gSenator Lindsey Graham, Ranking Member
Questions for the Record
Judge Jeffrey M. Bryan
Nominee to be a United States District Judge for the District of Minnesota

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: This statement does not represent how I have approached decision-making as a judge. Since becoming a state court judge in 2013, I have put aside my personal opinions and values when making decisions. My judicial decision-making is driven instead by a commitment to faithfully and objectively applying binding precedent without regard to my own personal moral values or beliefs.

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 have not heard of or read that statement before and do not have any information concerning it or the context in which it was made. Nor have I made any decisions or written any opinions that I thought would be reversed, as Judge Reinhardt presumes in this quote. Instead, I have endeavored to faithfully and objectively apply binding precedent.

3. **In *Royer v. Inventiv Health*, you affirmed the denial of unemployment benefits to a woman who refused to get the COVID-19 vaccine because of her stated religious belief. The Unemployment Law Judge found that the woman did not have a sincere religious objection, even though her employer previously said that she did. You held that the Unemployment Judge was allowed to make this determination.**
   a. **As a general matter, should those with religious objections to a vaccine be penalized for refusing to take it?**

      Response: The relator in *Royer* made no First Amendment challenge to the Unemployment Law Judge's (ULJ) decision, and because the case was a certiorari appeal of the denial of unemployment benefits under Minnesota statutes, none of the jurisprudence concerning Title VII employment discrimination claims applied. The Minnesota Court of Appeals panel was limited to the specific and narrow arguments presented, which concerned only whether the ULJ could act as an independent fact finder when the Minnesota Department of Employment and Economic Development disputed the employee's factual allegations as a party to the contested unemployment benefits request. The panel did not address the

question above and did not make any decision concerning whether those with religious objections should be penalized. If confirmed, and if confronted with a legal dispute concerning whether individuals with religious objections to a vaccine should be penalized for refusing to take it, I would consider the arguments presented, all legal authority relating to those arguments, and apply binding precedent of the Supreme Court and Eighth Circuit concerning the First Amendment, the Equal Protection Clause, the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, Title VII of the Civil Rights Act of 1964, and any other applicable federal or state law concerning religious discrimination that the parties raise.

b. Under federal law, how do courts determine whether someone's religious belief is sincere?

Response: The First Amendment protects beliefs that are rooted in religion, and "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) (*quoted in Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) and *Love v. Reed*, 216 F.3d 682, 687 (8th Cir. 2000)). Courts perform a "narrow function in this context," not one requiring courts to determine the accuracy or veracity of a religious belief, but instead "to determine whether the line drawn reflects an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (quoting *Thomas*, 450 U.S. at 716). In carrying out this narrow function, the question of whether or not an asserted belief constitutes "a sincerely held religious belief is a factual determination." *Murphy v. Missouri Dept. of Corrections,* 372 F.3d 979, 983 (8th Cir. 2004).

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: Consideration of habeas petitions for persons in custody pursuant to a state court judgment is governed by statute and caselaw regarding those statutory provisions. *See* 28 U.S.C. §§ 2241-2254. Generally, to prevail on a habeas petition of this type, the petitioner must establish that the state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). To demonstrate an unreasonable application, a petitioner must show that the state court's adjudication "was not merely wrong or even clearly erroneous but 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Bookwalter v. Vandergriff*, 73 F.4th 622, 624 (8th Cir. 2023) (citing *White v. Woodall*, 572 U.S. 415, 419-20 (2014)).

In addition, the petitioner must first exhaust all available state remedies before filing the federal habeas petition, *see* 28 U.S.C. 2254(b)(1), and must file the petition before the termination of the one-year period of limitations, *see id*. § 2244(d)(a)(A).

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: Consideration of habeas petitions for persons in custody pursuant to a federal court judgment is governed by 28 U.S.C. § 2255. Generally, to grant a habeas petition of this type, the petitioner must file the petition within a one-year period of limitation, 28 U.S.C. § 2255(f), and the petitioner must establish that "the sentence was imposed in violation of the Constitution or laws of the United States," the "court was without jurisdiction to impose such sentence," the "sentence was in excess of the maximum authorized by law," or the sentences is "otherwise subject to collateral attack," 28 U.S.C. § 2255(a).

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 considered whether the admissions policies of Harvard College and the University of North Carolina violated the Equal Protection Clause. Both institutions made admissions decisions based on several different factors, including the applicant's race. The Supreme Court determined that the admissions policies violated the Equal Protection Clause because the policies were not sufficiently tailored to achieve a compelling interest.

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: I participated in employment and hiring decisions while an associate attorney at Robins Kaplan, an Assistant United States Attorney for the District of Minnesota, and since becoming a state court judge. I also served as a member of a merit selection panel that interviewed and recommended finalists for United States Magistrate Judge for the District of Minnesota in 2016 as well a member of committees that interviewed and recommended finalists for Ramsey County Child Support Magistrate and Ramsey County Family Court Referee.

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?**

    Response: To the best of my knowledge, none of my employers used such preferences.

    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.

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

    Response: The Supreme Court and the Eighth Circuit apply strict scrutiny to race-based differentiations.

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

    Response: The Supreme Court concluded that enforcement of the Colorado Antidiscrimination Act violated the free speech rights of a web designer because it would have compelled the designer's speech. Specifically, enforcement would have compelled the web designer to create websites celebrating same-sex weddings, which were against the designer's personal religious beliefs.

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: If confirmed, I will faithfully and objectively apply all binding precedent. The *Barnette* case has been favorably cited many times, including as recently as June 2023 in *303 Creative LLC v. Elenis*. The Eighth Circuit has also cited *Barnette* favorably, including last year, for the proposition that "[t]he compelled speech doctrine prohibits the government from making someone disseminate a political or ideological message. . . . *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (holding unconstitutional a law requiring students to salute the flag every day)." *Arkansas Times LP v. Waldrip as Tr. of Univ. of Arkansas Bd. of Trustees*, 37 F.4th 1386, 1394 (8th Cir. 2022), *cert. denied sub nom. Arkansas Times LP v. Waldrip*, 143 S. Ct. 774, 215 L. Ed. 2d 46 (2023).

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: In *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015) and *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1472 (2022), the Supreme Court considered the constitutionality of local regulations on the use of signs, striking down the content-based regulatory scheme in *Reed* but upholding the content-neutral restrictions in *City of Austin*. One applicable Eighth Circuit opinion differentiated between content-based and content-neutral restrictions by relying on well-established Supreme Court case law: "A statute is 'content neutral so long as it is justified without reference to the content of the regulated speech.'" *Phelps-Roper v. Ricketts*, 867 F.3d 883, 892 (8th Cir. 2017) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *see also Reed*, 576 U.S. at 164 (quoting *Ward* as also classifying content-based regulations as those that were adopted by the government "because of disagreement with the message [the speech] conveys"). If confirmed and confronted with a dispute concerning whether a government restriction was content-based or content-neutral, I will faithfully and objectively apply binding precedent.

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

Response: In *Counterman v. Colorado*, 143 S. Ct. 2106, 2116 (2023), the Supreme Court concluded that laws prohibiting a person from threatening or causing fear in another violate the Free Speech clause of the First Amendment unless they require proof of the speaker's subjective intent, or recklessness. The purely objective standard in the Colorado statute was not sufficient to prohibit speech under the true threats doctrine. *Id.*

16. Under Supreme Court and Eighth 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: The Supreme Court treats "questions of who did what, when or where, how or why" as factual matters. *E.g.*, *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). Likewise, Black's Law Dictionary defines "fact" as "[s]omething that actually exists," "[a]n actual . . . event or circumstance, as distinguished from its legal effect, consequence or interpretation." *Fact*, BLACK'S LAW DICTIONARY (11th ed. 2019). The Eighth Circuit Court of Appeals has also addressed the "fine distinctions between legal and factual questions," noting that:

> *In United States ex rel. Morris Construction, Inc. v. Aetna Casualty Insurance Co.*, 908 F.2d 375 (8th Cir.1990), and in *In re McCrary's Farm Supply, Inc.*, 705 F.2d 330 (8th Cir.1983), our analysis focused on whether the question at issue required the application of a technical, legally oriented standard or whether it required the application of a non-technical, factually oriented standard.

Nodaway Valley Bank v. Cont'l Cas. Co., 916 F.2d 1362, 1364 (8th Cir. 1990).

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

Response: If confirmed, when making sentencing decisions, I will apply the factors set forth in 18 U.S.C. § 3553(a) and binding precedent from the Supreme Court and Eighth Circuit concerning those factors. The statute does not provide that any factor is more important than any other.

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 closely studied all Supreme Court decisions of the last 50 years, so I cannot identify one that is particularly well-reasoned. Moreover, as a sitting state court judge and judicial nominee, the Code of Conduct for United State Judges precludes me from offering commentary concerning any personal opinions I might hold on Supreme Court precedent because related issues could come before me, and I would not want litigants to think I had prejudged those issues. I am committed to faithfully and objectively applying all Supreme Court and Eighth Circuit precedent without regard to any personal view I might have.

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

Response: I have not closely studied all Eighth Circuit decisions of the last 50 years, so I cannot identify one that is particularly well-reasoned. Moreover, as a sitting state court judge and judicial nominee, the Code of Conduct for United State Judges precludes me from offering commentary concerning any personal opinions I might hold on Eighth Circuit precedent because related issues could come before me, and I would not want litigants to think I had prejudged those issues. I am committed to faithfully and objectively applying all Supreme Court and Eighth Circuit precedent without regard to any personal view I might have.

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

Response: The conduct prohibited by 18 U.S.C. § 1507 includes picketing, parading, using a "sound-truck or similar device," and "resort[ing] to any other demonstration" in or near a federal courthouse or any building used by a federal judge, juror, witness, or court officer, "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty."

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

Response: Although 18 U.S.C. § 1507 is cited in five Supreme Court and one Eighth Circuit case. In one case, the Supreme Court upheld the constitutionality of a Louisiana statute that the court noted was modeled after § 1507, *Cox v. Louisiana*, 379 U.S. 559, 561-63 (1965), but none of these opinions concerned the constitutionality of § 1507. Moreover, as a sitting state court judge and judicial nominee, the Code of Conduct for United State Judges precludes me from offering commentary concerning any personal opinions I might hold on the constitutionality of a federal statute because related issues could come before me, and I would not want litigants to think I had prejudged those issues. If confirmed, and if confronted with a constitutional challenge to section 1507, I will faithfully and objectively apply binding precedent.

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?
b. Was *Loving v. Virginia* correctly decided?
c. Was *Griswold v. Connecticut* correctly decided?
d. Was *Roe v. Wade* correctly decided?
e. Was *Planned Parenthood v. Casey* correctly decided?
f. Was *Gonzales v. Carhart* correctly decided?
g. Was *District of Columbia v. Heller* correctly decided?
h. Was *McDonald v. City of Chicago* correctly decided?
i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?
j. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?

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

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?

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

Response: Because the constitutionality of de jure segregation and laws prohibiting interracial marriage are unlikely to be litigated, I can note my opinion that both *Brown* and *Loving* were correctly decided. In addition, *Roe* and *Casey* were overruled by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022). For all remaining cases listed, the Code of Conduct for United State Judges precludes me from offering commentary concerning any personal opinions I might hold on whether Supreme Court precedent was correctly decided because related issues could come before me, and I would not want litigants to think I had prejudged those issues. I am committed to faithfully and objectively applying all Supreme Court and Eighth Circuit precedent without regard to any personal view I might have.

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

Response: I will faithfully and objectively apply binding precedent regarding the Second Amendment. The Supreme Court has held that the Second Amendment guarantees an individual and fundamental right to carry firearms outside the home for purposes of self-defense. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2122 (2022). When considering the constitutionality of a restriction on firearms, district courts must consider whether "the Second Amendment's plain text covers the restricted conduct," and, if so, whether the government has carried its burden "to demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2156; *see also McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

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: No.

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

Response: No.

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: I am not currently in contact with anyone who is currently associated with Alliance for Justice, although Daniel L. Goldberg is now Chief Counsel for Senator Amy Klobuchar. In that capacity, I have been in contact with him concerning this nomination process.

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

    Response: To the best of my knowledge, I have only ever been in contact with Daniel L. Goldberg, and my contact with him has only been in his capacity as Chief Counsel for Senator Klobuchar. To my knowledge, I have not had any contact with anyone else associated with Alliance for Justice and only had contact with Mr. Goldberg after he began working for Senator Klobuchar.

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: Including those subsidiaries does not change my answer.

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: No.

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: No.

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: No.

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

Response: No.

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: No.

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

Response: No.

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: In March 2023, I learned about a vacancy on the United States District Court for the District of Minnesota. Later that month, I submitted an application to the selection committee established by Senators Amy Klobuchar and Tina Smith. On April 12, 2023, I was interviewed by the selection committee. On May 2, 2023, Senator Klobuchar and members of her staff interviewed me. On May 3, 2023, Senator Smith and members of her staff interviewed me. On May 5, 2023, an attorney from the White House Counsel's Office advised me that I was being considered for the vacancy and on May 8, 2023, I interviewed with attorneys from the White House Counsel's Office. On July 27, 2023, my nomination was submitted to the Senate. Since May 10, 2023, I have been in periodic contact with officials from the Office of Legal Policy at the United States Department of Justice regarding the nomination and 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: No.

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: No.

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: No.

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: No.

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: No.

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: As a state court judge, I was assigned thousands of cases, including a wide variety of case types. For instance, I presided over several complex custody and dissolution disputes as well as child protection and juvenile delinquency cases, requiring application of specialized state statutes, caselaw, and rules of procedure. Attorneys from the Office of Legal Policy at the Department of Justice advised not to include too many of these cases, but instead to emphasize cases that demonstrated my understanding of federal law and my experience in matters concerning issues that could come before a federal district court judge.

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 September 13, 2023. After reviewing Eighth Circuit and Supreme Court caselaw to provide specific answers with citations to legal authority, I submitted a draft of my responses to the Office of Legal Policy. I made additional minor revisions and then submitted these responses.

Senator Mike Lee
Questions for the Record
Jeffrey Bryan, Nominee to the United States District Court Judge for the District of Minnesota

1. How would you describe your judicial philosophy?

Response: Over the course of the ten years that I have served as a state court judge, there are several principles that guide my approach. For example, district court judges should ensure that each litigant has a sufficient opportunity to be heard. Relatedly, district court judges should safeguard a fair and impartial process. In addition, district court judges should develop a comprehensive understanding of the facts of each case. Finally, district court judges should diligently research the law and carefully apply that law in an objective manner.

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

Response: If confirmed and if confronted with a dispute over the meaning of a specific word or phrase in a statute, I would start with the plain text of the disputed word or phrase. If the plain meaning is subject to more than one reasonable interpretation, I would consider the arguments presented, all legal authority relating to those arguments, and, if necessary, the applicable definitions of the disputed text, including consulting dictionaries of the English language. If the plain meaning of the disputed text was not clear at that point, I would apply the interpretive principles relied on in Supreme Court and Eighth Circuit precedent.

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

Response: Different interpretive methods encourage or result in consultation of different sources to interpret a constitutional provision. Throughout my service as a state court judge since 2013, I have heard thousands of arguments, and the litigants typically do not present issues requiring application of any principles of constitutional interpretation. Instead, the parties typically argue that the substantive decision in question is controlled by binding precedent. If confirmed, I anticipate my role would largely involve identifying binding precedent or some closely analogous precedent and applying that caselaw. If presented with an issue of true first impression concerning a disputed constitutional provision, I would begin with the plain text of the disputed constitutional provision, and apply the interpretive principles relied on in recent Supreme Court and Eighth Circuit precedent.

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

Response: The plain meaning and original meaning of the text of the disputed constitutional provision are typically the central focus of such disputes. If presented

with an issue of true first impression concerning a disputed constitutional provision, I would begin with the plain text of the disputed constitutional provision, and apply the interpretive principles relied on in recent Supreme Court and Eighth Circuit precedent, which include consideration of the original public meaning. *See, e.g.*, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2136 (2022) ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.") (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008)).

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: Please see my response to Question 2.

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: The Supreme Court determines the ordinary public meaning of a disputed constitutional or statutory provision as of the time of enactment, not based on the public's current understanding. *See, e.g*, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020); *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008).

6. What are the constitutional requirements for standing?

Response: Plaintiffs must show a concrete, imminent harm to a protected legal interest that is fairly traceable to the alleged conduct of the defendant and likely redressable by a favorable decision in the case. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

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

Response: The Supreme Court interpreted the Necessary and Proper Clause in Article I, Section 8 to provide Congress with implicit authorization to carry out the powers expressly conferred on it. *McCulloch v. Maryland*, 17 U.S. 316, 324 (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: If confirmed and if confronted with a dispute concerning Congress's authority to enact a law under the Necessary and Proper Clause, I would evaluate the arguments presented and the legal authority related to the arguments before faithfully and objectively applying binding precedent from the Supreme Court and the Eighth Circuit. *See generally*, *e.g.*, *United States v. Comstock*, 560 U.S. 126, 134 (2010) (holding that to determine "whether the Necessary and Proper Clause grants Congress

the legislative authority to enact a particular federal statute," courts should determine "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power"); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co*., 333 U.S. 138, 144 (1948) for the proposition that the "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise"); *United States v. Coppock*, 765 F.3d 921, 925 (8th Cir. 2014) (concluding that the Sex Offender Registration and Notification Act was authorized pursuant to the Necessary and Proper Clause).

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

Response: The Supreme Court has stated that the Due Process Clause of the Fourteenth Amendment guarantees individuals "some rights that are not mentioned in the Constitution." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022). To be protected by this implicit constitutional provision, the Supreme Court further explained that "any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id.* at 2246 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). In reaching the conclusion that "[t]he 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, the Supreme Court also listed rights, other than abortion, that are not expressly mentioned in the Constitution but "have a sound basis in precedent," including, among others, "the right to marry a person of a different race," "the right to marry while in prison," "the right to make decisions about the education of one's children," "the right not to be sterilized without consent," and "the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures." *Id.* at 2257-58 (citations omitted).

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

Response: The Supreme Court has explained that the Commerce Clause authorizes Congress to regulate "the channels of interstate commerce," "the instrumentalities of interstate commerce," and activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

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

Response: The Supreme Court has explained that laws differentiating people on the basis of race, religion, national origin, and alienage must survive strict scrutiny. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (explaining that strict scrutiny applies to classifications based on "race, alienage, or national origin");

City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (stating that strict scrutiny applies to classifications based on "race, religion, or alienage"); *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 n.4 (1976) (listing cases applying strict scrutiny to classifications based on race, national origin, and alienage). The Supreme Court has further explained that types of classifications subject to heightened protection under the Equal Protection Clause have "an immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), or that have been subject to a "history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process," *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *see also Gallagher v. City of Clayton*, 699 F.3d 1013, 1018 (8th Cir. 2012) (noting that heightened scrutiny applies to classes that share "some immutable characteristic beyond their control" and "require special protection by the courts because of vast discrimination . . . or their political powerlessness" (citations omitted)).

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

Response: The "separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch," *United States v. Lopez*, 514 U.S. 549, 552 (1995), and was regarded by the framers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other," *Buckley v. Valeo*, 424 U.S. 1, 96 (1976). At the same time, the Constitution does not require the three branches of government to "operate with absolute independence." *United States v. Nixon*, 418 U.S. 683, 707 (1974). Rather, the Constitution "contemplates that practice will integrate the dispersed powers into a workable government," and that it "enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (quoting concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)).

13. 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 confirmed and if confronted with an argument concerning the authority for one branch of government not granted to it by the constitution, I would evaluate the arguments presented and the legal authority related to the arguments before faithfully and objectively applying binding precedent from the Supreme Court, including *Nixon v. United States*, 506 U.S. 224, 234-35 (1993) (concluding that the Constitution did not confer authority on the judicial branch to review Senate impeachment proceedings), and the Eighth Circuit concerning the specific government actions and facts at issue in the case.

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

Response: In order to ensure that each litigant perceives that they had a sufficient opportunity to be heard and to ensure a fair and impartial process, I endeavor to understand the litigants on each case and the circumstances surrounding the lawsuit. Empathy may be useful in that regard. It does not, however, affect my efforts to develop a thorough and comprehensive understanding of the facts or have any bearing on my efforts to carefully apply binding precedent.

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

Response: In my experience as a judge, I have avoided both scenarios by objectively and faithfully applying binding precedent. I have not developed a personal opinion as to which is worse or why one may be less desirable than the other.

16. 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: In my career as a civil litigator, federal prosecutor, and state court judge, I have not encountered any arguments concerning the frequency (or trends in the frequency) with which federal courts strike down federal, state, and local laws. In the absence of additional information and careful study, I am unable to provide an informed response to this question.

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

Response: Black's Law Dictionary defines "judicial review" as "a court's power to . . . invalidate legislative and executive actions as being unconstitutional." *Judicial Review*, BLACK'S LAW DICTIONARY 11th ed. 2019. It defines "judicial supremacy" as "[t]he doctrine that interpretations of the Constitution by the federal judiciary . . . are binding on the coordinate branches of the federal government and the states." *Id.*

18. 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 expect elected officials to follow their oaths of office and applicable law. In addition, the Supreme Court has explained that state executive and legislative

officials do not have authority to nullify a judgment of the courts of the United States. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

19. 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: It is my understanding that Hamilton was referring to the concept of judicial restraint and explaining how the judiciary should be different from the two policy-making branches of government.

20. 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 familiar with this statement or the context in which it was made. The word "equity" means different things to different people, and I have not developed my own specific definition of that word. Black's Law Dictionary includes nine different definitions for the word "equity," including "[f]airness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right; natural law." *Equity*, BLACK'S LAW DICTIONARY (11th Ed. 2019). If confirmed and if confronted with a dispute over the meaning of the word "equity," I would evaluate the arguments presented and the legal authority related to the arguments before faithfully and objectively applying binding precedent.

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

Response: Both words mean different things to different people, and I have not developed my own specific definition of either "equity" or "equality." Black's Law Dictionary includes nine different definitions for the word "equity," including "[f]airness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right; natural law." *Equity*, BLACK'S LAW DICTIONARY (11th Ed. 2019). It also defines "equality" as "[t]he quality, state, or condition of being equal." *Id.* The two terms have related, but distinct meanings. If confirmed and if confronted with a dispute over the meaning of the word "equity," or of the word "equality," I would evaluate the arguments presented and the legal authority related to the arguments before faithfully and objectively applying binding Supreme Court and Eighth Circuit precedent.

22. Does the 14th Amendment's Equal Protection Clause guarantee "equity" as defined by the Biden Administration? (Listed above in question 20).

Response: I am not aware of the context of the statement or whether the statement was made in relation to the Equal Protection Clause or Fourteenth Amendment jurisprudence. In addition, the Fourteenth Amendment refers to "the equal protection of the laws," but does not explicitly refer to "equity." If confirmed, I will faithfully and objectively apply binding Supreme Court and Eighth Circuit precedent concerning the Fourteenth Amendment without regard to arguments made by nonparties and statements made outside of the case record.

23. How do you define "systemic racism?"

Response: The term "systemic racism" means different things to different people, and I have not developed my own specific definition of that term. Black's Law Dictionary defines the term "racism" as "[t]he belief that some races are inherently superior to other races" and "[u]nfair treatment of people, often including violence against them, because they belong to a different race from one's own." *Racism*, BLACK'S LAW DICTIONARY (11th Ed. 2019). It also defines the term "systemic discrimination" as "[a]n ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society or a particular industry, profession, company, or geographic location." *Id.* It does not define the specific term "systemic racism." If confirmed and if confronted with a dispute over the meaning of the term "systemic racism," I would evaluate the arguments presented and the legal authority related to the arguments before faithfully and objectively applying binding precedent.

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

Response: The term "critical race theory" means different things to different people, and I have not developed my own specific definition of that term. Black's Law Dictionary defines the term "critical race theory" as a primarily academic movement "whose adherents believe that the legal system has disempowered racial minorities" and whose "theorists observe that even if the law is couched in neutral language, it cannot be neutral because those who fashioned it had their own subjective perspectives that, once enshrined in law, have disadvantaged minorities and even perpetuated racism." *Critical Race Theory*, BLACK'S LAW DICTIONARY (11th Ed. 2019). If confirmed and if confronted with a dispute over the meaning of the term "critical race theory," I would evaluate the arguments presented and the legal authority related to the arguments before faithfully and objectively applying binding precedent.

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

Response: Please see my responses to Questions 23 and 24.

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

Questions for the Record for Jeffrey Marc Bryan, nominated to be United States District Judge for the District of Minnesota

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. Discriminatory conduct on the basis of race that violates the provisions of the Constitution or federal, state, or local laws is unlawful.

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 Supreme Court has stated that the Due Process Clause of the Fourteenth Amendment guarantees individuals "some rights that are not mentioned in the Constitution." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022). To be protected by this constitutional provision, the Supreme Court further explained that "any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id.* at 2246 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). If confirmed and if confronted with this issue, I would fairly and faithfully apply the *Glucksberg* test along with any relevant Supreme Court and Eighth Circuit precedent.

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 spent much time researching or classifying the decision-making philosophies of the justices on the Warren, Burger, Rehnquist, or Roberts Courts. Nor have I developed an understanding of whether or how closely any of my decisions fit within those classifications. Nevertheless, over the course of the ten years that I have served as a state court judge, there are several principles that guide my approach. For example, district court judges should ensure that each litigant has a sufficient opportunity to be heard. Relatedly, district court judges should safeguard a fair and impartial process. In addition, district court judges should develop a comprehensive understanding of the facts of each case. Finally, district court judges should diligently research the law and carefully apply that law in an objective manner.

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

Response: The word "originalism" means different things to different people, and I have not developed my own specific definition of that term. Black's Law Dictionary includes two different definitions for the word "originalism," including "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted," and "[t]he doctrine that a legal instrument should be interpreted to effectuate the intent of those who prepared it or made it legally binding." *Originalism*, BLACK'S LAW DICTIONARY (11th Ed. 2019). Although these definitions do not specifically refer to interpretation of the United States Constitution, I understand "originalism" to be a

method of constitutional interpretation. Throughout my service as a state court judge since 2013, I have not placed any particular labels on my interpretive principles. Additionally, I have heard thousands of arguments, and the litigants typically do not present issues requiring application of any principles of constitutional interpretation. Instead, the parties typically argue that the substantive decision in question is controlled by binding precedent. If confirmed, I anticipate my role would largely involve identifying binding precedent or some closely analogous precedent and applying that caselaw. If presented with an issue of true first impression concerning a disputed constitutional provision, I would begin with the plain text of the disputed constitutional provision, and apply the interpretive principles relied on in recent Supreme Court and Eighth Circuit precedent.

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

Response: The term "living constitutionalism" means different things to different people, and I have not developed a specific definition of the term "living constitutionalism." Black's Law Dictionary defines a nearly identical term as follows: "A constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." *Living Constitution*, BLACK'S LAW DICTIONARY (11th ed. 2019). Although this definition does not specifically refer to interpretation of the United States Constitution, I understand "living constitutionalism" to be a method of constitutional interpretation. Throughout my service as a state court judge since 2013, I have not placed any particular labels on my interpretive principles. Additionally, I have heard thousands of arguments, and the litigants typically do not present issues requiring application of any principles of constitutional interpretation. Instead, the parties typically argue that the substantive decision in question is controlled by binding precedent. If confirmed, I anticipate my role would largely involve identifying binding precedent or some closely analogous precedent and applying that caselaw. If presented with an issue of true first impression concerning a disputed constitutional provision, I would begin with the plain text of the disputed constitutional provision, and apply the interpretive principles relied on in recent Supreme Court and Eighth Circuit precedent.

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 presented with an issue of true first impression concerning a disputed constitutional provision, I would begin with the plain text of the disputed constitutional provision, and apply the interpretive principles relied on in recent Supreme Court and Eighth Circuit precedent, which include consideration of the original public meaning. *See, e.g.*, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2136 (2022) ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.") (quoting *District of Columbia v. Heller*, 554

U.S. 570, 634-35 (2008)).

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: The Supreme Court determines the ordinary public meaning of a disputed constitutional or statutory provision as of the time of enactment, not based on the public's current understanding. *See, e.g.*, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020); *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008). Application of certain doctrine in limited circumstances, however, may include consideration of contemporary community or public standards. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (requiring consideration of "evolving standards of decency" when evaluating an Eighth Amendment challenge); *Miller v. California*, 413 U.S. 15, 24 (1973) (requiring consideration of contemporary community standards when determining whether a challenged work appeals to the prurient interest).

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

Response: The Supreme Court has explained that "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008)).

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

Response: Yes, *Dobbs* is binding precedent.

a. Was it correctly decided?

Response: As a sitting state court judge and judicial nominee, the Code of Conduct for United State Judges precludes me from offering commentary concerning any personal opinions I might hold on whether Supreme Court precedent was correctly decided because related issues could come before me, and I would not want litigants to think I had prejudged those issues. I am committed to faithfully and objectively applying all Supreme Court and Eighth Circuit precedent without regard to any personal view I might have.

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

Response: Yes, *Bruen* is binding precedent.

a. Was it correctly decided?

Response: As a sitting state court judge and judicial nominee, the Code of Conduct for United State Judges precludes me from offering commentary concerning any personal opinions I might hold on whether Supreme Court precedent was correctly decided because related issues could come before me, and I would not want litigants to think I had prejudged those issues. I am committed to faithfully and objectively applying all Supreme Court and Eighth Circuit precedent without regard to any personal view I might have.

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

Response: Yes, *Brown* is binding precedent.

a. Was it correctly decided?

Response: Yes. Because the constitutionality of de jure segregation is unlikely to be litigated, I can note my opinion that it was correctly decided.

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

Response: A rebuttable presumption that no condition or combination of conditions can reasonably assure the safety of the community and the appearance of a federal criminal defendant can arise depending on the defendant's criminal and supervision history or if the defendant is charged with a specified offense (including weapons offenses, certain offenses involving a minor victim, and serious drug trafficking offenses). 18 U.S.C. § 3142(e)(2), (3).

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

Response: The Supreme Court considered the legislative intent and policy rationales behind the Bail Reform Act in *United States v. Salerno*, 481 U.S. 739, 747-51 (1987). Generally, the Supreme Court identified the government's interest in promoting community safety and preventing crime by arrested federal defendants. *Id.*; *see also* 18 U.S.C. §§ 3142(e)-(f) (listing offenses that Congress determined present a greater risk of flight or danger to the community).

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: The Supreme Court has recognized that the Free Speech and Free Exercise Clauses of the First Amendment, the Religious Freedom Restoration Act, and the Religious Land Use and Institutionalized Persons Act limit what governments can

require of religious organizations and businesses operated by observant owners. *See, e.g.*, *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2315 (2023); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020); *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014).

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

Response: Discriminatory conduct on the basis of religion that violates the First Amendment, the Religious Freedom Restoration Act, or the Religious Land Use and Institutionalized Persons Act is unlawful. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2433 (2022) (concluding that public employer's suspension of employee for praying on a football field after games required application of strict scrutiny); *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (concluding that government action treating secular indoor gatherings more favorably than religious indoor gatherings requires application of strict scrutiny); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (concluding that excluding religious schools from generally available public benefits requires application of strict scrutiny); *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018) (concluding that the First Amendment imposes a duty on governments not to enforce laws in a manner that is hostile to religion); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (concluding that the Religious Freedom Restoration Act required the government to demonstrate that the substantial burden imposed by federal requirements concerning insurance coverage of contraceptive methods was the least restrictive means to further a compelling governmental interest).

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: The Supreme Court considered the factors that courts apply to requests for preliminary injunction. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.")). The Supreme Court concluded that, under the strict scrutiny standard that applied to the restrictions at issue, plaintiffs established a strong showing of their likelihood of success on the merits. *Id.* at 66-67. In addition, the court concluded that the plaintiffs would suffer an irreparable harm and that granting the requested

injunction would not harm the public. *Id.* at 67-68.

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

Response: The Supreme Court concluded that, under the strict scrutiny standard that applied to California's COVID-19 restrictions on indoor gatherings, the Ninth Circuit should have granted a preliminary injunction blocking enforcement of the restrictions, which treated secular indoor gatherings differently from religious indoor gatherings. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam).

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

Response: Yes, the Free Exercise Clause of the First Amendment applies outside of houses of worship and individuals' domiciles. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2433 (2022).

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

Response: The Supreme Court concluded that the manner in which the Colorado Civil Rights Commission enforced the Colorado Antidiscrimination Act against a bakery that had religious objections to same-sex weddings violated the Free Exercise Clause.

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: The First Amendment protects beliefs that are rooted in religion, and "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) (*quoted in Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) and *Love v. Reed*, 216 F.3d 682, 687 (8th Cir. 2000)). Courts perform a "narrow function in this context," not one requiring courts to determine the accuracy or veracity of a religious belief, but instead "to determine whether the line drawn reflects an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (quoting *Thomas*, 450 U.S. at 716).

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

Response: In considering cases involving interpretations of religious or church doctrine, "secular courts" "may not resolve disputes of religious doctrine or ecclesiastical policy, because such resolution would violate the First and Fourteenth Amendments." *Hutterville Hutterian Brethren, Inc. v. Sveen*, 776 F.3d 547, 553 (8th Cir. 2015) (citing *Serbian Eastern Orthodox Diocese for*

United States and Canada v. Milivojevich, 426 U.S. 696, 715 n.8 (1976) and *Watson v. Jones*, 80 U.S. 679, 729 (1872)).

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

Response: The First Amendment protects beliefs that are rooted in religion, and "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

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

Response: I am not personally aware of the official position of the Catholic Church on this issue.

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: The Supreme Court concluded that the ministerial exception, which stems from the First Amendment's Religion Clauses, includes employment decisions made by religious institutions over employees who have "the responsibility of educating and forming students in the faith," and forecloses adjudication of the plaintiffs' employment discrimination claims.

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: The Supreme Court concluded that Philadelphia's refusal to contract with a foster care agency, which was affiliated with the Catholic Church and which declined to certify same-sex couples as foster parents, violated the Free Exercise Clause.

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: Applying *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020), the Supreme Court concluded that Maine's tuition assistance program violated

the Free Exercise Clause because it was generally available to the public, but it excluded religious institutions.

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

Response: The Supreme Court concluded that, under the strict scrutiny standard, the school district violated an employee's Free Exercise rights when it decided not to renew the employee's contract out of a concern that the employee's religious expression could result in a lawsuit under the Establishment Clause of the First Amendment. The Supreme Court held that the employee's prayer on the football field after games was protected by the First Amendment.

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: The Supreme Court summarily reversed a decision of the Minnesota Court of Appeals in light of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021) after the Minnesota Supreme Court denied review of the decision. The case concerned whether an Amish community in Minnesota was required to comply with a state statute mandating installation of modern septic systems, which were not consistent with the community's religious beliefs. Justice Gorsuch concurred, explaining his view that the strict scrutiny standard required by the Religious Land Use and Institutionalized Persons Act obligates the county to establish that enforcement of the septic system requirement in this specific instance achieves a compelling interest.

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: If confirmed and if confronted with any dispute over the meaning of a specific word or phrase in a statute, I would start with the plain text of the disputed word or phrase. If the plain meaning is subject to more than one reasonable interpretation, I would consider the arguments presented, all legal authority relating to those arguments, and, if necessary, the applicable definitions of the disputed text, including consulting dictionaries of the English language. If the plain meaning of the disputed text was not clear at that point, I would apply the interpretive principles relied on in Supreme Court and Eighth Circuit precedent.

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: Yes.

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: If confirmed, my focus would center on whether alleged conduct is unlawful, which can be distinct from determining whether alleged conduct is appropriate or inappropriate. If confirmed and if confronted with a claim concerning the consideration of race or gender when making a political appointment, I would carefully review the parties' arguments, research the legal authority relating to those arguments, and then faithfully and objectively apply binding Supreme Court and Eighth Circuit precedent concerning the specific facts of the case.

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

Response: If confirmed and if confronted with a legal claim under the Equal Protection Clause, Title VII of the Civil Rights Act of 1964, or some other claim concerning racially disparate outcomes, I would carefully review the parties' arguments and then faithfully and objectively apply binding Supreme Court and Eighth Circuit precedent

concerning the legal claim to the specific facts of the case.

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

Response: Whether Congress should increase, decrease, or take no action concerning the number of Supreme Court justices is a question for members of Congress to consider. If confirmed, I will apply binding Supreme Court and Eighth Circuit precedent regardless of the number of judges or justices involved in that precedential decision.

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

Response: Each of the justices on the Supreme Court was duly confirmed consistent with applicable provisions of the Constitution.

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

Response: The Supreme Court has held that the Second Amendment guarantees an individual and fundamental right to carry firearms outside the home for purposes of self-defense. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2122 (2022); *see also McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). If confirmed, I will faithfully and objectively apply binding precedent regarding the Second Amendment.

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: When considering the constitutionality of a restriction on firearms, district courts must consider whether "the Second Amendment's plain text covers the restricted conduct," and, if so, whether the government has carried its burden "to demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022); *see also McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

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

Response: Yes. Please see my responses to Questions 33 and 34.

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

Response: The Supreme Court has explained that "the 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. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

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

Response: The Supreme Court has explained that "the 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. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

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

Response: If confirmed, my focus would center on whether alleged conduct is unlawful, which can be distinct from determining whether alleged conduct is appropriate or inappropriate. I expect elected officials to follow their oaths of office and applicable law. If confirmed and if confronted with a legal dispute concerning an executive official's refusal to enforce a law, I would evaluate the arguments presented and the legal authority related to the arguments before faithfully and objectively applying binding precedent from the Supreme Court and the Eighth Circuit.

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

Response: In my experience as a federal prosecutor, the discretionary decisions made by the United States government in criminal cases relate to specific decisions on a particular case, given the relevant facts and evidence obtained at that point in time. A substantive administrative rule, however, would pertain to the general application or enforcement of law. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006) (holding that the Controlled Substances Act did not authorize the Attorney General to adopt a substantive administrative rule prohibiting doctors from prescribing regulated drugs for use in physician-assisted suicide).

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

Response: The imposition of the death penalty is governed by statute, 18 U.S.C. § 3591, and the President cannot repeal a statute.

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

Response: A district court concluded that the Centers for Disease Control exceeded its authority when it imposed a nationwide moratorium on residential evictions in response to the COVID-19 pandemic. The district court enjoined the moratorium but stayed the

injunction. The Supreme Court vacated the stay, concluding that "the applicants are virtually certain to succeed on the merits of their argument," the applicants were "at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery," and the balance of equities favored vacating the stay. *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S Ct. 2485, 2488-90 (2021 (per curiam).

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: If confirmed, my focus would center on whether alleged conduct is unlawful, which can be distinct from determining whether alleged conduct is appropriate or inappropriate. I expect elected officials to follow their oaths of office and applicable law. If confirmed and if confronted with a legal dispute concerning a prosecutor's announcement of intent to prosecute an individual prior to initiating a criminal investigation, I would evaluate the arguments presented and the legal authority related to the arguments before faithfully and objectively applying binding precedent from the Supreme Court and the Eighth Circuit.

43. Similar to the other Biden judicial nominees, you have been a vocal proponent of diversity, equity and inclusion policies. An October 4, 2018 edition of *Minnesota Lawyer* magazine featured an article titled "Diversity & Inclusion: Judge Jeffrey Bryan" that discussed the emphasis you place on diversity. The article goes on to state your work supporting diversity and inclusion continued on in your role as judge.

a. In your view, how does diversity and inclusion factor in to deciding a case?

Response: My judicial decision-making is driven by a commitment to faithfully and objectively applying binding precedent from the Supreme Court and the Eighth Circuit without regard to whether any attorneys involved are diverse or have been vocal proponents of diversity, equity, and inclusion policies. The decision by Minnesota Lawyer magazine to recognize me as one of the 20+ recipients of the 2018 Diversity and Inclusion Award would not factor into my judicial decisions.

b. Is it proper for a party to strike a juror for not being "diverse" enough (i.e. White)?

Response: No. The Supreme Court has concluded that the use of race to strike a potential juror violates the Equal Protection Clause. *See, e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242-43 (2019) ("[E]ach removal of an individual juror because of his or her race is a constitutional violation . . . . Under the Equal Protection Clause . . . even a single instance of race discrimination against a prospective juror is impermissible.") (citing *Batson v. Kentucky*, 476 U.S. 79, 99 (1986). The Equal Protection Clause is "universal in [its] application," protecting people of all races. *See, e.g.*, *Students for Fair Admissions, Inc. v. President &*

Fellows of Harvard Coll., 143 S. Ct. 2141, 2147 (2023) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)); *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-290 (1978) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.").

Senator Josh Hawley
Questions for the Record

Jeffery Bryan
Nominee, U.S. District Judge for the District of Minnesota

1. **Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?**

   Response: To the best of my recollection, I have not worked on such a case.

   a. **If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.**

2. **What role should the original public meaning of the Constitution's text play in the courts' interpretation of its provisions?**

   Response: The Supreme Court has explained that "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008)).

3. **Do you consider legislative history when interpreting legal texts?**

   Response: As a state court judge in Minnesota, I have occasionally addressed disputes concerning the meaning or a word or phrase in a statute. I have applied the interpretive principles as required by statute and caselaw. *See* Minn. Stat. § 645.16 (listing legislative history as one factor courts must consider when resolving statutory ambiguities); *City of Circle Pines v. Cnty. of Anoka*, 977 N.W.2d 816, 826 (Minn. 2022) (relying on legislative history to interpret an ambiguous statutory provision). If confirmed as a federal judge and if confronted with a dispute over the meaning of a specific word or phrase in a statute, I would start with the plain text of the disputed word or phrase. If the plain meaning is subject to more than one reasonable interpretation, I would consider the arguments presented, all legal authority relating to those arguments, and, if necessary, the applicable definitions of the disputed text, including consulting dictionaries of the English language. If the plain meaning of the disputed term was not clear at that point, I would apply the interpretive principles relied on in recent Supreme Court and Eighth Circuit precedent.

   a. **If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?**

      Response: As a state court judge in Minnesota, I currently look to the Minnesota Supreme Court and state law for the interpretive principles on which to rely in deciding cases. Federal courts consider the committee reports to be more

probative of legislative intent than other legislative history: the Supreme Court, "ha[s] repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quotation omitted). If confirmed as a federal judge and if confronted with a dispute over the weight to be given one particular aspect of legislative history, I would consider the arguments presented, all legal authority relating to those arguments, and apply the interpretive principles relied on in recent Supreme Court and Eighth Circuit precedent concerning competing aspects of legislative history.

b. When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?

Response: If confirmed and confronted with a dispute concerning whether to consult the laws of foreign nations to interpret a hypothetical Constitutional ambiguity, I would consider the arguments presented and all legal authority relating to those arguments. Generally, however, the Supreme Court interprets provisions of the Constitution without consulting the laws of foreign nations.

4. Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

Response: The Eighth Circuit Court of Appeals recently considered an argument challenging the execution protocol used in Arkansas and reiterated the applicable standard that applies to such arguments:

> To prove a method-of-execution claim under the Eighth Amendment, an inmate must satisfy two elements. First, he must demonstrate that the State's method "presents a risk that is 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" *Glossip v. Gross*, 576 U.S. 863, 877, 135 S.Ct. 2726, 192 L.Ed.2d 761 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 50, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (plurality opinion)) (internal quotation omitted). The risk must be "a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" Id. (quoting *Baze*, 553 U.S. at 50, 128 S.Ct. 1520 (plurality

> opinion)). Second, he "must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew v. Precythe*, —— U.S. ——, 139 S. Ct. 1112, 1125, 203 L.Ed.2d 521 (2019).

Johnson v. Hutchinson, 44 F.4th 1116, 1118-19 (8th Cir. 2022), *cert. denied sub nom. Johnson v. Payne*, 143 S. Ct. 2668 (2023).

5. **Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?**

   Response: Yes. Please see my response to Question 4.

6. **Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?**

   Response: The Supreme Court concluded that the Substantive Due Process Clause does not confer upon habeas petitioners a "freestanding right to DNA evidence." *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 72 (2009).

7. **Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?**

   Response: No.

8. **Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.**

   Response: The Supreme Court applies the strict scrutiny standard to facially neutral restrictions that impose a burden on the free exercise of religion pursuant to the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act and to facial religious-based restrictions pursuant to the Free Exercise Clause of the First Amendment. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020); *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014).

9. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: Please see my response to Question 8.

10. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

Response: The First Amendment protects beliefs that are rooted in religion, and "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) (*quoted in Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) and *Love v. Reed*, 216 F.3d 682, 687 (8th Cir. 2000)). Courts perform a "narrow function in this context," not one requiring courts to determine the accuracy or veracity of a religious belief, but instead "to determine whether the line drawn reflects an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (quoting *Thomas*, 450 U.S. at 716). In carrying out this narrow function, the question of whether or not an asserted belief constitutes "a sincerely held religious belief is a factual determination." *Murphy v. Missouri Dept. of Corrections,* 372 F.3d 979, 983 (8th Cir. 2004).

11. The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

a. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?

Response: The Supreme Court concluded that the Second Amendment protected an individual's fundamental right to keep and bear arms, including handguns, for purposes of "defense of hearth and home," and not only for purposes of maintaining a well-regulated militia. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: As a judge on the Minnesota Court of Appeals, I authored an opinion reviewing a district court's decisions on competing custody modification motions.

As part of the ensuing custody order, the district court included a requirement that the father lock his firearms in a gun safe at all times when the minor children are with him and that the father refrain from featuring or mentioning his children in YouTube videos, including videos concerning use of firearms. In that case, the appellate panel remanded the portion of the decision imposing these requirements because the district court failed to include sufficient underlying factual findings to permit appellate review. *See Winkowski v. Winkowski*, No. A19-0941, 2020 WL 1488339, at *1 (Minn. Ct. App. Mar. 23, 2020).

12. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

Response: The Supreme Court has overruled *Lochner*. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397-400 (1937) (noting that the view expressed in *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525, 540 (1923) were "a departure from the true application of the principles governing the regulation by the state" and overruling *Atkins*); *see also Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2307 (2022) (listing *Lochner* as a case that was "long-since-overruled"); *Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963) (noting that *Lochner* and *Adkins* have "long since been discarded"). Moreover, as a sitting state court judge and judicial nominee, the Code of Conduct for United State Judges precludes me from offering commentary concerning any personal opinions I might hold on whether Supreme Court precedent was correctly decided because related issues could come before me, and I would not want litigants to think I had prejudged those issues. I am committed to faithfully and objectively applying all Supreme Court and Eighth Circuit precedent without regard to any personal view I might have.

b. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

Response: Please see my response to the above subpart.

13. In *Trump v. Hawaii*, the Supreme Court overruled *Korematsu v. United States*, 323 U.S. 214 (1944), saying that the decision—which had not been followed in over 50 years—had "been overruled in the court of history." 138 S. Ct. 2392, 2423 (2018). What is your understanding of that phrase?

Response: I have not used that phrase myself, but the context of its use in *Trump v. Hawaii* provides a basis to understand its meaning. In using this phrase, Chief Justice Roberts stated that the dissent's reference to *Korematsu* afforded the Supreme Court "the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the

day it was decided, has been overruled in the court of history, and to be clear 'has no place in law under the Constitution.'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (quoting the dissent). Given this context, the statement may be an acknowledgement of the widespread criticism in legal academia and the general public of the holding, impact, or perceived injustice of the Roosevelt Administration's executive order authorizing internment of Japanese Americans during World War II.

14. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

Response: I am not aware of any precedential opinions of the Supreme Court that are no longer binding on me as a sitting judge, but that have not been formally overruled by the Supreme Court.

a. If so, what are they?

b. With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?

Response: Yes.

15. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?
b. If not, please explain why you disagree with Judge Learned Hand.
c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

Response: If confirmed and if confronted with a legal dispute concerning what constitutes a monopoly, I would evaluate the arguments presented and the legal authority related to the arguments before faithfully and objectively applying binding precedent from the Supreme Court and the Eighth Circuit. The Eighth Circuit has concluded that "[a]n eighty percent market share is within the permissible range from which an inference of monopoly power can be drawn." *Missouri Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 622 (8th Cir. 2011) (quoting *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 n.3 (8th Cir. 1994). Moreover, as a sitting state court judge and judicial nominee, the Code of Conduct for United State Judges precludes me from offering commentary concerning any personal opinions I might hold on whether Supreme Court precedent was correctly decided because related issues could come before me, and I would not want litigants to think I had prejudged those issues. I am committed to faithfully and objectively applying all Supreme Court and Eighth Circuit precedent without regard to any personal view I might have

16. Please describe your understanding of the "federal common law."

Response: The term "federal common law" has been defined as "[t]he body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law." *Federal Common Law*, BLACK'S LAW DICTIONARY (11th ed. 2019). Although there is no general federal common law, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Supreme Court has recognized several "enclaves of federal judge-made law which bind the States." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964); *Collins v. Virginia*, 138 S. Ct. 1663, 1679-80 (2018) (listing specific areas of federal common law) (Thomas, J., concurring).

17. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

Response: The Supreme Court has concluded that state supreme courts are the final arbiters of state constitutional disputes, allowing state supreme courts to interpret their constitutional provisions differently from the interpretations of the federal constitution. *See, e.g.*, *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976).

a. Do you believe that identical texts should be interpreted identically?

Response: I am aware of no binding precedent that permits the United States Supreme Court to interpret a state constitutional provision in a way that differs from the interpretation of that state constitutional provision by a state supreme court, even for identical terms.

b. Do you believe that the federal provision provides a floor but that the state provision provides greater protections?

Response: The United States Supreme Court has concluded that state supreme courts are "free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Florida v. Powell*, 559 U.S. 50, 59 (2010).

18. Do you believe that *Brown v. Board of Education*, 347 U.S. 483 (1954) was correctly decided?

Response: Yes. Because the constitutionality of de jure segregation is unlikely to be litigated, I can note my opinion that it was correctly decided.

19. Do federal courts have the legal authority to issue nationwide injunctions?

a. **If so, what is the source of that authority?**
b. **In what circumstances, if any, is it appropriate for courts to exercise this authority?**

Response: In a recent decision, the Eighth Circuit addressed the authority that federal courts have to enjoin parties to a lawsuit as well as the discretion that courts have to craft the scope of an injunction. *Nebraska v. Biden*, 52 F.4th 1044, 1048 (8th Cir. 2022). In that case, the Eighth Circuit recognized that "[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Id.* (citing *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam)). "The scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class," *id.* (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)), and the injunctive relief should be "workable," *id.* (citing *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam)), but "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *id.* (citing *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994)).

20. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

Response: Please see my answer to Question 19.

21. What is your understanding of the role of federalism in our constitutional system?

Response: The term "federalism" refers to "[t]he legal relationship and distribution of power between the national and regional governments . . . and in the United States particularly, between the federal government and the state government. *Federalism*, BLACK'S LAW DICTIONARY (11th ed. 2019). Broadly speaking, the role of federalism is to strike a balance between the supremacy of federal law pursuant to Article VI of the Constitution and the reservation of non-delegated governmental powers to the individual states pursuant to the Tenth Amendment.

22. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

Response: Federal courts abstain from adjudicating issues on the basis of several well-established doctrines. *See, e.g.*, *Watson v. Jones*, 80 U.S. 679, 729 (1872) (concluding that courts should abstain from adjudicating disputes concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them"); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (concluding that disputed questions of state law should be resolved by state courts before federal courts should adjudicate disputed questions of

federal law); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (concluding that abstention was appropriate to avoid needless conflict in administration of state affairs); *Younger v. Harris*, 401 U.S. 37 (1971) (concluding that state criminal actions should be resolved before federal courts consider parallel claims under 42 U.S.C. § 1983); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (concluding that abstention may be appropriate to avoid duplicative litigation and setting forth factors to govern such decisions); *Reed v. Goertz*, 598 U.S. 230, 234-35 (2023) (stating the *Rooker-Feldman* abstention doctrine as one prohibiting lower federal courts "from adjudicating cases brought by state-court losing parties challenging state-court judgments").

23. What in your view are the relative advantages and disadvantages of awarding damages versus injunctive relief?

Response: Courts may award damages to remedy past harm and may award injunctive relief to address ongoing harm or to address future harm that has not yet occurred. The relative advantages and disadvantages would depend on the unique facts of each case. If confirmed and if confronted with a dispute concerning the propriety of monetary verses injunctive relief, I would carefully review the parties' arguments and then faithfully and objectively apply binding Supreme Court and Eighth Circuit precedent concerning the specific facts of the case.

24. What is your understanding of the Supreme Court's precedents on substantive due process?

Response: The Supreme Court has stated that the Due Process Clause of the Fourteenth Amendment guarantees individuals "some rights that are not mentioned in the Constitution." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022). To be protected by this implicit constitutional provision, the Supreme Court further explained that "any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id.* at 2246 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). In reaching the conclusion that "[t]he 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, the Supreme Court also listed rights, other than abortion, that are not expressly mentioned in the Constitution but "have a sound basis in precedent," including, among others, "the right to marry a person of a different race," "the right to marry while in prison," "the right to make decisions about the education of one's children," "the right not to be sterilized without consent," and "the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures." *Id.* at 2257-58.

25. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. What is your view of the scope of the First Amendment's right to free exercise of religion?

Response: Please see my responses to Questions 8 and 10.

b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

Response: The term "freedom of religion" refers to an individual's "right to adhere to any form of religion or none, to practice or abstain from practicing religious beliefs, and to be free from governmental interference with or promotion of religion." *Freedom of Religion*, BLACK'S LAW DICTIONARY (11th ed. 2019). The term "worship" refers to a "form of religious devotion, ritual, or service showing reverence, [especially] for a divine being or supernatural power." *Id.* Thus, the two terms are not synonymous, but related, with the freedom of religion generally encompassing the freedom to worship.

c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

Response: Please see my responses to Questions 8 and 10.

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

Response: Please see my response to Question 10.

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

Response: The Supreme Court has explained that the Religious Freedom Restoration Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (quoting 42 U.S.C. § 2000bb–3(a)).

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: To the best of my recollection, I have not issued any opinion examining a claim under these statutes or constitutional provisions.

26. Under American law, a criminal defendant cannot be convicted unless found to be guilty "beyond a reasonable doubt." On a scale of 0% to 100%, what is your understanding of the confidence threshold necessary for you to say that you believe something "beyond a reasonable doubt." Please provide a numerical answer.

Response: In every criminal case that I tried to a jury and that I presided over, the parties and the district court carefully define the phrase "beyond a reasonable doubt," as the various definitions and explanations of that phrase have been the subject of innumerable direct appeals and post-conviction petitions concerning the jury instructions and effective assistance of counsel in making arguments regarding the jury instructions. *See, e.g.*, *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam) (concluding that a jury instruction that equated reasonable doubt with "grave uncertainty" and "actual substantial doubt," and that stated that what was required for a guilty verdict was "moral certainty," lowered the burden of proof below the standard required by the Sixth Amendment); *see also Victor v. Nebraska*, 511 U.S. 1, 22 (1994) (citing *Cage* and cautioning trial courts to "avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires"); *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (concluding that a district court commits structural error when it provides a jury instruction that was effectively identical to the deficient instruction in *Cage*). In particular, reversal may be required on appeal if the judge or an attorney quantifies the term "beyond a reasonable doubt." *See Reed v. Roe*, 100 F.3d 964 (9th Cir. 1996) (unpublished opinion) (reversing conviction because the district court "described reasonable doubt by reference to a numerical scale"); *see also, e.g.*, *United States v. Hall*, 854 F.2d 1036, 1044-45 (7th Cir. 1988) (observing that "[w]hen . . . judges and juries are asked to translate the requisite confidence into percentage terms or betting odds, they sometimes come up with ridiculously low figures," and discouraging judges from using "numerical estimates of probability . . . in the setting of jury deliberations") (Posner, J. concurring). If confirmed, I would evaluate the arguments presented and the legal authority related to the arguments before faithfully and objectively applying binding precedent from the Supreme Court and the Eighth Circuit concerning jury instructions setting forth the reasonable doubt standard.

27. The Supreme Court has held that a state prisoner may only show that a state decision applied federal law erroneously for the purposes of obtaining a writ of habeas corpus under 28 U.S.C. § 2254(d) if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

a. Do you agree that if there is a circuit split on the underlying issue of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents"?

b. In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by

definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?

c. If you disagree with either of these statements, please explain why and provide examples.

Response: The law concerning habeas petitions involves many specific and specialized issues, but generally, to prevail on a petition under 28 U.S. § 2254(d)(1), the petitioner must establish that the state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Eighth Circuit has further clarified that to demonstrate an unreasonable application, a petitioner must show that the state court's adjudication "was not merely wrong or even clearly erroneous but 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Bookwalter v. Vandergriff*, 73 F.4th 622, 624 (8th Cir. 2023) (*White v. Woodall*, 572 U.S. 415, 419-20 (2014)). If confirmed, I would faithfully and objectively apply this and other binding precedent from the Supreme Court and Eighth Circuit.

28. U.S. Courts of Appeals sometimes issue "unpublished" decisions and suggest that these decisions are not precedential. *Cf.* Rule 32.1 for the U.S. Court of Appeals for the Tenth Circuit.

a. Do you believe it is appropriate for courts to issue "unpublished" decisions?

Response: In Minnesota, the majority of opinions from the Minnesota Court of Appeals are designated as nonprecedential. *See* Minn. R. App. Pro. 136.01. In my experience as a district court and court of appeals judge, many attorneys make arguments based on the persuasive value of these nonprecedential opinions. Because the Minnesota Court of Appeals typically performs an error correcting role, one that is limited to applying existing precedent, and because nonprecedential opinions retain persuasive value, the rules of procedure in Minnesota permit issuance of such opinions.

b. If yes, please explain if and how you believe this practice is consistent with the rule of law.

Response: Please see my response to the above subpart.

c. If confirmed, would you treat unpublished decisions as precedential?

Response: Local Rule 32.1A of the Local Rules of the United States Court of Appeals for the Eighth Circuit explains that "[u]npublished opinions are decisions a court designates for unpublished status. They are not precedent."

d. **If not, how is this consistent with the rule of law?**

Response: The Supreme Court has acknowledged the authority that each court of appeals has "to make rules governing its practice either through rulemaking or adjudication." *Ortega-Rodriguez v. United States*, 507 U.S. 234, 253 (1993) (quotation omitted).

e. If confirmed, would you consider unpublished decisions cited by litigants when hearing cases?

Response: Rule 32.1 of the Federal Rules of Appellate Procedure explains that courts may not prohibit a party from citing nonprecedential federal opinions.

f. Would you take steps to discourage any litigants from citing unpublished opinions? *Cf.* Rule 32.1A for the U.S. Court of Appeals for the Eighth Circuit.

Response: No. If confirmed, I will not take steps to encourage or discourage litigants from citing unpublished opinions as required by Rule 32.1 of the Federal Rules of Appellate Procedure and Local Rule 32.1A of the Local Rules of the United States Court of Appeals for the Eighth Circuit.

g. Would you prohibit litigants from citing unpublished opinions? *Cf.* Rule 32.1 for the U.S. Court of Appeals for the District of Columbia.

Response: No. If confirmed, I will not take steps to prohibit litigants from citing unpublished opinions as required by Rule 32.1 of the Federal Rules of Appellate Procedure and Local Rule 32.1A of the Local Rules of the United States Court of Appeals for the Eighth Circuit.

29. In your legal career:

a. How many cases have you tried as first chair?

Response: Prior to my appointment as a judge in 2013, I tried nine cases to verdict, including five as sole counsel and four as one of two attorneys, equally sharing trial responsibilities. I also spent four months in trial as associate counsel on a trial team, but after submission of post-trial briefs and before we received the trial order, the parties reached a settlement. I also handled an additional 20 to 30 federal petty misdemeanor bench trials as sole counsel. Many of these involved only between one and four witnesses, although the trials in two of these cases lasted multiple days. Since becoming a state court judge, I estimate that I presided over several hundred petty misdemeanor and implied consent cases. Excluding petty misdemeanors and implied consent cases, I estimate that I have presided over between 100 and 120 trials in state court.

b. How many have you tried as second chair?

Response: Please see my response to the above subpart.

c. How many depositions have you taken?

Response: I have not kept track of the number of depositions that I took or defended as a civil litigator. I would estimate that the number is at least 30.

d. How many depositions have you defended?

Response: Please see my response to the above subpart.

e. How many cases have you argued before a federal appellate court?

Response: I have appeared as lead or co-counsel in approximately 30 cases before the Eighth Circuit Court of Appeals.

f. How many cases have you argued before a state appellate court?

Response: Before becoming a state court judge I represented one client before the Minnesota Court of Appeals. Since becoming a judge on the Minnesota Court of Appeals, I have participated in more than 500 decisions as part of various three-judge panels and authored between 180 and 200 written opinions and orders.

g. How many times have you appeared before a federal agency, and in what capacity?

Response: I appeared as counsel on an asylum trial in immigration court.

h. How many dispositive motions have you argued before trial courts?

Response: Before becoming a state court judge, I estimate that I handled more than 1,000 hearings in federal court relating to the more than 350 federal defendants that I prosecuted. Nearly all of these defendants made dispositive motions in these criminal proceedings, which resulted in hundreds of dispositive motions hearings in federal district court.

i. How many evidentiary motions have you argued before trial courts?

Response: As a civil litigator, I made many motions requiring or regarding evidence, and as a federal prosecutor, I argued hundreds of evidentiary hearings, including preliminary and detention hearings, motions concerning suppression or admission of trial evidence, evidentiary hearings concerning facts related to sentencing matters, and evidentiary hearings concerning allegations of supervised or pretrial release. As a judge, I have presided over several thousand evidentiary hearings or hearings concerning exclusion of trial evidence.

30. If any of your previous jobs required you to track billable hours:

a. What is the maximum number of hours that you billed in a single year?

Response: I do not recall my total billable hours from when I was in private practice (2003-2007), but I do recall that the total was in excess of 2100 hours, and I was one of the attorneys with the highest billable hours in the business litigation section of the firm each year.

b. What portion of these were dedicated to pro bono work?

Response: During my time in private practice, I estimate that I performed over 750 hours on pro bono matters.

31. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."

a. What do you understand this statement to mean?

Response: I am not familiar with this statement, or the context in which it was made. It may reflect Justice Scalia's viewpoint that judges should make decisions without regard to their personal beliefs or feelings.

32. Chief Justice Roberts said, "Judges are like umpires. Umpires don't make the rules, they apply them."

a. What do you understand this statement to mean?

Response: I am not familiar with this statement, or the context in which it was made. It may reflect Justice Robert's viewpoint that the judicial branch serves a distinct purpose, one that is different from the executive and legislative branch. In addition, Justice Roberts may be expressing his opinion that judges should make decisions objectively and impartially.

b. Do you agree or disagree with this statement?

Response: The three branches of government serve distinct roles, and generally, district court judges focus on application of existing precedent to the facts of each particular case.

33. When encouraged to "do justice," Justice Holmes is said to have replied, "That is not my job. It is my job to apply the law."

a. What do you think Justice Holmes meant by this?

Response: I am not familiar with this statement, or the context in which it was made. It may reflect Justice Holmes's viewpoint that judges should make decisions objectively and impartially, without regard to their personal moral beliefs.

b. Do you agree or disagree with Justice Holmes? Please explain.

Response: If confirmed, I will faithfully and objectively apply binding Supreme Court and Eighth Circuit precedent concerning the specific facts of the case, without regard to my personal moral beliefs.

34. Have you ever taken the position in litigation or a publication that a federal or state statute was unconstitutional?

Response: To best of my recollection, I have not taken such a position.

a. If yes, please provide appropriate citations.

35. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

Response: No.

36. What were the last three books you read?

Response: The last three books that I have read are:

LESLEY NNEKA ARIMAH, WHAT IT MEANS WHEN A MAN FALLS FROM THE SKY (2017)

KATE ATKINSON, SHRINES OF GAIETY (2023)

SUZANNE SIMARD, FINDING THE MOTHER TREE: DISCOVERING THE WISDOM OF THE FOREST (2021)

37. Do you believe America is a systemically racist country?

Response: The term "systemic racism" means different things to different people, and I have not developed my own specific definition of that term. Black's Law Dictionary defines the term "racism" as "[t]he belief that some races are inherently superior to other races" and "[u]nfair treatment of people, often including violence against them, because they belong to a different race from one's own." *Racism*, BLACK'S LAW DICTIONARY (11th Ed. 2019). It also defines the term "systemic discrimination" as "[a]n ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society or a particular industry, profession, company, or geographic location." *Id.* It does not define the specific term "systemic racism." In the past, laws in the United States treated people differently on the basis of race. Whether those laws continue to impact certain populations and how those populations are

impacted by this history are important questions that many elected officials and policymakers are asking. Moreover, as a sitting state court judge and judicial nominee, the Code of Conduct for United State Judges precludes me from offering commentary concerning any personal opinions I might hold on issues that could come before me, and I would not want litigants to think I had prejudged those issues. I am committed to faithfully and objectively applying all Supreme Court and Eighth Circuit precedent without regard to any personal view I might have.

38. What case or legal representation are you most proud of?

Response: While I can recall several individual cases and investigations that were rewarding to me, I am most proud of my ten years of service as a state court judge.

39. Have you ever taken a position in litigation that conflicted with your personal views?

Response: Yes.

a. How did you handle the situation?

Response: I put aside my personal beliefs and feelings and tried to represent my client consistent with the applicable rules of ethics.

b. If confirmed, do you commit to applying the law written, regardless of your personal beliefs concerning the policies embodied in legislation?

Response: Yes.

40. What three law professors' works do you read most often?

Response: I do not typically read the works of law professors, and there is no single law professor whose work I read often.

41. Which of the Federalist Papers has most shaped your views of the law?

Response: I recall reading the Federalist Papers in college and law school, and my understanding of the legal and non-legal history of our country is no doubt impacted by the Federalist Papers. Since becoming an attorney and judge, however, I have not relied on the Federalist Papers in my advocacy or judicial opinions. Nor have I spent much time developing an opinion as to which of the Federalist Papers is most important or has had the greatest impact on my views of the law.

42. What is a judicial opinion, law review article, or other legal opinion that made you change your mind?

Response: Although judges on the Minnesota Court of Appeals do not discuss or reveal our deliberations in panel conferences, I will relay one experience in general terms that is responsive to this Question. I recall serving on a panel in which the three judges did not agree after hearing oral argument. I was presumptively assigned to author the opinion on the panel's behalf. After circulating a draft, one of the other judges drafted a dissenting opinion. Without providing any specific information that could identify the case, I can state that the draft dissent convinced me to change the draft majority opinion. The panel ultimately incorporated enough aspects of the draft dissent that the decision was unanimous.

43. Do you believe that an unborn child is a human being?

Response: Response: As a sitting state court judge and judicial nominee, the Code of Conduct for United State Judges precludes me from offering commentary concerning any personal opinions I might hold on this issue because this or related issues could come before me, and I would not want litigants to think I had prejudged those matters. I am committed to faithfully and objectively applying all Supreme Court and Eighth Circuit precedent without regard to any personal view I might have.

44. Other than at your hearing before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is available online or as a record, please include the reference below or as an attachment.

Response: I was summoned for jury duty in Ramsey County, was examined individually, and took an oath as part of that process. To my best recollection, and apart from the Senate Judiciary Committee hearing, I have not testified under oath on any other occasion.

45. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:

a. *Roe v. Wade,* 410 U.S. 113 (1973)?

Response: No.

b. The Supreme Court's substantive due process precedents?

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

46. Do you currently hold any shares in the following companies:

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

47. Have you ever authored or edited a brief that was filed in court without your name on the brief?

Response: As a junior associate, there were many occasions when I drafted memoranda that was later included in a brief or when I contributed in some way to a draft brief. I do not recall whether my name was always included on the final version of the briefs in which I was involved. Nor did I compile any list of the matters on which I worked such that I could determine whether my name was included in the final version of briefs in which I was involved.

a. If so, please identify those cases with appropriate citation.

48. Have you ever confessed error to a court?

Response: To the best of my recollection, I have not ever confessed error to a court.

a. If so, please describe the circumstances.

49. Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.

Response: Judicial nominees are expected to answer all questions truthfully and to the best of their ability.

Questions from Senator Thom Tillis
for Jeffrey Marc Bryan, judicial nominee to the United States District Court for the District of Minnesota

1. **Can a judge's personal views and background benefit them in interpreting and applying the law, or would you say that they are irrelevant?**

   Response: As a state court judge for the last ten years, I have set aside my personal opinions, beliefs, and life experience when making decisions. If confirmed, I will faithfully and objectively binding precedent from the Supreme Court and Eighth Circuit without regard to my personal views.

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

   Response: Canon 2A of the Code of Conduct for U.S. Judges explains the ethical expectation that judges "should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

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

   Response: The term "judicial activism" means different things to different people, and I have not developed my own specific definition of that word. Black's Law Dictionary defines the term as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions . . . and are willing to ignore governing texts and precedents." *Judicial Activism*, BLACK'S LAW DICTIONARY (11th Ed. 2019). In addition, if confirmed, my focus would center on whether alleged conduct is unlawful, which can be distinct from determining whether alleged conduct is appropriate or inappropriate. Nevertheless, my judicial decision-making is driven by a commitment to faithfully and objectively applying binding precedent.

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

   Response: No.

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

   Response: My judicial decision-making is driven by a commitment to faithfully and objectively applying binding precedent the facts of each case presented. If confirmed, my focus would center on whether alleged conduct is unlawful, without regard to whether the parties would perceive the outcome as desirable.

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

Response: I will faithfully and objectively apply binding precedent regarding the Second Amendment. The Supreme Court has held that the Second Amendment guarantees an individual and fundamental right to carry firearms outside the home for purposes of self-defense. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2122 (2022). When considering the constitutionality of a restriction on firearms, district courts must consider whether "the Second Amendment's plain text covers the restricted conduct," and, if so, whether the government has carried its burden "to demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2156; *see also McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

7. **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: The Eighth Circuit has explained that to determine whether a party is entitled to qualified immunity, courts conduct a two-part inquiry: "(1) [whether] the facts, viewed in the light most favorable to [the party opposing the application of qualified immunity], demonstrate the deprivation of a constitutional or statutory right; and (2) [whether] the right was clearly established at the time of the deprivation." *Ryno v. City of Waynesville*, 58 F.4th 995, 1004-05 (8th Cir. 2023) (quoting *Jones v. McNeese*, 675 F.3d 1158, 1161 (8th Cir. 2012). A right is "clearly established" when its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "[Q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021) (per curiam). If confirmed and if confronted with a legal dispute concerning qualified immunity, I would evaluate the arguments presented and the legal authority related to the arguments before faithfully and objectively applying binding precedent from the Supreme Court and the Eighth Circuit.

8. **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: As a sitting state court judge and judicial nominee, the Code of Conduct for United State Judges precludes me from offering commentary concerning any personal opinions I might hold on whether the qualified immunity jurisprudence provides sufficient protection because that issue or related issues could come before me, and I would not want litigants to think I had prejudged those matters. I am committed to faithfully and objectively applying all Supreme Court and Eighth Circuit precedent without regard to any personal view I might have.

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

Response: As a sitting state court judge and judicial nominee, the Code of Conduct for United State Judges precludes me from offering commentary concerning any personal opinions I might hold concerning the proper scope of qualified immunity because that issue or related issues could come before me, and I would not want litigants to think I had prejudged those matters. I am committed to faithfully and objectively applying all Supreme Court and Eighth Circuit precedent without regard to any personal view I might have.

10. **What are your thoughts regarding the importance of ensuring that all IP rights are in fact enforced?**

Response: I am committed to faithfully and objectively applying all Supreme Court and Eighth Circuit precedent concerning IP rights.

11. **In the context of patent litigation, in some judicial districts plaintiffs are allowed to request that their case be heard within a particular division. When the requested division has only one judge, this allows plaintiffs to effectively select the judge who will hear their case. What are your thoughts on this practice, which typically is referred to as "forum shopping" and/or "judge shopping?"**

Response: The District of Minnesota does not assign cases in this manner or have mechanisms or conventions that allow such requests.

12. **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 shambles. What are your thoughts regarding the Supreme Court's patent eligibility jurisprudence?**

Response: As a sitting state court judge and judicial nominee, the Code of Conduct for United State Judges precludes me from offering commentary concerning any personal opinions I might hold on the current state of eligibility jurisprudence because that issue or related issues could come before me, and I would not want litigants to think I had prejudged those matters. I am committed to faithfully and objectively applying all Supreme Court and Eighth Circuit precedent without regard to any personal view I might have.