Responses of Darrel J. Papillion
Nominee to the U.S. District Court for the Eastern District of Louisiana
to the Written Questions of Senator Lindsey Graham, Ranking Member

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: While I am not familiar with this statement, or the context in which it arose, I do not believe it is a correct statement of the law. Judges in the United States District Court for the Eastern District of Louisiana should interpret the Constitution by following the binding precedents of the United States Supreme Court and the United States Fifth Circuit Court of Appeals, and in a manner consistent with the methods of interpretation the United States Supreme Court has used to decide constitutional questions.

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: While I am not familiar with this judge, the statement, or the context in which it arose, a United States District Judge in the Eastern District of Louisiana is obligated to follow the binding precedents of the United States Supreme Court and the United States Fifth Circuit Court of Appeals. It is improper for a federal judge to write opinions or to decide cases in a manner inconsistent with Supreme Court or binding federal precedent and guidance. If I were confirmed as a United States District Judge, I would faithfully follow the binding precedents of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

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

   Response: Black's Law Dictionary defines "living constitution" as "[a] constitution whose interpretation and application can vary over time according to changing circumstances and changing social values," and "living constitutionalism" as the "doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary, (11th ed. 2019).

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: The United States Supreme Court has stated that the Founders created a Constitution "intended to endure for ages to come, and consequently, to be adapted to the

various crises of human affairs." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). The Court further stated, "[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." *Id*. Beyond that, I am not familiar with then-Judge Ketanji Brown Jackson's 2013 statement or the context in which it arose. If confirmed as a United States District Judge, my duty would be to apply the binding precedents of the United States Supreme Court and United States Fifth Circuit.

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

   Response: If a case came before me that required me to address this issue, I would carefully research the law and impartially apply the law to the facts in the record.

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: United States District Judges are required to consider the factors set forth in 18 U.S.C. § 3553(a) when making sentencing decisions. If confirmed as a federal judge, I will consider all of the 3553(a) factors when making sentencing decisions, giving each factor appropriate weight depending on the particular facts and circumstances of each case based upon a careful application of the law and evidence in the record to reach a fair and just decision under the circumstances.

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: If confirmed as a United States District Judge, my judicial philosophy would be to approach each case with humility and: (1) to always carefully follow the letter of the law and apply the precedents of the United States Supreme Court and the United States Fifth Circuit Court of Appeals to the facts of each case; (2) to treat all who come before me equally and with dignity and respect; (3) to fairly and impartially discharge and perform my duties as a federal judge under the Constitution and laws of the United States; and (4) to have a deep respect for the rule of law. Stated simply, as a federal trial judge, my role would be to call balls and strikes and not color outside the lines. I am not aware of a particular United States Supreme Court decision that is typical of my judicial philosophy.

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

Response: If confirmed as a United States District Judge, my judicial philosophy would be to approach each case with humility and restraint and: (1) to always carefully follow the letter of the law and apply the precedents of the United States Supreme Court and the United States Fifth Circuit Court of Appeals to the facts of each case; (2) to treat all who come before me equally and with dignity and respect; (3) to fairly and impartially discharge and perform my duties as a federal judge under the Constitution and laws of the United States; and (4) to have a deep respect for the rule of law. Stated simply, as a federal trial judge, my role would be to call balls and strikes and not color outside the lines. I am not aware of a particular United States Supreme Court decision that is typical of my judicial philosophy. I am not aware of a particular Fifth Circuit judicial decision that is typical of my judicial philosophy.

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

Response: 18 U.S.C. § 1507 provides 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." If confirmed, I will apply the precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals to any such case involving 18 U.S.C. § 1507 that comes before the court.

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: In *Cox v. Louisiana*, 379 U.S. 559, 561-64 (1965), the United States Supreme Court held that a Louisiana state statute, which was modeled on 18 U.S.C. § 1507 and punished picketing near a courthouse, was constitutional on its face.

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

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

Combined Response to 11(a) to (j): As a judicial nominee, it is not appropriate for me to comment on the correctness of decisions of the United States Supreme Court because as a United States District Judge, I would be obligated to follow and respect the decisions of the United States Supreme Court. Consistent with the responses of other nominees, I agree there are some constitutional decisions that are settled and unlikely to be relitigated such that I can state that they were correctly decided. These decisions include *Brown v. Board of Education* and *Loving v. Virginia*. Of the cases noted above, in Question 11, the United States Supreme Court recently overruled *Roe v. Wade* and *Planned Parenthood v. Casey*. *See Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228, 2284 (2022). Apart from *Roe* and *Casey*, both of which have been overruled, the other referenced decisions are binding precedent. If I am confirmed, I will apply all binding precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

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

Response: In *District of Columbia v. Heller*, the United States Supreme Court declined to adopt a single standard of review. 554 U.S. 570, 634-35 (2008). The Court concluded the ban on handguns in the home in *Heller* failed any standard of scrutiny applied to enumerated constitutional rights. *Id*. at 628-29. Further, the United States Supreme Court held that a ban on firearms in the home violates the Second Amendment. *Id*. The Court noted that "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and provided three examples of presumptively valid regulations of firearms: (1) prohibitions on possession by "felons or the mentally ill"; (2) "laws forbidding the carrying of firearms in sensitive places such as schools or government buildings"; and (3) "laws imposing conditions and qualifications on the commercial sale of arms." *Id*. at 626-27. The United States Supreme Court noted that these were examples and the "list does not purport to be exhaustive." *Id*. at 627 n.26.

In *McDonald v. Chicago*, 561 US 742 (2010), the Supreme Court held the Fourteenth Amendment makes the Second Amendment right to keep and bear arms for the purpose of self-defense applicable to the states. The Court concluded rights, like the right to keep and bear arms, that are "fundamental to the Nation's scheme of ordered liberty" or that are "deeply rooted in this Nation's history and tradition" are appropriately applied to the states through the Fourteenth Amendment.

In *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court expounded on *Heller* and held that "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."

142 S. Ct. at 2129–30. In that context, the Government bears the burden of "justify[ing] its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. Put another way, "the [G]overnment must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id*. at 2127.

If I were confirmed as a United States District Judge, I would carefully apply these precedents of the United States Supreme Court and the United States Fifth Circuit Court of Appeals to evaluate whether a regulation or statutory provision infringes on Second Amendment rights.

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: No.

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: No.

c. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

d. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

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.

    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.

    b. **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: I was contacted by United States Senator John Kennedy's office on April 7, 2022, inviting me to a meeting with Senator Kennedy. I met with Senator Kennedy on April 12, 2022, and he indicated an interest in recommending me to the White House for an opening on the United States Fifth Circuit Court of Appeals. On April 18, 2022, after learning my name had been submitted to the While House by my home state senators, I sent my CV and biography to the White House Counsel's Office. On May 16, 2022, Senator Kennedy's office inquired about my interest in serving on the United States District Court for the Eastern District of Louisiana. I indicated I would be interested in serving. I met with Senator Bill Cassidy on May 25, 2022, about my potential service as a federal judge. On January 12, 2023, I interviewed with attorneys from the White House Counsel's Office. Since January 13, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice, the White House Counsel's Office, and the Offices of United States Senators John Kennedy and Bill Cassidy. On March 20, 2023, the President announced his intent to nominate me, and my nomination was sent to the United States Senate on March 21, 2023. A hearing was held on my nomination by the United States Senate Judiciary Committee on April 18, 2023.

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: I am not familiar with who is associated with this organization. To the best of my knowledge, 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: I am not familiar with who is associated with this organization. To the best of my knowledge, 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: I am not familiar with who is associated with this organization. To the best of my knowledge, 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: I am not familiar with who is associated with this organization. To the best of my knowledge, 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: I am not familiar with who is associated with this organization. To the best of my knowledge, 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: I received the questions from the United States Department of Justice. I prepared draft answers, and before my answers were finalized, I sent them to attorneys in the United States Department of Justice's Office of Legal Policy who provided limited feedback. All answers herein are my own answers based upon my own careful review and consideration of all questions and the applicable law or facts necessary to answer the questions, before certifying these answers as my own.

Responses of Darrel J. Papillion
Nominee to the U.S. District Court for the Eastern District of Louisiana
to the Written Questions of Senator Amy Klobuchar

During your nearly three decades as a practitioner, you have tried over 30 cases to verdict, including over a dozen jury trials. You served as chief counsel in nearly two dozen cases and have a broad practice ranging from civil rights cases to commercial litigation.

- **Can you describe your work in private practice and how that has prepared you to serve as a federal district court judge?**

  Response: I went to college and law school at my state's flagship public university with people from all walks of life. After law school, I clerked for a trailblazing Louisiana Supreme Court Associate Justice, who would eventually become Louisiana's first female Chief Justice. Since my clerkship, I have had an extremely busy trial and litigation practice for nearly 30 years.

  From 1995 until 1999, I worked at McGlinchey Stafford, a large regional law firm headquartered in New Orleans, in the firm's Products Liability Section, where my work consisted almost entirely of defense of products liability actions in state and federal court representing Fortune 500 companies. In 1999, I began working at Moore Walters Thompson and its successor firms, before starting my own firm with three of my partners in 2009. Since 1999, I have primarily represented individuals and families in injury and death cases, and I continue to represent businesses and corporations. My main areas of practice have been personal injury and wrongful death litigation. I have also served as a mediator and a Court-Appointed Special Master.

  All these experiences, in my opinion, will help me if I am confirmed as a United States District Judge because I know the value of good, hard-working, and fair trial judges who allow the parties to move their cases expeditiously through the court system. I know how important it is that both ordinary citizens and large corporations are treated fairly by a judge who recognizes that courthouses and courtrooms are not the usual abode of most people, and litigants are often under a great deal of stress and need a prompt resolution of their dispute or other legal matter, so they can move forward with their lives or businesses. Having tried many cases to verdict, I know trials are time-consuming and expensive for all concerned, and I will be mindful of this as I work to conclude the litigants' business in every matter by working hard to rule promptly and fairly to save the litigants' time and money while ensuring the fair and impartial administration of justice.

Responses of Darrel J. Papillion
Nominee to the U.S. District Court for the Eastern District of Louisiana
to the Written Questions of Senator Hirono

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.

Responses of Darrel J. Papillion
Nominee to the U.S. District Court for the Eastern District of Louisiana
to the Written Questions of Senator Mike Lee

1. How would you describe your judicial philosophy?

Response: If confirmed, my judicial philosophy would be to approach each case with humility and restraint and: (1) to always carefully follow the letter of the law and apply the precedents of the United States Supreme Court and the United States Fifth Circuit Court of Appeals to the facts of each case; (2) to treat all who come before me equally and with dignity and respect; (3) to fairly and impartially discharge and perform my duties as a federal judge under the Constitution and laws of the United States; and (4) to have a deep respect for the rule of law. Stated simply, if I were to be confirmed as a federal trial judge, my role would be to call balls and strikes and to not color outside the lines.

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

Response: I would look first at the plain language and text of the federal statute and work to apply the statute in accordance with its plain and ordinary meaning as written. I would then look at the precedents of the United States Supreme Court and the United States Fifth Circuit to ensure that my application of that statute strictly followed those precedents.

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

Response: I would first look at the text of the constitutional provision, and seek to apply the provision using its plain textual meaning. I would then carefully review applicable United States Supreme Court and United States Fifth Circuit precedent interpreting that particular constitutional provision to make sure that I was correctly applying the provision in accord with applicable precedent. In the very unlikely event I would be forced to decide a case that turned on a question of first impression involving a constitutional provision, not yet interpreted by the Supreme Court or United States Fifth Circuit, after reviewing the textual language of the provision, I would interpret the text in a manner consistent with the method of interpretation the Supreme Court used, for example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which the Supreme Court looked to the original public meaning of the Second Amendment.

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

Response: The United States Supreme Court has held the text and original public meaning of a constitutional provision play an important role in interpreting the Constitution. *See District of Columbia v. Heller*, 554 U.S. 570 (2008). As Justice

Scalia noted in Heller, "[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.") *Id*. at 576 (citations omitted). If confirmed, I would strictly apply all binding Supreme Court and Firth Circuit precedent when interpreting 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: I first look to the plain text of the statute, and if the statute is clear and unambiguous, I would apply the statute as written. I would also look carefully at the precedents of the Supreme Court and the Fifth Circuit to ensure that my reading of the plain textual language of the statute would be consistent with the binding precedents of those courts.

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: Statutes are immutable. In other words, the "plain meaning" of a statute does not change over time. The words mean what they meant when they were written. See, for example, *District of Columbia v. Heller*, 554 U.S. 570 (2008).

6. What are the constitutional requirements for standing?

Response: In general, for a party to establish standing, the party must have a genuine stake in the outcome of the case and to personally suffer (or imminently suffer): (1) a concrete and particularized injury; (2) traceable to the allegedly unlawful actions of the opposing party; and (3) the suffering is redressable by a favorable judicial decision. These requirements seek to ensure federal courts do not exceed their Article III power to decide actual cases or controversies.

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

Response: In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the United States Supreme Court held the Necessary and Proper Clause in Article I, Section 8, of the United States Constitution gives Congress certain implied powers that are not explicitly enumerated in the Constitution. The United States Constitution endowed Congress with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id*.

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

Response: If confirmed as a federal judge, I would evaluate the constitutionality of a law enacted by Congress in which Congress made no reference to a specific enumerated power by carefully following the precedents of the United States Supreme Court and the United States Fifth Circuit. The Supreme Court has held the determination of the constitutionality of action taken by Congress does not depend on recitals of the power it undertakes to exercise. *Nat'l Fed. Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012).

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

Response: The United States Supreme Court has held the Constitution protects unenumerated rights only if those rights are "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, 720-721 (1997). These rights include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), the right to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and the right to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

10. What rights are protected under substantive due process?

Response: The Supreme Court has recognized that certain rights are fundamental and protected under substantive due process because the rights are deeply rooted in our nation's history and tradition. *Washington v. Glucksberg*, 521 U.S. 702 (1997). These rights include the right: to marry (*Loving v. Virginia*, 388 U.S. 1 (1967)); to have children (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)); to direct the education and upbringing of one's children (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); to marital privacy (*Griswold v. Connecticut*, 381 U.S. 479 (1965)); to use contraception (*Eisenstadt v. Baird*, 405 U.S. 438 (1972)); and bodily integrity (*Rochin v. California*, 342 U.S. 165 (1952)).

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

Response: In *Dobbs v. Jackson Woman's Health Organization*, 142 S. Ct. 2228 (2022), the United States Supreme Court held the Constitution does not confer a right to abortion. *Lochner v. New York*, 198 U.S. 45 (1905), was largely abrogated by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), and applicable Supreme Court precedent has returned to the principle that a court should not substitute its own social

and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

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

Response: The United States Supreme Court has recognized Congress' power under the Commerce Clause includes: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and 3) those activities that substantially affect interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 558-559 (1995). If confirmed as a United States District Judge, I would be bound to apply this and all other binding precedents of the United States Supreme Court and the U.S. Fifth Circuit Court of Appeals.

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

Response: The United States Supreme Court has held race, national origin, religion, and alienage as suspect classes to which strict scrutiny applies. *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

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

Response: Separation of powers plays a pivotal role in the structure of the Constitution. The framers specifically sought to define and enumerate the power of each branch of government such that they would serve to check and balance the power of the others. Indeed, the separation of powers protects each branch of government from incursion by the others, but also protects the individual. *See Bond v. United States*, 564 U.S. 211, 222 (2011).

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 I were fortunate enough to be confirmed as a United States District Judge and faced this question, I would review the relevant text of the Constitution and consider the text itself, and I would also carefully apply and follow binding United States Supreme Court and United States Fifth Circuit precedent to properly adjudicate the issue before me in a fair and just manner.

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

Response: Judges should decide cases based on the law and the evidence, and not based on their own personal views or feelings. If I were so fortunate as to be confirmed as a United States District Judge, I would work to treat all litigants fairly

and with respect and courtesy, but my decisions and rulings would be based solely on the applicable law and evidence in a particular case.

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

Response: I believe both are wrong, and, if confirmed as a United States District Judge, I would work hard to very carefully apply the precedents of the United States Supreme Court and the United States Fifth Circuit to avoid committing either wrong.

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: The question regarding the change in trends regarding judicial review is a complex one, and I do not have sufficient information to resolve it. The role of a judge is to uphold the rule of law in all cases by carefully applying the law to the facts of each case in a fair and even-handed manner. If confirmed as a judge, I would follow this principle in every case, and I would scrupulously follow my oath of office in the performance of my duties as a federal judge and work to use the authority of that office with humility and when the law and precedents of the Supreme Court and the Fifth Circuit command use of judicial authority in furtherance of the Constitution and laws of the United States.

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

Response: Black's Law Dictionary defines "judicial review" as "[a] court's power to review the actions of other branches or levels of government; especially the courts' power to invalidate legislative and executive actions as being unconstitutional." *See* Black's Law Dictionary (11th ed. 2019). "Judicial supremacy" has been defined as follows: "interpretations of the Constitution by the federal judiciary in the exercise of judicial review, especially U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." *Id*.

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: Article Six, Section Three of the United States Constitution requires government officials to take an oath to uphold the Constitution. Elected officials are required to follow the decisions of the United States Supreme Court interpreting the Constitution. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). The question of how elected officials should balance these obligations is the type of question that could come before me in my capacity as a United States District Judge, if I were fortunate enough to be confirmed, such that the Canons of Judicial Conduct preclude me from giving an opinion on the application of this balance at this juncture. If I were faced with such a question, however, I would carefully follow the precedents of the United States Supreme Court and the United States Fifth Circuit to reach a fair and correct answer under the law.

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: Federalist 78 recognizes the role of the federal courts is to interpret and apply the law, and not to make the law or to enforce it because these two are the roles of the legislative and executive branches. The role of the courts is to decide cases and controversies, to faithfully apply the law, and to also uphold the rule of law. Federalist 78 speaks to the separation of powers and to judicial restraint and the need for avoidance of judicial overreach.

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 nominee to the United States District Court for the Eastern District of Louisiana, it is not my role to question whether the United States Supreme Court or the United States Fifth Circuit has properly decided the cases that are binding precedents. Rather, the proper role of a district judge in the Eastern District of Louisiana is to apply the binding precedents from the Supreme Court and Fifth Circuit whether or not those precedents have questionable constitutional underpinnings as referenced in the question. My role, if confirmed, would be to apply the law in a fair and neutral manner to the facts of the case at hand and to follow Supreme Court and Fifth Circuit precedent.

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

Response: None.

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 have no familiarity with the definition referred to in this question or the context in which it may have arisen. Black's Law Dictionary (11th ed. 2019) defines the term "equity" as "[f]airness; impartiality; evenhanded dealing." If I were fortunate enough to be confirmed as a United States District Judge, I would work to treat all persons in a fair, impartial, and evenhanded manner without regard to their race, gender, or status.

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

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

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 does not contain the word "equity." It forbids states from denying to any person within its jurisdiction the equal protection of the laws. If confirmed as a United States District Judge, I will faithfully follow United States Supreme Court and Fifth Circuit precedent regarding or interpreting the Fourteenth Amendment.

27. How do you define "systemic racism?"

Response: "Systemic racism" is defined by Merriam Webster 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's Dictionary (2022).

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: While I have heard the words or terms "critical race theory" and "systemic racism," and while I have included definitions, as cited in my answers to questions 27 and 28, I have not studied these concepts. I have no personal definition of these terms, and I am not an expert in the use of these terms. Therefore, I am not qualified to distinguish one term or definition from another. If I were to be confirmed as a United States District Judge, I would follow the law, as outlined by the United States Supreme Court, United States Fifth Circuit, and applicable statutes when dealing with issues related to allegations of race or racism.

Responses of Darrel J. Papillion
Nominee to the U.S. District Court for the Eastern District of Louisiana
to the Written Questions of Senator Josh Hawley

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

   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: On April 1, 2020, the East Baton Rouge Parish District Attorney's Office filed bills of information against Pastor Mark Anthony Spell, a Baton Rouge area pastor, for alleged violations of the Louisiana governor's emergency declarations that had been issued in response to the Covid-19 pandemic and restricted the size of indoor gatherings. I was not involved in the decision to commence the prosecution against Pastor Spell, nor was I involved in drafting the governor's emergency declarations. The East Baton Rouge Parish District Attorney asked me to assist in this matter as a Special Prosecutor because the case involved a number of constitutional issues. While the case against Pastor Spell presented important constitutional questions, on April 7, 2020, the United States Fifth Circuit stated that "all constitutional rights may be reasonably restricted to combat a public health emergency." *In re Abbott*, 954 F.3d 772, 786 (5th Cir. 2020), citing *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358 (1905), and in May 2020, the Supreme Court issued a decision in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), denying an application by a church – brought under the Free Exercise Clause – to enjoin a proclamation by the Governor of California which limited attendance at places of worship to 25% of building capacity or a maximum of 100 attendees in an effort to limit the spread of Covid-19. Chief Justice Roberts, concurring in the denial of the application for injunctive relief, concluded that these guidelines appeared to be consistent with the Free Exercise Clause of the First Amendment because "similar or more severe restrictions appli[ed] to comparable secular gatherings." *South Bay*, 140 S. Ct. at 1613 (Roberts, C. J., concurring) (quoting *Jacobson*, 197 U.S. at 38). The Chief Justice highlighted the fact that the California order only exempted or treated more leniently "dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." *Id*. The East Baton Rouge Parish District Attorney's office understood Louisiana's gubernatorial proclamation to be similar to the California gubernatorial order that had been temporarily upheld by the Supreme Court in *South Bay*.

   The trial court held a hearing on Pastor Spell's Motion to Quash the bills of information on January 25, 2021, and denied Pastor Spell's motion. Pastor Spell then filed an application for a supervisory review in the Louisiana First Circuit Court of Appeal.

On April 9, 2021, while Pastor Spell's case was pending in the Louisiana First Circuit, the United States Supreme Court decided *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), and stated, in part, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Id*. "It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Id*.

On May 24, 2021, the Louisiana First Circuit, which was aware of the substantive holding of *Tandon*, denied Pastor Spell's application for supervisory writs. Although *Tandon* had been issued by the time of its ruling, the First Circuit denied Pastor Spell's application for relief primarily on procedural grounds. Pastor Spell thereafter sought review in the Louisiana Supreme Court. On May 13, 2022, with the benefit of *Tandon*, the Louisiana Supreme Court ruled in Pastor Spell's favor and dismissed the charges against him.

With the benefit of *Tandon*, the Louisiana Supreme Court quashed the bills of information against Pastor Spell. Given the Louisiana Supreme Court's decision, which was informed by *Tandon*, I can only assume the Louisiana gubernatorial orders would have been drafted differently had *Tandon* been decided before charges were brought against Pastor Spell. As such, this prosecution would have been unnecessary because there would have been a clearer understanding, as the Court recognized in *Tandon,* that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." 141 S. Ct. 1294, 1296 (2021). Therefore, I believe if the law had been clearer in the early stages of the pandemic, this case would not have been brought against Pastor Spell.

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

Response: The original public meaning of the Constitution plays a critical role in interpretation of its provisions. The United States Supreme Court has held it is appropriate to look at the original understanding of constitutional provisions. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court looked to the original public meaning of the Second Amendment. As Justice Scalia noted in *Heller*, "[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." *Id*. at 576 (citations omitted). If confirmed, I would strictly apply all binding Supreme Court and Firth Circuit precedent when interpreting the Constitution.

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

Response: When interpreting a legal text, such as a statute, regulation, or the Constitution, I would start first with the plain text. I would next look to the precedents of the United States Supreme Court and the United States Fifth Circuit regarding the text. If faced with no binding precedent, I would return to the text, carefully reviewing it in connection with accepted canons of statutory construction and would try to apply the text as written, with the aid of any available authority from other United States federal courts. Next, I would consult trusted legal treatises and would look to analysis in articles from reputable law reviews or journals. If, after all the foregoing, I were to have trouble making sense of the text, I would examine the legislative history. Referencing extrinsic material, like legislative history, the Supreme Court explained these materials "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005). The Court cautioned "legislative history is itself often murky, ambiguous, and contradictory." *Id*.

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: No. Not all legislative history is of equal value. Recordings of floor debates or news reports or accounts of comments by individual members of a legislative body and similar legislative history are of less value than, for example and if available, committee reports. *See, e.g.*, *United States v. Craft*, 535 U.S. 274, 287 (2002) (failed legislative proposals not probative of legislative intent); *National Ass'n of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 832 n.28 (1983) (noting report of entire conference committee would carry greater weight than manager's statement not contained in committee report).

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

Response: The United States Supreme Court has turned to English precedents in interpreting various constitutional provisions. *See, e.g.*, *New York Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2135-42 (2022); *Crawford v. Washington*, 541 U.S. 36, 42-61 (2004). It is, however, difficult to conceive of when a United States District Judge would need to consult the law of a foreign nation to interpret the highest source of American law, the United States Constitution. If I were confirmed as a United States District Judge, and charged with interpreting the United States Constitution, I would look to the plain language of the text itself and then to the binding precedents of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

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

Response: The United States Supreme Court has found an execution protocol can violate the Eighth Amendment's prohibition against cruel and unusual punishment if the method presents "a substantial risk of serious harm" and if there is "an alternative that is feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (citations and quotation marks omitted). Moreover, the United States Fifth Circuit Court of Appeals has used these elements when seeking to determine whether a plaintiff has sufficiently pled a method-of-execution claim. *Whitaker v. Collier*, 862 F.3d 490, 497 (5th Cir. 2017).

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. See my response to Question 4.

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

Response: *In Dist. of Attorney Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72 (2009), the United States Supreme Court reversed a finding that a defendant possessed a right under the Due Process Clause to obtain postconviction access to the state's evidence for DNA testing. The Court held "there is no such substantive due process right." *Id*. Similarly, the United States Fifth Circuit Court of Appeals has recognized "[t]here is no freestanding, substantive due process right to access DNA evidence at the post-conviction stage." *Moon v. City of El Paso*, 906 F.3d 352, 359 (5th Cir. 2018).

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 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the United States Supreme Court held that, as a general proposition, "a law that is neutral and of general applicability need not be justified by a compelling

governmental interest even if the law has the incidental effect of burdening a particular religious practice." *See also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021); *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). However, a law or policy or law that allows for individualized exemptions but does not allow for an exemption for a religious entity is likely not neutral or generally applicable. *Fulton v. City of Philadelphia*, 141 S. Ct. at 1877. In addition, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Likewise, a law or policy adopted or motivated by religious animus on the government's part is subject to strict scrutiny. *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018).

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

Response: Please see my response to Question 8. Strict scrutiny requires the government to further "interests of the highest order" by means "narrowly tailored in pursuit of those interests." *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)).

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: According to the Fifth Circuit Court of Appeals, "[i]t does not matter whether a religious belief itself is central to the religion, but only that 'the adherent [ ] have an honest belief that the practice is important to his free exercise of religion.'" *Moussazadeh v. Texas Dep't of Crim. Just*., 703 F.3d 781, 790–91 (5th Cir. 2012), as corrected (Feb. 20, 2013) (citing *United States v. Seeger*, 380 U.S. 163, 185, 85 S. Ct. 850, 13 L.Ed.2d 733 (1965)).

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 *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008), the United States Supreme Court concluded Washington D.C.'s ban on handguns in the home failed any standard of scrutiny applied to enumerated constitutional rights. *Id*. at 628-29. Further, the United States Supreme Court held a ban on firearms in the home violates the Second Amendment. *Id*. The Court noted that

"[l]ike most rights, the right secured by the Second Amendment is not unlimited" and provided three examples of presumptively valid regulations of firearms: (1) prohibitions on possession by "felons or the mentally ill"; (2) "laws forbidding the carrying of firearms in sensitive places such as schools or government buildings"; and (3) "laws imposing conditions and qualifications on the commercial sale of arms." *Id*. at 626-27.

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 Justice Holmes was suggesting the Constitution enacted no particular economic theory. He went on to say in his dissent, "[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). As a federal judicial nominee, it is not appropriate for me to give an opinion on whether I agree with what Justice Holmes may have meant because any personal opinion or belief of mine would not be relevant to my application of binding precedent if I were to be confirmed as a federal judge. As a federal judge, I would be bound by the decisions of the United States Supreme Court and the Fifth Circuit. *Lochner*, however, was abrogated in *West Coast Hotel Co. v. Parrish*, 300 U.S 379 (1937), and it is my understanding *Lochner* is no longer binding precedent.

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

Response: See my response to 12(a).

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: In *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018), the Supreme Court held "[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly

on the basis of race, is objectively unlawful and outside the scope of Presidential authority." Chief Justice Roberts, writing for the majority, added, "[t]he dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear— 'has no place in law under the Constitution.'" My understanding of this phrase is that the majority is clearly expressing *Korematsu* was wrongly decided, but I believe this is likely a reference to the fact that years after the original *Korematsu* decision, in 1983, Mr. Korematsu's original conviction was overturned by a federal district judge in San Francisco, on grounds that the government had withheld critical evidence in the case, but this 1983 district court action had no effect on the 1944 United States Supreme Court decision which had continued to stand.

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?

a. If so, what are they?

Response: I am aware of no such opinions.

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

Response: If confirmed, I commit to faithfully applying all precedents of the United States 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 federal judicial nominee, it is not appropriate for me to express an opinion as to whether I agree with this contention because, if I am fortunate enough to be confirmed as a federal judge, I may have to make decisions regarding issues of this type, and I do not want to inappropriately pre-judge the issue. While I cannot comment on my agreement or not with Judge Hand's statement, in *Eastman Kodak Co. v. Image Tech Servs., Inc*., 504 U.S. 451, 481 (1992), the United States Supreme Court concluded Kodak's nearly 100% share of the parts market and 80% to 95% of the service market "with no readily available substitutes" was sufficient to create a triable issue of material fact as to whether Kodak had "monopoly power" under Section 2 of the Sherman Act. As a general matter, a nonconclusory allegation that a defendant holds a predominant share of the relevant market will usually satisfy the monopoly power element of a monopolization claim. *United States v. Grinnell*, 384 U.S. at 563, 571 (1966). The

exact share of the market a defendant controls before it is found to have monopoly power has not been conclusively defined, but, as a general matter, a market share of more than 70 percent is generally sufficient to support an inference of monopoly power. See, e.g., *Eastman Kodak Co*., 504 U.S. at 481; *Heatransfer Corp. v. Volkswagenwerk, A.G*., 553 F.2d 964, 981 (5th Cir. 1977) (71– 76 percent share sufficient). In contrast, courts almost never find monopoly power when market share is less than about 50 percent. *American Telephone & Telegraph Co. v. Delta Commc'ns Corp*., 408 F. Supp. 1075, 1107 (S.D. Miss. 1976), aff'd per curiam, 579 F.2d 972 (5th Cir. 1978) (adopting district court opinion), modified on other grounds, 590 F.2d 100 (5th Cir. 1979) (41% share of local prime time television market insufficient to subject television network to Section 2 monopolization scrutiny). The Fifth Circuit adheres to Judge Learned Hand's widely accepted rule of thumb that "while a 90 percent market share definitely is enough to constitute monopolization, 'it is doubtful whether 60 or 64 percent would be enough; and certainly, 33 percent is not.'" *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc*., 732 F.2d 480, 489 (5th Cir. 1984) (citing *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), approved and adopted, *American Tobacco Co. v. United States*, 328 U.S. 781, 811–14 (1946)).

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

Response: See Response to 15(a).

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

Response: See Response to 15(a).

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

Response: Black's Law Dictionary (11th ed. 2019) defines "federal common law" as "[t]he body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law." As a general matter, there is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The Supreme Court has recognized, however, certain "limited areas" in which "federal judges may appropriately craft the rule of decision," such as "admiralty disputes and certain controversies between States." *Rodriguez v. Fed. Deposit Ins. Corp*., 140 S. Ct. 713, 717 (2020).

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**:** If confirmed, in keeping with the precedents of the United States Supreme Court, I would seek to defer to the interpretation declared by a state's highest court. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 77-79 (1938); *see also Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the state's highest court with respect to state law are binding on the federal courts"), and if I were presented with a case or controversy involving this issue, I would carefully review the evidence, research the applicable statutes and precedent and follow the interpretation of the United States Supreme Court and the United States Fifth Circuit.

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

Response: Please see my response to Question 17.

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

Response: The United States Supreme Court stated in *California v. Greenwood*, 486 U.S. 35, 43 (1988), that "[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."

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

Response: Canons of judicial conduct prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation. As a consequence, it would not be appropriate for me to comment or opine on whether particular cases were decided correctly. As prior judicial nominees have stated, however, because the precise legal issues presented in *Brown v. Board of Education* (involving *de jure* segregation of schools) are unlikely to become the subject of serious litigation, I feel comfortable stating that *Brown* was correctly decided.

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

Response: Federal Rule of Procedure 65 gives courts the authority to issue injunctive relief. The United States Supreme Court has held a party seeking injunctive relief must show: (1) it has suffered an irreparable injury; (2) the absence of an adequate remedy at law; (3) that, considering the balance of hardships between the moving and resisting parties, an injunction is warranted; and (4) "the public interest would not be disserved" by issuing injunctive relief. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010). "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Id*. at 165. Both the United States Supreme Court and the Fifth Circuit Court of Appeals have concluded that, "[s]uch injunctions at times can constitute 'rushed, high-stake, low-information decisions,' while more limited equitable relief can be beneficial." *Louisiana v. Becerra*, 20 F.4th 260, 264 (5th Cir. 2021), quoting *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch J.,

concurring in the grant of a stay.). The Fifth Circuit has confirmed the right of federal trial judges to issue nationwide injunctions. *Texas v. United States,* 809 F.3d 134 (5th Cir. 2015) (issuing preliminary injunction against enforcement of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam). If confirmed as a federal district judge, I would follow the precedential authority of the Supreme Court and Fifth Circuit.

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

Response: See my response to Question 19.

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

Response: See my response 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: See my response to Question 19.

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

Response: Federalism is a bedrock concept of our constitutional democracy. The Supreme Court has said federalism "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." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The Court further observed that "[p]erhaps the principal benefit of the federalist system is a check on abuses of government power." *Id*. The Constitution grants limited powers to the federal government and reserves all other powers to the states. In so doing, the Constitution leaves room for states to enact laws and regulations according to the needs of that state.

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

Response: A federal court should or must abstain from resolving a pending legal question in deference to adjudication by a state court in the following circumstances:

1) *Burford* abstention refers to cases where state agency action is involved and federal courts defer to state courts to review those decisions under certain circumstances. The Fifth Circuit Court of Appeals has distilled the Supreme Court's guidance into five factors that steer the analysis of whether *Burford* abstention is warranted: (1)

whether the cause of action arises under federal or state law; (2) whether the case requires inquiry into unsettled issues of state law or into local facts; (3) the importance of the state interest involved; (4) the state's need for a coherent policy in that area; and (5) the presence of a special state forum for judicial review. *Grace Ranch, L.L.C. v. BP Am. Prod. Co.*, 989 F.3d 301, 313 (5th Cir. 2021), *as revised* (Feb. 26, 2021) (internal citations omitted). "Burford abstention is disfavored as an abdication of federal jurisdiction." *Aransas Proj. v. Shaw*, 775 F.3d 641, 653 (5th Cir. 2014).

2) *Colorado River* abstention applies where there is parallel state and federal litigation and requires abstention only in exceptional circumstances. The Fifth Circuit Court of Appeals has set forth six factors that may be considered and weighed in determining whether such exceptional circumstances exist: (1) assumption by either court of jurisdiction over a res; (2) the relative inconvenience of the forums; (3) the avoidance of piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) whether and to what extent federal law provides the rules of decision on the merits; and (6) the adequacy of the state proceedings in protecting the rights of the party invoking federal jurisdiction. *Black Sea Inv., Ltd. v. United Heritage Corp*., 204 F.3d 647, 650 (5th Cir. 2000). In assessing the propriety of abstention according to these factors, a federal court must keep in mind that "the balance [should be] heavily weighted in favor of the exercise of jurisdiction." *Id*. (internal citations omitted).

3) *Pullman* abstention applies when a case presents both state grounds and federal constitutional grounds for relief, the proper resolution of the state ground for the decision is unclear; and the disposition of the state ground could obviate adjudication of the federal constitutional ground. "*Pullman* abstention is limited to *uncertain questions of state law* because '[a]bstention from the exercise of federal jurisdiction is the exception, not the rule.'" *Texas Entm't Ass'n, Inc. v. Hegar*, 10 F.4th 495, 508 (5th Cir. 2021) (quoting *Colo. River Water Conservation Dist*., 424 U.S. at 813, 96 S. Ct. 1236) (emphasis supplied by the Fifth Circuit).

4) *Younger* abstention doctrine "counsels that federal courts should abstain from interfering with states' enforcement of their laws and judicial functions." *Texas Ent. Ass'n, Inc. v. Hegar*, 10 F.4th at 508 (citing *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013). *Younger* abstention applies only in exceptional circumstances and is appropriate only "in three types of proceedings": (1) ongoing state criminal prosecutions, (2) "certain 'civil enforcement proceedings'" that are "in aid of and closely related to [the State's] criminal statutes," and (3) "pending 'civil proceedings involving certain orders ... uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Id*. (citing *Sprint*, 571 U.S. at 77-78).

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

Response: As a general matter, damages provide financial compensation to the complaining party, while injunctive relief provides equitable relief in the form of an order commanding either action or inaction by the responding party. In some cases, an award of damages may adequately remedy the complaining party's injury. In other cases, damages may be insufficient, and injunctive relief may be warranted based on the nature of the complaining party's injury and the requirements of the law in demonstrating an entitlement to an injunctive relief. The key point is that the advantages and disadvantages of damages versus injunctive relief are fact specific and hinge on the particular circumstances of a case. If confirmed as a judge, I would faithfully follow binding precedent from the United States Supreme Court and Fifth Circuit in determining the appropriate remedies available to claimants in all cases that come before me.

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

Response: The United States Supreme Court has held the substantive due process clauses of the Fifth and Fourteenth Amendments protect unenumerated rights that are "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, 721 (1997). These rights include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), the right to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and the right to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

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: Pursuant to the First Amendment, Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. Whenever a governmental regulation that burdens religion treats any comparable secular activity more favorably than religious exercise, that regulation is not neutral and triggers strict scrutiny under the Free Exercise clause. The government must show that the challenged law satisfies strict scrutiny. See also my response to Question 8.

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

Response: In *Lee v. Weisman*, 505 U.S. 577, 591 (1992), the Supreme Court held

that the "Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment . . ."

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 answers to 1(a), 8 and 9. I would apply the tests set out the by the United States Supreme Court and the Fifth Circuit Court of Appeals.

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 answers 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); *see also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) ("Placing Congress' intent beyond dispute, RFRA specifies that it 'applies to all Federal law, and the implementation of that law, whether statutory or otherwise'"). "RFRA also permits Congress to exclude statutes from RFRA's protections." *Id.*

In *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014), the United States Supreme Court found Title VII and other similar laws indicate that Congress "speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations." In *Hobby Lobby*, the Supreme Court applied the RFRA's free exercise protections to for-profit corporations. Based on this binding precedent, it is clear that RFRA applies to all persons, non-profits, and for-profit corporations subject to federal laws, unless Congress clearly indicates otherwise.

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

Response: I have issued no such opinions.

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

believe something "beyond a reasonable doubt." Please provide a numerical answer.

Response: In the Fifth Circuit, "proof beyond a reasonable doubt" has been defined as "proof of such a convincing character that you would be willing to rely and act upon it without hesitation in making the most important decisions of your own affairs." Fifth Circuit District Judges Association Pattern Jury Instructions Committee, *Pattern Jury Instructions, Criminal Cases* (2019). If I were to be confirmed as a United States District Judge, my obligation would be to carefully follow the precedents of the United States Supreme Court and the United States Fifth Circuit Court of Appeals. To the extent I might be called upon to make a legal determination regarding the issue posed by this question, as a federal judicial nominee it would be inappropriate for me to set forth my own personal confidence threshold in numerical form.

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

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

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

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

Combined Response to 27(a) – (c): If confirmed, and a case or controversy were to be presented involving this question, my duty would be to review the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the applicable precedents of the United States Supreme Court and the United States Fifth Circuit to the matter before me. I cannot, under applicable canons, as a federal judicial nominee give statements of opinion regarding these issues.

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?

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

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

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

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

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.

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.

Combined Response to 28(a)-(g): If I were so fortunate as to be confirmed as a United States District Judge in the Eastern District of Louisiana, I would very carefully follow the rules established by the two federal courts that supervise that court, namely the United States Supreme Court and the United States Fifth Circuit. I would also follow the rules of court established by the Eastern District of Louisiana, and, to the extent applicable, the Fifth Circuit Rules relative to Federal Rule of Appellate Procedure 32.1. As a federal judicial nominee, it is not appropriate for me to comment on the "appropriateness" of rules made by supervising courts, and, if confirmed, I would follow the rules of the supervising courts.

29. In your legal career:

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

Response: I have tried 33 cases to verdict. In 24 of those cases, I was lead counsel, and in 9 of the cases I was either co-lead or second chair.

b. How many have you tried as second chair?

See Response to 29(a).

c. How many depositions have you taken?

Response: In my 28 years of practice, I have taken hundreds, if not thousands, of depositions.

d. How many depositions have you defended?

Response: In my 28 years of practice, I have defended hundreds of depositions.

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

Response: While I do not have an exact number, I believe I have argued before a federal appeals court, at oral argument, 2 to 5 times.

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

Response: In my 28 years of law practice, I have argued many times in Louisiana's courts of appeal and the Louisiana Supreme Court. I do not have an exact number, but I would estimate at least 20 times. For example, Louisiana has 5 intermediate appellate courts spread across the state, and, to my knowledge, I have argued in at least 4 and possibly all 5 courts of appeal.

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

Response: I do not recall "appearing" before a federal agency. I have interacted with federal agencies in connection with my law practice, but I do not recall ever arguing before an agency or federal agency's administrative tribunal.

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

Response: I do not have an exact number, but I would estimate I have argued hundreds of dispositive motions over my 28-year career, as both a plaintiff and a defense lawyer. For example, I believe each of the 10 cases listed in No. 17 of my Senate Judiciary Committee Questionnaire involved at least one (and sometimes several) dispositive motions, and, as I recall, the *Hackler* case, identified in 17(9) of my SJQ, accounted for roughly a dozen dispositive motions in the Eastern District of Pennsylvania. Based on this, and the hundreds of other cases I have handled, I believe "hundreds" of dispositive motions is a very fair estimate.

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

Response: I do not have an exact number, but I would estimate I have argued in at least 20 motion hearings that involved the "taking of evidence," for example a "prescription" or statute of limitations "trial" (which Louisiana counts as a "trial," but I do not count as a "trial" in my total number of "trials") in clergy abuse cases with allegations of repressed memory or other matters that involved the taking of evidence. In addition, if the question is seeking to understand how many motions I have argued regarding the "admissibility of evidence," prior to trial or some proceeding involving evidence, I have likely argued close to 100 motions of this type over my 28 years of practice.

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: When I practiced law at a firm that tracked my billable hours, which was over 20 years ago, I believe I typically billed 2300 to 2800 hours per year.

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

Response: I have not worked at a firm that "tracked" billable hours for over 20 years. I do not recall how much time I spent while working at a billable firm on pro bono matters. While working as an hourly lawyer at a big firm, I handled pro bono cases through a local pro bono organization. Any hours I spent on pro bono work would have been "on my own time" and would not have been counted toward the firm's billing requirements for associates. Over the past 24 years, I have been primarily a contingent fee lawyer, charging no fee unless I recovered for my clients. Over the years, I have represented numerous clients for free and have reduced many thousands of dollars in fees for clients of limited financial means. I have also supported legal aid organizations in my state in many ways, and I have been a board member of the Louisiana Bar Foundation and the Baton Rouge Bar Foundation, both of which help fund the legal needs of the poor. I also served as the Honorary Co-Chair of the Fiftieth Anniversary Advisory Committee of Southeast Louisiana Legal Services in 2017. Moreover, as a State Bar President and Bar leader, I have given seminars and speeches that have addressed the need for lawyers to serve the less fortunate, and I have always tried to advocate for funding for legal services corporations and organizations that serve the legal needs of the poor.

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: Under 28 U.S. Code § 453, each justice or judge of the United States takes an oath, promising to administer justice without respect to persons, and do equal right to the poor and to the rich, and to faithfully and impartially discharge and perform all the duties incumbent upon the justice or judge under the Constitution and laws of the United States. I understand Justice Scalia's quote to mean that judges must follow this oath, regardless of their personal feelings or opinions, and, obviously, sometimes in the performance of their duties, judges or justices will not always like, on a personal level, every decision they have to make to comply with this important oath. If I am fortunate enough to be confirmed as a United States District Judge, I will take my oath very seriously and will work very hard every day to fulfill its obligations.

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: Although I am not familiar with this statement or the context in which the Chief Justice made the statement, I understand it to mean judges should not be "activists" and should not "legislate" from the bench. It is essentially a statement about the separation of powers, and the appropriate role of the federal judiciary in our constitutional democracy. Article 1 gives Congress the legislative power to enact laws. Article 2 gives the President the Executive Branch's power to enforce the laws, and Article 3 defines the judicial power. So, he is saying, in my view, that judges, like umpires (who do not pitch, run, bat, or catch, but rather call the game) interpret and apply the rules.

b. Do you agree or disagree with this statement?

Response: I agree with the statement, but I would note that the Supreme Court has itself recognized certain "limited areas" in which "federal judges may appropriately craft the rule of decision," such as "admiralty disputes and certain controversies between States." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020). Similarly, judges do make certain rules regarding court procedure and the management of dockets, but, generally, I believe the statement of the Chief Justice is correct. If I were confirmed as a federal judge, I would seek to "call balls and strikes," and not legislate from the bench.

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: Although I am not familiar with this statement or the context in which Justice Holmes made the statement, I believe Justice Holmes was expressing his view that judges are obligated to apply the law by applying binding precedent, regardless of outcome.

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

Response: As stated in my response to Question 33(a), above, I am not familiar with this statement or the context in which Justice Holmes made the statement, and my belief is that Justice Holmes was expressing his view that judges are obligated to apply the law by applying binding precedent, regardless of outcome. If I were confirmed as a federal judge, I would carefully review and consider the evidence and arguments submitted by the parties with an open mind, research the applicable statutes and precedent, and apply the binding precedent to the case before me.

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

a. If yes, please provide appropriate citations.

Response: In my 28 years of practice, I would tend to believe that in some matter or another I have made allegations that a state statute, most likely the Louisiana Medical Malpractice Act, was unconstitutional. But I can recall no specific matter at this time.

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. I have not, to my knowledge or recollection, deleted any specific content from my social media. On or about March 21, 2023, after being notified the President would nominate me to the federal bench, I closed and deleted all of my social media accounts, not for any content they contained, but to protect the privacy and safety of my family, particularly my minor children, and because I do not believe it is appropriate for federal judges or federal judicial nominees to have a presence on social media.

36. What were the last three books you read?

Response:
Woodward, B., & Armstrong, S. (1979). The Brethren, (1st ed.) Simon and Schuster.
Chernow, R. (2004), Titan (2nd ed.) Vintage Books.
Williams, T.H. (2009), Huey Long: a biography, Blackstone Audio, Inc.

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

Response: While I have heard the term "systemic racism," I have not studied this concept and am not an expert in the use of this term. If confirmed as a federal district judge, I will work to ensure all who come before me are treated fairly and in a non-discriminatory manner. If any case were to come before me involving claims of systemic racism, I would follow the precedents of the United States Supreme Court and United States Fifth Circuit, and I would apply that precedent in a fair and neutral manner to the facts and circumstances of the case. Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation. As such, it would be inappropriate for me to comment further on this matter.

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

Response: This is a difficult question to answer. I have handled many rewarding matters, so it is difficult to select a particular case; rather, the cases that have given me the most satisfaction are the many cases I have handled for ordinary American families who

suffered a great loss. I have represented many working men, or their surviving wives and children, in cases in which the worker, most often a man, but sometimes a woman, left home, in a uniform or with a hard hat and work boots, and sometimes in a business suit, to do an honest day's work, and either never came home, or came home in a wheelchair or horribly burned and disfigured or otherwise badly damaged, and I was able to secure a recovery for the worker or the family to ensure the injury was not the end of that family's American dream. Similarly, while emotionally draining, and very sad, I am proud of the cases I handled for victims of abuse at the hands of trusted individuals: teachers, coaches, health care professionals, and members of the clergy who violated their trust and, in many cases, robbed my clients of their innocence.

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: In my role as an advocate, it was my duty to present the best case possible for my client consistent with the law and the rules of professional conduct. If confirmed as a federal judge, my role will be to faithfully follow binding precedent from the United States Supreme Court and the Fifth Circuit and to apply the law fairly and neutrally in each case, even if the outcome may conflict with my own personal views.

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

Response: Yes.

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

Response: I read a variety of sources in connection with my work as a lawyer. I cannot point to any three law professors whose works I have read most often.

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: While I am sure I have been persuaded or informed over my 30 years as a lawyer and law student by a law review article, opinion, or court decision, I cannot point to a particular decision at this time.

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

Response: In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the United States Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1978), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and the Supreme Court held there is no Constitutional right to abortion. If confirmed as a federal judge, I will carefully follow the precedents of the Supreme Court and Fifth Circuit, including *Dobbs*. As a federal judicial nominee, it would be inappropriate for me to comment further on this matter.

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: In June of 2022, I testified as a witness in the matter of *Boudreaux v. Louisiana State Bar Ass'n,* No. 11962, Eastern District of Louisiana (2022), as a past President of the Louisiana State Bar Association (LSBA) regarding certain programs of the LSBA, in an action brought by a Louisiana lawyer, challenging the mandatory status of the LSBA. The federal district court rendered judgment against the plaintiff, and in favor of the LSBA, and the matter is currently on appeal. The matter is pending in the United States Fifth Circuit Court of Appeals, where oral argument, in *Boudreaux v. LSBA*, No. 22-30564 (5th Cir.), is scheduled for July 2023. My involvement in that matter has concluded. A copy of my testimony is attached.

In August of 2021, I was proffered as an expert witness in matters related to the legal profession and standard of conduct for attorneys in a hearing seeking to disqualify an attorney from serving as counsel in a lawsuit involving allegations of legal malpractice against a Baton Rouge lawyer and law firm. My testimony was proffered as expert testimony on behalf of the defendant lawyer and law firm who sought, and ultimately obtained, the disqualification of the attorney who had filed the action. To my knowledge, that testimony is not available.

It is possible I testified under oath at some other time in my 28 years as an attorney and bar leader, but I do not recall being placed under oath at any time other than these two instances and when I testified at my Senate confirmation hearing on April 18, 2023.

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?
b. Amazon?
c. Google?
d. Facebook?
e. Twitter?

Combined response to 47 (a) to (e): No. I only own mutual funds and exchange traded funds. I do not own any individual stocks.

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

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

Response: To the best of my recollection, I have never authored a brief that was filed in court without my name on the brief. It is possible that when I was a very junior associate at a large law firm, who had recently clerked at the Louisiana Supreme Court, I may have edited or made suggested revisions to a brief filed by other members of the firm, and I was not listed as counsel on the brief. Similarly, later in my career, I may have reviewed or edited a brief at the request of one of my partners or another member of our firm as a courtesy and for the improvement of our firm's work product, when my name was not formally on the brief, but I have never, for example, "ghost-written" or secretly written a brief that did not contain my name.

48. Have you ever confessed error to a court?

Response: I do not recall ever confessing error to a court.

a. If so, please describe the circumstances.

Response: See Response 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: As a judicial nominee, I swore under oath that the testimony I provided to the Senate Judiciary Committee would be, to the best of my knowledge and understanding, true and accurate. I have attempted to answer each of these questions truthfully, to the best of my ability, and in a manner consistent with my ethical obligations under Canon 3 of the Code of Conduct for United States Judges as it applies to judicial nominees.

Responses of Darrel J. Papillion
Nominee to the U.S. District Court for the Eastern District of Louisiana
to the Written Questions of Senator John Kennedy

1. **Please describe your understanding of the First Amendment's guarantee of religious liberty.**

   Response: Pursuant to the First Amendment, Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. Whenever a governmental regulation that burdens religion treats any comparable secular activity more favorably than religious exercise, that regulation is not neutral and triggers strict scrutiny under the Free Exercise clause. The government must show that the challenged law satisfies strict scrutiny.

2. **As a Special Prosecutor, were you in any way involved in the decision to prosecute Pastor Tony Spell in early 2020?**

   Response: I was not involved in the decision to prosecute Pastor Spell. The East Baton Rouge Parish District Attorney asked me to assist in this case after the decision to take legal action was made, and he did so because of the constitutional considerations in the case.

3. **The COVID-19 pandemic revealed that law related to emergency state powers in the United States lacked clarity until the United States Supreme Court provided guidance, especially when emergency state action restricted certain constitutional rights and liberties. One year into the pandemic, for example, the Court in *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) stated that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." The Court released this decision as the Spell case remained unresolved.**

   a. **Please describe how this decision, among others, impacted your approach to the Spell case.**

      Response: On April 1, 2020, the East Baton Rouge Parish District Attorney's Office filed bills of information against Pastor Mark Anthony Spell for alleged violations of the Louisiana governor's emergency declarations that had been issued in response to the Covid-19 pandemic and restricted the size of indoor gatherings. I was not involved in the decision to commence the prosecution against Pastor Spell, nor was I involved in drafting the governor's emergency declarations. The East Baton Rouge Parish District Attorney asked me to assist in this matter because it involved a number of constitutional issues. While the case against Pastor Spell presented important constitutional questions, on April 7, 2020, the United States Fifth Circuit stated that "all constitutional rights may be reasonably restricted to combat a public health emergency." *In re Abbott*, 954

F.3d 772, 786 (5th Cir. 2020), citing *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358 (1905), and in May 2020, the Supreme Court issued a decision in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), denying an application by a church – brought under the Free Exercise Clause – to enjoin a proclamation by the Governor of California which limited attendance at places of worship to 25% of building capacity or a maximum of 100 attendees in an effort to limit the spread of Covid-19. Chief Justice Roberts, concurring in the denial of the application for injunctive relief, concluded that these guidelines appeared to be consistent with the Free Exercise Clause of the First Amendment because "similar or more severe restrictions appli[ed] to comparable secular gatherings." *South Bay*, 140 S. Ct. at 1613 (Roberts, C. J., concurring) (quoting *Jacobson*, 197 U.S. at 38). The Chief Justice highlighted the fact that the California order only exempted or treated more leniently "dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." *Id*. The East Baton Rouge Parish District Attorney's office understood Louisiana's gubernatorial proclamation to be similar to the California gubernatorial order that had been temporarily upheld by the Supreme Court in *South Bay*.

The trial court held a hearing on Pastor Spell's Motion to Quash the bills of information on January 25, 2021 and denied Pastor Spell's motion. Pastor Spell then filed an application for a supervisory review in the Louisiana First Circuit Court of Appeal.

On April 9, 2021, while Pastor Spell's case was pending in the Louisiana First Circuit, the United States Supreme Court decided *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), and stated, in part, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Id*. "It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Id*.

On May 24, 2021, the Louisiana First Circuit, which was aware of the substantive holding of *Tandon*, denied Pastor Spell's application for supervisory writs. Although *Tandon* had been issued by the time of its ruling, the First Circuit denied Pastor Spell's application for relief primarily on procedural grounds. Pastor Spell thereafter sought review in the Louisiana Supreme Court. On May 13, 2022, with the benefit of *Tandon*, the Louisiana Supreme Court ruled in Pastor Spell's favor and dismissed the charges against him.

b. Had the law been clearer at earlier stages in the pandemic, do you believe the State could have brought a case against Pastor Tony Spell?

Response: With the benefit of *Tandon*, the Louisiana Supreme Court quashed the bills of information against Pastor Spell. Given the Louisiana Supreme Court's

decision, which was informed by *Tandon*, I can only assume the Louisiana gubernatorial orders would have been drafted differently had *Tandon* been decided before charges were brought against Pastor Spell. As such, this prosecution would have been unnecessary because there would have been a clearer understanding, as the Court recognized in *Tandon,* that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." 141 S. Ct. 1294, 1296 (2021). Therefore, I believe if the law had been clearer in the early stages of the pandemic, this case would not have been brought against Pastor Spell.

4. **Pastor Tony Spell's attorney offered statements in support of your nomination to local media following your confirmation hearing. Do you believe, in light of the law at the time, that you handled your involvement with the case neutrally and fairly?**

Response: Yes. I believe I handled my work in that matter neutrally and fairly. It was gratifying to read the comments of my opposing counsel in the *Spell* case, Jeff Wittenbrink, on the day after my Senate confirmation hearing, who was quoted as follows: "In oral argument before the Louisiana Supreme Court, Mr. Papillion was refreshingly honest and candid with the tribunal in that he agreed with our side that 'strict scrutiny' must be applied in cases such as the Spell case." Mark Ballard, *Federal judicial nominee grilled on Spell prosecution*, The Advocate, April 20, 2023, at 3A. Mr. Wittenbrink additionally stated: "Many attorneys in a similar situation would stick with the game plan, but Mr. Papillion's honesty and integrity would not let him make a representation to the court that he did not believe himself." *Id*. It is also gratifying to know that several members of the Louisiana Supreme Court, who participated in the *Spell* case, including members of the majority, wrote letters in support of my nomination to the Senate Judiciary Committee. If I were fortunate enough to be confirmed as a United States District Judge, I would work very hard each day to apply the law, as articulated by the United States Supreme Court and the United States Fifth Circuit, in a fair and neutral manner to the facts of each case.

5. **Please detail any leadership position you hold or have held with a religious organization.**

Response: I have been an active member of Saint George Catholic Church in Baton Rouge, Louisiana for over twenty years. During that time, I have served on several committees, including the Finance Committee and the Committee for the construction of a new church that raised nearly $20 million. I regularly attend mass at Saint George, where I am a lector, eucharistic minister, and often lead prayers before mass.

Additionally, in 2019, I made a major financial contribution to St. George Church to build a prayer garden in memory of my late wife who had died of cancer the preceding year.

I also served on the Board of Trustees for the Academy of the Sacred Heart School, a Catholic school, in Grand Coteau, Louisiana, from 2019 until 2022.

In addition, I attend retreats at Manresa House of Retreats, a Jesuit retreat center in Convent, Louisiana, where I am also a “Co-Captain” in the coordination of retreats.

Finally, I served for several years on the board of Franciscan Diocesan High School, a Catholic High School in Baton Rouge, Louisiana.

Responses of Darrel J. Papillion
Nominee to the U.S. District Court for the Eastern District of Louisiana
to the Written Questions of Senator Thom Tillis

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

   Response: Yes.

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

   Response: Black's Law Dictionary defines "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Black's Law Dictionary (11th ed. 2019). I do not believe judicial activism is appropriate. Judges must faithfully and impartially discharge their duties.

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

   Response: Impartiality is an expectation for a judge. The oath of judges requires them to administer justice without respect to persons, and do equal right to the poor and to the rich, and faithfully and impartially discharge and perform all the duties incumbent upon them under the Constitution and laws of the United States. In addition, Canon 2 of the Code of Conduct for United States Judges expressly provides that a judge, "respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. In addition, Canon 3 provides that judges should perform the duties of the office fairly, impartially and diligently."

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: Judges should decide cases based on the law and the evidence, and not based on their own personal views or feelings. If I were so fortunate as to be confirmed as a United States District Judge, I would work to treat all litigants fairly and with respect and courtesy, but my decisions and rulings would be based solely on the applicable law and evidence in a particular case.

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 *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held the Second Amendment protects an individual right to keep and bear arms for lawful purposes, including to keep a usable handgun in the home for self-defense. *Id*. at 629. In *McDonald v. Chicago*, 561 US 742 (2010), the Supreme Court held the Fourteenth Amendment makes the Second Amendment right to keep and bear arms for the purpose of self-defense applicable to the states. The Court concluded rights, like the right to keep and bear arms, that are "fundamental to the Nation's scheme of ordered liberty" or that are "deeply rooted in this Nation's history and tradition" are appropriately applied to the states through the Fourteenth Amendment. *In New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court further concluded that the Second Amendment's individual right to keep and bear arms for lawful purposes includes the right to carry a gun for self-defense outside the home. *See* id. at 2122. If I were so fortunate as to be confirmed as a United States District Judge, I would faithfully apply all Supreme Court and United States Fifth Circuit precedent related to the Second Amendment.

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 Supreme Court has stated that government officials performing discretionary functions are, as a general matter, granted qualified immunity and thus are "shielded 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court and the United States Fifth Circuit have held that once a defendant properly pleads qualified immunity, the burden shifts to the plaintiff to establish that: (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct. *Craig v. Martin*, 26 F.4th 699, 704 (5th Cir. 2022) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). If confirmed, I will faithfully follow and apply all binding precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

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 nominee to the United States District Court for the Eastern District of Louisiana, it is not appropriate for me to comment on a question of policy. My role, if confirmed, would be to faithfully follow and apply all binding precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

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

Response: Please see my responses to questions 9 and 10.

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 nominee to the United States District Court for the Eastern District of Louisiana, it is not my role to question whether the United States Supreme Court has properly decided the cases that are binding precedents. Rather, the proper role of a district judge in the Eastern District of Louisiana is to apply the binding precedents from the Supreme Court and Fifth Circuit. My role, if confirmed, would be to apply the law in a fair and neutral manner to the facts of the case at hand. Following this methodology, my obligation would be to follow Supreme Court and Fifth Circuit precedent regarding the proper method of analysis needed under the circumstance and regarding the sources to be consulted in conducting that analysis to achieve an outcome consistent with the rule of law.

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: As a nominee to the United States District Court for the Eastern District of Louisiana, it is not appropriate for me to comment on a question of policy. My role, if confirmed, would be to faithfully follow and apply all binding precedent of the United States Supreme Court and the United States Fifth Circuit Court of Appeals.

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: To the best of my recollection, I have not had the opportunity to handle any matters involving copyright law.

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

Response: To the best of my recollection, I have not had the opportunity to

handle any matters involving the Digital Millennium Copyright Act.

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

Response: To the best of my recollection, I have not had the opportunity to handle any matters involving intermediary liability for online service providers that host unlawful content posted by users.

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

Response: To the best of my recollection, I have not had the opportunity to handle any matters involving free speech and intellectual property issues, including copyright.

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: If confirmed, I would begin by looking to United States Supreme Court and Fifth Circuit precedent. If faced with a situation where there is no precedent on point, I would first look at the text of the statute itself, and I would seek to apply the statute based upon its plain and ordinary meaning, including any definitions within the statute. If the statutory text is clear and unambiguous, my analysis would end there. If the text was ambiguous, I would carefully consider canons of construction, persuasive precedent from other courts, and finally legislative history. The United States Fifth Circuit Court of Appeals has instructed that only "if the statute is ambiguous, we may look to the legislative history [] for guidance." *United States v. Orellana*, 405 F.3d 360, 365 (5th Cir. 2005). Regarding legislative history, the Supreme Court has explained that Committee Reports are "more authoritative than comments from the floor." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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: If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Fifth Circuit when determining the role that advice and analysis of an agency such as the U.S. Copyright Office should have in any case I consider. This includes the analysis set forth in cases such as *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837 (1984).

When reviewing an agency's interpretation of a statute, courts apply a two-step process. The Court first determines "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "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." *Id*. at 842–43. Second, if Congress has not unambiguously expressed its intent regarding the precise question at issue, then the Court will defer to the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. The United States Supreme Court has explained that "the possibility of deference can arise only if a regulation is genuinely ambiguous." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019).

In addition, the Supreme Court held recently there are "extraordinary cases" in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2595 (2022) quoting *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 159-160 (2000). Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to "clear congressional authorization" for the authority it claims. *Id*.

An administrative rule interpreting the issuing agency's own ambiguous regulation may receive substantial deference. *Auer v. Robbins*, 519 U.S. 452, 461–463 (1997). So may an interpretation of an ambiguous statute, *Chevron*, 467 U.S. at 842–845, but only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," *United States v. Mead Corp*., 533 U.S. 218, 226–22 (2001). Otherwise, the interpretation is "entitled to respect" only to the extent it has the "power to persuade." *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944).

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 nominee to the United States District Court for the Eastern District of Louisiana, it is not appropriate for me to comment on a question of policy. If confirmed, I would apply United States Supreme Court and Fifth Circuit precedent to issues of copyright infringement.

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?

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 to Questions 15(a) and 15(b): Judges are required to interpret the DMCA in the same manner as other federal laws. Please see my response to question 14(a) above regarding the general methodology for statutory construction. The United States Supreme Court has held that "[p]olicy considerations cannot override our interpretation of the text and structure of [a statute], except to the extent that they may help to show that adherence to the text and structure would lead to a result so bizarre that Congress could not have intended it." *Central Bank, N.A. v. First Interstate Bank, N.A.,* 511 U.S. 164, 188 (1994).

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: I have not conducted my own research regarding the issue of "judge shopping" or "forum shopping," and as such, I do not have an opinion on this issue. Moreover, as a judicial nominee, it would be inappropriate for me to comment on litigants' use of specific litigation strategies and/or procedural devices or the

practices of current federal district court judges. Cases in the Eastern District of Louisiana are randomly assigned, and there is currently no other active division in the Eastern District of Louisiana. These factors further reduce the risk of judge-shopping in that court. If confirmed, I would follow all binding United States Supreme Court and Fifth Circuit precedent concerning venue issues as well as all applicable procedural rules.

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

Response: Please see my response to question 16(a).

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

Response: No, I do not believe this is ever appropriate conduct by a judge.

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

Response: Please see my answer to question 16(c). I commit to not engage in any type of behavior intended to attract a particular type of case or litigant.

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 nominee to the United States District Court for the Eastern District of Louisiana, it is not appropriate for me to comment on a question of policy. See also my response to Question 16(a).

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: As a nominee to the United States District Court for the Eastern District of Louisiana, it is not appropriate for me to comment on a question of policy. See also my response to Question 16(a).