Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Judge Joshua Kolar
Nominee to be United States Circuit Judge for the Seventh Circuit
September 13, 2023

1. **You stated in your Senate Judiciary Questionnaire that while in private practice—before becoming a prosecutor and a judge—you dedicated hundreds of hours every year to representing indigent clients.**

   a. **Can you speak to the significance of representing indigent clients as a young lawyer?**

      Response: Attorneys have a monopoly on the representation of others in our judicial system. This privilege comes with a responsibly to accept *pro bono* cases and ensure access to the courts for all. However, *pro bono* representation is not merely an *obligation*, it is also an *opportunity* to learn the joys of service to others, take on meaningful and rewarding work, and teach younger attorneys valuable skills under the supervision of experienced attorneys. Many people contributed to my desire to serve the public, but my first experience serving the public in the legal system was through *pro bono* work.

   b. **In your experience on the bench, what is the effect of indigent clients having access to pro bono representation?**

      Response: Generally speaking, there is no right to appointed counsel in civil cases. This means that a *pro se* litigant can be brought into court as a defendant who is unaware of their rights and lacks the ability to navigate our court system. Those who bring claims *pro se* likewise at times face difficulty. Fortunately, the Northern District of Indiana has a talented and dedicated volunteer panel full of attorneys who often take on *pro bono* representation. Of course, counsel is not available for all *pro se* litigants. While I attempt to actively manage many *pro se* cases, in my role as a neutral I cannot provide legal advice. We have an adversarial system, and I am bound to consider the arguments of counsel and those who appear *pro se* fairly and impartially.

Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Joshua Paul Kolar
Nominee to be a United States Circuit Judge for the Seventh Circuit

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

   Response: I do not agree with that statement, although I am not familiar with it. Judges decide the cases before them based upon binding precedent and the relevant constitutional or statutory text, not our personal beliefs or values. I do not reach answers to the questions before me as a judge that "values tell me to reach." I never prejudge a matter. Rather, I wait to decide a case until arguments are presented and I have reviewed all relevant materials, including binding precedent. I then apply the law to the facts in the record.

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: That is not an appropriate approach for a federal judge to take, although I am not familiar with the statement. I follow the law and binding precedent and do not issue decisions that I know or suspect would be subject to reversal by a higher court. If confirmed as a circuit judge, I will continue to fairly and impartially apply the law to the facts of the case, consistent with binding precedent from the Seventh Circuit and United States Supreme Court.

3. **Do you believe it is appropriate for the Seventh Circuit to grant a petition for rehearing en banc because the relevant panel decision made a factual error?**

   Response: As set forth in Federal Rule of Appellate Procedure 35, en banc hearings are not favored and ordinarily will not be ordered unless necessary to secure or maintain uniformity of the court's decisions or when the case involves a question of exceptional importance. As a sitting magistrate judge, the Seventh Circuit is my superior within the court's chain of command. I follow all Seventh Circuit precedent, whether that comes from a three-judge panel, or en banc Court.

4. **Do you believe it is appropriate for the Seventh Circuit to grant a petition for rehearing en banc because the relevant panel decision reached an undesirable policy outcome?**

Response: Please see my answer to Question 3.

5. **In *U.S. v. Gibson*, you ordered the release of a defendant that you concluded "is likely a danger to the community" and "presents a serious risk of flight." Among other conclusions, you determined that the government failed to show that there is no condition or combination of conditions that will reasonably assure the defendant's appearance.**

    a. **In hindsight, was that the right decision?**

    Response: I believe my decision was correct based upon the record at the time the opinion and order issued. However, as I have stated in open court in subsequent cases, I would welcome the opportunity to revisit the issue with full briefing by both the government and defense.

    The Defendant was charged with bank fraud (18 U.S.C. § 1344(1)) and aggravated identity theft (18 U.S.C. § 1028A(a)(1)). These are not among the offenses Congress listed in § (f)(1) of the Bail Reform Act and therefore do not generally allow the government to move for pretrial detention. The vast majority of the detention hearings I preside over involve the government presenting arguments under § (f)(1) of the Bail Reform Act, which clearly allows the government to meet its burden of proof by showing that *either* there are no conditions or combination of conditions that would reasonably assure the safety of the community *or* that there are no conditions or combination of conditions that would reasonably assure the defendant's continued appearance as required. A threshold question I was presented with in *United States v. Gibson* was whether the government could meet its burden of proof under § (f)(2)(A) of the Bail Reform Act, which provides for a detention hearing in cases where there is a "serious" risk that a defendant will flee, by showing only that there were no conditions or combination of conditions that would protect the community. I prepared for this hearing by reading cases that came down on both sides of this issue. At the hearing, I asked the parties for their views and provided time for argument. Ultimately, based upon my review of relevant case law and my reading of the statute, I found that the Bail Reform Act precluded the government from relying on danger to the community and so I was bound to disregard the government's focus on danger to the community. As I noted in my written opinion and order, perhaps such an outcome is bad public policy, yet it was "not for [me] to weigh [ ] significant liberty interests against the important duty of the government to ensure public safety, and that is certainly not something for [me] to take up on the current record." Simply put, regardless of whether release on conditions was preferable as a matter of policy, it was the outcome required by my reading of the Bail Reform Act and the presentation of evidence before me.

b. **Please provide examples of what the government could have shown to justify detention in this case?**

Response: As I indicated in my written decision, while this was a close case, the government's position seemed to rest on the notion that the Defendant was simply ineligible for conditions without carefully considering whether it met its burden of proof that no conditions were capable of reasonably assuring the Defendant's appearance as required. I specifically pointed out in my opinion and order that while the government provided a general objection to conditions of release, it did not address specific conditions and explain why those conditions would be ineffective at providing reasonable assurances of the Defendant's appearance. And, as discussed above, I was precluded from considering much of the government's argument, which focused on public safety.

Every case requires a detailed and individualized analysis under the Bail Reform Act. I cannot speculate as to exactly how I would have viewed additional evidence without having it presented to me in an adversarial fashion, giving both the government and defense a chance to present arguments. However, I would note that I do not believe anything was presented on whether the Defendant was previously required to have his mother serve as a third-party custodian, which was a condition I indicated I would impose. Additionally, there was very little discussion of the relative strengths and weaknesses of electronic home monitoring in assuring a defendant's appearance. When discussing electronic monitoring, the government focused upon such monitoring's inability to prevent certain dangers to the community. I noted in my opinion that the government did not provide any such arguments regarding the efficacy of electronic monitoring in providing reasonable assurances of appearance. As I stated, while there might be evidence to support such an argument, it was not appropriate for me to speculate in a manner that would fill in the gaps in the government's burden of proof.

Ultimately, I made clear I would impose very strict conditions and the Defendant agreed to pretrial detention while my opinion and order was under review.

6. **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: Federal courts look to 28 U.S.C. §§ 2241-2254 when considering habeas petitions from those in state custody. There is an extensive body of case law that has developed around the requirements for such habeas petitions. Without expressing a view on any unsettled areas of case law, I will attempt to summarize the governing legal principles. First, a petitioner must show their custodial status is due to a "violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2254(a). Courts would

conduct a two-part test in considering whether to grant habeas relief. First, an issue that was adjudicated on the merits in state court is only contrary to federal law if it "arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law. . . . [or is] contrary to [the Supreme Court's] precedent" such that "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [the opposite result]." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). Second, a federal court will look to the factual findings of state courts and presume them correct. A petitioner can rebut this presumption only with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). There are several procedural requirements, including the exhaustion (or absence) of state court remedies, unless such process is ineffective to protect the petitioner's rights (§ 2254(b)) and a one-year time limit (§ 2244(d)(1)).

7. **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: 28 U.S.C. § 2255 governs habeas petitions for federal prisoners. Section 2255 refers to many of the same sections discussed above in response to Question 5. There is also an extensive body of law that has developed around habeas petitions from federal prisoners. Without expressing a view on any unsettled areas of law, I will attempt to summarize the relevant legal standards. Section 2255 allows a federal prisoner to challenge ongoing custody when their "sentence was imposed in violation of the Constitution or law of the United States, or [when] the court was without jurisdiction to impose such a sentence, or [when] the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack." In addition to the same one-year time limit discussed in the previous question, §2255 strictly limits second or successive motions, except upon certification of newly discovered evidence that would make it so no reasonable finder of fact would find the petitioner guilty and/or there is a new rule of law made retroactive on collateral review. §2255(h). Sections 2241 and 2255 operate to provide a "savings clause" for successive petitions where it is "impossible or impracticable to seek relief in the sentencing court, as well as for challenges to detention other than collateral attacks on a sentence." *Jones v. Hendrix*, 599 U.S. 465 (2023). However, this will not allow a second or successive habeas petition based only on a more favorable interpretation of statutory law. *Id.*

8. **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: *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College*, 143 S. Ct. 2141 (2023), was a consolidated case that addressed the admissions systems used by Harvard College and University of North Carolina. The Supreme Court first addressed standing. The Court found that the Students for Fair Admissions qualified under the organization standing test and had identified members it was representing in

good faith, thereby meeting the standing requirements of Article III.

The Court next turned to "whether a university may make admissions decisions that turn on an applicant's race." *Id.*, 143 S. Ct. at 2163. Ultimately, the Court found that both Harvard and the University of North Carolina failed to operate race-based admission programs in a manner sufficiently measurable to allow for strict scrutiny analysis, indicating that the interests the colleges put forth could not be subjected to meaningful review. Further, the Court noted that the admissions programs did not "articulate a meaningful connection between the means they employ and the goals they pursue." *Id.*, 143 S. Ct. at 2167. Having failed both the "compelling interest" prong of strict scrutiny and the "narrowly tailored" means of meeting that interest, the programs were found to violate the Equal Protection Clause of the Fourteenth Amendment.

9. **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 interviewed candidates for jobs at my prior law firm, Mayer Brown LLP and for positions as an Assistant United States Attorney. I was a member of the hiring committee for one position as an Assistant United States Attorney. I have been responsible for hiring chambers staff as a United States Magistrate Judge. I am the hiring official for law clerks in my chambers and consult with the Clerk of Court for the hiring of my assigned Courtroom Deputy.

10. **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.

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

    Response: No.

12. **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: Not to my knowledge.

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.

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

Response: Yes. *See, e.g.*, *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College*, 143 S. Ct. 2141 (2023); *Dunnet Bay Const. Co. v. Borggren*, 799 F.3d 676, 697 (7th Cir. 2015).

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

Response: In *303 Creative LLC v. Elenis*, the Supreme Court held that a state cannot force a web designer to create expressive designs with messages or speech they disagree with through the threat of penalties imposed by anti-discrimination laws. To do so would violate the Free Speech Cluse of the First Amendment, as applied to the states through the Fourteenth Amendment.

15. **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: Yes. It is binding precedent. It was recently cited favorably by the Supreme Court. *See. 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2311 (2023). As a judge, I follow all binding precedent.

16. **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: As recently addressed in *City of Austin, Texas v. Reagan Natl. Advert. of Austin, LLC* "regulation of speech is facially content based under the First Amendment if it 'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" 142

S. Ct. 1464, 1471 (2022), quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). I would apply this precedent and—as the Supreme Court did and directed—look to whether the regulation addressed only one subject matter, such as political speech, even if it did not "discriminate among viewpoints within that subject matter." *Id.* at 1471. I would further look to whether the substantive message itself is relevant to the application of the regulation. And, while a classification that addresses a function or purpose does not automatically become content based (*Id.* at 1474), that is another factor I would consider, along with the degree to which the regulation simply addresses the time, place, and manner of speech.

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

Response: A "true threat" does not receive First Amendment protection when it is "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003), citing *Watts v. United States,* 394 U.S. 705, 708 (1969). The Supreme Court recently clarified a state must prove in any criminal action in this context that a defendant had some objective understanding of the nature of their statements, with a minimum *meas rea* of recklessness. *Counterman v. Colorado*, 600 U.S. 66 (2023).

18. **Under Supreme Court and Seventh 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 has repeatedly recognized the "vexing nature of the distinction between questions of fact and questions of law. [Federal Rule of Civil Procedure] 52(a) does not furnish particular guidance with respect to distinguishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Pullman-Stand. v. Swint*, 456 U.S. 273, 288 (1982) (internal citation to *Baumgartner v. United States*, 322 U.S. 665, 671 (1944) omitted). The Seventh Circuit likewise has noted that "[t]he distinction between questions of fact and of law 'at times has turned on a determination that, as a matter of sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Gekas v. Atty. Registration and Disc. Commn. of S. Ct. of Illinois*, 793 F.2d 846, 850 (7th Cir. 1986), quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985). Nevertheless, there are precedents that establish when a matter is a question of fact, a question of law, or a mixed question of fact and law. For example, the Supreme Court was clear in indicating "facts" can include "a recital of external events" and a court's determination of "what happened." *Thompson v. Keohane*, 516 U.S. 99, 110 (1995). As a magistrate judge, I look to Supreme Court and Seventh Circuit precedents to determine if particular matter has been treated as a question of fact, and I would continue to do so if confirmed as a circuit judge.

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

Response: As a magistrate judge, who handles misdemeanor sentencing, I apply all of the factors outlined in 18 U.S.C. § 3553(a), which roughly mirror retribution, deterrence, incapacitation and rehabilitation. Section 3553(a) requires an individualized determination of the history and characteristics of the defendant and nature and circumstances of the offense, among other things. As required by 3553(a), each sentencing requires its own analysis and must avoid unwarranted sentencing disparities. Moreover, having worked as an Assistant United States Attorney for over a decade, I saw cases that would warrant consideration of all of the factors listed above and often found the degree to which each factor was relevant varied from case to case.

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

Response: All Supreme Court decisions that have not been overturned by the Court are binding precedent. I work in a hierarchical court system and will follow binding precedent of both the Supreme Court and Seventh Circuit. I study Supreme Court cases as they apply to the cases before me and have not had the occasion to review them in an effort to rank their reasoning against one another.

21. **Please identify a Seventh Circuit judicial opinion from the last 50 years that you think is particularly well reasoned and explain why.**

Response: All Seventh Circuit decisions that have not been overturned by the Seventh Circuit or Supreme Court are binding precedent. I work in a hierarchical court system and will follow binding precedent of both the Supreme Court and Seventh Circuit. I study Seventh Circuit cases as they apply to the cases before me and have not had the occasion to review them in an effort to rank their reasoning against one another.

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

Response:18 U.S.C. § 1507 prohibits picketing or parading in or near a courthouse, building, or residence occupied or used by a judge, juror, witness, or court officer, with the intent of interfering with, obstructing, or impeding the administration of justice or "with the intent to influence a judge, juror, witness, or court officer in the discharge of his [or her] duty."

23. **Is 18 U.S.C. § 1507 constitutional?**

Response: The Supreme Court has not directly addressed the constitutionality of 18 U.S.C. §1507. Since this is a question that may come before me as a judge, I express no

opinion consistent with Code of Conduct for United States Judges, Canon 3. However, I would note that the Supreme Court upheld a similar state statute in *Cox v. Louisiana*, 379 U.S. 559 (1965).

24. **Is it ever appropriate to consider foreign law in constitutional interpretation? If yes, please describe in which circumstances such consideration would be appropriate.**

Response: I am not aware of any Supreme Court case that considered foreign law in such a manner. As a magistrate judge, I follow binding precedent on the appropriate methods for constitutional interpretation, just as I would do if confirmed as a circuit judge.

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

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

Response: Yes. The Code of Conduct for U.S. Judges generally prohibits me from commenting on the correctness of any judicial opinion. To do so could undermine public confidence in the independence of judges, and call into question whether I have prejudged matters that are before a court, or could come before a court. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6). However, some areas of law are so well settled that the matter is unlikely to be litigated further and I believe I can indicate agreement with *Brown v. Board of Education* consistent with these principles.

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

Response: Yes. The Code of Conduct for U.S. Judges generally prohibits me from commenting on the correctness of any judicial opinion. To do so could undermine public confidence in the independence of judges, and call into question whether I have prejudged matters that are before a court, or could come before a court. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6). However, some areas of law are so well settled that the matter is unlikely to be litigated further and I believe I can indicate agreement with *Loving v. Virginia* consistent with these principles**.**

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

Response: The Code of Conduct for U.S. Judges generally prohibits me from commenting on the correctness of any judicial opinion. To do so could undermine public confidence in the independence of judges, and call into question whether I have prejudged matters that are before a court, or could come before a court. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6). *Griswold v, Connecticut* is a binding precedent of the Supreme Court. I have followed and will continue to follow all binding precedent.

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

Response: The Code of Conduct for U.S. Judges generally prohibits me from commenting on the correctness of any judicial opinion. To do so could undermine public confidence in the independence of judges, and call into question whether I have prejudged matters that are before a court, or could come before a court. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6). I would note that the Supreme Court overruled *Roe v. Wade* in *Dobbs v. Women's Health Organization*. *Dobbs* is binding precedent, which I will follow. *Roe* is no longer good law.

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

Response: The Code of Conduct for U.S. Judges generally prohibits me from commenting on the correctness of any judicial opinion. To do so could undermine public confidence in the independence of judges, and call into question whether I have prejudged matters that are before a court, or could come before a court. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6). I would note that the Supreme Court overruled *Planned Parenthood v. Casey* in *Dobbs v. Women's Health Organization*. *Dobbs* is binding precedent, which I will follow. *Casey* is no longer good law.

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

Response: Please see my answer to Question 24(c).

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

Response: Response: Please see my answer to Question 24(c).

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

Response: Please see my answer to Question 24(c).

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

Response: Please see my answer to Question 24(c).

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

Response: See my answer to Question 24(c).

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

Response: Please see my answer to Question 24(c).

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

Response: Please see my answer to Question 24(c).

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

Response: Please see my answer to Question 24(c).

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

Response: I would apply the standard articulated by the Supreme Court in *New York State Rifle & Pistol Assn., Inc. v. Bruen* as follows, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." 142 S. Ct. 2111, 2126 (2022) (internal quotation omitted).

27. **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.

28. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

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

       Response: No.

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

       Response: No.

29. **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: No.

    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.

30. **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.

31. **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.

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

Response: On March 3, 2023, an official from the White House Counsel's Office contacted me to determine whether I was interested in speaking further about potential nomination to the United States Court of Appeals for the Seventh Circuit. I interviewed with attorneys from the White House Counsel's Office on March 6, 2023. Since March 10, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On March 10, 2023, I spoke with staff from Senator Young's office. On June 7, 2023, I met with a staff member from Senator Braun's office. On July 6, 2023, I met with Senator Braun. On July 27, 2023, my nomination was submitted to the Senate.

33. **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.

34. **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.

35. **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.

36. **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.

37. **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.

38. **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: There were many drafts of my Senate Judiciary Questionnaire, and I had several discussions with attorneys with the Department of Justice, Office of Legal Policy about several aspects of my questionnaire including the importance of ensuring it captured the breadth and depth of my experience as both a practicing attorney and sitting federal magistrate judge. I do not believe I ever discussed my questionnaire with any White House officials and had no contact with Senators or Senate staff, other than my home state Senators, Senator Young and Senator Braun. I believe I discussed various cases with staff from the Department of Justice, Office of Legal Policy, but cannot remember any specific cases. Most importantly, however, I decided which cases to list and I believe the cases listed reflect the full scope of my litigation and judicial experience.

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

Response: On March 3, 2023, an official from the White House Counsel's Office contacted me to determine whether I was interested in speaking further about potential nomination to the United States Court of Appeals for the Seventh Circuit. I interviewed with attorneys from the White House Counsel's Office on March 6, 2023. Since March 10, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On March 10, 2023, I spoke with staff from Senator Young's office. On June 7, 2023, I met with a staff member from Senator Braun's office. On July 6, 2023, I met with Senator Braun. On July 27, 2023, my nomination was submitted to the Senate.

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

Response: I reviewed the questions, conducted legal research as appropriate and composed my responses. Once completed, I shared my responses with the Department of Justice, Office of Legal Policy, which provided limited feedback.

Senator Hirono's Written Questions for Joshua P. Kolar
Nominee to the United States Circuit Court for the Seventh Circuit
September 6, 2023

1. **As part of my responsibility as a member of this Committee to ensure the fitness of nominees, I ask each nominee to answer two questions:**

   a. **Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

      Response: No.

   b. **Have you ever faced discipline or entered into a settlement related to this kind of conduct?**

      Response: No.

Senator Mike Lee
Questions for the Record
Joshua Paul Kolar, Nominee to the United States Circuit Court of Appeals for the Seventh Circuit

1. **How would you describe your judicial philosophy?**

Response: As a magistrate judge, I strive to decide the cases before me in a diligent, courteous and clear manner that fairly and impartially applies the law to the facts in the record before me. Prior to reaching any conclusions, I ensure I am taking into account the arguments of the parties before me and all relevant authority. When I reach a decision, I explain it in a clear manner so that the parties—and future litigants—understand my reasoning.

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

Response: I follow binding precedent of the Supreme Court and Seventh Circuit whenever there is authority interpreting the relevant text. If there is no such precedent, I look to the Supreme Court and Seventh Circuit for any instructions on how to interpret the relevant text. When determining the meaning of a statute, "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *See also Bostock v. Clayton County,* 140 S. Ct. 1731, 1749 (2020). If that starting point reveals an unambiguous meaning, the inquiry ends there. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016). When construing ambiguous text, the Seventh Circuit has at times looked to legislative history. *See, e.g.*, *Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1128 (7th Cir. 2008). The Supreme Court has likewise found some limited uses for legislative history. *See, Bostock*, 140 S. Ct. at 1750 (Legislative history may "ferret out shifts in linguistic usage or subtle distinctions between literal and ordinary meaning.") When looking to legislative history, the Supreme Court has warned that it is "often murky, ambiguous, and contradictory." *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568-569 (2005). Generally speaking, both the Supreme Court and Seventh Circuit narrowly construe when it is appropriate to consult legislative history.

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

Response: I would look to the text of the constitutional provision at issue and binding precedent.

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

Response: I adhere strictly to the Supreme Court's interpretive guidance, which stresses the text and original meaning are not only important considerations, but those

that should be looked to first. *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2117 (2022) and *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). As a magistrate judge, and if confirmed circuit judge, I would look to the method used by the Supreme Court in any given area and follow all binding precent.

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: Generally speaking, the Supreme Court has held that the meaning of a text is fixed at the time of enactment. *See, e.g., Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."). As a judge, I look to and follow precedent from the Supreme Court and Seventh Circuit. I adhere to the holdings and methods of interpretation prescribed therein and would consider contemporary meaning only when directed by the Supreme Court. *See, e.g.*, *Miller v. California*, 413 U.S. 15 (1973).

6. What are the constitutional requirements for standing?

Response: "The requirements of Article III standing are familiar: 'First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural or hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *United States v. Windsor*, 570 U.S. 744, 757 (2013) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

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

Response**:** Congress may "make all laws which shall be necessary and proper for carrying into execution [it's other enumerated powers], and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." U.S. Constitution, Article I, § 8. "Even without the aid of the general clause in the constitution, empowering congress to pass all necessary and proper laws for carrying its powers into execution, the grant of powers itself

necessarily implies the grant of all usual and suitable means for the execution of the powers granted." *McCulloch v. Maryland*, 17 U.S. 316, 323-24 (1819) *See also* United *States v. Comstock*, 560 U.S. 126, 144 (2010) ("The powers 'delegated to the United States by the Constitution' include those specifically enumerated powers listed in Article I along with the implementation authority granted by the Necessary and Proper Clause.")

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

Response: As a judge, I follow precedent from the Supreme Court and Seventh Circuit. I adhere to the holdings and the methods of interpretation prescribed therein. The Supreme Court has held that "the 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *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)).

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

Response: *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), held substantive due process protects "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." I would follow *Glucksberg* and any other binding precedent, which include cases involving: the right to marital privacy and the use of contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to interracial marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); the right for unmarried individuals to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); the right to engage in intimate sexual conduct, *Lawrence v. Texas*, 539 U.S. 558 (2003); and the right of same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

Response: The Constitution provides Congress with the power to regulate commerce, both among the states and with foreign powers and tribes. The Supreme Court has set out three main categories that Congress may regulate under its commerce power: (1) "the use of the channels of interstate commerce"; (2) the "instrumentalities of interstate commerce, or persons, or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *U.S. v. Lopez,* 514 U.S. 549, 558-59 (1995) (internal citations and quotations omitted.)

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

Response: Suspect classes are generally based on immutable characteristics, and include race, national origin, and religion. *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College*, 143 S. Ct. 2141 (2023); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1734 (2018); *Hernandez v. Texas*, 347 U.S. 475, 479 (1954).

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

Response: The Constitution separates the three branches of government to avoid consolidated power in any one person or group. *See, e.g., I.N.S. v. Chadha*, 462 U.S. 919, 947–48 (1983) ("The President's role in the lawmaking process also reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures.") Checks and balances were ingrained into the founding fathers as a method to avoid the concentration of power. This is meant to protect both individual liberty and our government as a constitutional democracy. *See Bond v. United States*, 564 U.S. 211, 222–23 (2011).

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: As a judge, I follow binding precedent of the Supreme Court and Seventh Circuit whenever confronted with questions concerning separation of powers. The Supreme Court has noted "[t]he President's power, if any, to issue [an order] must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

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

Response: As a magistrate judge, I strive to decide the cases before me in a diligent, courteous and clear manner that fairly and impartially applies the law to the facts and the record before me. I ensure I am taking into account the arguments of the parties before me and all relevant authority. When I reach a decision, I explain it in a clear manner so that the parties understand my reasoning. I would continue to decide cases in this manner if confirmed to the Seventh Circuit. While there are times that one factor or another will outweigh consideration of one or more otherwise compelling concerns, deciding cases based upon the facts and law allows all litigants and other members of society to live under the rule of law. And resolving cases in a clear

manner that explains to the losing party the Court's rationale ultimately furthers the interests of all.

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

Response: As a judge, I must render all decisions impartially. Those that seek to invalidate a law and those seeking to uphold a law in the face of a constitutional attack both deserve a fair and unbiased judge. I would hope to never err on either side of such a decision and will follow the law and facts. Both outcomes are equally undesirable.

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: I have not reviewed all such cases throughout the centuries. As a judge, I follow all binding precedent of the Supreme Court and Seventh Circuit.

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

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

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: The Constitution mandates that all officers of both the states and federal government take an oath to support the Constitution. That is an oath I have taken many times as an Assistant United States Attorney, magistrate judge, and naval officer. All should take that oath and its meaning seriously, as many have died to

protect our rights under the Constitution. Moreover, our country has been served well by *Marbury v. Madison*'s holding that the Supreme Court can review the acts of coordinate branches in a manner that binds those branches, and ensures the rule of law. 5 U.S. 137 (1803). Allowing another official to ignore an order of the Supreme Court would call into question the preservation of liberty. *See Cooper v. Aaron*, 358 U.S. 1, 19–20 (1958) ("The principles announced in [*Brown v. Board of Education*] and the obedience of the States to them, according to the command of the Constitution are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us.")

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: This underscores that the courts' duty is to only decide cases and controversies in a manner that is tied to the law and the facts. To do otherwise would call into question the legitimacy of the courts. The courts' legitimacy and reasoned decisions are the only power those in Article III hold.

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 the Biden Administration's definition of equity, nor do I have my own definition. Black's Law Dictionary (11th ed. 2019) defines "equity" as "[f]airness; impartiality; evenhanded dealing" and as "the body of principles constituting what is fair and right." In the event a case came before me involving the definition of equity, I would consider the arguments of the parties and would apply any binding precedent of the Supreme Court and the Seventh Circuit.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "equality" as "the quality, state, or condition of being equal; esp., likeness in power or political status." Black's Law Dictionary (11th ed. 2019) defines "equity" as "[f]airness; impartiality; evenhanded dealing" and as "the body of principles constituting what is fair and right." In the event a case came before me involving the definition of equality or equity, I would consider the arguments of the parties and would apply any binding

precedent of the Supreme Court and the Seventh Circuit.

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

Response: The Fourteenth Amendment's Equal Protection Clause provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

23. How do you define "systemic racism?"

Response: Black's Law Dictionary defines "racism" as the "[u]nfair treatment of people, often including violence against them, because they belong to a different race from one's own." The Oxford English Dictionary (2023) defines "systemic racism" as "[d]iscrimination or unequal treatment on the basis of membership of a particular racial or ethnic group (typically one that is a minority or marginalized), arising from systems, structures, or expectations that have become established within society or an institution."

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

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

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 Joshua Kolar, nominated to be United States Circuit Judge for the Seventh Circuit

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. Discrimination on the basis of race is wrong. It violates many laws and can violate the Fourteenth Amendment. Congress has passed Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)(1)), the Fair Housing Act of 1968 (42 U.S.C. § 3605(a)), and the Civil Rights Act of 1866 (42 U.S.C. § 1981), all prohibiting racial discrimination. The Fourteenth Amendment provides that sates cannot deny any person equal protection of the law. Racial classifications are subject to strict scrutiny and are therefore permissible only when narrowly tailored to meet a compelling state interest.

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: I have not considered this question as a magistrate judge. Should a litigant raise an argument to recognize a new unenumerated right under the Constitution, I would apply the test laid out in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), which held substantive due process protects "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." I would follow *Glucksberg* and any other binding 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: As a magistrate judge, I strive to decide the cases before me in a diligent, courteous, and clear manner that fairly and impartially applies the law to the evidence in the record before me. Prior to reaching any conclusions, I ensure I am taking into account the arguments of the parties before me and all relevant authority. When I reach a decision, I explain it in a clear manner so that the parties—and future litigants—understand my reasoning. I respect the intellect and thorough analysis of Supreme Court Justices. Regardless of any Justice's individual philosophy, I have an obligation to apply all Supreme Court and Seventh Circuit precedent.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "originalism" as a doctrine "that words of a legal instrument are to be given the meanings they had when they were adopted." As a magistrate judge, it is my responsibility to follow binding precent, not any particular method of analysis. I will have this same responsibility if confirmed as a circuit judge. I adhere strictly to the Supreme Court's interpretive guidance, which stresses the text and original meaning are not only important considerations, but those

that should be looked to first. *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2117 (2022) and *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). I look to the method used by the Supreme Court in any given area and follow all binding precent.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "living constitutionalism" as a legal doctrine where "the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." As discussed in my prior answers, I follow binding precedent. I am unaware of any binding Supreme Court of Seventh Circuit case that has relied on living constitutionalism.

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

Response: If the relevant text was unambiguous in its meaning, I would be bound by that meaning in many contexts under Supreme Court precedent. *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). There are few true areas of first impression so my first step in analyzing such an issue would be to look to binding precedent, or closely analogous binding precedent. As discussed in Question 4 above, precedent often directs a judge to consider the original public meaning first. I would follow any such binding precedent, including that which directed the manner in which I was to analyze the text.

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: Generally speaking, the Supreme Court has held that the meaning of a text is fixed at the time of enactment. *See, e.g., Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."). As a circuit judge, I would look to and follow precedent from the Supreme Court and Seventh Circuit. I adhere to the holdings and the methods of interpretation prescribed therein. I would consider contemporary meaning only when directed to do so by the Supreme Court. *See, e.g.*, *Miller v. California*, 413 U.S. 15 (1973).

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

Response: No. The Constitution is an enduring document, and its meaning is often

applied to present day circumstances. The prescribed method for changing the Constitution is through the amendment process, as laid out in Article V.

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

Response: Yes. *Dobbs v. Jackson Women's Health Organization* is binding precedent, which I am obligated to uphold and follow.

a. **Was it correctly decided?**

Response: The Code of Conduct for U.S. Judges generally prohibits me from commenting on the correctness of any judicial opinion. To do so could undermine public confidence in the independence of judges, and call into question whether I have prejudged matters that are before a court, or could come before a court. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6).

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

Response: Yes. *New York Rifle & Pistol Association v. Bruen* is binding precedent, which I am obligated to uphold and follow.

a. **Was it correctly decided?**

Response: Please see my answer to Question 9(a).

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

Yes. *Brown v. Board of Education* is binding precedent, which I am obligated to uphold and follow.

a. **Was it correctly decided?**

Response: Yes. The Code of Conduct for U.S. Judges generally prohibits me from commenting on the correctness of any judicial opinion. To do so could undermine public confidence in the independence of judges, and call into question whether I have prejudged matters that are before a court, or could come before a court. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6). However, some areas of law are so well settled that the matter is unlikely to be litigated further and I believe I can indicate agreement with *Brown v. Board of Education* consistent with these principles**.**

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

Response: The Bail Reform Act sets forth a rebuttable presumption that no conditions or combination of conditions will reasonably assure community safety when a defendant has prior qualifying convictions, was on bond, and not more than five years have elapsed since the release of the defendant on the qualifying convictions. 18 U.S.C § 3142 (e)(2). Additionally, in certain cases involving serious drug crimes, terrorism offenses, offenses with minor victims under enumerated statutes, or other listed crimes a presumption will arise. 18 U.S.C § 3142(e)(3).

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

Response: In *United States v. Dominguez*, the Seventh Circuit recognized the "import of the presumption of dangerousness in § 3142(e)" stemmed from "Congressional findings that certain offenders…as a group are likely to continue to engage in criminal conduct undeterred either by the pendency of charges against them or by the imposition of monetary bond or other release conditions." 783 F.2d 702, 707 (7th Cir. 1986).

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

Response: Yes, as the Supreme Court found in *Burwell v. Hobby Lobby Stores, Inc*., the Religious Freedom Restoration Act restricts the federal government "from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 573 U.S. 682, 705 (2014). In *Burwell*, the Supreme Court indicated the owner of a private company could not be forced to cover contraceptives in the company's health insurance, contrary to the owner's religious beliefs. And more recently the Supreme Court stressed that "[the Religious Freedom Restoration Act] specifies that it applies to all Federal law, and the implementation of that law, whether statutory or otherwise." *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (internal citation and quotation omitted)

Moreover, "[u]nder the Free Exercise Clause of the First Amendment of the United States Constitution, made applicable to state and local governments by the Fourteenth Amendment, no law may prohibit the free exercise of religion." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762–63 (7th Cir. 2003).

More recently, in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022) the Supreme Court held a governmental entity impermissibly burdened sincere religious practice with a policy prohibiting a football coach from praying at the 50-yard line. The policy was not neutral and generally applicable, and the government could not satisfy strict scrutiny. Similarly, in *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-98 (2021), the Supreme Court stressed regulations are not neutral and generally applicable whenever

they treat any comparable secular activity more favorably than a religious one.

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

Response: No. Discrimination based on religion is wrong and prohibited by the First and Fourteenth Amendments and the Religious Freedom Restoration Act. Government action that is not neutral and generally applicable must be based on a compelling governmental interest and be narrowly tailored to meet that interest. *See, e.g., Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022).

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: *Roman Catholic Diocese of Brooklyn v. Cuomo* raised a challenge to regulations that capped attendance at religious gatherings based upon the historical COVID-19 rates in given areas. 141 S. Ct. 63, 65-66 (2020). The Court held there was a "strong showing" the regulations lacked "the minimum requirement of neutrality" to religion where religious institutions were severely limited while many businesses were permitted to decide for themselves how many persons to admit. *Id.* at 66. The Court determined that the challenged restrictions were not narrowly tailored to the compelling state interest of stemming the spread of COVID-19 and that the restrictions caused irreparable harm. *Id.* at 67. Given the lack of a showing of public harm, the injunction issued.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-98 (2021), the Supreme Court stressed regulations are not neutral and generally applicable whenever they treat any comparable secular activity more favorably than a religious one. The case challenged COVID-19 restrictions on private gatherings and the Supreme Court found a violation of the Free Exercise Clause because comparable secular activity was treated more favorably than gatherings for prayer.

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

Response. Yes. For example, in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court held a governmental entity impermissibly burdened sincere

religious practice with a policy prohibiting a football coach from praying at the 50-yard line.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission***,** the Supreme Court found the Colorado Civil Rights Commission was impermissibly hostile to the religious beliefs of a baker who did not wish to make a cake for a same-sex wedding. The Supreme Court recognized that "to respect the Constitution's guarantee of free exercise, [a government entity] cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1731 (2018).

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

Response: Yes. The First Amendment protects an individual's free exercise of religion. An individual can claim a sincerely held religious belief that is not consistent with their religion and still be entitled to First Amendment protection. *See, e.g.*, *Frazee v. Illinois Dept. of Empl. Sec.*, 489 U.S. 829, 833 (1989).

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

Response: I am unaware on any limit on the type or number of interpretations of religious doctrine that can be recognized by courts. In fact, one not even need be a member of an organized religion to have protection, as long as their belief is sincere. *See, e.g. Frazee v. Illinois Dept. of Empl. Sec.*, 489 U.S. 829, 833 (1989).

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

Response: Yes, as long as it is sincere. Please see my answer to Question 19(a).

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

Response: As a magistrate judge and nominee for the Seventh Circuit, it is not appropriate for me to opine on religious doctrine.

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

reasoning in the case.

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, Catholic school teachers brought employment discrimination claims based upon age and disability. 140 S. Ct. 2049 (2020). The Supreme Court held that the ministerial exception did not allow for such lawsuits against a religious school. The Court focused on what the employees did in determining whether to apply the ministerial exception. Since the record showed the teachers performed religious functions, the ministerial exception applied, barring such suits. *Id.* at *2066*.

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

Response: *Fulton v. City of Philadelphia* held that a city's decision to not renew a foster care contract with a Catholic entity because of a religious objection to certifying same-sex couples as foster parents did not survive strict scrutiny. This level of scrutiny was required since the policy was not one of general applicability where the city itself retained the authority to make decisions on same-sex couples.

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: *Carson v. Makin* involved a tuition assistance program in Maine. The state paid for certain tuition, but only if the school was "nonsectarian." The Supreme Court found this law penalized the free exercise of religion and applied strict scrutiny in striking down the law. The Court reasoned that since the benefit at issue, tuition, was neutral and would flow to religious schools only after the independent choice of private citizens, the state's stated concern in avoiding an Establishment Clause violation was unnecessary.

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

Response: In *Kennedy v. Bremerton School District*, the Supreme Court held a governmental entity impermissibly burdened sincere religious practice with a policy prohibiting a football coach from praying at the 50-yard line. 142 S. Ct. 2407 (2022). The policy was not neutral and generally applicable and the government could not satisfy strict scrutiny. The Court determined that the coach engaged in private speech and therefore it was not government speech, rejecting the school's Establishment Clause concerns. The Court reviewed historical practices in rejecting the school's concern that allowing such speech would run afoul of the Establishment Clause and

ultimately determined the school violated the coach's Free Speech and Free Exercise Rights.

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: *Mast v. Fillmore County* was brought by an Amish group that sought exemptions from an ordinance requiring a septic system. In agreeing with the majority to remand, Justice Gorsuch indicated the state should consider the Religious Land Use and Institutionalized Persons Act and not infringe on sincerely held religious beliefs. Justice Gorsuch questioned whether the local government gave "due weight" to alternative proposals from the Amish community. 141 S. Ct 2430 (2021). Justice Gorsuch indicated that the courts below erred by "treating the County's *general interest* in sanitation regulations as 'compelling' without reference to the *specific* application of those rules to *this* community." 141 S. Ct at 2432. Additionally, Justice Gorsuch noted the lower courts "erred by failing to give due weight to exemptions other groups enjoy." *Id.*

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

Response: As judge and judicial nominee, it would be inappropriate for me to comment on a hypothetical that could come before me or the Court. I am not aware of any Supreme Court or Seventh Circuit precedent in the context of protests outside of a Justice's home that address the breadth of interpretation of 18 U.S.C §1507 relative to the First Amendment right to peaceful assembly.

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: As a magistrate judge and nominee for the United States Court of Appeals for the Seventh Circuit, it would be inappropriate for me to comment on a hypothetical that could mirror a question likely to come before the Court. The President's appointment power is set forth in Article II, §2 of the Constitution.

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

Response: The Supreme Court has noted the availability of disparate impact and disparate treatment theories in showing discrimination under 42 U.S.C. § 2000e employment discrimination cases. *See Ricci v. DeStefano*, 557 U.S. 557, 577-78 (2009). As a magistrate judge, I preside over employment discrimination cases and they are likely to come before me as a circuit judge, should I be confirmed. I express no view on the relative strengths or weakness of disparate impact and disparate treatment claims.

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

Response: As a magistrate judge and nominee for the United States Court of Appeals for the Seventh Circuit, it would be inappropriate for me to comment on a matter reserved to other branches of government. I will follow the binding precedent of the Supreme Court, regardless of the number of Justices on the Supreme Court.

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

Response: No.

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

Response: The Supreme Court has held that the Second Amendment protects a personal right to keep and bear arms in the home and in the public. *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2117 (2022) and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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: "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (internal quotation omitted).

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

Response: Yes. In *District of Columbia v. Heller*, the Supreme Court recognized that the ability to own a firearm is a personal right, not dependent upon service in a militia. 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

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

Response: No. "The constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022). In *District of Columbia v. Heller*, the Supreme Court recognized that the ability to own a firearm is a personal right, not dependent upon service in a militia. 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."). *New York State Rifle & Pistol Assn., Inc. v. Bruen*, reiterated that the Second

Amendment protects a personal right to keep and bear arms, both at home and in public. 142 S. Ct. at 2117.

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

Response: No. Please see my answer to Question 36.

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

Response: Article II, § 3 of the Constitution sets forth that one of the President's duties is the "take care that the laws be faithfully executed." The Seventh Circuit has cited this constitutional provision for the proposition that "[u]nder our system of separation of powers, prosecutors retain broad discretion to enforce criminal laws because they are required to help the President "take Care that the Laws be faithfully executed." *United States v. Scott*, 631 F.3d 401, 406 (7th Cir. 2011) (citing U.S. Constitution, Article II, § 3 and *United States v. Armstrong*, 517 U.S. 456, 464 (1996). The Supreme Court has also spoken on this issue, noting that the executive's:

> broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision- making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.

Wayte v. United States, 470 U.S. 598, 607 (1985).

If I am presented with this issue, I will follow this binding precedent.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "discretion" as "[a] public official's or agency's power to exercise judgment in the discharge of its duties." The Administrative Procedure Act provides "general procedures for various types of rulemaking." Congressional Research Service, Author Redacted, *A Brief Overview of Rulemaking and Judicial Review* (March 27, 2017). The Supreme Court and Seventh Circuit both have issued many opinions on rulemaking. This is an issue that is before many courts and is likely to come before courts in the future. *See, e.g.*, *Sackett v. EPA*,

598 U.S. 651, 663 (2023) (Recent Supreme Court decision regarding a case brought under the Administrative Procedure Act.) The Code of Conduct for U.S. Judges, Canon 3, requires that a judge not make public comments on the merits of a matter pending or impending in any court. The issues or related issues may come before me making it inappropriate for me to comment further.

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

Response: No. While the President has the sole power to grant pardons and reprieves for offenses against the United States, other than in cases of impeachment (U.S. Constitution, Article II, § 2), the President does not have the power to unilaterally strike, repeal, or alter a statute passed by Congress and signed into law. The Federal Death Penalty Act, 18 U.S.C. § 3591, is one such statute.

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

Response: In *Alabama Association of Realtors v. HHS*, the Supreme Court found that the Centers for Disease Control and Prevention (CDC) lacked the authority to enforce a nationwide eviction moratorium to prevent the spread of disease in response to COVID-19. The Court noted that the language cited by the CDC was "wafer thin" given "the sheer scope of the CDC's claimed authority," its "unprecedented" nature, and Congress' failure to extend the moratorium. 141 S. Ct. 2485 (2021).

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: As a magistrate judge and nominee for the United States Court of Appeals for the Seventh Circuit, it would be inappropriate for me to comment on a hypothetical that could mirror a question or fact pattern likely to come before a court. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6).

43. **In *United States v. Gibson*, you declined the government's request to detain a suspect charged with three counts of bank fraud and one count of aggravated identity theft, even though the government requested detention and the Probation Office recommended it. Importantly, you also made a judicial determination that the defendant was a danger to the community and posed a serious risk of flight.**

a. **Why after you acknowledged that the defendant was a danger to the community and presented a serious flight risk did you authorize pretrial release?**

Response: The Defendant was charged with bank fraud (18 U.S.C. § 1344(1)) and aggravated identity theft (18 U.S.C. § 1028A(a)(1)). These are not among the offenses Congress listed in § (f)(1) of the Bail Reform Act and therefore do not

generally allow the government to move for pretrial detention. The vast majority of the detention hearings I preside over involve the government presenting arguments under § (f)(1) of the Bail Reform Act, which clearly allows the government to meet its burden of proof by showing that *either* there are no conditions or combination of conditions that would reasonably assure the safety of the community *or* that there are no conditions or combination of conditions that would reasonably assure the defendant's continued appearance as required. A threshold question I was presented with in *United States v. Gibson* was whether the government could meet its burden of proof under § (f)(2)(A) of the Bail Reform Act, which provides for a detention hearing in cases where there is a "serious" risk that a defendant will flee, by showing only that there were no conditions or combination of conditions that would protect the community. I prepared for this hearing by reading cases that came down on both sides of this issue. At the hearing, I asked the parties for their views and provided time for argument. Ultimately, based upon my review of relevant case law and my reading of the statute, I found that the Bail Reform Act precluded the government from relying on danger to the community and so I was bound to disregard the government's focus on danger to the community. As I noted in my written opinion and order, perhaps such an outcome is bad public policy, yet it was "not for [me] to weigh [ ] significant liberty interests against the important duty of the government to ensure public safety, and that is certainly not something for [me] to take up on the current record." Simply put, regardless of whether release on conditions was preferable as a matter of policy, it was the outcome required by my reading of the Bail Reform Act and the presentation of evidence before me.

As I indicated in my written decision, while this was a close case, the government's position seemed to rest on the notion that the Defendant was simply ineligible for conditions without carefully considering whether it met its burden of proof that no conditions were capable of reasonably assuring the Defendant's appearance as required. I specifically pointed out in my opinion and order that while the government provided a general objection to conditions of release, it did not address specific conditions and explain why those conditions would be ineffective at providing reasonable assurances of the Defendant's appearance. And, as discussed above, I was precluded from considering much of the government's argument, which focused on public safety.

44. **At your September 6, 2023 nomination hearing, you fellow judicial nominee, Richard Federico, repeatedly avoided squarely answering Sen. Kennedy's question as to whether minorities in America today needed special help to succeed. By my count, Sen. Kennedy posed the question to Mr. Federico at least four times, with Federico providing a non-responsive answer each and every time. When Sen. Kennedy subsequently posed the question to you, you unfortunately similarly**

dodged the question.

a. **Yes or no, do minorities in America today need special help to succeed? (Your answer should be yes or no. If you care to elaborate beyond that, you may, but your answer should begin with either a yes or a no).**

Response: Respectfully, I am unable to provide a yes or no answer to this question. Use of the term "minorities" could encompass any number of distinct groups. Additionally, "success" is a relative term. Success for some might entail a job that requires significant training, while for others it might mean a job that only requires minimal training. Many, including myself, define success largely based upon their ability to instill values of kindness and community service in their children. Raising children and taking care of family members often requires the help of others, regardless of one's background. In the context of "help" I am unsure what "special help" means. When I was deployed, my in-laws and others provided a great deal of assistance to my wife and our boys. I consider that very special help. However, I am unsure how to draw any line between help and "special" help.

In the context of the question, as asked during the September 6, 2023 hearing, I understood this to refer at least in part to recent cases involving affirmative action programs. The Code of Conduct for U.S. Judges, Canon 3, requires that a judge not make public comments on the merits of a matter pending or impending in any court. This issue or related ones may come before me making it inappropriate for me to comment further. I have not, and will not, form any final decisions on such matters until presented with the arguments of any litigants who appear before me and a chance to review any binding precedent or other authority. Additionally, to the extent this relates to recently decided cases, the Code of Conduct for U.S. Judges generally prohibits me from commenting on the correctness of any judicial opinion under Canon 3A(6). Regardless, I follow binding precedent as a magistrate judge, and will continue to do so if confirmed as a circuit judge.

Senator Josh Hawley
Questions for the Record

Joshua Kolar
Nominee, U.S. Circuit Judge for the Seventh Circuit

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

   Response: No.

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

      Response: I have never worked on such a legal case or representation.

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

   Response: I adhere strictly to the Supreme Court's interpretive guidance, which stresses the text and original meaning are not only important considerations, but those that should be looked to first. *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2117 (2022) and *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). As a judge, I look to the method used by the Supreme Court in any given area and follow all binding precent.

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

   Response: If confirmed as a circuit judge, I will follow binding precedent of the Supreme Court and Seventh Circuit whenever there is authority interpreting the relevant text. I follow the same precedent as a magistrate judge. If there is no such precedent, I look to the Supreme Court and Seventh Circuit for any instructions on how to interpret the relevant text. When determining the meaning of a statute, "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *See also Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). If that starting point reveals an unambiguous meaning, the inquiry ends there. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016). When construing ambiguous text, the Seventh Circuit has at times looked to legislative history. *See, e.g.*, *Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1128 (7th Cir. 2008). The Supreme Court has likewise found some limited uses for legislative history. *See*, *Bostock*, 140 S. Ct. at

1750 (Legislative history may "ferret out shifts in linguistic usage or subtle distinctions between literal and ordinary meaning.") When looking to legislative history, the Supreme Court has warned that it is "often murky, ambiguous, and contradictory." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568-569 (2005).

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: The Supreme Court has recognized that:

> [i]n surveying legislative history we have 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. We have eschewed reliance on the passing comments of one Member and casual statements from the floor debates. [W]e stated that Committee Reports are 'more authoritative' than comments from the floor. . . .

Garcia v. United States, 469 U.S. 70, 76 (1984) (internal citations and quotations omitted)

As in all such matters, I follow precedent from the Supreme Court and Seventh Circuit.

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

Response: I am not aware of any Supreme Court case that considered foreign law in such a manner. As a magistrate judge, I follow binding precedent on the appropriate methods for constitutional interpretation, just as I would do if confirmed as a circuit judge.

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 Supreme Court held last year that such a claim would survive only upon a showing that the execution method presents "a substantial risk of serious harm," and there is an alternative method of execution that is "feasible, readily implemented, and in fact significantly reduces the risk of harm involved." *Nance v. Ward*, 142 S. Ct. 2214, 220 (2022). I am obligated to follow this binding precedent of the Supreme Court and Seventh Circuit.

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.

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: I do not believe so. The Supreme Court has addressed the somewhat related question of "whether a convicted state prisoner seeking DNA testing of crime-scene evidence" can "assert that claim in a civil rights action under 42 U.S.C. § 1983, or [whether] such a claim [is] cognizable in federal court only when asserted in a petition for a writ of habeas corpus under 28 U.S.C. § 2254[.]" *Skinner v. Switzer*, 562 U.S. 521, 524 (2011). The *Skinner* Court found such a claim cognizable under § 1983.

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: "Under the Free Exercise Clause of the First Amendment of the United States Constitution, made applicable to state and local governments by the Fourteenth Amendment, no law may prohibit the free exercise of religion." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762–63 (7th Cir. 2003).

   In *Kennedy v. Bremerton School District*, the Supreme Court held a governmental entity impermissibly burdened sincere religious practice with a policy prohibiting a football coach from praying at the 50-yard line. 142 S. Ct. 2407 (2022). The policy was not neutral and generally applicable, and the government could not satisfy strict scrutiny. Similarly, in *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-98 (2021), the Supreme Court stressed regulations are not neutral and generally applicable whenever they treat any comparable secular activity more favorably than a religious one. *Roman Catholic Diocese of Brooklyn v. Cuomo* raised a challenge to regulations that capped attendance at religious gatherings based upon the historical COVID-19 rates in given areas. 141 S. Ct. 63, 65-66 (2020). The Court found there was strong showing the

regulations lacked "the minimum requirement of neutrality" to religion where religious institutions were severely limited while many businesses were permitted to decide for themselves how many persons to admit. *Id.* at 66. The Court determined that the challenged restrictions were not narrowly tailored to the compelling state interest of stemming the spread of COVID-19 and caused irreparable harm. *Id.* at 67.

As the Supreme Court found in *Burwell v. Hobby Lobby Stores, Inc*., the Religious Freedom Restoration Act restricts the federal government "from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 573 U.S. 682, 705 (2014) In *Burwell*, the Supreme Court indicated the owner of a private company could not be forced to cover contraceptives in the company's health insurance, contrary to the owner's religious beliefs.

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 answer to Question 8. Additionally, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* the Supreme Court found the Colorado Civil Rights Commission was impermissibly hostile to the religious beliefs of a baker who did not wish to make a cake for a same-sex wedding. The Supreme Court recognized that "to respect the Constitution's guarantee of free exercise, [a government entity] cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1731 (2018).

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 Supreme Court has held that in looking to such a question, courts are to simply determine if the belief represents "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). Generally, it "is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989). The Seventh Circuit has stressed that personal religious beliefs "are entitled to as much protection as one espoused by an organized group." *Vinning-El v. Evans*, 657 F.3d 591, 593 (7th Cir. 2011).

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 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 has held that the Second Amendment protects a personal right to keep and bear arms in the home and in the public. *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2117 (2022) and *District of Columbia v. Heller*, 554 U.S. 570 (2008). The narrow holding in *Heller* was limited to the individual right to keep and bear arms in one's home in the District of Columbia.

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: No.

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: Justice Holmes argued that the "[C]onstitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez-faire." *Lochner v. New York*, 198 U.S. 45, 75 (1905). The Code of Conduct for U.S. Judges generally prohibits me from commenting on the correctness of any judicial opinion. To do so could undermine public confidence in the independence of judges, and call into question whether I have prejudged matters that are before a court, or could come before a court. *See*, Code of Conduct for U.S. Judges, Canon 3(A)(6). As a judge, I am bound to apply all binding precedent from the Supreme Court or Seventh Circuit.

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

Response: *Lochner* was overturned. The Supreme Court has long recognized that the "doctrine that prevailed *in Lochner* [and its progeny]—that due process authorizes courts to hold laws unconstitutional when they believe the legislature

has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). The Code of Conduct for U.S. Judges generally prohibits me from commenting on the correctness of any judicial opinion. To do so could undermine public confidence in the independence of judges, and call into question whether I have prejudged matters that are before a court, or could come before a court. *See*, Code of Conduct for U.S. Judges, Canon 3(A)(6). As a judge, I am bound to apply all binding precedent from the Supreme Court or Seventh Circuit.

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: The Court went on to say that *Korematsu* "has no place in law under the Constitution." *Trump v. Hawaii*, 138 S. Ct. 2392, 2432 (2018). I believe the plain words used by the Supreme Court indicate the justices no longer consider *Korematsu* good law. As a judge, I am obligated to apply all binding precedent from the Supreme Court or Seventh Circuit. This includes precedent that establishes only the Supreme Court may overturn its decisions. It is not for lower courts to predict how the Supreme Court may rule.

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: No.

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. I am required to apply all binding precedent from the Supreme Court or Seventh Circuit.

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?

Response: Monopoly power "is the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 319 (1956). The Supreme Court has found that controlling over two-thirds of the market may constitute a monopoly. *Id.*; *United States v. Grinnell Corp.*, 384 U.S.

563 (1966); *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946). In looking to market share, the Seventh Circuit has recognized that while "market share" *might* indicate "market power" one does not always follow the other. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1414 (7th Cir. 1989) ("Market share indicates market power only when sales reflect control of the productive assets in the business, for only then does it reflect an ability to curtail total market output.")

As a judge, I apply all binding precedent from the Supreme Court or Seventh Circuit. The Code of Conduct for U.S. Judges generally prohibits me from commenting on the correctness of any judicial opinion. To do so could undermine public confidence in the independence of judges, and call into question whether I have prejudged matters that are before a court, or could come before a court. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6).

b. If not, please explain why you disagree with Judge Learned Hand.

Response: Please see my answer to Question 15(a).

c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

Response: Please see my answer to Question 15(a).

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

Response: Black's Law Dictionary (11th ed. 2019) defines "federal common law" 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." When hearing a case with diversity jurisdiction there is no "federal general common law" and federal courts instead look to state substantive law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Federal common law is limited to questions under the U.S. Constitution or federal statutes. *Id.* In very "few and restricted" additional areas federal common law exists to address conflicts between federal interests and state law. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 (1981), *See also Rodriguez v. Fed. Deposit Ins. Corp*., 140 S. Ct. 713, 717 (2020) ("These areas have included admiralty disputes and certain controversies between States.")

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: Principles of federalism require federal judges to defer to a state court's interpretation of state law. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

As a federal magistrate judge, I apply all binding precedent from the Supreme Court or Seventh Circuit Court of Appeals. In this instance, that precedent would direct me to state court precedent. As with all matters, I would follow this same precedent if confirmed as a circuit judge.

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

Response: Please see my answer to Question 17.

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

Response: Generally speaking, state constitutions can provide greater protection than the U.S. Constitution. *See. e.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 (1980) ("Appellants have failed to provide sufficient justification for concluding that this test is not satisfied by the State's asserted interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution.") As a judge, I apply all binding precedent from the Supreme Court or Seventh Circuit.

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

Response: The Code of Conduct for U.S. Judges generally prohibits me from commenting on the correctness of any judicial opinion. To do so could undermine public confidence in the independence of judges, and call into question whether I have prejudged matters that are before a court, or could come before a court. *See*, Code of Conduct for U.S. Judges, Canon 3(A)(6). However, some areas of law are so well settled that the matter is unlikely to be litigated further and I believe I can indicate agreement with *Brown v. Board of Education* consistent with these principles.

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

Response: I do not believe a majority opinion of the Supreme Court has directly answered this question. Injunctive relief is properly considered a "drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 130 S. Ct. 2743, 2748 (2010). The Seventh Circuit has noted "both historical and current practice lends support to a determination that the courts possess the authority to impose injunctions that extend beyond the parties before the court. The propriety of such an injunction, in a given case, is another matter." *Chicago v. Barr*, 961 F.3d 882, 912-18 (7th Cir. 2020). As a judge, I apply all binding precedent from the Supreme Court or Seventh Circuit. The issues or related issues may come before me making it inappropriate for me to comment further. The Code of Conduct for U.S. Judges requires that a judge not make public comments on the merits of a matter pending or impending in any court. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6).

a. If so, what is the source of that authority?

Response: Please see my answer to Question 19.

b. In what circumstances, if any, is it appropriate for courts to exercise this authority?

Response: Please see my answer to Question 19.

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 Supreme Court has recognized the importance of respecting federalism concerns, especially when federal courts handle litigation involving "core state responsibility, such as public education." *Horne v. Flores*, 557 U.S. 433, 448 (2009). Federalism is a founding principle of our system of government. The U.S. Constitution and federal law are the "supreme law of the land." U.S. Constitution, Article VI. At the same time, those rights that were not delegated to the United States are retained by the states or the people. U.S. Constitution, 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: A number of doctrines discuss when it is appropriate to defer or abstain in deference to state courts. For example, the *Rooker-Feldman* doctrine provides that lower federal courts should not review final state-court judgments. *Pullman* abstention, on the other hand, addresses the need to abstain when a "difficult unsettled" area of state law needs to be resolved. *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). In such circumstances, it may be appropriate to certify a question to the state's highest court. *Younger* abstention comes into play when cases are already pending in state court. And *Colorado River* abstention allows federal courts to stay matters when there is simultaneous state and federal litigation. Abstention doctrines are often the subject of motion practice. When presented with an abstention question, I consider the parties' arguments and/or agreements, the factual record, and precedent from the Supreme Court and Seventh Circuit. The Code of Conduct for U.S. Judges requires that a judge not make public comments on the merits of a matter pending or impending in any court. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6). The issues or related issues may come before me making it inappropriate for me to comment further.

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

Response: Generally speaking, a judge is to consider the relief requested by the parties in any given case. As a magistrate judge, I do not believe I have ever independently considered the best form of relief for a litigant and instead determine whether the relief requested is warranted under precedent from the Supreme Court and Seventh Circuit. As a circuit judge, if confirmed, I will review such questions, again based upon the record, the parties' arguments, and binding authority.

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

Response: *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), held substantive due process protects "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." I would follow *Glucksberg* and any other binding precedent, which include cases involving: the right to marital privacy and the use of contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to interracial marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); the right for unmarried individuals to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); the right to engage in intimate sexual conduct, *Lawrence v. Texas*, 539 U.S. 558 (2003); and the right of same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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 response to Question 8.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "worship" as "[a]ny form of religious devotion, ritual, or service showing reverence, esp. for a divine being or supernatural power." The Free Exercise Clause protects "the ability of those who hold religious beliefs of all kinds to live out their faith in daily life through the performance of (or abstention from) physical acts." *Kennedy v. Bremerton Sch. Dist.,* 142 S. Ct. 2407, 2421 (2022) (internal citation and quotation omitted). The Free Exercise Clause embraces a "freedom of worship" and a "freedom of conscience." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The

Supreme Court has recognized that especially in the school setting, courts must protect "freedom of conscience from [even] subtle coercive pressure." *Id.* One not even need be a member of an organized religion to have protection, as long as their belief is sincere. *See, e.g. Frazee v. Illinois Dept. of Empl. Sec.*, 489 U.S. 829, 833 (1989). However, the freedom to worship with others arose as an issue in several recent cases. In *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-98 (2021), the Supreme Court stressed regulations are not neutral and generally applicable whenever they treat any comparable secular activity more favorably than a religious one. The case challenged COVID-19 restrictions on private gatherings and the Supreme Court found a violation of the Free Exercise Clause because comparable secular activity was treated more favorably than gatherings for prayer. *Roman Catholic Diocese of Brooklyn v. Cuomo* raised a challenge to regulations that capped attendance at religious gatherings based upon the historical COVID-19 rates in given areas. 141 S. Ct. 63, 65-66 (2020). The Court found there was a strong showing the regulations lacked "the minimum requirement of neutrality" to religion where religious institutions were severely limited while many businesses were permitted to decide for themselves how many persons to admit. *Id.* at 66.

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: The Supreme Court found in *Burwell v. Hobby Lobby Stores, Inc*., that the Religious Freedom Restoration Act restricts the federal government "from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 573 U.S. 682, 705 (2014). In *Burwell*, the Supreme Court indicated the owner of a private company could not be forced to cover contraceptives in the company's health insurance, contrary to the owner's religious beliefs.

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 recently stressed that "[the Religious Freedom Restoration Act] specifies that it applies to all Federal law, and the implementation of that law, whether statutory or otherwise." *Little Sisters of the*

Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2383 (2020) (internal citation and quotation omitted). As the Supreme Court found in *Burwell v. Hobby Lobby Stores, Inc*., the Religious Freedom Restoration Act restricts the federal government "from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 573 U.S. 682, 705 (2014). In *Burwell*, the Supreme Court indicated the owner of a private company could not be forced to cover contraceptives in the company's health insurance, contrary to the owner's religious beliefs.

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

Response: I do not believe I have addressed this issue in any case.

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: The Seventh Circuit has resisted attempts to define reasonable doubt. *United States v. Hanson*, 994 F.2d 403, 408 (7th Cir. 1993); *United States v. Bardsley,* 884 F.2d 1024, 1029 (7th Cir. 1989); *United States v. Blackburn*, 992 F.2d 666, 668 (7th Cir.), *cert. denied*, 114 S. Ct. 393 (1993). At least one Judge on the Seventh Circuit has questioned whether the "rigid rule" prohibiting the parties from defining reasonable doubt is appropriate. *United States v. Alt*, 58 F.4th 910, 920 (7th Cir. 2023), *cert. denied*, 143 S. Ct. 1097 (2023) (Kirsch, Circuit Judge, Concurring). Since this is a question that may come before me if confirmed as a circuit judge, I express no opinion on it. The Code of Conduct for U.S. Judges requires that a judge not make public comments on the merits of a matter pending or impending in any court. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6).

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"?

Response: As a magistrate judge and nominee for the United States Court of Appeals for the Seventh Circuit, it would be inappropriate for me to comment on a hypothetical that could mirror a question likely to come before the Court.

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"?

Response: Please see my response to Question 27(a).

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

Response: Please see my response to Question 27(a).

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: Seventh Circuit Rule 32.1(b) allows for the issuance of unpublished orders. Federal Rule of Appellate Procedure 32.1(a) generally permits citation of recent orders when a party provides a copy of the relevant order. Under Seventh Circuit Rule 32.1(b), opinions are published and "constitute the law of the circuit." The Code of Conduct for U.S. Judges generally prohibits me from commenting on the correctness of any judicial opinion under Cannon 3A(6). To do so could undermine public confidence in the independence of judges, and call into question whether I have personal views on matters that are before a court, or could come before a court. I treat all orders and opinions as set forth in precedent and the relevant rules.

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 Question 28(a).

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

Response: Please see my response to Question 28(a).

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

Response: Please see my response to Question 28(a).

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

Response: Yes, when consistent with precedent, the Federal Rules of Appellate Procedure, and the Seventh Circuit Rules.

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, unless required to do so by precedent, the Federal Rules of Appellate Procedure, or the Seventh Circuit Rules.

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, unless required to do so by precedent, the Federal Rules of Appellate Procedure, or the Seventh Circuit Rules.

29. In your legal career:

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

Response: I tried 16 cases to verdict, including one pro bono criminal bench trial in state court, one asylum hearing before an administrative law judge, and 14 federal criminal jury trials. I tried all cases with co-counsel, with the workload evenly split. Approximately half of my jury trials as an Assistant United States Attorney were cases I was responsible for indicting and where I served as primary counsel.

b. How many have you tried as second chair?

Response: Please see my response to Question 29.

c. How many depositions have you taken?

Response: While in private practice at Mayer Brown LLP I both took and defended depositions. I no longer have records that would accurately reveal the precise number and do not remember such information, as I left private practice in 2007.

d. How many depositions have you defended?

Response: Please see my answer to Question 29(c).

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

Response: I briefed and argued 10 appeals before the United States Court of Appeals for the Seventh Circuit, was responsible for full briefing in another 5 matters, and argued another 5 matters. I was counsel in additional cases beyond these 20.

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

Response: None that I can recall.

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

Response: I appeared before an Immigration Judge while handling a *pro bono* asylum matter. I do not believe I have any other appearances before any federal agencies.

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

Response: I do not believe I was responsible for oral argument on any dispositive motions while in private practice. I did draft dispositive motions that did not receive oral argument and currently rule on dispositive motions with the consent of the parties in civil matters.

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

Response: I did not keep track of evidentiary motions, such as motions to suppress. However, I would estimate that I handled many dozens of such motions.

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 no longer have access to my billing records and do not remember my maximum hours from 2007, which is the last time I worked in private practice.

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

Response: I no longer have access to my billing records and do not remember a precise number of hours dedicated to pro bono matters. I believe I dedicated hundreds of hours each year in private practice to *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: While I am not familiar with this comment, I take it to mean that judges are required to fairly and impartially render decisions, based upon the facts of each case and the law. Judges are not to rule based on any ideology, preference, or political belief, even—and perhaps especially—when such beliefs would call for a contrary outcome.

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: Similar to Justice Scalia's remarks, I take this to mean that judges must fairly and impartially follow the law.

b. Do you agree or disagree with this statement?

Response: To the extent this statement was meant to underscore a judge's duty to fairly and impartially follow the law, I agree. To do otherwise threatens the rule of law and our founding principles.

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: Similar to Justice Scalia and Justice Roberts's comments, I take this to mean that judges must fairly and impartially follow the law.

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

Response: To the extent this statement was meant to underscore a judge's duty to fairly and impartially follow the law, I agree. To do otherwise threatens the rule of law and our founding principles.

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

Response: Not that I recall.

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: Presidents of War, Michael Beschloss; The Making of a Justice, Justice John Paul Stevens; Frog and Toad are Friends, Arnold Lobel.

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

Response: As a magistrate judge and circuit judge nominee, it is not appropriate for me to comment on issues that are the subject of political debate, and may arise in issues pending, or that might come before, the Court. I have worked tirelessly most of my adult life to ensure our laws are fairly and equally enforced.

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

Response: It was an honor to represent clients, including *pro bono* clients, in private practice and I learned a great deal. I was honored every time I rose to represent the United States of America in court. The cases I prosecuted involving victims were always meaningful and I cannot place one matter over another.

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 represented my client to the best of my ability, understanding the importance of doing so to our system of justice and the rule of law.

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 read academic articles primarily when such materials are relevant to an issue that is before me. As such, the subject matter and authors differ.

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

Response: No single Federalist Paper has shaped my view of the law such that it can stand out among all others.

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

Response: Cases I have read related to matters pending before me have changed my mind. However, it would be inappropriate to comment on those cases outside of a court session with parties and/or counsel present, or a docketed opinion.

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

Response: As a magistrate judge and circuit judge nominee, it is not appropriate for me to comment on issues that are the subject of political debate, and may arise in issues pending, or that might come before, the Court. *See*, Code of Conduct for U.S. Judges, Canon 3(A)(6). I would note the Supreme Court has recognized that "[s]ome believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed. For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2240 (2022).

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: No.

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: No. I have assisted colleagues from time to time with suggestions on briefs and other work product. However, I have not kept a list of such matters.

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

48. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: I believe I may have corrected the record on a few occasions while an Assistant United States Attorney and think I likely acknowledged one or more Speedy Trial Act violations after *Bloate v. United* States, 559 U.S. 196 (2010) overturned Seventh Circuit case law on the exclusion of time for the filing of pretrial motions.

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: It is an honor to appear before the Senate Judiciary Committee. I have a duty to provide complete and truthful answers to all questions asked. When a question calls for an answer that I cannot provide as a magistrate judge, and circuit judge nominee, I must explain why I am precluded from answering, consistent with my ethical obligations and the practice of prior nominees.

Questions from Senator Thom Tillis
for Joshua Paul Kolar, nominee to be United States Circuit Judge for the Seventh Circuit Court of Appeals

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: A judge's personal views are irrelevant. However, a judge's background can include a myriad of useful experiences, such as academic training in law school and prior familiarly with legal issues, among other things.

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

   Response: It is an ironclad expectation and right of all litigants. Canon 3 of the Code of Conduct for United States Judges provides "[a] judge should perform the duties of the office fairly, impartially, and diligently."

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

   Response: Black's Law Dictionary (11th ed. 2019) defines "judicial activism" as "judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." If this is what is meant by judicial activism, it runs contrary to the role of a judge and the rule of law.

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: Yes. I reconcile that with the fact that such outcomes are better than the collapse of the rule of law. Judges must never alter an outcome that is otherwise dictated by the law and the facts.

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

   Response: As a judge, I follow binding precedent of the Supreme Court and Seventh Circuit. This includes precedent establishing that Second Amendment protects a personal right to

keep and bear arms, in the home and in public. *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2117 (2022) and *District of Columbia v. Heller*, 554 U.S. 570 (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: To determine whether a public official is entitled to qualified immunity, the Court "undertake[s] a two-part analysis asking: (1) whether the facts alleged, '[t]aken in the light most favorable to the party asserting the injury, ... show the officer's conduct violated a constitutional right'; and (2) whether the right was clearly established at the time of the alleged violation." *Nanda v. Moss*, 412 F.3d 836, 841 (7th Cir. 2005) (quoting *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L.Ed.2d 272 (2001)); *see also Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L.Ed.2d 565 (2009); *Brooks v. City of Aurora, Ill.*, 653 F.3d 478, 483 (7th Cir. 2011) (quoting *McAllister v. Price*, 615 F.3d 877, 881 (7th Cir. 2010)). The burden of proof is on the plaintiff to show that qualified immunity does not apply. *Holloway v. City of Milwaukee*, 43 F.4th 760, 767 (7th Cir. 2022). *Bostic v. Vasquez*, No. 2:15-CV-429-JPK, 2023 WL 356841, at *6 (N.D. Ind. Jan. 23, 2023).

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 magistrate judge and circuit judge nominee, it is not appropriate for me to comment on issues that are the subject of debate, and may arise in issues pending in, or that might come before, the Court. This is a question for policy makers to consider.

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

   Response: As a magistrate judge and circuit judge nominee, I will follow all binding precedent. This requires the analysis set forth in Question 7. It is not appropriate for me to comment on issues that are the subject of debate, and may arise in issues pending in, or that might come before, the Court. This is a question for policy makers to consider.

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

    Response: As a magistrate judge and circuit judge nominee, I ensure that the courthouse is open to all and litigants receive a fair and impartial hearing. Enforcement of private rights of action are properly left to others and enforcement of criminal laws is the province of the Executive branch. Intellectual property rights can "promote the progress of science and

useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. Constitution, Article I, § 8.

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: In the Northern District of Indiana, cases are randomly assigned, which limits, if not eliminates, the ability of a litigant to "judge shop" or "forum shop." As a judge I follow all binding precedent and listen to the arguments of those before me prior to making any determination regarding any pattern of judge or forum shopping. As part of my ethical obligations, I have never attempted to attract a particular case, subject matter of cases, or type of litigation, to my courtroom.

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: The Code of Conduct for U.S. Judges generally prohibits me from commenting on the correctness of any judicial opinion. To do so could undermine public confidence in the independence of judges, and call into question whether I have prejudged matters that are before a court, or could come before a court. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6). As a judge, I am bound to apply all binding precedent from the Supreme Court and Seventh Circuit.