Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Brendan A. Hurson
Nominee to be United States District Judge for the District of Maryland

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

   Response: I am not familiar with the statement or its context, however, I disagree with it. Judges must decide cases by fairly and impartially applying precedent to facts. A judge's personal opinions or values should not guide their decision-making. As a sitting United States Magistrate Judge, I apply the binding precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit. If confirmed as a district judge, I would continue to do so.

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

   Response: I am not familiar with the statement or its context, however, I disagree with it. Judges of lower courts are bound to apply the binding precedent of the courts above them. As a sitting United States Magistrate Judge, I apply the binding precedent of the Supreme Court and the Fourth Circuit Court of Appeals. If confirmed as a district judge, I would continue to do so.

3. **Please define the term "living constitution."**

   Response: Black's Law Dictionary (11th ed. 2019) defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values."

4. **Do you agree with then-Judge Ketanji Brown Jackson when she said in 2013 that she did not believe in a "living constitution"?**

   Response: I am not familiar with the statement or its context. However, assuming that Justice Jackson was articulating the view that the Constitution has a fixed meaning that can only be changed through the amendment process outlined in Article V, I agree. As the Supreme Court has noted, "[a]lthough its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

   Response: Criticism of judicial opinions is to be expected and protected by the First Amendment. However, as a sitting United States Magistrate Judge, I am aware of the need for, and discussions surrounding, judicial security. Federal law prohibits threats against a judge made with the purpose of attempting to influence the "due administration of justice." 18 U.S.C. § 1503(a). Federal law also prohibits retaliation against a federal judge "by false claim or slander of title." 18 U.S.C. § 1521. If called upon to adjudicate a matter involving alleged threats to a member of the judiciary, I would fairly and impartially apply the law to the facts before me.

6. **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: Federal law outlines the factors to be considered when imposing a sentence in 18 U.S.C. § 3553. This statute does not rank the purposes of sentencing or provide comment on the relative importance of each purpose. If confirmed, before imposing a sentence, I would consult those sources that both Congress and binding precedent have directed me to consult, including the factors outlined in 18 U.S.C. § 3553, the relevant sentencing guidelines, and any precedent from the Supreme Court and the Fourth Circuit Court of Appeals.

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

   Response: I have not reviewed Supreme Court decisions for the purpose of determining a judicial philosophy. However, as a United States Magistrate Judge, my judicial philosophy is to approach each case with a completely open mind and to treat all parties, witnesses, and counsel with respect. I thoroughly review the record, diligently research the applicable law, and then fairly and neutrally apply that law to the facts before me. I follow the binding precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit. I endeavor to treat all matters before me as though they are critically important as I recognize that each case is of the utmost importance to the parties involved. I also strive to ensure that I maintain a judicial temperament, that I remain humble, and that I do not allow emotion or ego to substitute for fair judgment. If confirmed as a district judge, I would continue to adhere to this judicial philosophy.

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

Response: Please see my response to Question 7.

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

Response: This statute holds that:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades 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, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 1507. If called upon to adjudicate a matter involving this statute, I would fairly and impartially apply the law to the facts before me.

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

Response: I do not believe that the Supreme Court or the Court of Appeals have adjudicated the constitutionality of 18 U.S.C. § 1507. I am aware that the Supreme Court rejected a challenge to a similar state statute in *Cox v. Louisiana*. 379 U.S. 559, 564 (1965).

11. **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 United States Magistrate Judge, I ordinarily cannot comment on whether a case was correctly decided. However, as numerous prior judicial nominees have observed, the issues presented in *Brown v. Board of Education* are highly unlikely to be litigated in the future, and therefore I believe it is appropriate to express my view that the case was correctly decided. If confirmed as a district judge, I would faithfully apply *Brown v. Board of Education* and all other Supreme Court and Fourth Circuit precedent.

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

    Response: As a sitting United States Magistrate Judge, I ordinarily cannot comment on whether a case was correctly decided. However, as numerous prior judicial nominees have observed, the issues presented in *Loving v. Virginia* are highly unlikely to be litigated in the future, and therefore I believe it is

appropriate to express my view that the case was correctly decided. If confirmed as a district judge, I would faithfully apply *Loving v. Virginia* and all other Supreme Court and Fourth Circuit precedent.

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

Response: Canon 3A(6) of the Code of Conduct for United States Judges provides that a judge should not make public comment on the merits of a matter pending or impending in any court. Therefore, I cannot comment on whether this case was correctly decided. If confirmed as a district judge, I would faithfully apply *Griswold v. Connecticut* and all other Supreme Court and Fourth Circuit precedent.

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

Response: Canon 3A(6) of the Code of Conduct for United States Judges provides that a judge should not make public comment on the merits of a matter pending or impending in any court. Therefore, I cannot comment on whether this case was correctly decided. That said, the Supreme Court overruled this case in *Dobbs v. Jackson Women's Health Organization*. 142 S. Ct. 2228, 2279 (2022). If confirmed as a district judge, I would faithfully apply *Dobbs* and all other Supreme Court and Fourth Circuit precedent.

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

Response: Canon 3A(6) of the Code of Conduct for United States Judges provides that a judge should not make public comment on the merits of a matter pending or impending in any court. Therefore, I cannot comment on whether this case was correctly decided. That said, the Supreme Court overruled this case in *Dobbs v. Jackson Women's Health Organization*. 142 S. Ct. 2228, 2279 (2022). If confirmed as a district judge, I would faithfully apply *Dobbs* and all other Supreme Court and Fourth Circuit precedent.

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

Response: Canon 3A(6) of the Code of Conduct for United States Judges provides that a judge should not make public comment on the merits of a matter pending or impending in any court. Therefore, I cannot comment on whether this case was correctly decided. If confirmed as a district judge, I would faithfully apply *Gonzales v. Carhart* and all other Supreme Court and Fourth Circuit precedent.

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

Response: Canon 3A(6) of the Code of Conduct for United States Judges provides that a judge should not make public comment on the merits of a matter

pending or impending in any court. Therefore, I cannot comment on whether this case was correctly decided. If confirmed as a district judge, I would faithfully apply *District of Columbia v. Heller* and all other Supreme Court and Fourth Circuit precedent.

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

Response: Canon 3A(6) of the Code of Conduct for United States Judges provides that a judge should not make public comment on the merits of a matter pending or impending in any court. Therefore, I cannot comment on whether this case was correctly decided. If confirmed as a district judge, I would faithfully apply *McDonald v. City of Chicago* and all other Supreme Court and Fourth Circuit precedent.

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

Response: Canon 3A(6) of the Code of Conduct for United States Judges provides that a judge should not make public comment on the merits of a matter pending or impending in any court. Therefore, I cannot comment on whether this case was correctly decided. If confirmed as a district judge, I would faithfully apply *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* and all other Supreme Court and Fourth Circuit precedent.

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

Response: Canon 3A(6) of the Code of Conduct for United States Judges provides that a judge should not make public comment on the merits of a matter pending or impending in any court. Therefore, I cannot comment on whether this case was correctly decided. If confirmed as a district judge, I would faithfully apply *New York State Rifle & Pistol Association v. Bruen* and all other Supreme Court and Fourth Circuit precedent.

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

Response: Canon 3A(6) of the Code of Conduct for United States Judges provides that a judge should not make public comment on the merits of a matter pending or impending in any court. Therefore, I cannot comment on whether this case was correctly decided. If confirmed as a district judge, I would faithfully apply *Dobbs v. Jackson Women's Health Organization* and all other Supreme Court and Fourth Circuit precedent.

12. **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 & Pistol Association, Inc. v. Bruen*, the Supreme Court held that the proponent of such a regulation "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." 142 S. Ct. 2111, 2126 (2022). "Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* (citation omitted). If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit, including *Bruen*.

13. **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.

14. **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 Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

Response: In early 2021, I recall registering for an online presentation on the judicial nomination process sponsored by a number of organizations that may have included the Alliance for Justice. Beyond listening to a short portion of that presentation, I have had no contact with anyone associated with the Alliance for Justice. I have never had contact with, nor do I know, the individuals listed.

15. **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: I have not had contact with anyone associated with these groups.

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.

16. **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.

17. **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.

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

Response: On December 11, 2020, I submitted an application to the judicial selection committee established by Senators Cardin and Van Hollen for a position on the United States District Court for the District of Maryland. I interviewed with the committee on December 21, 2020. On December 20, 2022, I was interviewed by Senators Cardin and Van Hollen for a newer vacancy on the Court. On December 22, 2022, I learned from Senator Cardin's office that my name would be submitted to the White House for further consideration. On December 23, 2022, I interviewed with attorneys from the White House Counsel's Office. Since that time, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On March 20, 2023, the President announced his intent to nominate me.

19. **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.

20. **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.

21. **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.

22. **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.

23. **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.

24. **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 18.

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

    Response: The Office of Legal Policy at the Department of Justice (OLP) sent me these questions on April 25, 2023. I reviewed the questions, researched them, and then drafted my responses. The OLP provided limited feedback on my draft responses after which I submitted my responses.

Senate Judiciary Committee
Nominations Hearing
April 18, 2023
Questions for the Record
Senator Amy Klobuchar

For Judge Brendan Abell Hurson, nominee to be United States District Court Judge for the District of Maryland

You were appointed to serve as a U.S Magistrate Judge by the sitting district court judges of the District of Maryland which includes judges appointed by presidents of both parties. During your service as a magistrate you have written approximately 77 opinions and presided over a civil trial that has gone to verdict or judgment.

- **How has your experience as a magistrate judge informed your view on the role of a federal district court judge?**

  Response: As a United States Magistrate Judge since February of 2022, my responsibilities have included conducting preliminary proceedings in felony criminal cases, adjudicating criminal misdemeanor cases, conducting various pretrial matters on delegation from the judges of the district, conducting settlement conferences in civil matters, and trying and disposing of civil cases upon consent of the litigants. I have also served on several court committees and attended monthly bench meetings with the other judges of my court. These experiences have informed my view of the role of a federal district court judge by exposing me to the wide variety of responsibilities of that position as well as by introducing me to the diversity of cases I will face if fortunate enough to be confirmed. I am familiar with the often fast-paced environment of a trial court's chambers. My service as a United States Magistrate Judge has given me familiarity with the unpredictability of the tasks, and the significant volume of the work, that a district judge is called upon to complete in a diligent manner. My service has also provided me with the rewarding opportunity to work with judicial law clerks and other courthouse staff in serving the litigants who appear in our court. In short, my role as a United States Magistrate Judge has provided me with an invaluable "front row seat" to the work of federal district court judges and has given me experience as a fair and neutral arbiter. If fortunate enough to be confirmed as a district court judge, I will apply the many lessons I have learned as a United States Magistrate Judge.

Senator Hirono's Written Questions for Judge Brendan Abell Hurson
Nominee to the United States District Court for the District of Maryland
April 18, 2023

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

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

      Response: No.

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

      Response: No.

Senator Mike Lee
Questions for the Record
Brendan Hurson, Nominee to the United States District Court for the District of Maryland

1. How would you describe your judicial philosophy?

Response: As a United States Magistrate Judge, my judicial philosophy is to approach each case with a completely open mind and to treat all parties, witnesses, and counsel with respect. I thoroughly review the record, diligently research the applicable law, and then fairly and neutrally apply that law to the facts before me. I follow the binding precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit. I endeavor to treat all matters before me as though they are critically important as I recognize that each case is of the utmost importance to the parties involved. I also strive to ensure that I maintain a judicial temperament, that I remain humble, and that I do not allow emotion or ego to substitute for fair judgment. If confirmed as a district judge, I would continue to adhere to this judicial philosophy.

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

Response: In addressing cases that turn on the interpretation of a federal statute, I would first look to the text of that statute and any binding precedent from the Supreme Court or the Court of Appeals for the Fourth Circuit that interprets that statute. If this did not provide a satisfactory answer, I would consult relevant canons of construction and persuasive precedent from other circuits. I may then turn to legislative history, but only to the extent the Supreme Court has authorized and being mindful of the types of legislative history that the Supreme Court has found most relevant.

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

Response: "The first rule of constitutional interpretation is, of course, to apply the plain meaning of the text." *NLRB v. Enter. Leasing Co. Se., LLC*, 722 F.3d 609, 664 (4th Cir. 2013) (Duncan, J., concurring) (citing *McPherson v. Blacker*, 146 U.S. 1 (1892)). Therefore, I would begin by reviewing the text of the constitutional provision at issue and then turn to any binding precedent from the Supreme Court or the Court of Appeals for the Fourth Circuit interpreting the provision. This ordinarily ends the inquiry.

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

Response: The Supreme Court has held that original meaning and text play a critical role in interpreting the Constitution. S*ee District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed as a district judge,

I will faithfully apply precedent from the Supreme Court and the Court of Appeals for the Fourth Circuit if called upon to interpret provisions of the Constitution.

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: My approach to reading statutes is to first read the plain text of the statute along with any binding precedent interpreting that statute. *See Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."). I also ensure that I review any relevant precedent from the Supreme Court and the Court of Appeals for the Fourth Circuit that interprets the text of the statute at issue. If confirmed as a district judge, I would continue to adhere to the plain text of a statute along with any binding precedent interpreting that statute.

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

Response: In interpreting the text of the Second Amendment, the Supreme Court was "guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). If confirmed as a district judge, I would continue to rely on precedent from the Supreme Court and the Court of Appeals for the Fourth Circuit if called upon to interpret provisions of the Constitution

6. What are the constitutional requirements for standing?

Response: The three "irreducible minimum requirements" of Article III standing are:

> (1) an injury-in-fact (i.e., a concrete and particularized invasion of a legally protected interest); (2) causation (i.e., a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

Beck v. McDonald, 848 F.3d 262, 269 (4th Cir. 2017) (quoting *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

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

Response: Sections 8 and 9 of Article I specifically delineate the powers of Congress. Section 8 permits Congress "[t]o make all laws which shall be necessary and proper for carrying" these powers "into execution." Section 9 limits Congress's powers by, for example, forbidding Congress from passing an "ex post facto" law. In *McCulloch v. Maryland*, the Supreme Court held that Section 8 granted limited implied powers to Congress to pass laws that are "necessary and proper to carry into execution the powers of the government." 17 U.S. 316, 422 (1819) (internal quotation marks omitted).

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 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). If faced with this question, I would evaluate the constitutionality of the challenged law by applying the binding precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit.

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

Response: Yes. In *Washington v. Glucksberg*, the Supreme Court affirmed that it has "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed' . . . ." 521 U.S. 702, 720–21 (1997) (citations omitted). The *Glucksberg* Court described "the 'liberty' specially protected by the Due Process Clause" to include "the rights to marry," "to have children," "to direct the education and upbringing of one's children," "to marital privacy," "to use contraception," and "to bodily integrity." *Id.* at 720 (citations omitted); *see also Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257–58 (2022) (acknowledging the substantive due process rights previously recognized by the Supreme Court). As a United States Magistrate Judge, I faithfully follow binding precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit related to substantive due process. If confirmed as a district judge, I would continue to do so.

10. What rights are protected under substantive due process?

Response: Please see my answer to Question 9.

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

Response: As a sitting United States Magistrate Judge, it would be inappropriate to share my personal views, if any, on substantive due process rights. That said, "[t]he doctrine that prevailed in *Lochner*, . . . — that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). Also, the Supreme Court has held that there is no substantive due process right to an abortion. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). If confirmed as a district judge, I will faithfully apply precedent from the Supreme Court and the Court of Appeals for the Fourth Circuit in all cases including those involving substantive due process rights.

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

Response: The Supreme Court has "identified three broad categories of activity that Congress may regulate under its commerce power." *United States v. Lopez*, 514 U.S. 549, 558 (1995). These categories are: (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities that substantially affect interstate commerce." *Id.* at 558–59 (internal citations omitted).

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

Response: The Supreme Court looks to multiple factors to determine if a particular group qualifies as "suspect": (1) whether the class has been historically "subjected to discrimination"; (2) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group"; and (3) whether the class is "a minority or politically powerless." *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (citation omitted).

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

Response: "The Constitution's particular blend of separated powers and checks and balances was informed by centuries of political thought and experiences." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 116 (2015) (Thomas, J., concurring in the judgment). As the Supreme Court noted in *Buckley v. Valeo*, "[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." 424 U.S. 1, 122 (1976).

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

Response: If faced with this issue, I would review the text of the Constitution and apply any relevant binding precedent from the Supreme Court or the Court of Appeals for the Fourth Circuit. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (dividing "the exercises of Presidential power into three categories"); *Nixon v. United States*, 506 U.S. 224, 229 (1993) (examining "Art. I, § 3, cl. 6, to determine the scope of authority conferred upon the Senate by the Framers regarding impeachment"); *Bowsher v. Synar*, 478 U.S. 714, 730 (1986) ("The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.").

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

Response: Judges must decide cases by fairly and impartially applying the law to facts. A judge's personal opinions or values should not guide their decision-making. As a sitting United States Magistrate Judge, I apply the binding precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit. If confirmed as a district judge, I would continue to do so.

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

Response: Both present equally undesirable outcomes.

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

Response: I have not researched the trend referenced in the question and cannot intelligently comment on it. As a sitting United States Magistrate Judge, I apply the binding precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit. If confirmed as a district judge, I would continue to do so.

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

Response: Judicial review refers to the bedrock principal that it is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also* Black's Law Dictionary (11th ed. 2019) (defining "judicial review" as "[a] court's power to review the actions of other branches or levels of government; esp[ecially], the courts' power to invalidate legislative and executive actions as being unconstitutional"). Judicial supremacy is defined as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp[ecially] U.S. Supreme Court interpretations, are binding on the

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

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

Response: The Constitution mandates that all "Senators and Representatives . . . , and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support th[e] Constitution . . . ." U.S. Const. art. VI, cl. 3. The Supreme Court has rejected the argument that "there is no duty on state officials to obey federal court orders resting on th[e Supreme] Court's considered interpretation of the United States Constitution." *Cooper v. Aaron*, 385 U.S. 1, 4 (1958). As a sitting United States Magistrate Judge and a judicial nominee, it would be inappropriate to comment further on whether these obligations conflict and, if so, how an elected official should balance them.

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: Hamilton's opinion is rooted in the understanding that judges must approach each case with a completely open mind and must remain committed to fairly and neutrally applying the law. If confirmed, I would remain committed to interpreting and applying the law without regard for my personal views, if any, on the issue at hand.

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: As a sitting United States Magistrate Judge, I apply the binding precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit regardless of any opinion I might have of the higher court's decision. That is an obligation of a

lower court judge. If confirmed as a district judge, I would continue to apply binding precedent regardless of any opinion I may have of its constitutional underpinnings.

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: A defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) should play no role in the sentencing analysis. The factors a judge may consider at sentencing are set forth in 18 U.S.C. § 3553(a). Moreover, the United States Sentencing Guidelines contain a policy statement noting that "race, sex, national origin, creed, religion, and socioeconomic status are not relevant in the determination of a sentence." U.S. Sent'g Guidelines Manual § 5H1.10 (U.S. Sent'g Comm'n 2021).

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

Response: I am unfamiliar with the quotation or the context in which it was provided. "Equity" is defined as "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019).

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

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

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

Response: The Fourteenth Amendment guarantees "the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Amendment does not contain the term "equity" and I am not familiar with any binding precedent that has adopted the definition of "equity" contained in Question 24. If confirmed as a district judge, I will faithfully apply precedent from the Supreme Court and the Court of Appeals for the Fourth Circuit if called upon to interpret the Fourteenth Amendment.

27. How do you define "systemic racism?"

Response: Merriam-Webster's online dictionary defines "systemic racism" as "the oppression of a racial group to the advantage of another as perpetuated by inequity within interconnected systems (such as political, economic, and social systems)." Merriam-Webster.com Dictionary, Merriam-Webster, available at https://www.merriam-webster.com/dictionary/systemic%20racism.

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

Response: 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: Please see the answers to Questions 27 and 28.

Senator Josh Hawley
Questions for the Record

Brendan Hurson
Nominee, U.S. District Court for the District of Maryland

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

   Response: No.

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

      Response: Please see my response to Question 1.

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

   Response: The Supreme Court has held that original meaning and text play a critical role in interpreting many constitutional provisions. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 47–50 (2004) (Sixth Amendment Confrontation Clause). If confirmed as a district judge, I will faithfully apply precedent from the Supreme Court and the Court of Appeals for the Fourth Circuit if called upon to interpret provisions of the Constitution.

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

   Response: In interpreting legal texts, I first look to the plain text at issue. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."). If the text is unclear or ambiguous and there is no judicial precedent on point, I may then turn to legislative history, but only to the extent the Supreme Court allows it. *Id.* (noting that legislative history may be helpful "when interpreting *ambiguous* statutory language").

   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: If called upon to consult legislative history to interpret a legal text, I would not treat all legislative history the same. The Supreme Court has explicitly noted that some forms of legislative history are more probative of legislative intent than others. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In

surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'") (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969))). If confirmed as a district judge, I would follow the directives of the Supreme Court and the Court of Appeals for the Fourth Circuit.

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

Response: As a sitting United States Magistrate Judge I have never been called upon to utilize the laws of foreign nations to interpret the U.S. Constitution and I know of no circumstance where it would be appropriate to do so. If confirmed as a district judge, I would apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit.

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

Response: To prevail on a claim that a proposed method of execution violates the Eighth Amendment, a prisoner must (1) establish that the method of execution "presents a 'substantial risk of serious harm'—severe pain over and beyond death itself" —and (2) "'identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]' the risk of harm involved." *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)).

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

Response: Yes.

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

Response: In *District Attorney's Office for Third Judicial District v. Osborne*, the Supreme Court declined to "recognize a freestanding right to DNA evidence" as a "substantive due process right." 557 U.S. 52, 72 (2009).

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

Response: No.

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

Response: In *Kennedy v. Bremerton School District*, the Supreme Court affirmed that "a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" 142 S. Ct. 2407, 2421–22 (2022) (citing *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879–81 (1990)). If a plaintiff were to make such a showing, it would constitute "a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Id.* at 2422 (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)). "A plaintiff may also prove a free exercise violation by showing that 'official expressions of hostility' to religion accompany laws or policies burdening religious exercise; in cases like that [the Supreme Court has] 'set aside' such policies without further inquiry." *Id.* at 2422 n.1 (citing *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018)). "[L]aws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (citing *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879-881 (1990)).

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

Response: "[L]aws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (citing *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879-881 (1990)). However, "[a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–32 (1993). Moreover, "[w]hen presented with a law that affects religious practice, even if indirectly, a court must look behind the law's text to determine if it was enacted 'because of' and not 'in spite of' its effect on religion." *Alive Church of the Nazarene, Inc. v. Prince William Cnty.*, 59 F.4th 92, 108 (4th Cir. 2023) (citing *Lukumi*, 508 U.S. at 540).

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

Response: First Amendment protection is afforded to those whose religious beliefs are "sincerely held." *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989). To determine whether a person's set of beliefs is sincerely held, a reviewing court's "narrow function . . . in this context is to determine" if the belief "reflects 'an honest conviction.'" *Burwell*, 573 U.S. 682, 725 (2014) (alteration in *Burwell*) (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981)). Such beliefs "need not be confined in either source or content to traditional or parochial concepts of religion" in order to be deemed to be sincerely held. *Welsh v. United States*, 398 U.S. 333, 339 (1970).

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

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

Response: "In *Heller* and *McDonald*," the Supreme Court "held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2125 (2022) (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010)). The *Heller* Court held that the District of Columbia's "ban on handgun possession in the home violates the Second Amendment, as [did] its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." 554 U.S. at 635.

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

Response: No.

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

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

Response: I believe that Justice Holmes clarified his statement by noting that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). He continued, "[a Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." *Id.* at 76. As a sitting United States Magistrate Judge, I cannot comment on whether a case was correctly decided or opine on what views, if any, I have on a dissenting opinion.

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

Response: As a sitting United States Magistrate Judge, I ordinarily cannot comment on whether a case was correctly decided. That said, "[t]he doctrine that prevailed in *Lochner*, . . . —that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). If confirmed as a district judge, I would faithfully apply *Ferguson* and all other Supreme Court and Fourth Circuit precedent.

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

Response: I take this phrase to further emphasize what the Supreme Court observed as "already obvious: *Korematsu* was gravely wrong on the day it was decided" and "has no place in law under the Constitution." *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (internal quotation marks and citation omitted).

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

Response: I am unaware of any such Supreme Court opinions.

a. If so, what are they?

Response: Please see my answer to Question 14.

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

Response: Yes. If confirmed as a district judge, I will continue to faithfully apply the binding precedent of the Supreme Court.

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

a. Do you agree with Judge Learned Hand?

Response: As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. As such, it would be inappropriate to comment on the specific market share that may constitute a monopoly. I do note, however, that the Supreme Court previously held that "evidence that Kodak control[ed] nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes" was "sufficient to survive summary judgment" on a claim that Kodak violated Section 2 of the Sherman Act. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992). The Court of Appeals for the Fourth Circuit has noted that "[a]lthough there is no fixed percentage market share that conclusively resolves whether monopoly power exists, the Supreme Court has never found a party with less than 75% market share to have monopoly power." *Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 174 (4th Cir. 2014).

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

Response: Please see my answer to Question 15a.

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

Response: Please see my answer to Question 15a.

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

Response: "Federal common law" is defined in Black's Law Dictionary as "[t]he body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law." Black's Law Dictionary (11th ed. 2019). Generally speaking, however, "[t]here is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The Supreme Court has recently remarked that "[t]he cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 716 (2020). "Instead," the Court noted that "only limited areas exist in which federal judges

may appropriately craft the rule of decision," including "admiralty disputes and certain controversies between States." *Id.* at 717 (citations omitted).

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

Response: "[T]he views of [a] state's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). Accordingly, I would defer to the determination of the scope of the state constitutional right as determined by the state's highest court.

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

Response**:** Please see my answer to Question 17a.

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

Response: "Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution." *Mills v. Rogers*, 457 U.S. 291, 300 (1982); *see also Arizona v. Evans*, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.").

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

Response: As a sitting United States Magistrate Judge, I ordinarily cannot comment on whether a case was correctly decided. However, as numerous prior judicial nominees have observed, the issues presented in *Brown v. Board of Education* are highly unlikely to be litigated in the future, and therefore I believe it is appropriate to express my view that the case was correctly decided.

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

Response: "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 579 (2017). The power to issue an injunction is found in Federal Rule of Civil Procedure 65. The Fourth Circuit has held that a federal district court has "wide discretion to fashion appropriate injunctive relief in a particular case," even if that injunction has "nationwide scope." *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308 (4th Cir. 1992). If confirmed to serve as a district judge and called upon to address this

issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me, always recognizing than injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

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

Response: Please see my answer to Question 19.

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

Response: Please see my answer to Question 19.

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

Response: Please see my answer to Question 19**.**

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

Response: The Supreme Court has recognized that our system's "federalist structure of joint sovereigns preserves to the people numerous advantages." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). "It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* (citations omitted).

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

Response: In general, "[a]bstention rarely should be invoked, because the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). However, the Supreme Court has recognized a few extraordinary scenarios under which a federal court can abstain from resolving a pending legal issue in deference to adjudication by a state court.

One of these is so-called *Younger* abstention, named for *Younger v. Harris*, 401 U.S. 37 (1971), and applicable only in cases involving "ongoing state criminal prosecutions," "certain 'civil enforcement proceedings,'" and "pending 'civil proceedings involving certain orders . . . uniquely in furtherance of the state courts'

ability to perform their judicial functions.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013) (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989) (*NOPSI*)). If the federal court is considering one of these types of cases, the court must then, a federal court must ensure the presence of three factors before invoking *Younger* abstention: "(1) whether there is 'an ongoing state judicial proceeding'; (2) whether that state proceeding 'implicate[s] important state interests'; and (3) whether that state proceeding provides 'an adequate opportunity . . . to raise constitutional challenges.'" *Air Evac EMS, Inc. v. McVey*, 37 F.4th 89, 96 (4th Cir. 2022) (quoting *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)). "But even when [the above criteria] are satisfied, *Younger* identifies three exceptions to the court's duty to abstain: (1) 'bad faith or harassment' by state officials responsible for the prosecution; (2) a statute that is 'flagrantly and patently violative of express constitutional prohibitions'; and (3) other 'extraordinary circumstances' or 'unusual situations.'" *Id.* (citing *Younger*, 401 U.S. at 49–54).

Another is *Pullman* abstention, named after the case of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and applicable when, "at a minimum . . . there is (1) an unclear issue of state law presented for decision (2) the resolution of which may moot or present in a different posture the federal constitutional issue such that the state law issue is 'potentially dispositive.'" *Educ. Servs., Inc. v. Md. State Bd. for Higher Educ.*, 710 F.2d 170, 174 (4th Cir. 1983) (citations omitted).

Burford abstention pertains to issues involving "difficult state question." *Burford v. Sun Oil Co.*, 319 U.S. 315, 331 (1943). "*Burford* permits abstention when federal adjudication would 'unduly intrude' upon 'complex state administrative processes' because either: (1) 'there are difficult questions of state law . . . whose importance transcends the result in the case then at bar'; or (2) federal review would disrupt 'state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Martin v. Stewart*, 499 F.3d 360, 364 (4th Cir. 2007) (quoting *NOPSI*, 491, U.S. at 361–63).

Colorado River abstention gets its name from the case of *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). "Under the principles of *Colorado River*, federal courts may abstain from exercising their jurisdiction in the exceptional circumstances where a federal case duplicates contemporaneous state proceedings and '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation' clearly favors abstention[.]" *Vulcan Chem. Techs., Inc. v. Barker*, 297 F.3d 332, 340–41 (4th Cir. 2002) (quoting *Colo. River*, 424 U.S. at 817). "Although the prescribed analysis is not a 'hard-and-fast' one in which application of a 'checklist' dictates the outcome, six factors have been identified to guide the analysis for *Colorado River* abstention: (1) whether the subject matter of the litigation involves property where the first court may assume jurisdiction to the exclusion of others; (2) whether the federal forum is an inconvenient one; (3) the desirability of avoiding piecemeal litigation; (4) the relevant order in which the courts obtained jurisdiction and the progress achieved in each action; (5) whether state law or federal law provides the rule of decision on the merits; and (6) the adequacy of the state proceeding to protect the parties' rights." *Id.* (citations

omitted). The Fourth Circuit has reiterated that, "[a]t bottom, abstention should be the exception, not the rule, and it may be granted only when 'the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties.'" *Id.* (citation omitted).

"[U]nder what has come to be known as the *Rooker–Feldman* doctrine, lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments." *Lance v. Dennis*, 546 U.S. 459, 463 (2006). The doctrine derives its name from the cases of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The Supreme Court has explicitly noted that this doctrine "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

Finally, the *Brillhart/Wilton* doctrine, "articulated in *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942), and *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), . . . affords a federal court broad discretion . . . to abstain from deciding declaratory judgment actions when concurrent state court proceedings are under way." *VonRosenberg v. Lawrence*, 781 F.3d 731, 732–34 (4th Cir. 2015) (emphasis deleted) (citations omitted).

If confirmed as a district judge, I will faithfully apply precedent from the Supreme Court and the Court of Appeals for the Fourth Circuit as it pertains to these, or any other abstention doctrines.

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

Response: As a general matter, damages are designed to remedy past harm and injunctive relief is intended to prevent a future harm. In my experience, litigants tend to pursue the type of relief they determine would be most beneficial to them. The relative advantages or disadvantages of an award of damages or injunctive relief would depend on the facts of the case.

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

Response: In *Washington v. Glucksberg*, the Supreme Court affirmed that it has "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed' . . . ." 521 U.S. 702, 720–21 (1997) (citations omitted). The *Glucksberg* Court described "the 'liberty' specially protected by the Due Process Clause" to include "the rights to marry," "to have children," "to direct the education and upbringing of one's children," "to marital privacy," "to use contraception," and "to bodily integrity." *Id.* at 720 (citations omitted); *see also Dobbs*

v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257–58 (2022) (acknowledging the substantive due process rights previously recognized by the Supreme Court). As a United States Magistrate Judge, I faithfully follow binding precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit related to substantive due process. If confirmed as a district judge, I would continue to do so.

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

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

Response: In *Kennedy v. Bremerton School District*, the Supreme Court affirmed that "a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" 142 S. Ct. 2407, 2421–22 (2022) (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879-881 (1990). If a plaintiff were to make such a showing, it would constitute "a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Id.* (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)). "A plaintiff may also prove a free exercise violation by showing that 'official expressions of hostility' to religion accompany laws or policies burdening religious exercise; in cases like that [the Supreme Court has] 'set aside' such policies without further inquiry." *Id.* at 2422 n.1 (citing *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1732, 201 L.Ed.2d 35 (2018)). Finally, the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act may place additional limitations on governmental burdens to the free exercise of religion. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014).

"[L]aws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (citing *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879-881 (1990)). However, "[a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–32 (1993). Moreover, "[w]hen presented with a law that affects religious practice, even if indirectly, a court must look behind the law's text to determine if it was enacted 'because of' and not 'in spite of' its effect on religion." *Alive Church of the Nazarene, Inc. v. Prince William Cnty.*, 59 F.4th 92, 108 (4th Cir. 2023) (citing *Lukumi*, 508 U.S. at 540).

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 embraces a freedom of conscience *and* worship . . . ." *Lee v. Weisman*, 505 U.S. 577, 591 (1992) (emphasis added). It "protects not only the right to harbor religious beliefs inwardly and secretly." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022). "It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through 'the performance of (or abstention from) physical acts.'" *Id.* (quoting *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877 (1990)).

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 25a.

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 10.

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

Response: The Religious Freedom Restoration Act (RFRA) "applies to all Federal law, and the implementation of that law, whether statutory or otherwise[.]" 42 U.S.C. § 2000bb-3(a). However, Congress may "exclude statutes from RFRA's protections" if those statutes are passed after RFRA's enactment. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (citing 42 U.S.C. § 2000bb-3(b)).

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.

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

Response: The Court of Appeals for the Fourth Circuit has a tradition of not defining "beyond a reasonable doubt," at least in absence of a request by a jury. *United States v. Hornsby*, 666 F.3d 296, 310–11 (4th Cir. 2012). This custom stems from the well-founded belief that "attempting to explain the words 'beyond a reasonable doubt' is more dangerous than leaving a jury to wrestle with only the words themselves." *Id.* (quoting *United States v. Lighty*, 616 F.3d 321, 380 (4th Cir. 2010)). I am also unaware of any jury instruction that provides a numerical "confidence threshold" for the establishment of reasonable doubt. As a sitting United States Magistrate Judge and a district court nominee, it would be inappropriate to contravene binding precedent by offering a numerical representation of reasonable doubt.

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

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

Response: The Supreme Court and the Court of Appeals for the Fourth Circuit have suggested that a circuit split may exist on this issue. *See White v. Woodall*, 572 U.S. 415, 422 n.3 (2014); *Horner v. Nines*, 995 F.3d 185, 202 n.2 (4th Cir. 2021). As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me.

b. In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?

Response: As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me.

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

Response: Please see my answers to question 27b.

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

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

Response: As a sitting United States Magistrate Judge and a judicial nominee, it would be inappropriate for me to provide an opinion on the wisdom of a higher court's practices and rules. I note that while the Court of Appeals for the Fourth Circuit issues unpublished opinions, it does "not prohibit or restrict the citation of" these opinions "issued on or after January 1, 2007." *See* FRAP 32.1(a). Under the Fourth Circuit's Local Rules, "[c]itation of [Fourth Circuit] unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case." Loc. R. 32.1 (4th Cir. 2023). However, "[i]f a party believes, nevertheless, that an unpublished disposition of [the Fourth Circuit] issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of FRAP 32.1(b) [noting the requirement to provide copies] are met." *Id.* I am bound to follow these rules and would continue to do so if confirmed as a district judge.

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

Response: Please see my answer to Question 28a.

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

Response: Please see my answer to Question 28a.

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

Response: Please see my answer to Question 28a.

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

Response: Yes. Please see my answer to Question 28a.

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

Response: No.

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

Response: No.

29. In your legal career:

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

Response: Ten.

b. How many have you tried as second chair?

Response: Nine.

c. How many depositions have you taken?

Response: I do not recall taking any depositions.

d. How many depositions have you defended?

Response: I do not recall defending any depositions.

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

Response: I have argued three cases before a federal appellate court.

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

Response: I have argued one case before a state appellate court.

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

Response: Since becoming a licensed attorney, I do not recall appearing before a federal agency.

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

Response: Before my appointment as a United States Magistrate Judge, I worked as a litigator for over 15 years. In that role, I briefed and argued dozens of dispositive motions before trial courts.

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

Response: Before my appointment as a United States Magistrate Judge, I worked as a litigator for over 15 years. In that role, I briefed and argued dozens of evidentiary motions before trial courts.

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

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

Response: I last tracked my billable hours when I was a litigation associate in 2006–2007 and I cannot recall the number of hours I billed. The remainder of my career was spent as a public defender where I was not required to track billable hours since my clients did not pay for my services.

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

Response: I do not recall the amount of time spent on pro bono work in 2006–2007. The remainder of my career was spent as public defender representing the indigent accused.

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

a. What do you understand this statement to mean?

Response: I am not familiar with this quote or its context, but I take it to mean that judges must disregard their personal beliefs when determining facts and applying the law.

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

a. What do you understand this statement to mean?

Response: I take this statement to mean that while it is the job of other branches of government to make the law, it is up to judges to fairly and neutrally apply it.

b. Do you agree or disagree with this statement?

Response: I agree that a judge must fairly and neutrally apply the law. If confirmed as a district judge, I would do so by applying the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit.

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

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

Response: I am not familiar with this quote or its context, but I take it to mean that judges must disregard their personal beliefs and serve no personal agenda when determining facts and applying the law.

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

Response: I agree that judges must disregard their personal beliefs and serve no personal agenda when determining facts and applying the law. If confirmed as a district judge, I would do so by applying the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit.

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

Response: Soon after the Supreme Court's decision *District of Columbia v. Heller*, 554 U.S. 570 (2008), I recall raising the argument that the prohibitions on the possession of firearms by convicted felons was unconstitutional. The argument was not successful.

a. If yes, please provide appropriate citations.

Response: The only case in which I remember raising the argument was *United States v. Hill*, No. Crim. WDQ-09-0446, 2010 WL 2038995 (D. Md. May 20, 2010), *aff'd*, 471 F. App'x 143 (4th Cir. 2012).

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

Response: No.

36. What were the last three books you read?

Response: *We Don't Know Ourselves: A Personal History of Modern Ireland* by Fintan O'Toole; *Animal Farm* by George Orwell; and *The Passenger* by Cormac McCarthy.

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

Response: I am deeply proud to be an American and have had the pleasure of living in multiple states and a United States territory. Respectfully, while I believe this question raises an important issue worthy of discussion, I believe it is ultimately one to be addressed by those who make policy. As a United States Magistrate Judge, I work to ensure that all litigants and counsel who appear before me are treated fairly and afforded equal justice under law. If a litigant were to raise an allegation that the country is systematically racist, I would neutrally apply the relevant precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the facts before me.

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

Response: Though no particular case stands out, I am proud of my service as an Assistant Federal Public Defender in the District of Maryland and the District of the Virgin Islands. I am equally proud of my work as a United States Magistrate Judge.

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

Response: Yes.

a. How did you handle the situation?

Response: Consistent with my ethical obligations as an advocate, I put aside my personal views and fulfilled my ethical and Sixth Amendment obligations to zealously advocate within the bounds of the law on behalf of my clients.

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

Response: Yes.

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

Response: I do not regularly read the works of any particular law professor.

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

Response: No single Federalist Paper has most shaped my views of the law.

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

Response: As a law student, a judicial law clerk, a practicing attorney, and a judge, I have always enjoyed reading legal opinions and articles on a variety of topics. I learn something new from nearly all of these works and each has informed my knowledge of

relevant statutes and precedent. I cannot, however, point to a particular opinion or article that "made [me] change [my] mind."

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

Response: In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court 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). As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed as a district judge, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit.

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

Response: I was called to testify to the details of a client's plea agreement in a case in the Circuit Court for Baltimore City. *See Cox v. State*, 194 Md. App. 629, 641–42, 5 A.3d 730, 737 (Md. Ct. Spec. App. 2010).

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: I do not recall ever authoring a complete brief that was filed without my name on it. However, in over 15 years as an Assistant Federal Public Defender, I proofread, edited, or authored portions of countless briefs filed by colleagues. It was common in both public defender offices where I worked for colleagues to share their work without attribution. I cannot provide an accurate account of the number of times in which I assisted with filings in this capacity.

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

Response: Please see my answer to Question 47.

48. Have you ever confessed error to a court?

Response: In 2012, I authored an affidavit in support of a motion to vacate a former client's conviction in which I expressed the view that I had erred by failing to raise several issues at hearing on pre-trial motions. The Court never ruled on the motion, nor did it evaluate the claims I raised in the affidavit since my former client's sentence was vacated with the consent of the Government for unrelated reasons.

a. If so, please describe the circumstances.

Response: Please see my answer to Question 48.

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

Response: I swore an oath to tell the truth to the Senate Judiciary Committee prior to answering questions at a hearing on April 18, 2023. That oath obligates me to provide complete and truthful answers to all questions posed by the Senate Judiciary Committee, including those answered in writing.

Senator John Kennedy
Questions for the Record

Judge Brendan Hurson

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

   Response: As a United States Magistrate Judge, my judicial philosophy is to approach each case with a completely open mind and to treat all parties, witnesses, and counsel with respect. I thoroughly review the record, diligently research the applicable law, and then fairly and neutrally apply that law to the facts before me. I follow the binding precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit. I endeavor to treat all matters before me as though they are critically important as I recognize that each case is of the utmost importance to the parties involved. I also strive to ensure that I maintain a judicial temperament, that I remain humble, and that I do not allow emotion or ego to substitute for fair judgment. If confirmed as a district judge, I would continue to adhere to this judicial philosophy.

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

   Response: I believe that the Constitution has a fixed meaning that can only be changed through the amendment process outlined in Article V. "Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022) (citations omitted).

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

   Response: No. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.").

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

   Response: The Supreme Court has explicitly noted that some forms of legislative history are more probative of legislative intent than others. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'") (quoting *Zuber v.*

Allen, 396 U.S. 168, 186 (1969))). If confirmed as a district judge, I would follow the directives of the Supreme Court and the Court of Appeals for the Fourth Circuit as they pertain to reviewing legislative history when construing the meaning of a statute.

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

Response: In *Lloyd Corp., Ltd. v. Tanner*, the Supreme Court held that private property does not "lose its private character merely because the public is generally invited to use it for designated purposes." 407 U.S. 551, 569 (1972). In *PruneYard Shopping Center v. Robins*, the Supreme Court upheld a California state constitutional provision that required the owner of a shopping center to allow individuals to exercise free speech and petition rights on the property of a privately owned shopping center, but also affirmed that the shopping center owner "may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." 447 U.S. 74, 83 (1980). If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit, including *Lloyd Corp., Ltd. v. Tanner* and *PruneYard Shopping Center v. Robins*.

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

Response: In *Mathews v. Diaz*, the Supreme Court noted that "[t]here are literally millions of aliens within the jurisdiction of the United States." 426 U.S. 67, 77 (1976). The Court then observed that "[t]he Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Id.* (citations omitted). The *Mathews* Court also noted that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* at 79–80. In *United States v. Verdugo-Urquidez*, the Supreme Court summarized a series of cases addressing whether "aliens enjoy certain constitutional rights" by observing that such persons "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." 494 U.S. 259, 271 (1990). I am unaware of any specific precedent of the Court of Appeals for the Fourth Circuit relating specifically to whether non-citizens unlawfully present in the United States are entitled to a right of privacy. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me.

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

Response: It is well-established "[t]hat searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States v. Ramsey*, 431 U.S. 606, 616 (1977). As such, "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant . . . ." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me. Also, please see my answer to question 6.

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

Response: In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court 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). As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit.

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

a. Do you agree?

Response: I am not familiar with this judge's suggestion or the circumstances under which it was made. However, as a United States Magistrate Judge and a district judge nominee, it would be improper for me to comment on the wisdom of another court's ruling. If confirmed, I would faithfully apply the Supreme Court's binding precedent including *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

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

Response: Please see my answer to Question 9a.

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

Response: No. Judges must follow the precedent of the Supreme Court and of the Court of Appeals for the circuit in which the judge sits.

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

Response: In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Supreme Court upheld a statute that "require[ed] citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government." 553 U.S. 181, 185 (2008). If confirmed as a district judge, I would faithfully apply *Crawford* and all other Supreme Court and Fourth Circuit precedent.

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

Response: In *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Supreme Court held that the proponent of such a regulation "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." 142 S. Ct. 2111, 2126 (2022). "Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* (citation omitted). If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit, including *Bruen*, *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), to the specific facts of the case before me.

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

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

Response: In *Janus v. American Federation of State, County, and Municipal Employees*, the Supreme Court identified five factors as "most important" to the determination of whether to "overrule a past decision," namely: "[1] the quality of [the prior case's] reasoning, [2] the workability of the rule it established, [3] its consistency with other related decisions, [4] developments since the decision was handed down, and [5] reliance on the decision." 138 S. Ct. 2448, 2478–79 (2018). The Supreme Court has relied on "[a]ll these reasons" to provide the "special justification" required to overturn its precedent. *Id.* at 2486; *see also Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022) (overturning precedent after discussing "the nature of [Supreme Court's] error [in the prior cases], the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the

absence of concrete reliance"). To my knowledge, the Supreme Court has not identified a specific number of these factors as necessary to provide the special justification for overturning precedent.

b. Is one factor alone ever sufficient?

Response: Please see my answer to Question 13a.

14. P**lease explain the difference between judicial review and judicial supremacy.**

Response: Judicial review refers to the bedrock principal that it is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also* Black's Law Dictionary (11th ed. 2019) (defining "judicial review" as "[a] court's power to review the actions of other branches or levels of government; esp[ecially], the courts' power to invalidate legislative and executive actions as being unconstitutional"). Judicial supremacy is defined as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp[ecially] U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019).

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

Response: Consistent with the rest of the Constitution, the Ninth Amendment has a fixed meaning. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022) (noting that "the Second Amendment's historically fixed meaning applies to new circumstances" (citing *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008))).

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

Response: Justice Thomas noted in a concurrence in *McDonald v. City of Chicago, Ill.*, that the Ninth Amendment was an "obvious example" of a "Bill of Rights provision[designed to] prevent federal interference in state affairs and [was] not readily construed as protecting rights that belong to individuals." 561 U.S. 742, 851 n.20 (2010). Other courts have made similar observations. *See, e.g.*, *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991) ("Finally, Schowengerdt's ninth amendment argument is meritless, because that amendment has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation.") (citing *Strandberg v. City of Helena*, 791 F.2d 744 (9th Cir.1986)); *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991) ("[T]he ninth amendment does not confer substantive rights in addition to those conferred by other portions of our governing law."). If confirmed as a district judge, I will faithfully apply precedent from the Supreme Court and the Court of Appeals for the Fourth Circuit if called upon to interpret provisions of the Constitution.

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

Response: The Ninth Amendment expressly references rights enumerated elsewhere in the Constitution. *See* U.S. Const. amend IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.")

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

Response: The Supreme Court has held that original meaning and text play a critical role in interpreting many constitutional provisions, and Founding-era history can be useful in determining what that original meaning is. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 47–50 (2004) (Sixth Amendment Confrontation Clause). If confirmed as a district judge, I will faithfully apply precedent from the Supreme Court and the Court of Appeals for the Fourth Circuit if called upon to interpret provisions of the Constitution.

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

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

Response: In *District of Columbia v. Heller*, the Supreme Court recognized that in the Second Amendment, and "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset." 554 U.S. 570, 580 (2008). The Court then reaffirmed what it had said in *United States v. Verdugo-Urquidez*:

> '[T]he people' seems to have been a term of art employed in select parts of the Constitution. . . . [Its uses] sugges[t] that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Id. (citing 494 U.S. 259, 265 (1990)). If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me.

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

Response: Please see my answers to Questions 6, 7, and 19a. As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed as a district judge and called upon to address this

issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me.

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

Response: "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). Please also see my answers to Questions 6, 7, and 19a. As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me.

21. In *Washington v. Glucksberg,* 521 U.S. 702 (1997), the Supreme Court determined that the right to assisted suicide is not a fundamental liberty interest protected by the Fourteenth Amendment since its practice has been offensive to our national traditions and practices. Do evolving social standards of acceptance for practices like assisted suicide suggest that the meaning of the Due Process Clause changes over time?

Response: To the best of my knowledge, *Glucksberg* did not directly address this question. However, it affirmed that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed' . . . ." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted). Further, the Supreme Court recently re-affirmed that "[a]lthough its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me. whether the meaning changes over time.

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

Response: The Supreme Court long ago held that the Privileges or Immunities Clause of the Fourteenth Amendment "protects only those rights 'which ow[e] their existence to the Federal government, its National character, its Constitution or its laws.'" *McDonald v. Chicago*, 561 U.S. 742, 754 (2010) (quoting *Slaughter-House Cases*, 83 U.S. 36, 79

(1872)). As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me.

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

Response: I am not aware of any decision of the Supreme Court or the Court of Appeals for the Fourth Circuit that holds that the right to terminate a pregnancy is among the "privileges or immunities" of citizenship. As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me.

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

Response: Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, "a court review[ing] an agency's construction of the statute which it administers . . . is confronted with two questions":

> First, always, is the question whether Congress has directly spoken to the precise question at issue. 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. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. 837, 843 (1984). *Chevron* remains binding precedent. However, in *West Virginia v. EPA*, the Supreme Court identified that there may be "extraordinary cases" that implicate the major questions doctrine and thus require than an agency provide "something more than a merely plausible textual basis for the agency action" and instead "point to 'clear congressional authorization' for the power it claims." 142 S. Ct. 2587, 2609 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

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

Response: Please see my answer to Question 24. Also, "[t]he Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, which sets forth the full extent of judicial authority to review executive agency action for procedural correctness, . . . permits . . . the setting aside of agency action that is 'arbitrary' or 'capricious' . . . ." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009) (internal citations omitted).

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

Response: Sections 8 and 9 of Article I specifically delineate the powers of Congress. Section 8 permits Congress "[t]o make all laws which shall be necessary and proper for carrying" these powers "into execution." But Section 9 limits Congress's powers by, for example, forbidding Congress from passing an "ex post facto" law. In *McCulloch v. Maryland*, the Supreme Court held that Section 8 granted limited implied powers to Congress to pass laws that are "necessary and proper to carry into execution the powers of the government." 17 U.S. 316, 422 (1819) (internal quotation marks omitted). The Constitution also limits power by specifically enumerating limits on judicial and executive authority in Articles II and III, and through the Tenth Amendment's recognition that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," U.S. Const. amend. X.

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

Response: The Supreme Court has "identified three broad categories of activity that Congress may regulate under its commerce power." *United States v. Lopez*, 514 U.S. 549, 558 (1995). These categories are: (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities that substantially affect interstate commerce." *Id.* at 558–59 (internal citations omitted).

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

Response: The Supreme Court held that Congress exceeded its Commerce Clause authority when it enacted the Gun-Free School Zones Act, a federal law that criminalized the knowing possession of a firearm in a school zone. *Lopez v. United States*, 514 U.S. 549, 568 (1995).

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

Response: The Supreme Court has explicitly affirmed the long-standing rule that "the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable[.]" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995).

30. In *Gundy v. United States*, 588 U.S. ___ (2019), justices in dissent indicated willingness to limit the non-delegation doctrine, arguing that Congress can only delegate authority that is non-legislative in nature. Does the Constitution limit the power to define criminal offenses to the legislative branch?

Response: As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me.

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

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

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

Response: The anti-commandeering doctrine has its roots in the Supreme Court's recognition that the Tenth Amendment prohibits Congress from "commandeer[ing] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981). The doctrine "is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018). "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 1477.

33. Does the meaning of 'cruel and unusual change over time? Why or why not?

Response: The Supreme Court has held that the Eighth Amendment standard for cruel and unusual punishment "itself remains the same, but its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)).

34. Do you believe the death penalty is constitutional?

Response: The Supreme Court has held that the death penalty is constitutional. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me.

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

Response: The Supreme Court has recognized that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case[.]" *United States v. Nixon*, 418 U.S. 683, 693, 94 S. Ct. 3090, 3100, 41 L. Ed. 2d 1039 (1974); *see also Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."). As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me.

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

Response: As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me.

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

Response: Please see my answer to Question 5.

38. Do private social media companies create any type of forum that protects speech against restrictions in the context of the First Amendment?

Response: As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me.

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

Response: Article VI of the Constitution contains the Supremacy Clause, which provides that the Constitution, federal laws, and certain treaties are the "supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI. Under the "adequate and independent state grounds" doctrine, the Supreme Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (citations omitted).

40. Please explain why the Fifth Amendment's Due Process Clause does not require the federal government to provide notice and a hearing to an individual before their name is added to the no-fly list.

Response: As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the specific facts of the case before me.

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

Response: To the best of my knowledge, the Supreme Court has not cited a textual source for the different standards of review for determining whether state laws or regulations violate constitutional rights. Thus, it is decisions of the Supreme Court that provide the sources of the different standards of review. *See, e.g.*, *Munn v. People of State of Illinois*, 94 U.S. 113, 131–32, (1876) (rational basis test); *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution[.]"); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 538–39 (1942) (strict scrutiny); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (intermediate scrutiny for sex-based classifications).

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

Response: "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 579 (2017). The power to issue an injunction is found in Federal Rule of Civil Procedure 65. The Fourth Circuit has held that a federal district court has "wide discretion to fashion appropriate injunctive relief in a particular case," even if that injunction has "nationwide scope." *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308 (4th Cir. 1992). If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit

to the specific facts of the case before me, always recognizing that injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Questions from Senator Thom Tillis

for Brendan Abell Hurson
Nominee to be United States District Judge for the District of Maryland

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

Response: Yes. Judges must decide cases by fairly and impartially applying the law to facts. A judge's personal opinions or values should not guide their decision-making. As a sitting United States Magistrate Judge, I apply the binding precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit. If confirmed as a district judge, I would continue to do so.

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

Response: Judicial activism has been defined as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Black's Law Dictionary (11th ed. 2019). Judicial activism is not appropriate, as judges must apply the law impartially and fairly to the facts before them without regard to their personal views on the outcome.

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

Response: Impartiality is an 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: Faithfully interpreting the law may sometimes result in an undesirable outcome. As a sitting United States Magistrate Judge, whether an outcome may be undesirable has no bearing on my judicial decision-making. I am bound to follow the binding precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit regardless of any opinion I may have of the desirability of a particular outcome. I will continue to do so if confirmed as district judge.

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: "In *Heller* and *McDonald*," the Supreme Court "held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2125 (2022) (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010)). The *Heller* Court held that the District of Columbia's "ban on handgun possession in the home violates the Second Amendment, as [did] its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." 554 U.S. at 635. If confirmed, I would apply this precedent as well as any other relevant binding precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit.

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

Response: "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "In determining whether defendant government officials [such as law enforcement] are protected by qualified immunity, the court considers both 'whether a constitutional right [was] violated on the facts alleged' and 'whether the right was clearly established' at the time of the conduct in question." *Scinto v. Stansberry*, 841 F.3d 219, 235 (4th Cir. 2016) (quoting *Saucier v. Katz*, 533 U.S. 194, 200 (2001)). As a sitting United States Magistrate Judge, I am bound to follow the binding precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit, and I will continue to do so if confirmed as district judge.

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

Response: As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed to serve as a district judge, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit, including *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

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

Response: Please see my answer to Question 9.

11. 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: As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed to serve as a district judge, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Federal Circuit (which has exclusive jurisdiction over patent appeals from district courts under 28 U.S.C. § 1295(a)(1)), including *Alice Corporation Pty. Ltd. v. CLS Bank International*, 573 U.S. 208 (2014), and *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012).

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

Response: Please see my answer to Question 11.

13. 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: As an Assistant Federal Public Defender, I recall being involved in at least one matter involving allegations of criminal copyright infringement. As a United States Magistrate Judge, I have also been involved in matters involving alleged trademark infringement.

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

Response: In nearly eighteen years serving as a federal law clerk, a litigator, and a United States Magistrate Judge, I do not recall involvement in any cases involving the Digital Millennium Copyright Act. If confirmed to serve as a district judge, I would faithfully apply the relevant precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit.

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

Response: In nearly eighteen years serving as a federal law clerk, a litigator, and a United States Magistrate Judge, I do not recall involvement in any cases involving intermediary liability for online service providers that host unlawful content posted by users. If confirmed to serve as a district judge, I would faithfully apply the relevant precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit.

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: As an Assistant Federal Public Defender, I represented clients charged with crimes that raised First Amendment issues including cases alleging the solicitation of crimes, unlawful interstate communication of threats, and threatening a federal official. I have also been involved in these types of cases as a United States Magistrate Judge presiding over preliminary criminal matters.

14. 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: When interpreting legislative text, the first step is to look at the plain meaning of the statute. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."). If the text is unclear or ambiguous and there is no judicial precedent on point, legislative history may be helpful, but only to the extent the Supreme allows it. *Id.* (noting that legislative history may be helpful

"when interpreting *ambiguous* statutory language"). The Supreme Court has explicitly noted that some forms of legislative history are more probative of legislative intent than others. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'") (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969))). If confirmed as a district judge, I would follow the directives of the Supreme Court and the Court of Appeals for the Fourth Circuit.

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: To ascertain the level of deference to afford an expert federal agency, courts generally look to the Supreme Court's precedents of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *United States v. Mead Corp.*, 533 U.S. 218 (2001), and their progeny. If confirmed as a district judge, I would follow the relevant binding precedents of the Supreme Court and the Court of Appeals for the Fourth Circuit.

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 United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed to serve as a district judge, I would faithfully apply the relevant precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit.

15. 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 14a. As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed to serve as a district judge, I would faithfully apply the relevant precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit. I leave to policymakers the decision of whether to amend the DMCA.

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 15a.

16. 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 Maryland, cases are randomly assigned to district judges and magistrate judges (with the consent of the parties under 28 U.S.C. § 636(c)) within the appropriate geographic division. *See* Loc. Rs. 301.4, 501.1 (D. Md. 2021). I am not aware that "judge shopping" or "forum shopping" is an issue in either of the two divisions that comprise the District of Maryland.

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

Response: I am not aware that "judge shopping" or "forum shopping" is an issue in either division of the District of Maryland. In all cases, judges should fairly and impartially apply relevant binding precedents to the facts before them.

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

Response: No.

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

Response: I do not, and will not, engage in the conduct described in Question 16c.

17. 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: As a sitting United States Magistrate Judge and a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. It would therefore be inappropriate to comment.

18. 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 Questions 16a and 17.

Senate Judiciary Committee

"Nominations"

Questions for the Record

for Brendan Hurson

to be United States District Judge for the District of Maryland

QUESTIONS FROM SENATOR BLACKBURN

1. **Please describe your understanding of an originalist judicial philosophy.**

   Response: Black's Law Dictionary (11th ed. 2019) defines "originalism" as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect."

2. **When, if ever, is it appropriate for a judge to take into account his or her lived experience when interpreting the law?**

   Response: It is not appropriate for a judge to take into account his or her lived experience when interpreting the law.

3. **What is your understanding of the definition of "original public meaning"?**

   Response: Black's Law Dictionary (11th ed. 2019) notes that "original public meaning" shares a definition with "originalism," which is defined as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Specifically, it is "the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." Black's Law Dictionary (11th ed. 2019). In the context of constitutional interpretation, the Supreme Court has held that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). "Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *Id.* at 576–77. The Supreme Court and the Court of Appeals for the Fourth Circuit have held that original public meaning is a primary consideration in the interpretation of texts. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President."); *Williams v. Kincaid*, 45 F.4th 759, 766 (4th Cir. 2022) (affirming that absent an explicit statutory definition, courts must look to meaning of a statute's "terms at the time of its enactment"

(quoting *Bostock*, 140 S. Ct. at 1738)). If confirmed, I would continue to faithfully follow the precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit.

4. **When, if ever, is it appropriate for a judge to consider legislative history when interpreting a statutory provision?**

   Response: In interpreting a statutory provision, a judge should first look to the plain language of the statute at issue. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."). If the text is unclear or ambiguous and there is no judicial precedent on point, the judge may then turn to legislative history, but only to the extent the Supreme Court allows it, and always being mindful of the types of legislative history that the Supreme Court has found most relevant. *Id.* (noting that legislative history may be helpful "when interpreting ambiguous statutory language").

5. **At your confirmation hearing, Ranking Member Graham asked you a number of questions regarding the scourge of fentanyl in our society and, specifically, in Baltimore where you currently preside as a federal magistrate judge. Please research each of the following questions and answer according to the data available to you.**

   a. **How many fentanyl related deaths occurred in Baltimore last year?**

      Response: The most recent reliable data I could find on deaths related to fentanyl use in Maryland is a Maryland Department of Health report from March 2022 including data through the third quarter of 2021. *See* Md. Dep't of Health, Unintentional Drug- and Alcohol-Related Intoxication Deaths in Maryland (Mar. 2022), available at https://health.maryland.gov/vsa/Documents/Overdose/Quarterly%20Drug_Alcohol_Intoxication_Report_2021_Q3.pdf. According to the Maryland Department of Health, there were 737 "fentanyl-related intoxication deaths" in Baltimore City from January through September of 2021. *Id.* at 15. There were 253 such deaths in Baltimore County. *Id.*

   b. **Recently, there has been a massive spike in fentanyl related deaths in the United States. What is your understanding of the cause of this spike in deaths?**

      Response: I am deeply troubled by all deaths related to drug overdoses. I am also aware of statistics reflecting an increase in such deaths attributable to fentanyl. *See* Ctrs. for Disease Control & Prevention, Understanding Drug Overdoses and Deaths (Feb. 14, 2022), available at https://www.cdc.gov/drugoverdose/epidemic/index.html. Researchers at the Johns Hopkins University Bloomberg School of Public Health have attributed this

rise in drug overdose deaths to "the potent synthetic opioid fentanyl and other similar substances, which are increasingly laced into heroin and other street drugs, making them even more deadly." Bloomberg Am. Health Initiative, Johns Hopkins Bloomberg Sch. of Pub. Health, Detecting Fentanyl. Saving Lives (2018), available at https://americanhealth.jhu.edu/fentanyl. I am generally aware that an increase in the use of fentanyl and other synthetic opioids, often mixed with other illicit drugs and under circumstances where the user was unaware that they were ingesting fentanyl, is a major source of the increase in fentanyl overdoses and deaths.

c. What is your understanding of the origins of the increase of fentanyl in the United States?

Response: I am generally aware of the debate over the reason for the increase in fentanyl use in the United States. I am also aware that multiple federal agencies including the Drug Enforcement Agency posit that illicit fentanyl used in the United States is mostly manufactured in foreign laborites. Drug Enf't Admin., Facts About Fentanyl, available at https://www.dea.gov/resources/facts-about-fentanyl. If faced with a case involving fentanyl, I would neutrally apply the relevant statutes and precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the facts before me.

d. What is the origin of the chemicals used to make most of the fentanyl consumed in the United States?

Response: I am generally aware of the discussion over the origin of the chemicals used to make most of the fentanyl consumed in the United States, and I am also aware that multiple federal agencies, including the Drug Enforcement Administration, posit that illicit fentanyl used in the United States is largely manufactured in foreign laboratories. Drug Enf't Admin., Facts About Fentanyl, available at https://www.dea.gov/resources/facts-about-fentanyl. If faced with a case involving fentanyl, I would neutrally apply the relevant statutes and precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit to the facts before me.

e. What is the average age of fentanyl overdose victims in the United States?

Response: I have not found a reliable source of information for the average age of fentanyl overdose victims in the United States. However, according to the National Safety Council, "[t]he 35- to 44-year age group is experiencing the most opioid overdose deaths . . . . Currently, 71% of preventable opioid deaths occur among those ages 25 to 54, and the number of deaths among individuals 55 and older is growing rapidly." *See* Nat'l Safety Council, Drug Overdoses, available at https://injuryfacts.nsc.org/home-and-community/safety-topics/drugoverdoses/.

f. What is your understanding of the drug trafficking network in Baltimore?

Response: I am aware that both Baltimore City and Baltimore County have significant issues with drug trafficking. According to the United States Sentencing Commission, 31.6% of federal sentencings in Maryland in 2022 were for offenses involving drug trafficking or drug possession. *See* U.S. Sentencing Comm'n, Statistical Information Packet, Fiscal Year 2022, District of Maryland, at 1, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2022/md22.pdf.

g. What is your understanding of the drug trafficking network in the United States as a whole?

Response: I am aware that the United States has a significant issue with drug trafficking. According to the United States Sentencing Commission, 31.1% of federal sentencings (19,938) in the United States in 2022 were for offenses involving drug trafficking. *See* U.S. Sentencing Comm'n, Statistical Information Packet, Fiscal Year 2022, District of Maryland, at 3, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2022/md22.pdf.

h. How many cases have you seen over the course of your career as a federal magistrate judge involving distribution of drugs?

Response: Including applications for search warrants and initial appearances related to drug distribution, I have personally seen dozens of cases involving drug distribution since becoming a United States Magistrate Judge. According to the United States Sentencing Commission, 31.6% of federal sentencings in Maryland in 2022 were for offenses involving drug trafficking or drug possession. *See* U.S. Sentencing Comm'n, Statistical Information Packet, Fiscal Year 2022, District of Maryland, at 1, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2022/md22.pdf.

i. During your testimony, you referenced cases on your docket involving defendants charged with distribution of drugs and how these defendants are often drug users. In what circumstances do you believe that drug users who are charged with distribution of drugs should be given alternatives to incarceration?

Response: If confirmed as a district judge, I would take my responsibility to sentence individuals convicted of any federal crimes, including defendants convicted of unlawfully distributing drugs, extremely seriously. Congress has delineated the factors federal judges must consider when sentencing a defendant in 18 U.S.C. § 3553. These include "the need for the sentence imposed" "to reflect the seriousness of the offense," "to afford adequate deterrence to criminal conduct," and "to protect the public from further crimes of the defendant," among other considerations. 18 U.S.C. §§ 3553 (a)(2)(A)–(C). As a United States

Magistrate Judge, I have imposed misdemeanor sentences and made determinations related to pretrial detention by strictly adhering to the laws of Congress and by applying the relevant precedent of the Supreme Court and the Court of Appeals for the Fourth Circuit. If confirmed, I would continue to do so.

j. What is the recidivism rate of drug dealers who are given alternatives to incarceration in Maryland?

Response: I not familiar with a reliable source of information compiling the information requested. In 2017, the United States Sentencing Commission published a comprehensive report on recidivism among federal drug trafficking offenders finding that "[o]ver the eight-year follow-up period, one-half (50.0%) of federal drug trafficking offenders released in 2005 recidivated by being rearrested[ ] for a new crime or rearrested for a violation of supervision conditions." U.S Sentencing Comm'n, Recidivism Among Federal Drug Trafficking Offenders, at 3 (Feb. 21, 2017), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170221_Recidivism-Drugs.pdf. This report does not provide information specific to offenders who are "given alternatives to incarceration."

k. What is the recidivism rate of drug dealers who are given alternatives to incarceration across the United States?

Response: Please see my answer to Question 5j.