Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Robert Kirsch
Nominee to be United States District Judge, District of New Jersey

1. **Is it legal for police to stop and frisk someone based on a reasonable suspicion of involvement in criminal activity?**

   Response: Yes. Under the principles first established in *Terry v. Ohio*, 392 U.S. 1 (1968), police may engage in an investigatory stop "when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense." *Arizona v. Johnson*, 555 U.S. 323, 326 (2009). However, to proceed from a stop to a "frisk," the officer "must reasonably suspect that the person is armed and dangerous." *Id.* at 326-27.

2. **Under Supreme Court and Third 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 U.S. Supreme Court has described "facts" – either "basic" or "historical" – as "addressing questions of who did what, when or where, how or why." *U.S. Bank Nat'l Assoc. v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). The Third Circuit "[has] followed the Supreme Court's definition of factual issues . . . in the sense of a recital of external events and the credibility of their narrators." *Washington v. Sobina*, 509 F.3d 613, 621 (3d Cir. 2007) (quotations omitted) (citing *Thompson v. Keohane*, 516 U.S. 99, 111-12 (1995)).

   The line between a question of fact for the jury and a question of law to be resolved by the judge, however, is "slippery" and often unclear. *Thompson v. Keohane*, 516 U.S. at 111. Mixed questions of law and fact ask whether "the historical facts . . . satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *U.S. Bank* at 966. In *Markman v. Westview Instruments*, the Supreme Court advised that where the constitutional or statutory text is unclear, courts tasked with distinguishing between a question of fact and a question of law should "consult existing precedent and consider both the relative interpretive skills of judges and juries and the statutory policies that ought to be furthered by the allocation." 517 U.S. 370, 384 (1996) (ultimately finding that the construction of a patent claim was a question of law to be resolved by a judge).

3. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

   Response: Criticism of a judicial opinion is protected speech and permissible in an open society. *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 269-71 (1964) (protecting

the right to criticize public officials). "Attacks" on a judge, however, depending on their nature, may rise to the level of potential criminal conduct. 18 U.S.C. § 1507 prohibits anyone from "obstructing, or impeding the administration of justice, or with the intent of influencing any judge . . . in the discharge of his duty, picket[ing] or parad[ing] in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge . . . . "

4. **Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?**

   Response: If confirmed, I would consider all of the factors outlined in 18 U.S.C. § 3553(a) and sentence defendants individually, with consideration to the specific facts of the case before me, and in accordance with the applicable advisory guidelines range. Consistent with the rationales governing sentencing, I would consider, among other factors, the need for the sentence imposed "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2).

5. **In what situation(s) does qualified immunity not apply to a law enforcement officer in New Jersey?**

   Response: Qualified immunity "shields law enforcement officers from personal liability for civil rights violations when the officers are acting under color of law in the performance of official duties, unless the officers' performance is not objectively reasonable." *Harris v. City of Newark*, 250 N.J. 294, 299-300 (2022). *See also Thomas v. Tice*, 948 F.3d 133 (3d Cir. 2020) ("Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.").

6. **Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.**

   Response: As a sitting superior court judge in New Jersey for the last 13 years, I have approached each of the thousands of cases I have handled with an open mind, carefully considered the arguments of counsel, independently researched the applicable law, and faithfully applied the binding precedent of higher courts. If I am privileged to be confirmed to serve as a federal district court judge, I will faithfully apply all U.S. Supreme Court and Third Circuit precedents in every matter before me.

7. **Please identify a Third Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.**

   Response: Please see my answer to Question 6.

8. **Please state the governing law for self-defense in New Jersey and the Third Circuit.**

   Response: In New Jersey, the standard for self-defense is set forth in *N.J. Stat. Ann.* § 2C:3-4. The Model Criminal Jury Charge (Rev. June 2011) for a self-defense claim instructs that a person may use force in self-protection if the following elements are met: (1) the person reasonably believes they must use force; (2) the person reasonably believes that the use of force is immediately necessary; (3) the person reasonably believes they are using force to defend themselves against unlawful force; and (4) the person reasonably believes that the level of intensity of the force is proportionate to the unlawful force they are attempting to prevent against. A self-defense claim fails if the state is able to disprove any element beyond a reasonable doubt. *See also Palmer v. Hendricks*, 592 F.3d 386, 396 (3d Cir. 2010) (articulating the New Jersey standard for self-defense) (citing *State v. Jenewicz*, 193 N.J. 440, 450 (N.J. 2008).

   In the Third Circuit, for a self-defense claim to succeed, the claimant must prove by a preponderance of the evidence each of the following four elements: (1) that the claimant was under an immediate, unlawful threat of death or serious bodily injury to themselves or others; (2) that the claimant had a well-grounded fear that the threat would be carried out if they did not commit the offense (i.e., the criminal act in self-defense); (3) that the criminal action was directly caused by the need to avoid the threatened harm and that there was no reasonable, lawful opportunity to avoid the threatened harm without committing the offense; and (4) that the claimant had not recklessly placed themselves in a situation in which they would be forced to engaged in criminal conduct. THIRD CIRCUIT MODEL JURY INSTRUCTIONS § 8.04 (Rev. Dec. 2021). *See also United States v. Paolello*, 951 F.2d 537, 540 (3d Cir. 1991).

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

   Response: 18 U.S.C. § 1507 prohibits anyone from "obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, picket[ing] or parad[ing] in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer." In addition, the statute prohibits the use of a "sound-truck or similar device" or resorting "to any other demonstration in or near any such building or residence." *Id.*

10. **Under Supreme Court precedent, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?**

Response: I am unaware of any U.S. Supreme Court decision interpreting 18 USC § 1507 or a state analogue. As a sitting superior court judge and as a nominee to serve as a federal district judge, it is inappropriate for me to express a view on the merits of a matter that may come before the courts.

11. **Please explain the differences in the introduction of evidence between federal courts and a military commission.**

    Response: Federal courts follow the evidentiary admissibility procedures codified in the Federal Rules of Evidence, as amended each year by the U.S. Supreme Court. While I have never practiced before a military commission or tribunal and am unfamiliar with its precise evidentiary procedures, my understanding is that the introduction of evidence before a military commission is governed by the Uniform Code of Military Justice. *See, e.g.*, 10 USCS § 850 (discussing the admissibility of certain forms of sworn testimony at trial before a court-martial, military commission, or other court of inquiry).

12. **What is the operative standard for determining whether a statement is not protected speech under the "fighting words" doctrine?**

    Response: The Supreme Court has found "fighting words" to consist of "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971).

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

    Response: Under the true threats doctrine, a statement does not constitute protected free speech where "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citation omitted).

14. **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: As a sitting superior court judge and as a nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion as to whether a particular case was correctly decided. However, consistent with the practice of past nominees, and because this holding is so widely accepted and not likely to be challenged in future litigation, I am comfortable stating that *Brown v. Board of Education* was correctly decided.

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

Response: As a sitting superior court judge and as a nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion as to whether a particular case was correctly decided. However, consistent with the practice of past nominees, and because this holding is so widely accepted and not likely to be challenged in future litigation, I am comfortable stating that *Loving v. Virginia* was correctly decided.

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

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. The *Griswold* decision is binding precedent of the U.S. Supreme Court. If confirmed, I would follow the precedent established by the Supreme Court and the Third Circuit.

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

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. The Supreme Court's decision in *Dobbs v. Jackson Women's Health* overturned the holdings in *Roe v. Wade* and *Planned Parenthood v. Casey*. The *Dobbs* decision is binding precedent of the U.S. Supreme Court. If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent.

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

Response: Please see my answer to Question 14(d).

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

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. The *Gonzales* decision is binding precedent of the U.S. Supreme Court. If confirmed, I would follow the precedent established by the Supreme Court and the Third Circuit.

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

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding

whether a particular case was correctly decided. If confirmed, I would follow the precedent established by the Supreme Court and the Third Circuit, including *District of Columbia v. Heller*, *McDonald v. City of Chicago*, and *New York State Rifle & Pistol Association v. Bruen*.

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

Response: Please see my answer to Question 14(g).

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

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. The *Hosanna-Tabor* decision is binding precedent of the U.S. Supreme Court. If confirmed, I would follow the precedent established by the Supreme Court and the Third Circuit.

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

Response: Please see my answer to question 14(g).

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

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. The *Dobbs* decision is binding precedent of the U.S. Supreme Court. If confirmed, I would follow the precedent established by the Supreme Court and the Third Circuit.

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

Response: In *New York State Rifle and Pistol v. Bruen*, 142 S. Ct. 2111, 2126 (2022), the U.S. Supreme Court held that a firearm restriction violates the Second Amendment if the government is unable to demonstrate that its regulation restricting firearms is consistent with this Nation's historical tradition of firearm regulation.

16. **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.

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

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

Response: No.

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

Response: No.

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

Response: No.

18. **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.

19. **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.

20. **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.

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

    Response: In December 2014, I was referred to Senators Booker and Menendez for consideration for a judicial position on the U.S. District Court for the District of New Jersey. In early 2015, I was interviewed by Senator Cory Booker's Judicial Advisory Committee and was subsequently contacted by Senator Menendez's staff. Senator Booker's Judicial Advisory Committee recommended that I be interviewed by the Senator's staff. As a result, I was interviewed by members of Senator Booker's staff. A few days later, I was interviewed by Senator Booker. In early 2021, I was telephonically interviewed by both Senators Booker and Menendez. On August 4, 2022, I was interviewed by Senator Menendez. On August 9, 2022, I was interviewed telephonically by Senator Booker. On August 12, 2022, I interviewed with attorneys from the White House Counsel's Office. Since August 15, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On December 21, 2022, the President announced his intent to nominate me, and on January 3, 2023, the President nominated me to serve as a U.S. District Judge for the District of New Jersey.

22. **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.

23. **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.

24. **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.

25. **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.

26. **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.

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

    Response: Please see my answer to Question 21.

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

    Response: On February 1, 2023, these questions were provided to me by the Office of Legal Policy at the Department of Justice. I reviewed the questions and prepared answers to each of the questions. I researched any relevant case law as needed to prepare my

answers. I provided my answers to attorneys from the Office of Legal Policy who reviewed my answers and provided me with feedback. The final answers are my own.

Senator Mike Lee
Questions for the Record
Robert Kirsch, Nominee to the United States District Court for the District of New Jersey

1. How would you describe your judicial philosophy?

Response: As a sitting superior court judge in New Jersey for the last 13 years, I have approached each of the thousands of cases I have handled with an open mind, carefully considered the arguments of counsel, independently researched the applicable law, and faithfully applied the binding precedent of higher courts. If I am privileged to be confirmed to serve as a federal district court judge, I will faithfully apply all U.S. Supreme Court and Third Circuit precedents in every matter before me. I have appeared before and admired many federal judges, including the federal district judge for whom I clerked. I have attempted to emulate their approach in terms of handling each matter with the utmost care and consideration, and treating every lawyer and litigant with dignity and respect.

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

Response: With regard to the interpretation of a federal statute, the first inquiry is to examine whether the U.S. Supreme Court or Third Circuit has interpreted the statutory provision at issue. If so, as a lower court judge, I would apply the holding regarding the statutory interpretation by the higher court. If there were no precedents, I would examine the text of the statute itself. If the text is clear and unambiguous, I would apply the plain meaning of the text and the interpretive inquiry ends. If the language is ambiguous and there is no applicable Supreme Court or Third Circuit precedent, I would also consult persuasive authority such as Supreme Court or Third Circuit precedent on analogous statutes or similar language, other circuit precedents, relevant canons of interpretation, and legislative history, if authorized and/or applied by the Supreme Court and Third Circuit.

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

Response: When interpreting a constitutional provision, I would examine the text of the constitutional provision itself and any applicable Supreme Court or Third Circuit precedent and, if necessary, further consult applicable canons of interpretation or other sources, such as legislative history, if authorized and/or applied by the Supreme Court and Third Circuit.

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

Response: The U.S. Supreme Court has applied the original meaning of the text in its analysis when interpreting a number of constitutional provisions, including for example, the individual right to keep and bear arms under the Second Amendment

and the right of confrontation under the Sixth Amendment. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I would faithfully apply Supreme Court and Third Circuit precedent regarding the interpretation of constitutional provisions, including the appropriate method of interpretation.

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 answer 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: Please see my answer to Questions 2 and 3.

6. What are the constitutional requirements for standing?

Response: To establish standing under Article III of the U.S. Constitution, a plaintiff must demonstrate (1) that they suffered an "injury in fact" which is concrete and particularized, not speculative or hypothetical; (2) a causal nexus between the alleged injury and the alleged conduct; and (3) that the injury will likely be redressable through the judicial process. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

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

Response: The U.S. Supreme Court held in *McCulloch v. Maryland* that the Necessary and Proper Clause of the Constitution grants Congress implied powers necessary to implement its enumerated powers. 17 U.S. 316 (1819); U.S. Const. Art. I, § 8, cl. 18 (vesting in Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

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

Response: The U.S. Supreme Court has held that the constitutionality of an action taken by Congress is not dependent on explicit recitals of the power which it undertakes to exercise. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012). Thus, I would evaluate the constitutionality of an enacted law, whether or not it references a specific constitutionally enumerated power, based upon applicable Supreme Court and Third Circuit precedents.

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

Response: The Supreme Court recently restated that certain substantive rights, though not specifically enumerated in the Constitution, are entitled to due process protection where those rights are "deeply rooted in [our] history and tradition" and "implicit in the concept of ordered liberty." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) (quoting *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997) (internal quotations omitted)). The substantive rights recognized by the Court include, but are not limited to: the right to purchase and use contraceptives in marriage, *Griswold v. Connecticut*, 318 U.S. 479 (1965); the right to marry a person of a different race, *Loving v. Virginia*, 377 U.S. 1 (1967); the right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015); the right to custody of one's own children, *Stanley v. Illinois*, 405 U.S. 645 (1972); the right to direct the teaching and upbringing of one's own children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

10. What rights are protected under substantive due process?

Response: Please see my answer to Question 9. In addition, most of the rights outlined in the first eight Amendments to the U.S. Constitution, including but not limited to, the right of free speech, the right to bear arms, the right to a public and impartial jury in a criminal case, the right to be free from an unlawful search, etc., are considered substantive due process rights which have been incorporated through the Due Process Clause of the Fourteenth Amendment and thus applicable to the states as well.

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

Response: The U.S. Supreme Court held that substantive due process protects neither abortion nor the economic rights at stake in *Lochner v. New York*. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (abortion); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (*Lochner*-type economic rights). If confirmed to serve as a federal district judge, I would faithfully apply U.S. Supreme Court and Third Circuit precedents regarding the existence of substantive due process rights.

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

Response: The Supreme Court has held that Congress may regulate three broad categories under the Commerce Clause: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or the persons or things in interstate commerce," and (3) "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted).

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

Response: The U.S. Supreme Court has defined "suspect" or "quasi-suspect" classes as generally having "been subjected to discrimination," who "exhibit obvious, immutable, or distinguishing characteristics that define them as a group," and are "a minority or politically powerless." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). The Supreme Court has recognized that race, religion, national origin, and alienage meet the criteria of a suspect class. *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

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

Response: In *Buckley v. Valeo*, 424 U.S. 1, 123 (1976), the U.S. Supreme Court cited the Constitution's inherent, explicit checks and balances and separation of powers which serve as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."

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

Response: When confronting the issue of whether one branch of government assumed an authority not granted to it by the text of the Constitution, I would examine and analyze the text of the Constitution, and apply relevant, binding U.S. Supreme Court or Third Circuit precedent. *See, e.g., Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015) (citing Y*oungstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring)) (discussing framework for evaluating exercises of presidential power).

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

Response: A judge's duty is to apply the law fairly, neutrally, and objectively without regard to improper considerations such as personal opinions, viewpoints, or sympathies.

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

Response: Neither are desirable outcomes.

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

Response: In my career as federal law clerk, trial attorney at the Department of Justice, Assistant U.S. Attorney, and superior court judge, I have not had occasion to study this historical trend, or its significance. Accordingly, I am unable to provide an informed response.

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

Response: Judicial review is the authority of the judicial branch to determine the constitutionality of governmental actions. *Marbury v. Madison*, 5 U.S. 137, 177– 78 (1803). Judicial supremacy refers to the binding power of Supreme Court constitutional interpretation on the other branches of government. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

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

Response: Elected officials take an oath to uphold the Constitution. Elected officials also are bound by Supreme Court decisions interpreting the Constitution. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). As a sitting superior court judge and as a nominee to serve as federal district judge, it would be inappropriate for me to comment upon the conduct of elected officials.

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

Response: My understanding of Hamilton's statement in Federalist 78 is that the role of the judiciary is circumscribed and limited solely to interpreting the law, whereas the other branches of government have the power to make and enforce the law. The significance of this observation is for judges to apply the law to the facts of the case before the court, without reference to any impermissible and extraneous considerations.

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

the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: Lower federal court judges are dutybound to faithfully apply the binding precedents of the U.S. Supreme Court and the circuit court which oversees the district judge. However, the premise of the question poses a hypothetical that there exists no binding precedent which "speak[s] directly to the issue at hand." Accordingly, absent binding precedent, I would approach the issue as I would any unresolved issue. I would first look to the U.S. Supreme Court and Third Circuit for guidance through their analyses of analogous constitutional or statutory text. I would also examine the text of the constitutional provision or statutory text to discern its plain and unambiguous meaning. If the meaning is unclear and ambiguous, I would consider other sources, such as legislative history, when authorized by the U.S. Supreme Court and Third Circuit to do so. I would also consider the arguments of counsel regarding each of the above steps in order to reach an outcome consistent with the rule of law.

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

Response: None. When imposing a sentence on a defendant, a judge may only consider the factors set forth in 18 U.S.C. § 3553(a), including the applicable relevant Sentencing Commission policy statements. Personal characteristics of a defendant's race, sex, national origin, creed, religion, and socioeconomic status may not be considered as such "are not relevant in the determination of a sentence." U.S.S.G. § 5H1.10.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "equity" as "fairness; impartiality; evenhanded dealing," or "the body of principles constituting what is fair and right." I am not familiar with the specific definition of equity set forth in the question or the context in which it was made.

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

Response: Equity and equality are typically construed to have different meanings. In contrast to the definition of equity provided in my answer to Question 25, Black's Law Dictionary (11th ed. 2019) defines "equality" as "the quality, state, or condition of being equal" or "likeness in power or political status."

26. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 25)?

Response: The Fourteenth Amendment's Equal Protection Clause states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. I am not aware of any binding decision that has considered or adopted the definition of equity addressed in Question 25 for equal-protection purposes. If confirmed to serve as a federal district judge, I would follow Supreme Court and Third Circuit precedents in analyzing Fourteenth Amendment issues.

27. How do you define "systemic racism?"

Response: I am not aware of a consensus definition of systemic racism. I have not studied the issue of systemic racism, and the issue has not been raised before me during my career at the Department of Justice or as a sitting superior court judge. If confirmed to serve as a federal district judge, and as I have done my whole life, I would ensure that any individual I interact with, in court or otherwise, is treated fairly and with dignity, regardless of their race.

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

Response: I am not aware of a consensus definition of critical race theory. Black's Law Dictionary 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." Black's Law Dictionary (11th ed. 2019).

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

Response: As I have not researched "critical race theory" or "systemic racism," kindly see my responses to Questions 27 and 28.

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

Questions for the Record for Robert Kirsch, nominated to be United States District Judge for the District of New Jersey

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. Racial discrimination is unlawful and is proscribed by a variety of statutes and the U.S. Constitution. For example, Title VII of the Civil Rights of 1964 prohibits discrimination in employment on the basis of race, religion, sex and national origin and the Equal Protection Clause of the Fourteenth Amendment prohibits discriminating on the basis of race, among other things.

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

Response: The Supreme Court recently restated that certain substantive rights, though not specifically enumerated in the Constitution, are entitled to due process protection where those rights are "deeply rooted in [our] history and tradition" and "implicit in the concept of ordered liberty." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) (quoting *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997) (internal quotations omitted)). The substantive rights recognized by the Court include, but are not limited to: the right to purchase and use contraceptives in marriage, *Griswold v. Connecticut*, 318 U.S. 479 (1965); the right to marry a person of a different race, *Loving v. Virginia*, 377 U.S. 1 (1967); the right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015); the right to custody of one's own children, *Stanley v. Illinois*, 405 U.S. 645 (1972); the right to direct the teaching and upbringing of one's own children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). As a sitting superior court judge and nominee to serve as a U.S. district court judge, it would be inappropriate for me to express an opinion regarding the existence of any additional unenumerated rights in the Constitution. If confirmed to serve as a U.S. district judge, I would faithfully abide by the precedents of the U.S. Supreme Court and Third Circuit.

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

Response: I do not identify with any particular Justice's philosophy, and thus do not identify with any particular Justice's philosophy. As a sitting superior court judge in New Jersey for the last 13 years, I have approached each of the thousands of cases I have handled with an open mind, carefully considered the arguments of counsel, independently researched the applicable law, and faithfully applied the binding precedent of higher courts. If I am privileged to be confirmed to serve as a U.S. district court judge, I will faithfully apply all U.S. Supreme Court and Third Circuit precedents in every matter before me. I have appeared before and admired many federal judges, including the U.S. district judge for whom I clerked. I have attempted to emulate their approach in terms of handling each matter with the utmost care and consideration, and treating every lawyer and litigant with dignity and respect.

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

Response: Black's Law Dictionary defines "originalism" as the "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." *Originalism, Black's Law Dictionary* (11th ed. 2019). While I do not subscribe to a particular label, the Supreme Court has applied the interpretive doctrine of originalism to a number of constitutional provisions, including for example, the individual right to keep and bear arms under the Second Amendment and the right of confrontation under the Sixth Amendment. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed to serve as a U.S. district judge, I would be bound by Supreme Court and Third Circuit precedent regarding the interpretation of statutory and constitutional provisions, including the appropriate method of interpretation.

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

Response: My understanding is that the term "living constitution" refers to a theory of constitutional interpretation that interprets the Constitution according to society's current norms, practices, and values. *Living Constitution*, *Black's Law Dictionary* (11th ed. 2019). While I do not subscribe to a particular label, if confirmed, I would be bound by Supreme Court and Third Circuit precedent regarding the interpretation of statutory and constitutional provisions, including the appropriate method of interpretation.

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: In the exceedingly rare circumstance that there existed no controlling case law interpreting a constitutional provision, my analysis would begin with examining the specific language of the text. I would then look to the U.S. Supreme Court and Third Circuit for guidance as to their interpretative approach through analogous constitutional provisions. I would follow the precedent established by the Supreme Court and the Third Circuit to determine when the original public meaning of the text of the Constitution should be used to interpret its provisions. *See*, *e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

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, no. *But see Ashcroft v. ACLU*, 535 U.S. 564, 574-75 (2002) (citing *Miller v. California*, 413 U.S. 15, 24 (1973) (referencing, with approval, the use of a "contemporary community standard" by which to evaluate whether material is obscene

and thus unprotected by the First Amendment). Absent binding precedent, when interpreting constitutional and statutory provisions, judges should follow the plain meaning of the constitutional or statutory provision if that plain meaning is clear and unambiguous. If confirmed to serve as a U.S. district judge, I would faithfully apply the precedents of the U.S. Supreme Court and Third Circuit regarding specific statutory and constitutional provisions, including the appropriate method of interpretation.

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

Response: My belief is that the Constitution is a fixed and enduring document, meaning that the Constitution does not change unless amended through Article V of the Constitution but its provisions may apply to new circumstances.

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

Response: Yes.

a. **Was it correctly decided?**

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. The *Dobbs* decision is binding precedent of the U.S. Supreme Court. If confirmed, I would follow the precedent established by the Supreme Court and the Third Circuit.

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

Response: Yes.

a. **Was it correctly decided?**

Response: As a sitting superior court judge and a judicial nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided. The *Bruen* decision is binding precedent of the U.S. Supreme Court. If confirmed, I would follow the precedent established by the Supreme Court and the Third Circuit.

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

Response: Yes.

a. **Was it correctly decided?**

Response: As a sitting superior court judge and as a nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion as to whether a particular case was correctly decided. However, consistent with the practice of past nominees, and because this holding is so widely accepted and not likely to be challenged in future litigation, I am comfortable stating that *Brown v. Board of Education* was correctly decided.

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

Response: 18 U.S.C. § 3142 addresses pretrial detention. 18 U.S.C. § 3142(e)(3) establishes that in certain types of cases a rebuttable presumption of detention arises that no release conditions will reasonably assure the defendant's appearance in court and the safety of the community. A presumption in favor of pretrial detention applies to violent offenses, offenses for which the maximum sentence is life in prison or death, drug offenses carrying maximum sentences of ten years or more, offenses involving underage victims, crimes involving slavery or human trafficking, and other enumerated offenses and factors related to certain offenders, including their prior criminal history.

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

Response: As set forth in 18 U.S.C. § 3142(f), the presumption in favor of pretrial detention reflects Congress's determination that defendants accused of the certain crimes present a greater flight risk or danger to the community.

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

Response: Yes. Under U.S. Supreme Court precedents, government regulations that burden a sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable" receive strict scrutiny. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421-22 (2022). A regulation that treats "*any* comparable secular activity more favorably than religious exercise" is not neutral or generally applicable. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020)). Neither is a government regulation neutral – even if it appears facially neutral – where the record reveals animus or hostility toward a particular religious belief. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). Moreover, a regulation will not be generally applicable where it is subject to discretionary individualized exemptions. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021).

When strict scrutiny is triggered, the government bears the burden to demonstrate that its action was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. *Kennedy*, 142 S. Ct. at 2422 (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 526 (1993)); *Tandon*, 141 S. Ct. at 1296 (2021). If instead the

regulation is found to only "incidentally burden[] religion" but otherwise be neutral and generally applicable, then rational basis review is applied. *Fulton*, 141 S. Ct. at 1878 (2021).

In addition, the Religious Freedom Restoration Act of 1993 (RFRA) prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if that burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). If the government's action places a substantial burden on the exercise of religion, the government must demonstrate that the burden "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." *Id.* at § 2000bb-1(b).

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

Response: Generally, no. Under the Free Exercise Clause of the First Amendment, laws that burden the free exercise of religion are first analyzed to determine whether they are both neutral and generally applicable. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). When government action burdens an individual's sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable," the action is subject to strict scrutiny whereby the government must demonstrate that its action is justified by a compelling state interest and is narrowly tailored in pursuit of that interest. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 526 (1993)). As stated in the previous response to Question 13, RFRA prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if that burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). If the government's action places a substantial burden on the exercise of religion, the government must demonstrate that the burden "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." *Id.* at § 2000bb-1(b).

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the U.S. Supreme Court held that certain restrictions imposed by the Governor of New York in response to the COVID-19 pandemic, capping the number of individuals who could participate in religious services in certain designated areas, were unlawful under the Free Exercise Clause of the First Amendment. The Court applied the strict scrutiny test,

finding that the law was not neutral and generally applicable. While the Court agreed that the state demonstrated a compelling interest in stemming the spread of COVID-19, it failed to satisfy the "narrowly tailored" prong of the inquiry as retail stores and factories were treated more favorably.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the U.S. Supreme Court enjoined the restrictions imposed by the State of California regarding the prohibition to hold private gatherings, specifically at-home worship, during the COVID-19 pandemic. In granting the injunction pending appeal, the Court noted that strict scrutiny applied to California's activity because "California's Blueprint System contains myriad exceptions and accommodations for comparable activities." *Id.* at 1298. Under strict scrutiny analysis, "[a]pplicants are likely to succeed on the merits of their free exercise claim; they are irreparably harmed by the loss of free exercise rights for even minimal periods of time; and the State has not shown that public health would be imperiled by employing less restrictive measures." *Id.* at 1297 (quotations and citations omitted).

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court vacated the state agency's enforcement of Colorado's anti-discrimination law in a case where a baker refused to make a wedding cake for a same-sex couple, citing petitioner's religious beliefs. The Supreme Court held that the facially neutral public accommodations law violated the Free Exercise Clause because the evidentiary record demonstrated that the state's civil rights commissioners had openly expressed hostility toward the petitioner's religious beliefs in the issuance of a cease-and-desist order, which the Court found sufficient to show animus in violation of the Free Exercise Clause. *Id.* at 1729-31.

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. An individual's religious belief, provided it is "sincerely held," need not be "logical, consistent and comprehensible to others in order to merit First Amendment protection." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (quoting *Thomas v. Rev. Bd. Of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981)); *see also Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 832-35 (1989). The Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Person Act also

expressly include broad language protecting "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *See Burwell v. Hobby Lobby*, 573 U.S. 682, 695–696 (2014).

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

Response: Generally, yes. The U.S. Supreme Court held that federal courts have "no business" addressing whether an individual's asserted religious belief is "reasonable." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014). Instead, the "narrow function" is to "determine whether the line drawn reflects an honest conviction." *Id.* at 725 (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715 (1981)). "Only beliefs rooted in religion are protected by the Free Exercise Clause . . . ." *Thomas*, 450 U.S. at 713 (internal citations omitted).

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

Response: Please see my answers to Question 19 and 19(a).

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

Response: I lack the knowledge and expertise to comment on the Catholic Church's official position on the acceptability or moral righteousness regarding abortion.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the U.S. Supreme Court held that, under the "ministerial exception," religious organizations are exempt from employment discrimination claims because the plaintiffs' roles in educating and guiding students in their faith were at the "core" of the private religious school's mission. As a result, the government was prohibited under the First Amendment to intrude in such employment decisions.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the City of Philadelphia refused to work with a Catholic organization in its foster care program because the organization would not certify same-sex couples as foster parents. *Id.* at 1874-75. The U.S. Supreme Court found that the City's action was subject to strict scrutiny, reasoning that the contract's nondiscrimination provision was not "neutral and generally applicable" because the provision allowed the City to grant exceptions in its "sole discretion." *Id.* at 1879, 1881. Applying strict scrutiny, the Court held that the City offered "no compelling reason why it has a particular interest in denying an exception to [the religious entity] while making them available to others." *Id.* at 1882. As a result, the Court remanded case for further proceedings.

22. **In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.**

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the U.S. Supreme Court held that Maine's "nonsectarian" mandate for its tuition assistance program for private secondary schools was unconstitutional. Specifically, the Court found that the law was subject to and could not pass the strict scrutiny analytical framework because it conditioned benefits in a way that "effectively penalizes the free exercise" of religion. *Id.* at 1997 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)). The Court found that the program violated the Free Exercise Clause of the First Amendment because the "State's anti-establishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit." *Carson*, 142 S. Ct. at 1998.

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

Response: The U.S. Supreme Court in *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022), held that the school district's sanctions, including firing the coach, for his post-game brief, quiet, and personal prayer at midfield violated his right to free exercise of religion and free speech under the First Amendment.

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

Response: In *Mast v. Fillmore County*, the U.S. Supreme Court vacated the judgment of the lower court and remanded the matter in light of its recent decision in *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). 141 S. Ct. 2430 (2021). The case involved Fillmore County's refusal to grant an exception to the County's septic system mandate requested by an Amish community based on their sincerely held religious beliefs. *Id.* at 2431. In his concurrence, Justice Gorsuch explained that the County and lower courts misapplied the

strict scrutiny analysis required under the Religious Land Use and Institutionalized Persons Act (RLUIPA) by treating the County's general interest in sanitation regulation as compelling without reference to applying those rules specifically to the Amish community. Instead, under *Fulton*, strict scrutiny requires "a more precise analysis" that scrutinizes "the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 2432.

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: 18 U.S.C. § 1507 prohibits anyone from "obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, picket[ing] or parad[ing] in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer." In addition, the statute prohibits the use of a "sound-truck or similar device" or resorting "to any other demonstration in or near any such building or residence." *Id.* As a sitting superior court judge and nominee to serve as a U.S. district judge, it would be inappropriate for me to express my personal views on protests in front of the homes of U.S. Supreme Court Justices.

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, and I am not familiar with any judicial trainings which teach, counsel, or promote any of the examples set forth in this question.

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: Article II, Section 2, Clause 2 of the Constitution vests the authority to make political appointments with the President of the United States, upon advice and consent of the Senate. As a sitting superior court judge and nominee to serve as a U.S. district judge, it would be inappropriate for me to express a view on either the appropriateness or constitutionality of considerations made in the political appointment process because such an issue may come before the courts.

30. **Is the criminal justice system systemically racist?**

Response: I have not studied the issue of systemic racism, and the issue has not been raised before me during my career at the Department of Justice or as a sitting superior court judge. If confirmed to serve as a U.S. district judge, and as I have done my whole life, I would ensure that any individual I interact with, in court or otherwise, is treated fairly and with dignity, regardless of their race.

31. **President Biden has created a commission to advise him on reforming the U.S. Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.**

Response: The question of whether the number of Supreme Court Justices should be altered is a question for policymakers. As a nominee to serve as a U.S. district judge, it would be inappropriate for me to express a view. I am bound by the precedent of the U.S. Supreme Court regardless of the size of its composition.

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: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court held that the original public meaning of the Second Amendment protects an individual's right to keep and bear arms in the home for self-defense. In *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2021), the Court concluded that the original public meaning of the Second Amendment also afforded the right to keep and bear arms for self-defense outside the home.

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: In *New York State Rifle and Pistol v. Bruen*, 142 S. Ct. 2111, 2126 (2022), the U.S. Supreme Court held that a firearm restriction violates the Second Amendment if the government is unable to demonstrate that its regulation restricting firearms is consistent with this Nation's historical tradition of firearm regulation.

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

Response: Yes. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: I am unaware of any Supreme Court or Third Circuit precedent that suggests that the right to own a firearm receives less constitutional protection than the right to vote.

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

Response: I am unaware of any Supreme Court or Third Circuit precedent that suggests that the right to own a firearm receives less constitutional protection than the right to vote.

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

Response: Under Article II, Section 3 of the United States Constitution, the President "shall take Care that the Laws be faithfully executed." In *United States v. Nixon*, 418 U.S. 683 (1974), the U.S. Supreme Court found that the "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *Id.* at 693.

During my tenure as an Assistant United States Attorney prosecuting a wide variety of federal crimes, including most specifically complex criminal fraud matters, I have made prosecutorial charging decisions based on the specific facts of a case and have never been instructed that an entire category of laws should not be enforced. As a sitting superior

court judge and as a nominee to serve as a U.S. district judge, it is not appropriate for me to opine or comment further.

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

Response: Generally, prosecutorial discretion refers to decisions by members of the executive branch to charge a matter based on the specific facts and circumstances of the case. Prosecutors typically have near-absolute discretion on whether or not to prosecute, what to charge to bring, and whether to engage in plea bargaining. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). I am unsure exactly what the question asks by "a substantive administrative rule change" but administrative rule changes are subject to the Administrative Procedure Act.

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

Response: No, the President does not have the unilateral authority to abolish the death penalty.

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. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the U.S. Supreme Court granted the plaintiffs' application to vacate a stay of a judgment that declared that a nationwide eviction moratorium that was imposed by the Director of Centers for Disease Control and Prevention in response to the COVID-19 pandemic was unlawful. The Court determined that the plaintiffs had a substantial likelihood of success on the merits as the CDC exceeded its authority and a balancing of equities weighed against a stay of the judgment in favor of the plaintiffs pending appeal.

42. **Does the United States have an over-incarceration problem?**

Response: As a sitting superior court judge and a nominee to serve as a U.S. district judge, it would be inappropriate to express an opinion on this issue which relates to a policy issue more appropriately left to the legislative branch.

a. **If so, please identify the factors justifying your response.**

Response: Please see my answer to Question 42.

43. **Do judges need to be concerned about equity?**

Response: Black's Law Dictionary (11th ed. 2019) defines "equity" as "fairness; impartiality; evenhanded dealing" and "the body of principles constituting what is fair and right." As a superior court judge, I strive to adjudicate each matter impartially and without bias or

favoritism. If confirmed, I will follow the law and apply Supreme Court and Third Circuit precedent.

44. **Do judges need to undergo implicit bias training?**

Response: This is a question is best left to policymakers and those who manage the federal judicial system. If confirmed, I will do everything in my power to ensure that litigants are afforded respect and dignity, and that I adjudicate each case in a fair and impartial manner.

45. **Are there instances where a judge should not honor the judicial code of conduct?**

Response: No.

a. **If so, can you please identify all instances?**

Response: N/A.

b. **What justifies a departure from the judicial code of conduct?**

Response: N/A.

Senator Josh Hawley
Questions for the Record

Judge Robert Kirsch
Nominee, U.S. District Court for the District of New Jersey

1. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**
    a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years**
    b. **The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence**
    c. **The enhancement for offenses involving the use of a computer**
    d. **The enhancements for the number of images involved**

    Response includes subparts (a), (b), (c), and (d): I am not familiar with Justice Jackson's sentencing practices during her time as a district judge. A sentencing court is required to fashion a sentence that is sufficient but not greater than necessary, and district judges must first begin by calculating the applicable advisory guidelines range, including any appropriate sentencing enhancements. *See Gall v. United States*, 552 U.S. 38, 50 (2007). The district judge should also consider all of the factors outlined in 18 U.S.C. § 3553(a) and sentence defendants individually. If confirmed, I would consider the specific facts of the case, the history and characteristics of the defendant in determining whether a given sentencing enhancement is appropriate, and in so doing, I would consider the positions of the government, probation and the defendant.

2. **Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.**
    a. **Do you agree that the penalties should be aligned?**
    b. **If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?**
    c. **If an offender before you is charged only with possession even though uncontested evidence shows the offender also committed the crime of receiving child pornography, will you aim to sentence the offender to between 5 and 10 years?**

    Response includes subparts (a), (b), and (c): As a sitting superior court judge and a nominee to serve as a federal judge, it would be inappropriate to express an opinion on this issue which relates to a policy issue that is left to the legislative branch. If

confirmed to the federal district court, I would follow and apply all current federal law.

3. **Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."**
    a. **Do you agree with that philosophy?**

        Response: I am not familiar with Justice Marshall's comments nor the context in which they were given; however, I do not agree that judges should inject their personal beliefs into judicial decision-making.

    b. **If not, do you think it is a violation of the judicial oath to hold that philosophy?**

        Response: As stated in response to Question 3(a), I am not familiar with Justice Marshall's comments nor the context in which they were given. It would nonetheless be inappropriate for me to comment on whether a current or former Supreme Court Justice violated a judicial oath.

4. **Do you believe that the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* is settled law?**

    Response: Yes.

5. **What is the standard for each kind of abstention in the court to which you have been nominated?**

    Response: New Jersey district court judges may apply several forms of abstention. The doctrines described below are the most common.

    Under *Pullman* abstention, the federal court must find that (1) uncertain issues of state law underlie the federal constitutional claims; (2) the state law issues are amenable to a state court interpretation that would obviate the need for, or substantially narrow, adjudication of the federal claim; and (3) important state policies would be disrupted through a federal court's erroneous construction of state law. *Artway v. Attorney Gen.*, 81 F.3d 1235, 1270 (3d Cir. 1996); *Chez sez III Corp. v. Township of Union*, 945 F.2d 628, 631 (3d Cir. 1991). If all factors are present, the court must further consider whether abstention is appropriate based on "the availability of an adequate state remedy, the length of time the litigation has been pending, and the impact of delay on the litigants." *Artway*, 81 F.3d at 1270.

    Younger abstention requires a federal court to refrain from hearing a case that threatens to interfere with a pending state-court case, provided that the state-court case is either "(1) [a] state criminal prosecution[]; (2) [a] civil enforcement proceeding[]; [or] (3) [a] civil proceeding[] involving orders in furtherance of the state courts' judicial function." *Smith*

& Wesson Brands, Inc. v. AG, 27 F.4th 886, 891 (3d Cir. 2022) (quotations omitted) (citing Sprint *Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013)).

Burford abstention instructs courts to "avoid federal intrusion into matters of local concern [] which are within the special competence of local courts." *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 303-04 (3d Cir. 2004). Deciding whether to abstain under *Burford* requires a two-step analysis. *Riley v. Simmons*, 45 F.3d 764, 771 (3d Cir. 1995) (citing *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989)). First, the court must assess "whether timely and adequate state-court review is available." *Id.* If so, the court must then consider the second step, which assesses whether the case "involves difficult questions of state law impacting on the state's public policy or whether the court's exercise of jurisdiction would have a disruptive effect on the state's efforts to establish a coherent public policy on a matter of important state concern." *Id. See also Hi Tech Trans*, 382 F.3d at 304.

Colorado River abstention permits a federal court to abstain for reasons of judicial economy where a "parallel" proceeding exists in state court involving the same parties, claims, and remedies sought. *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 307-08 (3d Cir. 2009); *Yang v. Tsui*, 416 F.3d 199, 204 (3d Cir. 2005). If the court finds that the proceedings are parallel, it must then determine whether "extraordinary circumstances meriting abstention" exist. *Nationwide*, 571 F.3d at 308 (quoting *Spring City Corp. v. American Bldgs. Co.*, 193 F.3d 165, 171 (3d Cir. 1999)). Such factors include "(1) [in an *in rem* case,] which court first assumed jurisdiction over [the] property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether federal or state law controls; and (6) whether the state court will adequately protect the interests of the parties." *Id.*

Rooker-Feldman abstention "precludes federal district courts from exercising jurisdiction over appeals from unfavorable state court judgments." *Vuyanich v. Smithton Borough*, 5 F.4th 379, 381 (3d Cir. 2021). In order for a federal court to abstain on *Rooker-Feldman* doctrine grounds, the court must find that each of the following four requirements are met: "(1) the federal plaintiff lost in state court; (2) the plaintiff 'complains of injuries caused by the state-court judgments'; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments." *Id.* at 385 (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)).

6. **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: N/A.

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

Response: The Supreme Court has looked to the original public meaning to interpret the Constitution in a number of cases. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court looked to the original public meaning to interpret the Second Amendment. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court looked to the original public meaning of the text of the Confrontation Clause in its decision. If confirmed, I will follow Supreme Court and Third Circuit precedent regarding the appropriate method of constitutional interpretation.

8. Do you consider legislative history when interpreting legal texts?

Response: If confirmed and I am confronted with a question of the interpretation of a statute not previously addressed by Supreme Court or Third Circuit precedent, I would first look to the statute's text to determine if its meaning is clear and unambiguous. If the meaning is clear and unambiguous, the inquiry ends. However, to the extent the meaning is unclear or ambiguous, the Supreme Court has authorized other methods to assist statutory interpretation, including statutory canons of construction and, when appropriate, legislative history. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011).

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: Not all legislative history is to be treated the same. The U.S. Supreme Court has recognized that some types of legislative history (e.g., contemporaneous committee reports) are more probative of legislative intent than others (e.g., comments made during floor debate). *See, e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017); *Garcia v. United States*, 469 U.S. 70, 76 (1984). I would follow the teachings of the U.S. Supreme Court and Third Circuit on the issue of whether and when to consult legislative history to discern legislative intent.

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

Response: The Constitution is a domestic document that should generally be interpreted consistent with domestic authorities. If confirmed, I would follow all binding U.S. Supreme Court and Third Circuit precedent in interpreting provisions of the United States Constitution. Except as directed by the U.S. Supreme Court and Third Circuit, I would not consult or defer to the laws of foreign nations, other than in the narrow circumstances when the U.S. Supreme Court has ruled that doing so is appropriate.

9. 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 has held that "all Eighth Amendment method-of-execution claims" are governed by the following two-part standard. *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). First, the prisoner must show that the state's method of execution presents a "substantial risk of serious harm," described as "severe pain over and above death itself." *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)). Second, the prisoner must establish that an alternative method exists that is "feasible, readily implemented, and in fact significantly reduces the risk of harm involved." *Id.* (citations and quotations omitted). To my knowledge, the Third Circuit has not developed any additional standards beyond this framework.

10. 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.

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

Response: The Supreme Court has "reject[ed] the invitation" to recognize a substantive due process right to DNA analysis. *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 72 (2009). Relying upon *Osborne*, the Third Circuit has acknowledged that "[t]here is no substantive due process right to access DNA evidence." *Grier v. Klem*, 591 F.3d 672, 678 (3d Cir. 2010). However, a habeas petitioner may raise a procedural due process claim on the grounds that a State's procedures for postconviction relief—and in particular those procedures in place for consideration of DNA-testing requests—are so flawed as to be "fundamentally unfair or constitutionally inadequate." *Id.* at 679.

12. 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.

13. 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 U.S. Supreme Court precedents, a plaintiff bears the initial burden of showing that a government regulation has burdened his or her sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421-22 (2022). A regulation that treats "*any* comparable secular activity more favorably than religious exercise" is not neutral or generally applicable. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). Neither is a government regulation neutral – even if it appears facially neutral – where the record reveals animus or hostility toward a particular religious belief. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). Moreover, a regulation will not be generally applicable where it is subject to discretionary individualized exemptions. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021).

If the plaintiff meets their initial burden, strict scrutiny is triggered and the burden shifts to the government to demonstrate that its action was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. *Kennedy*, 142 S. Ct. at 2422 (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 526 (1993)); *Tandon*, 141 S. Ct. at 1296 (2021). If instead the regulation is found to only "incidentally burden[] religion" but otherwise be neutral and generally applicable, then rational basis review is applied. *Fulton*, 141 S. Ct. at 1878 (2021).

14. 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 13.

15. 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 Third Circuit, following Supreme Court guidance on the matter, has emphasized that "no court should inquire into the validity of plausibility of the beliefs; instead, the task of a court is 'to decide whether the beliefs professed [] are sincerely held and whether they are, in [the believer's] own scheme of things, religious.'" *Fallon v. Mercy Catholic Med. Ctr.*, 877 F.3d 487 (3d Cir. 2017) (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)). To evaluate whether a belief is "religious," courts in the Third Circuit must consider whether the beliefs "address[] fundamental and ultimate questions having to do with deep and imponderable matters, are comprehensive in nature, and are accompanied by certain formal and external signs." *Id.* at 491 (quotations omitted) (citing *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981)). Regarding the sincerity

component, the court must determine whether the belief reflects "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724-25 (2014).

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms for the purpose of self-defense inside the home.

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.

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

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

Response: In *Lochner*, in his dissent, Justice Holmes expressed the view that the case should have been decided on legal principles and not "a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). As a sitting superior court judge and nominee to the federal bench, it would not be appropriate for me to express an opinion regarding the merits of Justice Holmes's statement.

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

Response: *Lochner* was effectively overturned by a number of subsequent U.S. Supreme Court decisions and thus *Lochner* is no longer controlling. *See West Coast Hotel, Co. v. Parrish*, 300 U.S. 379 (1937); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). If confirmed, I would not follow *Lochner* as it is no longer binding U.S. Supreme Court precedent. As a sitting superior court judge and as nominee to the federal judicial bench, it would not be appropriate for me to opine or comment on whether a decision of the Supreme Court was correctly decided. If confirmed, I would follow current binding Supreme Court and Third Circuit precedent, including the decisions of *West Coast Hotel* and *Ferguson*.

18. 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, I am not aware of any U.S. Supreme Court opinions that have not been formally overruled by the Supreme Court but are no longer good law.

a. If so, what are they?

Response: N/A.

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

Response: Yes.

19. 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: I am not familiar with Judge Learned Hand's statement in *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945). As a sitting superior court judge and as a nominee to serve as a federal judge, it would be inappropriate for me to express an opinion on this issue. If confirmed, I will faithfully apply all binding precedent of the Supreme Court and the Third Circuit as to what constitutes a monopoly.

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

Response: Please see my answer to 19(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: If confirmed, I will apply all Supreme Court and Third Circuit precedents to the facts of the case before me. For example, the Third Circuit has found that absent other pertinent factors, a market share significantly larger than 55% has been required to established prima facie market power. *United States v. Dentsply, Int'l*, *Inc.*, 399 F.3d 181, 187 (3d Cir., 2005). The Supreme Court has also held that "80% to 95% [of a market] . . . with no readily available substitutes" is sufficient to constitute a monopoly. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992).

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

Response: In general, there is no "federal common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

21. 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: If confirmed, I would defer to the interpretation of the state constitution provided by the state's highest court. In *Wainwright v. Goode*, 464 U.S. 78, 84 (1983), the U.S. Supreme Court stated that "the views of the state's highest court with respect to state law are binding on the federal courts." *See also Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (standing for the general proposition that there is no general federal common law and that federal courts sitting in diversity should defer to state court interpretations of state substantive law).

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

Response: Please see my answer to Question 21. Generally, identical texts should be interpreted in an identical manner.

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

Response: Yes, state constitutions may afford greater, but not lesser, protections than federal constitutional protections. *See Florida v. Powell*, 559 U.S. 50, 59 (2010).

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

Response: As a sitting superior court judge and as a nominee to serve as a federal judge, it is generally inappropriate for me to express an opinion as to whether a particular case was correctly decided. However, consistent with the practice of past nominees, and because this holding is so widely accepted and not likely to be challenged in future litigation, I am comfortable stating that *Brown v. Board of Education* was correctly decided.

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

Response: I am unaware of any U.S. Supreme Court or Third Circuit precedent prohibiting a federal district court from issuing a nationwide injunction.

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

Response: Article III's general equitable power and Federal Rule of Civil Procedure 65 provide the authority for issuing an injunction. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017) (upholding the district court's grant of a nationwide injunction to bar the enforcement of an executive order provision which suspended the entry of certain foreign nationals into the United States). However, while district courts often have discretion in framing injunctions, the Third Circuit and the U.S. Supreme Court have noted that injunctions are "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Free Speech Coal, Inc., v. AG of the United States*, 974 F.3d 408, 430 (3d Cir. 2020) (quoting *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 165 (2010)).

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

Response: As a sitting superior court judge and as a nominee to serve as a federal judge, it is generally inappropriate for me to comment on a legal issue that is likely to come before the courts. If confirmed, and presented with this question, I would carefully review the facts of the case and the applicable law, the rules, and U.S. Supreme Court and Third Circuit precedent to determine the proper scope of any proposed injunction.

24. 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 23(b).

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

Response: Federalism is one of the critical governmental constructs to diffuse centralized governmental power, one of the framers' central priorities. As the U.S. Supreme Court noted: "Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 567 U.S. 387, 398 (2012).

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

Response: Please see my answer to Question 5.

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

Response: The advantages and disadvantages of awarding damages versus injunctive relief are fact and case specific. Generally, money damages compensate for past injuries and may be the preferred remedy where some amount of money may adequately make the plaintiff whole. Injunctive relief, generally, may be sought to address or prevent future harm and irreparable injury.

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

Response: Aside from the substantive rights articulated in the first eight amendments of the U.S. Constitution that have been incorporated as against the states through the Due Process Clause, the Supreme Court recently restated that certain substantive rights, though not specifically enumerated in the Constitution, are entitled to due process protection where those rights are "deeply rooted in [our] history and tradition" and "implicit in the concept of ordered liberty." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) (quoting *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997) (internal quotations omitted)). The substantive rights recognized by the Court include, but are not limited to: the right to purchase and use contraceptives in marriage, *Griswold v. Connecticut*, 318 U.S. 479 (1965); the right to marry a person of a different race, *Loving v. Virginia*, 377 U.S. 1 (1967); the right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015); the right to custody of one's own children, *Stanley v. Illinois*, 405 U.S. 645 (1972); the right to direct the teaching and upbringing of one's own children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

29. 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 answer to Question 13.

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

Response: The Free Exercise Clause encompasses the freedom of worship and protects religious practices. *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940); *Lee v. Weisman*, 505 U.S. 577, 591 (1992). *See also Wallace v. Jaffree*, 472 U.S. 38, 53 (1985) ("[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.").

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

Response: Please see my answer to Question 13.

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 answer to Question 15.

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 U.S. Supreme Court has instructed that the Religious Freedom Restoration Act has broad applicability to all federal laws. The statute, by its terms, applies "to all Federal law, and the implementation of that law, whether statutory or otherwise," subject to limited exceptions. 42 U.S.C. § 2000bb-3.

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: No.

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

a. What do you understand this statement to mean?

Response: I am not familiar with this quote by Justice Scalia or the context in which it was made but I understand it to mean that a judge must objectively apply the facts to the law regardless of one's personal views or beliefs.

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

Response: No.

a. If yes, please provide appropriate citations.

Response: N/A.

32. 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.

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

Response: I have not studied the issue of systemic racism, and the issue has not been raised before me during my career at the Department of Justice or as a sitting superior court judge. If confirmed, I would ensure – as I have done my whole life – that any individual I interact with, in court or otherwise, is treated fairly and with dignity, regardless of their race.

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

Response: Yes.

35. How did you handle the situation?

Response: As a lawyer, I was duty-bound to represent my client's best interest within the bounds of the law and consistent with professional rules of responsibility, without consideration to my personal views or beliefs. Similarly, as a judge, I am dutybound to abide by precedents of higher courts and faithfully to apply the law without regard to my personal views.

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

Response: Yes.

37. 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 more than any of the others.

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

Response: As a judicial nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or may come before the court. In *Dobbs v. Jackson Women's Health Org.*, the U.S. Supreme Court explicitly left this question open and declined to express a "view about if and when prenatal life is entitled to any of the rights enjoyed after birth." 142 S. Ct. 2228, 2261 (2022). If confirmed to serve as a federal district judge, I would faithfully apply Supreme Court and Third Circuit precedent.

39. 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: Yes. I was deposed in the matter of *Daibo v. Ned and Melvin Kirsch, et al.*, 316 N.J. Super. 580 (1998). I was dismissed from the matter.

I testified as a non-party witness in a civil action in *Simone v. United States*, 2015 WL 419691 (E.D.N.Y. Jan. 31, 2015), *aff'd*, 642 Fed. Appx. 73 (2d Cir. March 16, 2016).

I also testified in my confirmation hearing to serve as a superior court judge in or around December of 2009, and in my reconfirmation hearing approximately 7 years later.

40. 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.

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

a. Apple?

Response: Yes.

b. Amazon?

Response: Yes.

c. Google?

Response: No.

d. Facebook?

Response: Yes.

e. Twitter?

Response: No.

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

Response: No.

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

Response: N/A.

44. Have you ever confessed error to a court?

Response: No.

45. If so, please describe the circumstances.

Response: N/A.

46. 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: Pursuant to my oath administered to me at the confirmation hearing held on January 25, 2023, I provided truthful answers to all questions put to me on that date and continue to do so in these inquiries.

Questions from Senator Thom Tillis
for Robert Kirsch
Nominee to be United States District Judge for the District of New Jersey

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

   Response: Yes.

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

   Response: While I do not believe there is a settled definition of judicial activism, my understanding is that it involves a judge's insertion of their personal beliefs and views into their judicial decision-making. I do not believe judicial activism is appropriate.

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

   Response: I have served as a superior court judge for 13 years and view impartiality as a prerequisite and expectation for a judge.

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, there are occasions when faithfully interpreting the law may sometimes run counter to a judge's personal beliefs or views, but judges are required to follow the law as enacted by the legislature regardless of their personal opinions.

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

   Response: No.

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

   Response: If confirmed to serve as a federal district judge, I will faithfully follow the U.S. Supreme Court precedents relating to an individual's Second Amendment rights, and follow binding precedents such as *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022).

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

Response: If confirmed, I would faithfully apply U.S. Supreme Court and Third Circuit precedent regarding the Second Amendment, including *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022). As to this specific hypothetical, as a sitting superior court judge and as a nominee to serve as a federal judge, I must refrain from offering any opinion as the above issue may be litigated and come before the court.

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

Response: Qualified immunity is a judicial doctrine created by the U.S. Supreme Court, which immunizes a government official from civil damages who acted under color of state law unless they violated a clearly established right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotations omitted). Under the Supreme Court's decision in *Pearson*, a court must consider: (1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right; and (2) whether that constitutional right was clearly established at the time of the alleged violation. If confirmed to serve as a federal district court judge, I would follow Supreme Court and Third Circuit precedent regarding the application of qualified immunity.

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

Response: Whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers is a policy consideration for the legislature. As a sitting superior court judge and nominee to serve as a federal judge, and out of respect for the separation of powers, it would be inappropriate for me to comment or render an opinion on the issue.

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

Response: Please see my answer to Question 10.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: During my more than 30 years of practice, which included a two-year clerkship with a federal district judge; approximately 8 years practicing civil litigation on behalf of the

United States at both the U.S. Department of Justice and U.S. Attorney's Office; approximately 8 years as a federal criminal prosecutor at the U.S. Attorney's Office; and 13 years as a superior court judge, I have not handled any cases involving patent jurisprudence. If confirmed to serve as a federal district judge, I would – as I have in the past when confronted with an issue with which I was unfamiliar – carefully consider the arguments and submissions of the parties, independently research all applicable areas of the law, and render an objective, well-reasoned opinion, subject to applicable U.S. Supreme Court and Third Circuit precedent.

13. **Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?**

    Response: As a sitting superior court judge and as a nominee to serve as a federal judge, it would not be appropriate for me to comment on a decision best left to the legislature, or on issues which may come before me in the future. If a patent eligibility issue comes before me, I will apply the Patent Act, 35 U.S.C. § 101, and all binding U.S. Supreme Court and Third Circuit precedent.

14. **Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.**

    a. **What experience do you have with copyright law?**

       Response: In the almost two decades that I have served as a trial attorney practicing civil and criminal law, and the well more than a decade serving as a superior court judge, I have not handled a case involving copyright law.

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

       Response: In the almost two decades that I have served as a trial attorney practicing civil and criminal law, and the well more than a decade serving as a superior court judge, I have not handled a case involving the Digital Millennium Copyright Act.

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

       Response: In the almost two decades that I have served as a trial attorney practicing civil and criminal law, and the well more than a decade serving as a

superior court judge, I have not handled a case involving intermediary liability for online service providers that host unlawful content by users.

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

Response: In the almost two decades that I have served as a trial attorney practicing civil and criminal law, and the well more than a decade serving as a superior court judge, I have not handled any cases involving First Amendment free speech issues or intellectual property issues, including copyright matters.

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

a. In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?

Response: With regard to the interpretation of a federal statute, the first inquiry is to examine whether the U.S. Supreme Court or Third Circuit previously interpreted the subject statutory provision at issue. If there is binding precedent from a higher court, I would apply its guidance regarding the statutory interpretation. If there were no precedents, I would examine the text of the statute itself. If the text is clear and unambiguous, I would apply the plain meaning of the text and the interpretive inquiry would end. If the language is ambiguous and there is no applicable Supreme Court or Third Circuit precedent, I would also consult persuasive authority such as Supreme Court or Third Circuit precedent on analogous statutes or similar language, other circuit precedents, relevant canons of interpretation, and legislative history, if necessary and authorized by a higher court.

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

Response: The level of deference given to an agency's interpretation of a statute depends on the facts of the case and the textual clarity of the statutory provision in

question. The court must first assess the asserted power at issue in the context of the statutory text. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute is not unambiguous on its face, then the court will defer to the agency's interpretation of the text provided that the interpretation is reasonable and "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and [] the agency interpretation claiming deference was promulgated in the exercise of that authority." *La. Forestry Ass'n v. Sec'y United States DOL*, 745 F.3d 653, 670 (3d Cir. 2014) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

The agency's method of interpretation also influences the level of deference provided. For example, an interpretation promulgated through formal or informal rulemaking will usually be afforded *Chevron* deference. In contrast, agency interpretations set forth in pamphlets, circulars, or informal guidelines are entitled deference "only to the extent that those interpretations have the power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Recently, however, the Supreme Court found it inappropriate to defer to an agency's interpretation of ambiguous text where the asserted power would constitute a "radical or fundamental change" to the statutory scheme or grant the agency significant control over the national economy. *West Virginia v. EPA*, 597 U.S. ____, 18-19 (2022).

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

Response: As a sitting superior court judge and as a nominee to serve as a federal judge, it would not be appropriate for me to comment on or predict how I might rule on hypothetical cases involving issues which may come before me in the future. If confirmed, I will faithfully follow all U.S. Supreme Court and Third Circuit precedent.

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

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

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

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

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

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

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

Response: In the District of New Jersey, there are 17 "active" district judges (and a number of additional senior district judges). All active district judges in New Jersey are assigned every type of case, including patent cases, and the cases are generally assigned through a computer-generated program, thereby foreclosing the potential problem outlined in the question.

b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

Response: Please see my answer to Question 17(a).

c. Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

Response: No.

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

Response: Yes, I commit not to engage in such conduct.

18. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

Response: This poses an issue for consideration by policymakers or the U.S. Judicial Conference. As a sitting superior court judge and as a nominee to serve as a federal district judge, it would not be appropriate for me to opine or comment on these issues.

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: Please see my answer to Question 17(a).