons of construction.

9. Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?

Response: The Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. The Due Process Clause of the Fifth and Fourteenth Amendments specifically "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). Some examples of these rights are the right to privacy (*Griswold v. Connecticut*, 381 U.S. 479 (1965)); the right to marry (*Loving v. Virginia*, 388 U.S. 1 (1967) and *Obergefell v. Hodges*, 576 U.S. 644 (2015)); the right to travel (*Kent v. Dulles*, 357 U.S. 116 (1958)); the right to have children (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)); and the right to educate your children (*Meyer v. Nebraska*, 262 U.S. 390 (1923)).

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

11. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?

Response: In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Supreme Court held that the Due Process Clause does not protect the right to an abortion. Similarly, the economic rights identified in *Lochner v. New York* were also overruled in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). If fortunate to be confirmed as a district judge, I am duty bound and will follow all binding Supreme Court and Sixth Circuit precedent.

12. What are the limits on Congress's power under the Commerce Clause?

Response: Congress is limited to three types of activities under the Commerce Clause: (1) the use of channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, including 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).

13. What qualifies a particular group as a "suspect class," such that laws affecting that group must survive strict scrutiny?

Response: There are four classifications that are accepted as suspect classifications, subjecting them to strict scrutiny: race, religion, national origin, and alienage. *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971). For any other group to qualify as a suspect class, it must, as a historical matter, be a discrete and insular minority group that has been the subject of discrimination, politically powerless, and exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *See Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

14. How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?

Response: The Supreme Court has stated, "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Morrison v. Olsen*, 487 U.S. 654, 693 (1988).

15. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

Response: If fortunate to be confirmed as a district judge, I would first begin by applying any binding Supreme Court and Sixth Circuit precedent if confronted with a case in which one branch assumed an authority not granted to it by the text of the Constitution. I would apply the relevant precedent depending on the issue before me using cases like *Medellin v. Texas*, 552 U.S. 491 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Marbury v. Madison*, 5 U.S. 137 (1803). If application of binding Supreme Court and Sixth Circuit precedent did not resolve the issue, I would look to the plain meaning of the Constitutional provision, cannons of construction and persuasive authority (such as other circuit opinions).

16. What role should empathy play in a judge's consideration of a case?

Response: Judicial decisions should not be based on a judge's empathy, personal opinions, values, or beliefs. Judges are duty bound to apply all relevant Supreme Court and circuit precedent to the facts before them. The individual opinions or values of a particular judge are irrelevant to any consideration of a case.

17. What's worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: Both scenarios present undesirable and inappropriate outcomes.

18. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: I have not had the occasion to study the Supreme Court's opinions from 1789 to 1857. However, as a judicial nominee, it would be inappropriate for me to opine or comment on the validity of the actions of any court. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply all applicable Supreme Court precedent to the facts of the cases before me.

19. How would you explain the difference between judicial review and judicial supremacy?

Response: "Judicial review" refers to "[a] court's power to review the actions of other branches or levels of government; esp. the courts' power to invalidate legislative and executive actions as being unconstitutional" and "judicial supremacy" refers to "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." *See* Black's Law Dictionary (11th ed. 2019).

20. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: I am not familiar with this quote or the context in which it was made. However, the Constitution requires all elected officials and judicial officers to support the Constitution. *See* U.S. Const. art. VI. And the Supreme Court has also determined that elected officials are required to follow duly rendered judicial decisions. *See Cooper v. Aaron*, 358 U.S. 1 (1958).

21. In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.

Response: I have not had occasion to study this statement, but generally understand it to mean that courts are limited to the facts before them and the applicability of binding precedent. Judges do not have the authority to make law or the force to execute it. Judges' roles are to uphold the rule of law by application of the law to the cases before them. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply all Supreme Court and Sixth Circuit precedent to the facts of the cases before me.

22. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: District court judges are duty bound to always apply binding Supreme Court and circuit precedent. Moreover, even where no controlling precedent applies, the district judge must issue a decision consistent with the Constitution. A judge's personal beliefs on the issue should not be a consideration in any decision rendered.

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

Response: None. These factors are not relevant in the determination of a sentence. *See* U.S.S.G. §5H1.10 Policy Statement. If fortunate to be confirmed as a district judge, when determining a sentence, I will consider all the factors set forth in 18 U.S.C. §3553(a) and neutrally apply each to the facts and the defendant before me.

24. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?

Response: I am not aware of the context in which that definition was supplied. However, Black's Law Dictionary (11th ed. 2019) defines "equity" as "[f]airness; impartiality; evenhanded dealing."

25. Is there a difference between "equity" and "equality?" If so, what is it?

Response: "Equity" is defined as "[f]airness; impartiality; evenhanded dealing," whereas "equality" is defined as "[t]he quality, state, or condition of being equal; esp., likeness in power or political status." *See* Black's Law Dictionary (11th ed. 2019).

26. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?

Response: The Fourteenth Amendment provides, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 2. I am unaware of any Supreme Court or Sixth Circuit precedent that applies that definition of equity to the Fourteenth Amendment.

27. How do you define "systemic racism?"

Response: Systemic racism is a complex paradigm that means many different things to many different people. Merriam-Webster online dictionary defines systemic racism as "the oppression of a racial group to the advantage of another as perpetuated by inequity within interconnected systems (such as political, economic, and social systems)." *See Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/systemic%20racism.

28. How do you define "critical race theory?"

Response: Black's Law Dictionary (11th ed. 2019) defines "critical race theory" as a "reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities."

29. Do you distinguish "critical race theory" from "systemic racism," and if so, how?

Response: Please see my response to Questions 27 and 28.

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

Questions for the Record for Brandy R. McMillion, nominated to be United States District Judge for the Eastern District of Michigan

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: Yes. The Equal Protection Clause of the Fourteenth Amendment in the U.S. Constitution prohibits discrimination on the basis of race. There are also other federal laws that prohibit racial discrimination, such as the Civil Rights Act of 1964.

2. 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 Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. The Due Process Clause of the Fifth and Fourteenth Amendments specifically "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). If fortunate to be confirmed as a district judge, I will faithfully and impartially apply all Supreme Court and Sixth Circuit precedent on enumerate rights. As a judicial nominee, it would be inappropriate for me to opine on any as yet articulated rights that could be identified by the Supreme Court in the future.

3. How would you characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.

Response: I have not had the occasion to study the philosophies of the many Supreme Court Justices, so I cannot say that I am or would be analogous to any particular Justice. If fortunate to be confirmed as a district judge, I will diligently prepare, approach each case with an open mind, review all court filings and arguments of the parties, consider binding Supreme Court and Sixth Circuit precedent, and faithfully and impartially apply the law to the facts of the cases before me. I will treat all parties fairly, and with the respect and dignity that they deserve.

4. Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an "originalist"?

Response: Black's Law Dictionary (11th ed. 2019) defines originalism as the doctrine by which "words of a legal instrument are to be given the meanings they had when they were adopted." I do not personally subscribe to any particular labels; however, if fortunate to be confirmed as a district judge, I will faithfully and impartially apply all binding Supreme Court and Sixth Circuit precedent to the facts of the cases before me.

5. Please briefly describe the interpretive method often referred to as living constitutionalism. Would you characterize yourself as a 'living constitutionalist'?

Response: Black's Law Dictionary (11th ed. 2019) defines living constitutionalism as the doctrine by which "the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." I do not personally subscribe to any particular labels; however, if fortunate to be confirmed as a district judge, I will faithfully and impartially apply all Supreme Court and Sixth Circuit precedent to the facts of the cases before me.

6. If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?

Response: If the text of the Constitution is unambiguous as to the issue before the court, I would be bound to apply the plain language of the Constitution.

7. Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?

Response: Statutory interpretation is governed by binding precedent. In certain areas the Supreme Court has set forth which standards of constitutional interpretation to use in analyzing law. *See e.g. New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022) and *District of Columbia v. Heller*, 554 U.S. 570 (2008) (analyzing challenges to the Second Amendment based on the original meaning of the text); *Crawford v. Washington*, 541 U.S. 36 (2004) (applying the original meaning of the text when analyzing the Confrontation Clause).

8. Do you believe the meaning of the Constitution changes over time absent changes through the Article V amendment process?

Response: The Constitution is an enduring document; but Article V sets forth the ability to amend the Constitution. If confirmed as a district judge, I would dutifully uphold the Constitution, all of its amendments, and faithfully follow all Supreme Court and Sixth Circuit precedent.

9. Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?

Response: Yes. *Dobbs v. Jackson Women's Health Organization* is binding and controlling Supreme Court precedent.

a. Was it correctly decided?

Response: Under the Code of Judicial Conduct, it is generally inappropriate for a judicial nominee to comment on the correctness of the opinion of any court.

Deference to the judgments and rulings of courts depends on public confidence in the integrity and impartiality of judges. In cases dealing with areas of the law that could potentially be litigated further, an opinion on those decisions would be inappropriate because I would not want any potential litigant to think that I have prejudged any issue that may be presented to the court. Consistent with past judicial nominees, I cannot opine on the correctness of this case.

10. Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?

Response: Yes. *New York Rifle & Pistol Association v. Bruen* is binding and controlling Supreme Court precedent.

a. Was it correctly decided?

Response: Under the Code of Judicial Conduct, it is generally inappropriate for a judicial nominee to comment on the correctness of the opinion of any court. Deference to the judgments and rulings of courts depends on public confidence in the integrity and impartiality of judges. In cases dealing with areas of the law that could potentially be litigated further, an opinion on those decisions would be inappropriate because I would not want any potential litigant to think that I have prejudged any issue that may be presented to the court. Consistent with past judicial nominees, I cannot opine on the correctness of this case.

11. Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?

Response: Yes. *Brown v. Board of Education* is binding and controlling Supreme Court precedent.

a. Was it correctly decided?

Response: Under the Code of Judicial Conduct, it is generally inappropriate for a judicial nominee to comment on the correctness of any opinion of any court. Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. However, there are some cases and areas of law that are so unlikely to be litigated further, that an opinion on those areas is not likely to erode public confidence in the judicial system. Consistent with past judicial nominees, I believe that I can opine on the correctness of this case and do believe that *Brown v. Board of Education* was correctly decided.

12. What sort of offenses trigger a presumption in favor of pretrial detention in the federal criminal system?

Response: There is a rebuttable presumption in favor of detention when the defendant is alleged to have committed crimes while on pretrial release. If the charges are for crimes of violence, certain drug crimes, life imprisonment or death eligible offenses,

crimes involving a minor victim, or crimes that involve the possession or use of a firearm or destructive device, detention is presumed. *See* 18 U.S.C. § 3142(e)(2).

There is also a rebuttable presumption in favor of detention based on the nature of certain crimes. *See* 18 U.S.C. § 3142(e)(3). Those crimes include certain controlled substance offenses; use of a deadly or dangerous weapon in relation to a crime of violence or drug trafficking crime; conspiracies to kill, kidnap, maim, injure persons or damage property in a foreign country; acts of terrorism transcending national boarders; other federal terrorism crimes; crimes relating to involuntary servitude and forced labor; and child exploitation crimes. *See* 18 U.S.C. § 3142(f)(1). If charged with any of these offenses, it is presumed that the defendant is a danger to the community and that he or she should be detained pending trial.

a. What are the policy rationales underlying such a presumption?

Response: One of the aims of the Bail Reform Act, 18 U.S.C. § 3142, is to reasonably assure the safety of any other person or the community. It is presumed that these types of offenses present a defendant who is dangerous. However, that presumption is not absolute and can be overcome by a preponderance of evidence.

13. Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be a religious organization like Little Sisters of the Poor or small businesses operated by observant owners?

Response: Yes. The government is generally prohibited from infringing upon the free exercise of religion guaranteed by the First Amendment, whether it be to a religious organization, or a small business operated by observant owners. Under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb–1(b), the government shall not burden a person's free exercise of religion, unless the government action: "(i) is in furtherance of a compelling governmental interest; and (ii) is the least restrictive means of furthering that compelling governmental interest." *Id*.

14. Is it ever permissible for the government to discriminate against religious organizations or religious people?

Response: Infringement upon an individual or organization's religious freedoms is subject to strict scrutiny. *See e.g. 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2310 (2023); *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022); *Carson v. Makin,* 142 S. Ct. 1987 (2022); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Espinosa v. Montana Dept. of Revenue*, 140 S. Ct. 2246, 2257 (2020); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1983). Therefore, to withstand the enhanced protections given to religious freedom under the Constitution, the government must "narrowly tailor" its actions to meet a "compelling government interest." *Lukumi*, 508 U.S. at 546. However, if there is a facially neutral statute that is generally applied and only incidentally burdens religion, strict scrutiny does not apply. *Id*. at 531.

15. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court held that the governor of New York was enjoined from enforcing an executive order which set occupancy limits on religious services during the COVID-19 pandemic. The Court found that the religious entity organizations were entitled to a preliminary injunction because (i) they were likely to prevail on the merits of their claim by making a strong showing that the executive order violated the neutrality requirement of the Free Exercise clause when naming religious entities but allowing secular entities to simply be categorized as essential; (ii) they could show irreparable harm because "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"; and (iii) the government failed to show how enjoining the restrictions would harm the public because there was no evidence that allowing more expansive attendance at the religious gatherings would result in the spread of COVID-19. *Id*. at 66-68.

16. Please explain the U.S. Supreme Court's holding and rationale in *Tandon v. Newsom*.

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted an application for injunctive relief that prohibited California from enforcing COVID-19 gathering restrictions on in-home religious observances pending an appeal to the Ninth Circuit and the disposition of any writ of certiorari, if one was filed. *Id*. at 1296. The Court made clear that its prior rulings suggested that the Ninth Circuit was erroneous for failing to grant the injunction pending appeal. *Id*. In so finding, the Court provided the following principles for consideration:

> (1) "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise"
>
> (2) "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue"
>
> (3) the government has the burden to establish that the challenged law satisfies strict scrutiny and must do more than assert that certain risk factors "are always present in worship, or always absent from the other secular activities"
>
> (4) even if the government withdraws or modifies a COVID restriction during

litigation, that does not necessarily moot the case because future litigants "remain under a constant threat" that the restriction could be reinstated.

Id. at 1296-97. Consequently, the Court held that California cannot treat comparable secular activities more favorably than at-home religious activities. *Id*.

17. Do Americans have the right to their religious beliefs outside the walls of their houses of worship and homes?

Response: Yes.

18. Explain your understanding of the U.S. Supreme Court's holding in *Masterpiece Cakeshop v. Colorado Civil Rights Commission.*

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that Colorado's public accommodations law compelling a baker to create a wedding cake for a same-sex couple, even though it was in contravention to the baker's religious beliefs, violated the First Amendment's Free Exercise Clause. The Court explained that religious views in objection to same sex-marriage are protected forms of expression. *Id*. at 1727. And those protected forms of expression are entitled to neutral treatment under the Free Exercise Clause. *Id*. at 1729. "State's [have a] duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Id*. at 1731.

19. Under existing doctrine, are an individual's religious beliefs protected if they are contrary to the teaching of the faith tradition to which they belong?

Response: Yes. It is not the role of the Court to determine whether one's religious beliefs are in-line with the teachings of their faith. Any religious belief that is "sincerely held" is protected under the First Amendment. *See Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014); *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829 (1989); *Welsh v. United States*, 398 U.S. 333, 339-40 (1970) (protected beliefs "need not be confined in either source or content to traditional or parochial concepts of religion").

a. Are there unlimited interpretations of religious and/or church doctrine that can be legally recognized by courts?

Response: Please see my response to Question 19.

b. Can courts decide that anything could constitute an acceptable "view" or "interpretation" of religious and/or church doctrine?

Response: Please see my response to Question 19. As stated, it is not the role of the Court to determine what is acceptable or even correct in terms of a particular religious belief. *See Fox v. Washington*, 949 F.3d 270 (6th Cir. 2020). What the court is tasked with determining is whether a sincere religious belief is an "honest

conviction." *Id*. (*quoting Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014)).

c. Is it the official position of the Catholic Church that abortion is acceptable and morally righteous?

Response: I am not aware if the Catholic Church has an official position on abortion. However, as a judicial nominee, it would be inappropriate for me to opine on the official position of any religious organization.

20. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court addressed the ministerial exception grounded in the First Amendments religious clauses that exempts religious institutions from anti-discrimination claims from those considered to be "ministers." The Court had previously developed a four-factor test in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), to determine if an employee qualified as a minister. However, the Court found that the *Hosanna-Tabor* inquiry should be case specific, and the key consideration should be based on what the employee does. *Morrissey-Berru*, 140 S. Ct. at 2064. Because educating children in their faith was their essential role and at the very core of the religious school's mission, the two religious teachers qualified as "ministers" and therefore were excepted from the anti-discrimination laws. *Id*. at 2066.

21. In *Fulton v. City of Philadelphia*, the U.S. Supreme Court was asked to decide whether Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment. Explain the Court's holding in the case.

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that the City of Philadelphia's refusal to contract with Catholic Social Services violated the First Amendment's Free Exercise Clause. The Court found that Philadelphia's non-discrimination requirement in the foster care contract was not neutral and generally applied because there were exceptions that could be granted by the Commissioner to secular groups. *Id*. at 1878. Consequently, the policy was subject to strict scrutiny and the city failed to prove that their policy was narrowly tailored to meet a compelling interest. *Id*. at 1879-82.

22. In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus

undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Carson v. Makin,* 142 S. Ct. 1987 (2022), the Supreme Court invalidated Maine's tuition assistance program because it sought to subsidize secular private schools but not religious private schools. The Court reasoned that the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Id*. at 1996 (internal citation omitted). A program that bars religious schools from public benefits solely because of the religious character of the school requires strict scrutiny. *Id*. at 1997. That said, Maine's program fails because "[a] State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." *Id*. at 1998.

23. Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District*.

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court held that suspending a high school football coach who knelt midfield after games for a personal prayer was a violation of his rights under the Free Speech and Free Exercise clauses of the First Amendment. The Court, applying a strict scrutiny analysis, found that the government failed to show that its actions served a compelling purpose that was narrowly tailored to that purpose. *Id*. at 2426. Kennedy's prayers were actions of private speech, not attributable to the school district, and the government burdened his sincere religious practice based on a policy that was not "neutral" or "generally applied." *Id*. at 2422-24. Further, there was no Establishment Clause violation because Kennedy's "private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion." *Id*. at 2429.

24. Explain your understanding of Justice Gorsuch's concurrence in the U.S. Supreme Court's decision to grant certiorari and vacate the lower court's decision in *Mast v. Fillmore County*.

Response: In *Mast v. Fillmore Cnty., Minnesota*, 141 S. Ct. 2430 (2021), the Supreme Court granted certiorari, vacated the judgment and remanded the case to the Minnesota Court of Appeals for further consideration in light of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). Justice Gorsuch concurred in the decision but wrote an opinion to highlight things that the lower court and administrative authorities should consider on remand under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) in light of *Fulton*. Most notably, Justice Gorsuch says the true question at issue "is not whether the [County] has a compelling interest in enforcing its [septic system requirement] *generally*, but whether it has such an interest in denying an exception from that requirement to the Swartzentruber Amish *specifically*." *Mast*, 141 S. Ct. at 2432. The lower court should take heed that "RLUIPA prohibits governments from infringing sincerely held religious beliefs and practices except as a last resort." *Id*.

at 2433.

25. Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?

Response: As a judicial nominee, it would be inappropriate to provide an opinion on any issue that could potentially be presented before me because I would not want any potential litigant to think that I have prejudged any issue that may be presented to the court. If I am fortunate to be confirmed as a district judge, I will faithfully apply Supreme Court and Sixth Circuit precedent related to any issues regarding 18 U.S.C. §1507 and the First Amendment presented before me.

26. Would it be appropriate for the court to provide its employees trainings which include the following:

a. One race or sex is inherently superior to another race or sex;

Response: No.

b. An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;

Response: No.

c. An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or

Response: No.

d. Meritocracy or related values such as work ethic are racist or sexist?

Response: No.

27. Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?

Response: I am unaware of any such trainings offered in the Eastern District of Michigan. However, I do not support these trainings.

28. Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?

Response: Yes.

29. Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?

Response: As a judicial nominee, it would be inappropriate for me to comment on the constitutionality of the executive or legislative branch's political appointment process. If fortunate to be confirmed as a district judge and I was presented with a case addressing these issues, I would faithfully apply all Supreme Court and Sixth Circuit precedent to the facts of the case before me.

30. If a program or policy has a racially disparate outcome, is this evidence of either purposeful or subconscious racial discrimination?

Response: As a judicial nominee, it would be inappropriate for me to comment on any issue that has the potential to be litigated before me if I am fortunate to be confirmed as a district judge. Issues regarding racial disparity and racial discrimination are continually litigated in federal courts. I would not want any potential litigant to think that I have prejudged any issue that may be presented to the court and therefore I cannot opine on these issues. However, if confirmed, I will faithfully and impartially apply all Supreme Court and Sixth Circuit precedent to any case without regard to race.

31. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.

Response: Any opinion I might have on the makeup of the Supreme Court is irrelevant to any decision I would be required to make if confirmed as a district judge. Whether or not to increase or decrease the number of Justices on the Supreme Court presents a policy question, best left to policymakers.

32. In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?

Response: No.

33. What do you understand to be the original public meaning of the Second Amendment?

Response: The Supreme Court has interpreted the meaning of the Second Amendment in *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *District of Columbia v. Heller*, 554 U.S. 570 (2008) and its progeny. In *Bruen*, the Supreme Court held "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2126. Therefore, the Second Amendment guarantees an individual the right to bear arms for self-defense inside and outside the

home. *See Heller*, 554 U.S. 570; *Bruen*, 142 S. Ct. 2111.

34. What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?

Response: The Supreme Court has held that the Second Amendment confers an individual right to bear arms, but that right is not absolute. "Like most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *see also United States v. Carey*, 602 F.3d 738, 740–41 (6th Cir. 2010) (citing *Heller*); *McDonald v. Chicago*, 561 U.S. at 786 (noting that *Heller* did not recognize a broad "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose"). If the government is going to restrict individual access to firearms, it must demonstrate:

> …that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 142 S. Ct. at 2126 (citation omitted). The court is required to "assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id*. at 2131. And that historical inquiry will often involve reasoning by analogy where present-day firearm regulations must be "relatively similar" to historical regulations. *Id*. at 2132.

35. Is the ability to own a firearm a personal civil right?

Response: Yes. The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Second Amendment "confer[s] an individual right to keep and bear arms" and "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id*. at 592, 595. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010) the Court incorporated, by the Fourteenth Amendment, the enforceability of that right against the states. The Supreme Court recently extended the individual right to bear arms for self-defense to include possession of firearms outside of the home. *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

36. Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the Constitution?

Response: In *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court explained the following with respect to the right to bear arms in public:

> "The constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees. We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need.

> That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant's right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense.

Bruen, 142 S. Ct. at 2156 (internal citation omitted).

37. Does the right to own a firearm receive less protection than the right to vote under the Constitution?

Response: Please see my response to Question 36.

38. Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.

Response: Article II of the Constitution states that the executive is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. However, the executive branch has "exclusive authority and absolute discretion" to determine if and how to proceed with prosecutions. *United States v. Nixon*, 418 U.S. 683, 693 (1974). As a judicial nominee, it would be inappropriate for me to comment on the application of that discretion.

39. Explain your understanding of what distinguishes an act of mere 'prosecutorial discretion' from that of a substantive administrative rule change.

Response: Prosecutorial discretion is the broad power of a prosecutor to determine how to proceed with a case (*e.g.*, whom to prosecute and which charges to bring). *United States v. LaDeau*, 734 F.3d 561, 566 (6th Cir. 2013). A substantive administrative rule change is governed by the Administrative Procedure Act, 5 U.S.C. §§ 551-559. The APA sets forth the procedures of administrative law that allow for rule changes if the public is provided notice and an opportunity to comment on proposed rule changes.

40. Does the President have the authority to abolish the death penalty?

Response: No. The death penalty is governed by 18 U.S.C. § 3591(a). Nothing therein or in the Constitution or precedent of the Supreme Court grants the President the ability to abolish that legislation enacted by Congress.

41. Explain the U.S. Supreme Court's holding on the application to vacate stay in *Alabama Association of Realtors v. HHS*.

Response: In *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021), the Supreme Court, granted an application to vacate stay, holding that petitioners were likely to prevail on a claim that the Centers for Disease Control ("CDC") exceeded its agency authority in issuing a nationwide moratorium on residential evictions in areas

experiencing substantial or high levels of COVID-19. *Id*. at 2486. The Court found that if there was going to be a federally imposed eviction moratorium, "Congress must specifically authorize it." *Id*. at 2490.

42. Is it appropriate for a prosecutor to publicly announce that they are going to prosecute a member of the community before they even start an investigation as to that person's conduct?

Response: The Department of Justice Manual (§ 1-7.000 *et. seq.*) generally prohibits a federal prosecutor from making any statement or disclosing any information that could potentially prejudice an adjudicative proceeding.

43. You authored the Federal Bar Association's Eastern District of Michigan Chapter's 2021 Chapter Diversity Statement, which noted, "[f]ighting systemic racism and institutionalized oppression of BIPOC individuals (black, indigenous, and people of color) will take more than statements and panel discussions."

Response: I did not personally author the Federal Bar Association EDMI Diversity Statement. It was drafted by a committee of attorneys, with input from myself and others, and ultimately approved by the Executive Board of the organization.

a. Is the United States systemically racist?

Response: Systemic racism is a complex paradigm that means many different things to many different people. Merriam-Webster online dictionary defines systemic racism as "the oppression of a racial group to the advantage of another as perpetuated by inequity within interconnected systems (such as political, economic, and social systems)." *See Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/systemic%20racism. For example, in promulgating the Fair Sentencing Act of 2010, Pub. L. No. 111–220, Congress noted the racial disparities in sentencing between convictions resulting from crack cocaine vs. powder cocaine. If fortunate to be confirmed as a district judge, it is not my role to look at the systemic effects, instead it is my role to look to the facts of the case before me and faithfully and impartially apply the law to those facts. I will also take great care to treat all parties in my courtroom with the same dignity and respect that they deserve, regardless of their race or any other personal characteristic.

b. If not, what are the systemically racist institutions or persons referenced above?

Response: Please see my response to Question 43a.

44. Your diversity statement opened by memorializing the names of "[b]lack Americans killed as a result of police use of force."

a. Are the police systemically racist?

Response: Please see my response to Question 43a. As an AUSA, I have worked directly with law enforcement officers that have treated me and all individuals involved in investigations and prosecutions with dignity and respect regardless of race or any other personal characteristics.

Senator John Kennedy
Questions for the Record

Brandy McMillion

1. **Please describe your judicial philosophy. Be as specific as possible.**

   Response: If fortunate to be confirmed as a district judge, I will diligently prepare, approach each case with an open mind, review all court filings and arguments of the parties, consider binding Supreme Court and Sixth Circuit precedent, and faithfully and impartially apply the law to the facts of the cases before me. I will treat all parties fairly, and with the respect and dignity that they deserve.

2. **Do you believe the meaning of the Constitution is immutable or does it evolve over time?**

   Response: The Constitution is an enduring document, and Article V sets forth the ability to amend the Constitution over time. If fortunate to be confirmed as a district judge, I would dutifully uphold the Constitution, all of its amendments, and faithfully follow all Supreme Court and Sixth Circuit precedent.

3. **Should a judge look beyond a law's text, even if clear, to consider its purpose and the consequences of ruling a particular way when deciding a case?**

   Response: In interpreting a statute, a judge must first start with the text of the statute. If the language of the statute is unambiguous, then the plain meaning of the statute must be applied, and the inquiry ends there.

4. **Should a judge consider statements made by a president as part of legislative history when construing the meaning of a statute?**

   Response: In interpreting a statute, a judge must first start with the text of the statute. If the language of the statute is unambiguous, then the plain meaning of the statute must be applied. If it is ambiguous, judges then look to Supreme Court and circuit precedent, any applicable canons of construction, persuasive authority (such as other circuit opinions), and precedent interpreting similar statutes. If after exhausting all those sources, a statute is still unclear, then the legislative history may be considered, placing greater weight on committee reports than any other form of legislative history (*see Garcia v. United States*, 469 U.S. 70 (1984)). The Supreme Court has noted in *Milner v. Department of Navy*, 562 U.S. 562, 574 (2011), "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it."

5. **What First Amendment restrictions can the owner of a shopping center place on private property?**

Response: The Supreme Court addressed the issue of privately owned shopping centers attempting to limit the First Amendment rights of citizens in *Lloyd Corp., Limited v. Tanner*, 407 U.S. 551 (1972) and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). In *Lloyd*, the Court held that private shopping centers do not violate the First Amendment rights of citizens who are prohibited from the free exercise of those rights if the property is "privately owned and used nondiscriminatorily for private purposes only." 407 U.S. at 568. However, if privately owned property is dedicated to public use, citizens are entitled to exercise their First Amendment rights therein. *Id*. Likewise, in *PruneYard*, the Supreme Court held that private property owners cannot infringe upon the rights of citizens when there is a state constitution provision that protects "speech and petitioning, reasonably exercised, in privately owned shopping centers." 447 U.S. at 78-79.

6. Are non-citizens unlawfully present in the United States entitled to a right of privacy?

Response: I am unaware of any Supreme Court or Sixth Circuit precedent that addresses non-citizens right to privacy; however, the Supreme Court has held that non-citizens, even those here illegally, are entitled to Due Process under the law. *See Yick Wo v. Hopkins,* 118 U.S. 356 (1886). But the Supreme Court has also held that the non-citizens receive constitutional protections only when "they have come within the territory of the United States and developed substantial connections with this country." *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (finding that the Fourth Amendment was not applicable in the search of the Mexican citizen's residence located in Mexico, who had no voluntary attachment to the United States).

7. Are non-citizens unlawfully present in the United States entitled to Fourth Amendment rights during encounters with border patrol authorities or other law enforcement entities?

Response: Citizens and non-citizens, alike, have limited privacy rights at the United States borders. The Border Search Exception Doctrine allows agents at the border to search you and your belongings without a warrant or probable cause. *United States v. Ramsey*, 431 U.S. 606, 619 (1977). This is premised on the longstanding recognition of "right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country" and the fact that border searches are presumptively reasonable under the Fourth Amendment. *Id*. at 620, 622.

8. At what point is a human life entitled to equal protection of the law under the Constitution?

Response: I am unaware of any Supreme Court or Sixth Circuit precedent that affirmatively addresses this issue. In its recent decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court "return[ed] the issue of abortion to the people's elected representatives." *Id*. at 2243. And the Court advised that

its opinion "[was] not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." *Id*. at 2261.

9. A federal district court judge in Washington, DC recently suggested that the Thirteenth Amendment may provide a basis for the right to abortion in light of the Supreme Court's decision in *Dobbs v. Jackson Women's Health*.

a. Do you agree?

Response: The *Dobbs* decision is binding Supreme Court precedent. As a judicial nominee, it would be inappropriate for me to provide an opinion on any issue that could potentially be presented before me because I would not want any potential litigant to think that I have prejudged any issue that may be presented to the court. If I am fortunate to be confirmed as a district judge, I will faithfully apply Supreme Court and Sixth Circuit precedent to any issues presented before me.

b. Is it ever appropriate for a lower court judge to imply the existence of a constitutional right despite the existence of controlling precedent to the contrary?

Response: No. District judges are duty bound to follow the binding Supreme Court and circuit court precedent. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply all Supreme Court and Sixth Circuit precedent to the facts of the cases before me.

10. Is there ever an appropriate circumstance in which a district court judge ignores or circumvents precedent set by the circuit court within which it sits or the U.S. Supreme Court?

Response: Please see my response to Question 9b.

11. Are state laws that require voters to present identification in order to cast a ballot illegitimate, draconian, or racist?

Response: In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Supreme Court upheld the constitutionality of voter identification laws. If fortunate to be confirmed as a district judge, I will faithfully apply the controlling Supreme Court and Sixth Circuit precedent.

12. Please describe the analysis you will use, if confirmed, to evaluate whether a law or regulation infringes on an individual's rights under the Second Amendment in light of the Supreme Court's opinion in *Bruen*.

Response: If fortunate to be confirmed a district judge, I would apply the legal standards set forth in *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022),

McDonald v. City of Chicago, 561 U.S. 742 (2010), *District of Columbia v. Heller*, 554 U.S. 570 (2008) and its progeny. In *Bruen*, the Supreme Court held:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 142 S. Ct. at 2126 (citation omitted). If fortunate to be confirmed as a district judge, I would assess whether the law or regulation is "consistent with the Second Amendment's text and historical understanding." *Id*. at 2131. And in doing so, conduct a historical inquiry that may involve reasoning by analogy where present-day firearm regulations must be "relatively similar" to historical regulations. *Id*. at 2132.

13. The Supreme Court relies on a list of factors to determine whether overturning precedent is prudent in the context of stare decisis.

a. How many factors are necessary to provide a special justification for overturning precedent?

Response: In *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), the Supreme Court set forth five factors to be considered in determining whether precedent should be overruled: (i) the quality of its reasoning; (ii) the workability of the precedent in question; (iii) the consistency with other related decisions; (iv) changed understanding of relevant facts; and (v) reliance on the precedent. I am unaware of any precedent that specifically states how many of these factors are necessary, but the Court did note in *Janus* that "[Supreme Court] cases identify factors that should be taken into account in deciding whether to overrule a past decision" and these were "five of the most important" in that particular case. *Id*. at 2478. The Court "will not overturn a past decision unless there are strong grounds for doing so." *Id*.

b. Is one factor alone ever sufficient?

Response: Please see my response to Question 13a.

14. Please explain the difference between judicial review and judicial supremacy.

Response: "Judicial review" refers to "[a] court's power to review the actions of other branches or levels of government; esp. the courts' power to invalidate legislative and executive actions as being unconstitutional" and "judicial supremacy" refers to "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the

coordinate branches of the federal government and the states." *See* Black's Law Dictionary (11th ed. 2019).

15. Do you believe the meaning of the Ninth Amendment is fixed or evolving?

Response: The Constitution is an enduring document. The Ninth Amendment, like any other provision of the Constitution, can have a fixed meaning that can be applied to new circumstances over time. *See New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

16. Does the Ninth Amendment protect individual rights or does it provide structural protection applicable to the people?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court undertook an analysis to determine the meaning of the operative clause "right of the people" in the Second Amendment context but noted that similar terminology also appears in the First, Fourth and Ninth Amendments. *Id*. at 579. The Court found that all of these instances "unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body." *Id*.

17. Are the Bill of Rights informative for understanding the meaning of the Ninth Amendment or should it be interpreted independently of the other amendments?

Response: The text of the Ninth Amendment itself references other rights within the Constitution. As such, it cannot be interpreted in a vacuum and should be considered in relation to other provisions of the Constitution.

18. Is Founding-era history useful for understanding the meaning of the Ninth Amendment?

Response: Yes, the Supreme Court has used founding-era history to determine the context and meaning of Constitutional provisions. *See New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *Crawford v. Washington*, 541 U.S. 36 (2004). For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), in analyzing the operative clause "right of the people" in the Second Amendment, the Supreme Court noted the application of founding-era documents to understanding the Ninth Amendment as well:

> "*If we look to other founding-era documents*, we find that some state constitutions used the term "the people" to refer to the people collectively, in contrast to "citizen," which was used to invoke individual rights. But that usage was not remotely uniform. And, most importantly, it was *clearly not the terminology used* in the Federal Constitution, given the First, Fourth, and *Ninth Amendments*."

Id. at n.6 (emphasis added).

19. The First, Second, Fourth, Ninth, and Tenth Amendments reference "the people."

a. Who is included within the meaning of *'the people'*?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court found that in six provisions of the Constitution, "the people" "unambiguously refers to all members of the political community, not an unspecified subset." *Id*. at 579-580. And in *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), the Court explained that "the people" seems to be "a term of art employed in select parts of the Constitution." *Id*. at 265. The term "the people" "protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Heller*, 554 U.S. at 580 (*citing Verdugo-Urquidez*, 494 U.S. at 265). However, I note that this issue is being currently litigated in federal courts. If I am fortunate to be confirmed as a district judge, I will faithfully apply Supreme Court and Sixth Circuit precedent to any issues presented before me.

b. Is the term's meaning consistent in each amendment?

Response: Please see my response to Question 19a.

20. Does 'the people' capture non-citizens or illegal immigrants within the meaning of any amendment?

Response: Please see my response to Question 19a. In *Plyer v. Doe*, 457 U.S. 202 (1982), the Supreme Court found that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Id*. at 210.

21. 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: Please see my response to Question 2.

22. Could the Privileges or Immunities Clause within the Fourteenth Amendment be a source of unenumerated rights?

Response: The Supreme Court has directly found that the Privileges or Immunities Clause provides a basis for protecting enumerated rights. However, I am unaware of any Supreme Court or Sixth Circuit precedent that addresses the Privileges or Immunities Clause in relation to unenumerated rights. It would be inappropriate for me to comment

on any issue that could potentially be presented before me because I would not want any potential litigant to think that I have prejudged any issue that may be presented to the court. If I am fortunate to be confirmed as a district judge, I will faithfully apply Supreme Court and Sixth Circuit precedent when interpreting constitutional provisions.

23. Is the right to terminate a pregnancy among the 'privileges or immunities' of citizenship?

Response: In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court held that the "Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including… the Due Process Clause of the Fourteenth Amendment." *Id*. at 2242.

24. What is the original holding of *Chevron*? How have subsequent cases changed the *Chevron* doctrine?

Response: In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court developed a two-step test to determine when to give deference to an agency's interpretation of a statute. First, if Congress has unambiguously spoken directly to the issue, then the inquiry can end there. *Id*. at 843. If not, then the second step requires evaluating whether the agency's interpretation is based on a permissible construction of the statute. *Id*. at 844. In applying that test, the Court held that the "bubble regulations" was a reasonable interpretation of the term "source" in the Clean Air Act because Congress did not provide an interpretation for that term and the EPA's regulation was a reasonable and permissible interpretation. *Id*. at 865-66.

Subsequent cases have further detailed the amount of discretion afforded to agencies' interpretation of statutes. For example, in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the Supreme Court, using the major questions doctrine, found that agencies cannot regulate outside their traditional expertise without some clear congressional authorization. *Id*. at 2616. This area of the law is ever developing as the Supreme Court has granted cert to hear *Loper Bright Enterprises v. Raimando*, in which it will address agency deference and the *Chevron* doctrine. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply all Supreme Court and Sixth Circuit precedent to the facts of the cases before me.

25. How does the judicial branch decide when an agency exercised more authority than Congress delegated or otherwise exercised its rulemaking powers?

Response: Courts can consider whether agency action is consistent with the Administrative Procedures Act, 5 U.S.C. §551, *et. seq*. Additionally, courts can undergo a major questions doctrine analysis and determine whether an agency can show "something more than a merely plausible textual basis for the agency action" and instead, "point to clear congressional authorization for the power it claims." *See West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

26. How does the Constitution limit the powers of Congress? Please provide examples.

Response: Article I, Section 8 of the Constitution provides the enumerated powers granted to Congress. U.S. Cons. Art. I, §8. In addition to the enumerated powers Article I, Section 8 also grants Congress the power to make laws that are "necessary and proper" to carry out the other federal powers granted therein. *Id*. Congress has broad authority to determine what is "necessary" for implementing federal powers. *See McCullough v. Maryland*, 17 U.S. 316 (1819). However, this authority is not unfettered, and the Constitution also places limits on Congress' ability to act. Article I, Section 9 of the Constitution sets forth specific limits on Congressional power (*e.g*., Congress cannot pass ex post facto laws or levy taxes on state exports). Articles II and III set forth the powers exclusively reserved for the executive and judicial branches. The First Amendment prohibits Congress from enacting laws that establish religion, violate the free exercise of religion, speech, press, assembly or petition. The Tenth Amendment sets forth the powers reserved to the States as opposed to Congress under the theory of federalism.

27. Please describe the modern understanding and limits of the Commerce Clause.

Response: Congress is limited to three types of activities under the Commerce Clause: (1) the use of channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, including 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).

28. Please provide an example of activity Congress cannot regulate under the Commerce Clause.

Response: In *Lopez v. United States*, 514 U.S. 549 (1995), the Supreme Court held that Congress cannot enact statutes criminalizing gun possession in school zones. The Court found that this type of regulation was in no sense an economic activity that would substantially affect any sort of interstate commerce under the Commerce Clause. *Id*. at 567.

29. Should Due Process in the Fourteenth Amendment and Fifth Amendment be interpreted differently? Please explain.

Response: The Supreme Court has consistently interpreted the Fifth and Fourteenth Amendments similarly. Both the Fifth Amendment (as to the federal government) and the Fourteenth Amendment (as to the states) prohibit the deprivation of life, liberty, or property, without due process of law.

30. 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 to the legislative branch?

Response: As a judicial nominee, it would be inappropriate for me to comment on any issue that could potentially be presented before me because I would not want any potential litigant to think that I have prejudged any issue that may be presented to the court. If I am fortunate to be confirmed as a district judge, I will faithfully apply Supreme Court and Sixth Circuit precedent to any issues presented before me.

31. Please describe how courts determine whether an agency's action violated the Major Questions doctrine.

Response: Please see my response to Questions 24 and 25.

32. Please describe your understanding and limits of the anti-commandeering doctrine.

Response: The anti-commandeering doctrine is rooted in the Tenth Amendment and prohibits the federal government from requiring states or state officials to adopt or enforce federal law. The doctrine was conceived in *New York v. United States*, 505 U.S. 144 (1992) and then developed further in *Printz v. United States*, 521 U.S. 898 (1997). In both cases, the Court describes the limits of congressional authority to require states to act. "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. at 2421.

33. Does the meaning of the Eighth Amendment change over time? Why or why not?

Response: Please see my response to Question 2. The Constitution, including all its amendments, is an enduring document. The Supreme Court has held that the Eighth Amendment contains an "evolving standard of decency that mark[s] the progress of a maturing society." *See Trop v. Dulles*, 356 U.S. 86, 101 (1958). "A claim that punishment is excessive is judged not by the standards that prevailed in 1685… or when the Bill of Rights was adopted, but rather by those [standards] that currently prevail." *See Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

34. Is the death penalty constitutional?

Response: The Supreme Court has held that the death penalty is not *per se* unconstitutional under the Eighth Amendment. *See Gregg v. Georgia*, 96 S. Ct. 2909 (1976). The federal death penalty has been codified in the Federal Death Penalty Act, 18 U.S.C. § 3591(a) et. seq.

35. Can Congress require a federal prosecutor to convene a grand jury for someone charged with criminal contempt of Congress if prosecutorial discretion belongs to the executive branch?

Response: Article II of the Constitution states that the executive is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. And, the executive branch has

"exclusive authority and absolute discretion" to determine if and how to proceed with prosecutions. *United States v. Nixon*, 418 U.S. 683, 693 (1974). As a judicial nominee, it would be inappropriate for me to comment on the application of that discretion.

36. Please describe which presidential aides, if any, are entitled to "absolute immunity" from congressional subpoenas.

Response: As a judicial nominee, it would be inappropriate for me to comment on any issue that could potentially be presented before me because I would not want any potential litigant to think that I have prejudged any issue that may be presented to the court. If I am fortunate to be confirmed as a district judge, I will faithfully apply Supreme Court and Sixth Circuit precedent to any issues presented before me.

37. What restrictions on First Amendment activities can owners of a private shopping center put on their property?

Response: Please see my response to Question 5.

38. 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, it would be inappropriate for me to comment on any issue that could potentially be presented before me because I would not want any potential litigant to think that I have prejudged any issue that may be presented to the court. If I am fortunate to be confirmed as a district judge, I will faithfully apply Supreme Court and Sixth Circuit precedent to any issues presented before me.

39. How does the Supremacy Clause interact with the Adequate and Independent State grounds doctrine?

Response: The Supremacy Clause establishes that the Constitution is the "supreme law of the land," taking precedence over state law. *See* U.S. Const. art. VI, para. 2. Under the Adequate and Independent State Grounds Doctrine, the Supreme Court refuses to hear a case where there is a state ground that is (1) "adequate" to support the judgment, and (2) "independent" of federal law. *See Michigan v. Long*, 463 U.S. 1032 (1983). Essentially, the Supreme Court will only exercise jurisdiction over state court cases if the issues attacking the state court judgement can be addressed with supreme federal law.

40. 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 the no-fly list.

Response: As a judicial nominee, it would be inappropriate for me to comment on any issue that could potentially be presented before me because I would not want any potential litigant to think that I have prejudged any issue that may be presented to the

court. If I am fortunate to be confirmed as a district judge, I will faithfully apply Supreme Court and Sixth Circuit precedent to any issues presented before me.

41. What's the textual source of the different standards of review for determining whether state laws or regulations violate constitutional rights?

Response: I am unaware of any particular source that determines the different standards of review other than various Supreme Court and circuit precedent. Strict scrutiny applies with suspect classifications (race, religion, national origin, alienage) and fundamental rights. *See Graham v. Richardson*, 403 U.S. 365 (1971). To survive a strict scrutiny analysis, the state statute must meet a compelling government interest with a narrowly tailored approach. *Id*. at 371-72. Intermediate scrutiny applies when a state statute negatively affects a quasi-suspect classification. *See Clark v. Jeter*, 486 U.S. 456 (1988). Under an intermediate scrutiny analysis, the law must further an important government interest and must do so by some substantially related means. *Id*. at 461. Lastly, the rational basis test generally applies when no fundamental rights are at issue. *See Bowman v. United States, 564 F.3d 765 (6th Cir. 2008)*. To pass this test, the law at issue must be "rationally related to legitimate government interests." *Id*. at 776.

42. Please describe the legal basis that allows federal courts to issue universal injunctions.

Response: Federal Rule of Civil Procedure 65 gives courts the power to issue permanent and temporary injunctions without restraint to the parties in a particular case. Fed. R. Crim. P. 65. Because injunctions can be issued against parties and non-parties alike, orders can result in nationwide or universal injunctions. Courts also can issue injunctive relief in class action cases, which often results in nationwide injunctions. *See Califano v. Yamasaki*, 442 U.S. 682 (1979). Nonetheless, the Court has cautioned that injunctive relief should "be no more burdensome to the defendant than necessary to provide complete relief to the [plaintiff]." *Id*. at 702.

43. Please identify one federal judge or justice, current or former, whose service on the bench most inspires you and explain why you will seek to emulate it if confirmed.

Response: There are many judges that I admire, and I have been fortunate to have the opportunity to practice in front of some amazing judges during my years of practice. It is extremely hard to limit it to just one – however, a current judge that truly inspires me is Sixth Circuit Judge Stephanie Dawkins Davis. Her ascension in her career inspired me to keep reaching for my goal of becoming a judge. Judge Davis and I have similar backgrounds and she was a direct example of "if you see it, you can be it." If fortunate to be confirmed as a district court judge, I hope to take to the bench her preparedness, even temperament, dedication to the work and the community, her civility and professionalism. These are all characteristics that I know make her a fantastic jurist, but also make her a wonderful person.

Questions from Senator Thom Tillis
for Brandy R. McMillion Nominee to be United States District Judge for the Eastern District of Michigan

1. **Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

   Response: Yes. Judicial decisions should not be based on a judge's personal opinions, values, or beliefs. Judges are duty bound to apply all relevant Supreme Court and circuit precedent to the facts before them. The individual opinions or values of a particular judge are irrelevant to any determination of the court.

2. **What is judicial activism? Do you consider judicial activism appropriate?**

   Response: Judicial activism likely has different meanings to different people. However, it is defined in Black's Law Dictionary (11th ed. 2019) as "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." I do not consider judicial activism appropriate. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply all Supreme Court and Sixth Circuit precedent to the facts of the cases before me without regard to any personal views or other influences.

3. **Do you believe impartiality is an aspiration or an expectation for a judge?**

   Response: Judges are expected to be impartial.

4. **Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

   Response: No. Judges are duty bound to faithfully and impartially apply the law to the facts of the cases before them.

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

   Response: It is possible, but the role of a judge is to faithfully and impartially apply all applicable precedent to the facts of the case without regard to personal opinions on the outcome of the case.

6. **Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

   Response: No. Judicial decisions should not be based on a judge's politics or policy preferences. Judges are duty bound to apply all relevant Supreme Court and circuit

precedent to the facts of the cases before them. The individual politics or policy preferences of a judge are irrelevant to any determination of the court.

7. What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?

Response: If fortunate to be confirmed as a district judge, in evaluating any case assessing the individual right to bear arms, I would apply the legal standards set forth in *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *District of Columbia v. Heller*, 554 U.S. 570 (2008) and its progeny.

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

Response: I would apply the legal standards set forth in *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *District of Columbia v. Heller*, 554 U.S. 570 (2008) and its progeny. In *Bruen*, the Supreme Court held:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 142 S. Ct. at 2126 (citation omitted). If fortunate to be confirmed as a district judge, I would assess whether the Sherrif's policy is "consistent with the Second Amendment's text and historical understanding." *Id*. at 2131. And in doing so, I would conduct a historical inquiry that may involve reasoning by analogy where present-day firearm regulations must be "relatively similar" to historical regulations. *Id*. at 2132.

9. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?

Response: If fortunate to be confirmed as a district judge, I would approach any qualified immunity case with diligence, thoroughly researching the law and reviewing all the pleadings submitted to the court. Qualified immunity must be granted in cases against government officials acting under color of state law filed pursuant to 42 U.S.C. §1983 unless the government official (1) violates "a statutory or constitutional right" and (2) that right was "clearly established at the time" of the violation. *See Saucier v. Katz*, 533 U.S. 194 (2001); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018). "[C]learly established means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *Wesby*, 138 S. Ct.

at 589. Courts have the discretion to determine which prong of the test to address first, but if either prong is lacking, qualified immunity must be granted. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

10. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?

Response: Qualified immunity has been recognized and reaffirmed by the Supreme Court. *See e.g. Saucier v. Katz*, 533 U.S. 194 (2001); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018). If fortunate to be confirmed as a district judge, I would faithfully apply all applicable Supreme Court and Sixth Circuit precedent regarding issues of qualified immunity presented before me. My own personal views are irrelevant to an application of the law; and as a judicial nominee, it would be inappropriate for me to opine on an issue that has the potential to be presented in court. The sufficiency of qualified immunity protections is best left to policy makers to determine the depth, breadth and scope of any such regulations.

11. What do you believe should be the proper scope of qualified immunity protections for law enforcement?

Response: Please see my response to Question 10.

12. 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: It has been more than a decade since I practiced any form of intellectual property law, and I am not intimately familiar with the Supreme Court decisions on patent eligibility over the last ten years. In addition, as a judicial nominee, it would generally be inappropriate for me to comment on the adequacy or correctness of any opinion of any court. I am aware that patent eligibility is statutorily defined in 35 U.S.C. §101. If fortunate to be confirmed as a district judge, I will thoroughly research this area of law and faithfully apply Supreme Court, Federal Circuit and Sixth Circuit precedent to determine patent eligibility in any case presented before me.

13. Do you believe the current patent eligibility 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: Please see my response to Question 12.

14. 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 lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

Response: I have limited experience in copyright law from my time as a junior associate in an intellectual property group at a law firm. If fortunate to be confirmed as a district judge, I will thoroughly research this area of law and faithfully apply Supreme Court, Federal Circuit and Sixth Circuit precedent to any issues of copyright law presented before me.

b. Please describe any particular experiences you have had involving the Digital Millennium Copyright Act.

Response: In my 17 years of legal practice, I have not had an opportunity to handle any matters relating to the Digital Millennium Copyright Act. If fortunate to be confirmed as a district judge, I will thoroughly research this area of law and faithfully apply Supreme Court, Federal Circuit and Sixth Circuit precedent to any issues of copyright law presented before me.

c. What experience do you have addressing intermediary liability for online service providers that host unlawful content posted by users?

Response: In my 17 years of legal practice, I have not had an opportunity to handle any matters addressing intermediary liability for online service providers that host unlawful content posted by users. If fortunate to be confirmed as a district judge, I will thoroughly research this area of law and faithfully apply Supreme Court, Federal Circuit and Sixth Circuit precedent to any issues of online service provider/intermediary liability presented before me.

d. What experience do you have with First Amendment and free speech issues? Do you have experience addressing free speech and intellectual property issues, including copyright?

Response: In my 17 years of legal practice, I have not had an opportunity to handle any matters relating to the intersection of the First Amendment, free speech and intellectual property issues, including copyright. If fortunate to be confirmed as a district judge, I will thoroughly research this area of law and faithfully apply Supreme Court, Federal Circuit and Sixth Circuit precedent to any issues of free speech and copyright law presented before me.

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text 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 reported that courts have conflated statutory obligations 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.

a. In your opinion, where there is debate among courts about the meaning of legislative text, 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: If fortunate to be confirmed as a district judge, in interpreting a statute where there is no binding Supreme Court or circuit precedent, I would first start with the text of the statute. If the language of the statute is unambiguous, then the plain meaning of the statute must be applied. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If it is ambiguous, I would then look to non-precedential cases interpreting similar statutes, persuasive authority (such as other circuit opinions), and any applicable canons of construction. After exhausting all those sources, legislative history may be considered, consistent with the Supreme Court's guidance, placing greater weight on committee reports (*see Garcia v. United States*, 469 U.S. 70 (1984)). The Supreme Court has noted in *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011), "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it."

b. Likewise, what role does or should the advice and analysis of the expert federal agency with jurisdiction over an issue (in this case, the U.S. Copyright Office) have when deciding how to apply the law to the facts in a particular case?

Response: Courts apply the two-part test set forth in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to determine if deference is given to an agency's formal interpretation of a statute it administers. If the intent of the statute is clear because "Congress has directly spoken to the precise question at issue" then that interpretation of the statute is applied. *Id*. at 842-43. If "Congress has not unambiguously expressed its intent," then courts will defer to an agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id*. at 844. Agency interpretation merits less deference if it is contained in "policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law and were not promulgated via notice and comment rulemaking." *Atrium Med. Ctr. v. U.S. Dep't of Health & Hum. Servs.*, 766 F.3d 560, 566 (6th Cir. 2014) (*citing Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)). However, the Supreme Court recently set forth that the major questions doctrine is applicable to agency statutory interpretation, and it presumes that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

The Supreme Court has granted cert in *Loper Bright Enterprises v. Raimando* (Docket No. 22-451) to readdress *Chevron* deference. If fortunate to be confirmed as a district judge, I will faithfully and impartially apply all Supreme Court and Sixth Circuit precedent when analyzing agency decisions.

c. Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

Response: As a judicial nominee, it would be inappropriate to provide an opinion on any issue that could potentially be presented before me because I would not want any potential litigant to think that I have prejudged any issue that may be presented to the court. If I am fortunate to be confirmed as a district judge, I will faithfully apply Supreme Court, Federal Circuit and Sixth Circuit precedent to any issues of copyright law presented before me.

16. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

Response: Judges often have to apply laws that were enacted before the technological advances that we have seen in modern society. In doing so, the regular cannons of statutory interpretation apply – review of the text, binding precedent, cannons of construction, persuasive authorities, and precedent interpreting similar statutes.

b. How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?

Response: Please see my response to Question 16a.

17. 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 this practice.

a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

Response: It is my understanding that cases in the Eastern District of Michigan are assigned by random draw in the division in which the filing party resides. We do not have any divisions with only one judge, so it does not seem that "judge shopping" or "forum shopping" as described will present an issue within my district.

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 17a.

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: No.

d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

Response: I commit not to engage in any such conduct.

18. 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 17a.

19. 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 17a.