Senator Lindsey Graham, Ranking Member
Questions for the Record

Judge Jacquelyn D. Austin
Nominee to be United States District Judge for the District of South Carolina

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

   Response: I disagree with this statement. Judges must reach answers and judgments about the Constitution based upon the text and binding precedent, not their own value judgments.

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

   Response: The approach suggested in this statement is not consistent with the approach a federal judge should take in authoring opinions. As a United States magistrate judge, I have endeavored to apply binding precedent faithfully and objectively and to author opinions consistent with precedent.

3. **Do you consider a law student's public endorsement of or praise for an organization listed as a "Foreign Terrorist Organization," such as Hamas or the Popular Front for the Liberation of Palestine, to be disqualifying for a potential clerkship in your chambers? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "no."**

   Response: Yes.

4. **In the aftermath of the brutal terrorist attack on Israel on October 7, 2023 the president of New York University's student bar association wrote "Israel bears full responsibility for this tremendous loss of life. This regime of state-sanctioned violence created the conditions that made resistance necessary." Do you consider such a statement, publicly made by a law student, to be disqualifying with regards to a potential clerkship in your chambers? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "no."**

   Response: Yes.

5. **Please describe the relevant law governing how a prisoner in custody under sentence of a federal court may seek and receive relief from the sentence.**

Response: A prisoner in custody under sentence of a federal court may seek relief from the sentence by filing a direct appeal; a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241; a motion to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255; or a motion for sentence modification pursuant to 18 U.S.C. § 3582(c). The primary means of attacking the validity of a federal conviction and sentence is through a motion pursuant to 28 U.S.C. § 2255, and a petition for habeas corpus under § 2241 is the proper method to challenge the computation or execution of a federal sentence. *United States v. Miller*, 871 F.2d 488, 489–90 (4th Cir. 1989) (distinguishing between attacks on the "computation and execution of the sentence [and] the sentence itself"). Under § 2255, a petitioner must establish that "the sentence was imposed in violation of the Constitution or laws of the United States," the "court was without jurisdiction to impose such sentence," the "sentence was in excess of the maximum authorized by law," or the sentence is "otherwise subject to collateral attack," 28 U.S.C. § 2255(a).

6. **Please explain the facts and holding of the Supreme Court decisions in *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*.**

   Response: The University of North Carolina and Harvard College both considered their applicants' races in making admissions decisions. The Supreme Court held that these university admissions policies and processes violated the Equal Protection Clause of the Fourteenth Amendment.

7. **Have you ever participated in a decision, either individually or as a member of a group, to hire someone or to solicit applications for employment?**

   Response: Yes.

   If yes, please list each job or role where you participated in hiring decisions.

   As a United States magistrate judge, I have made hiring decisions with respect to term and career law clerks. I interviewed candidates for positions at Womble Carlyle Sandridge and Rice, PLLC.

8. **Have you ever given preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?**

   Response: No.

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

   Response: No.

10. **Have you ever worked for an employer (such as a law firm) that gave preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?**

Response: I am not aware of any of my prior law firms giving preference to any candidate for employment or other benefit based on race, ethnicity, religion, or sex. Additionally, I am not aware of any other employer that I have worked with giving such preferences.

If yes, please list each responsive employer and your role at that employer.

Response: Not applicable.

Please also describe, with respect to each employer, the preference given. Please state whether you played any part in the employer's decision to grant the preference.

Response: Not applicable.

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

Response: Yes. *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023); *H.B. Rowe Co. v. Tippett*, 615 F.3d 233 (4th Cir. 2010).

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

Response: In *303 Creative LLC v. Elenis*, the Supreme Court held that a Colorado law violated the First Amendment free speech rights of a website designer because it forced her to create expressive designs conveying messages with which she disagreed.

13. **In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), Justice Jackson, writing for the Court, said: "*If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein*."**

Is this a correct statement of the law?

Response: The *Barnette* case has been favorably cited many times, including as recently as June 2023 in *303 Creative LLC v. Elenis*. The Supreme Court has reiterated that "[t]his Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Janus v. Am. Fed. of State, Cnty, and Mun. Emps, Council 31*, 138 S. Ct. 2448, 2478 (2018). If confirmed, I will faithfully apply the precedent of the Supreme Court and the Fourth Circuit.

14. **How would you determine whether a law that regulates speech is "content-based" or "content-neutral"? What are some of the key questions that would inform your analysis?**

Response: A regulation of speech is content based under the First Amendment if it "target[s] speech based on its communicative content"—that is, if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The Court in *Reed* reasoned that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id*. at 169. By contrast, "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 643 (1994). The "crucial first step in the content-neutrality analysis" is "determining whether the law is content neutral on its face." *Reed*, 576 U.S. at 165. If the law is content neutral on its face, a court must then evaluate the purpose and justification for the law before concluding that a law is content neutral. *Id.* at 166. If confirmed and confronted with a dispute concerning whether a government restriction was content-based or content-neutral, I will faithfully and objectively apply binding precedent.

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

Response: In *Counterman v. Colorado*, 600 U.S. 66, 69 (2023), the Supreme Court held that true threats are "outside the bounds of First Amendment protection and punishable as crimes" if the speaker "consciously disregarded a substantial risk that his communications would be viewed as threatening violence."

16. **Under Supreme Court and Fourth Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?**

Response: The Supreme Court has often noted the difficulty in distinguishing between questions of law and questions of fact. *See Miller v. Fenton*, 474 U.S. 104, 113 (1985) ("[T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive."); *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (noting the "vexing nature of the distinction between questions of fact and questions of law"). Often, the Court focuses on practical considerations such as who the proper decision maker is or the need for judicial review of the question. *See Miller*, 474 U.S. at 113–14; *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070 (2020). The Fourth Circuit Court of Appeals has quoted *Miller* as the "most complete discussion of the appropriate methodology for distinguishing" questions of fact from questions of law:

> "At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a

matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."

Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1995) (quoting *Miller*, 474 U.S. at 114.)

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

Response: Congress set forth the law, principles, and purposes of federal sentencing in 18 U.S.C. § 3553, but it did not weigh or rank those factors. Rather, the district court is required to consider all of the § 3553(a) factors in making an individualized decision to formulate a sentence that is "sufficient, but not greater than necessary" to achieve the statutory sentencing purposes. If confirmed as a district judge, I would consider all of the factors and apply binding precedent from the Supreme Court and the Fourth Circuit.

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

Response: As a United States magistrate judge and judicial nominee, I am precluded by the Code of Conduct for United States Judges from offering commentary concerning any personal opinions I might hold regarding Supreme Court precedent because related issues could come before me, and I would not want litigants to think I have prejudged those issues. I am committed to faithfully and objectively applying all Supreme Court and Fourth Circuit precedent without regard to any personal views.

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

Response: As a United States magistrate judge and judicial nominee, I am precluded by the Code of Conduct for United States Judges from offering commentary concerning any personal opinions I might hold regarding Supreme Court precedent because related issues could come before me, and I would not want litigants to think I have prejudged those issues. I am committed to faithfully and objectively applying all Supreme Court and Fourth Circuit precedent without regard to any personal views.

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

Response: Section 1507 of Title 18 of the United States Code makes it unlawful to picket or parade in or near a building housing a court of the United States or in or near a building or residence occupied or used by a judge, juror, witness, or court officer, in an attempt to interfere with, obstruct, or impede the administration of justice or to influence a judge.

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

Response: I am aware that the Supreme Court rejected a constitutional challenge to a similar state statute in *Cox v. Louisiana*, 379 U.S. 559 (1965). However, as a United States magistrate judge and judicial nominee, I am precluded by the Code of Conduct for United States Judges from opining on the constitutionality of a statute, as that question may come before me, and I would not want litigants to think I have prejudged the issue. If a case were to present this question before me, I would decide the case based on Supreme Court and Fourth Circuit precedent, the text of the statute, the facts before the court, and the arguments of the parties.

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

a. **Was *Brown v. Board of Education* correctly decided?**
b. **Was *Loving v. Virginia* correctly decided?**
c. **Was *Griswold v. Connecticut* correctly decided?**
d. **Was *Roe v. Wade* correctly decided?**
e. **Was *Planned Parenthood v. Casey* correctly decided?**
f. **Was *Gonzales v. Carhart* correctly decided?**
g. **Was *District of Columbia v. Heller* correctly decided?**
h. **Was *McDonald v. City of Chicago* correctly decided?**
i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**
k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**
l. **Were *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* correctly decided?**
m. **Was *303 Creative LLC v. Elenis* correctly decided?**

Response: Because the constitutionality of de jure segregation and laws prohibiting interracial marriage are unlikely to be litigated again, I can note my opinion that both *Brown* and *Loving* were correctly decided. In addition, *Roe* and *Casey* have been overruled *by Dobbs*. For all remaining cases listed, the Code of Conduct for United States Judges precludes me from offering commentary concerning any personal opinions I might hold on whether Supreme Court precedent was correctly decided because related issues could come before me, and I would not want litigants to think I have prejudged those issues. I am committed to faithfully and objectively applying all Supreme Court and Fourth Circuit precedent without regard to any personal views.

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

Response: The Supreme Court has held that the Second Amendment guarantees an individual the fundamental right to carry firearms outside the home for purposes of self-

defense. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 10 (2022). *See also McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) and *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008). When considering the constitutionality of a restriction on firearms, district courts must consider whether "the Second Amendment's plain text covers the restricted conduct" and, if so, whether the government has carried its burden "to demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17.

24. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

    b. **Are you currently in contact with anyone associated with Demand Justice? If so, who?**

       Response: No.

    c. **Have you ever been in contact with anyone associated with Demand Justice? If so, who?**

       Response: No.

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

       Response: No.

    b. **Are you currently in contact with anyone associated with the Alliance for Justice? If so, who?**

       Response: No.

    c. **Have you ever been in contact with anyone associated with Demand Justice? If so, who?**
       Response: No.

26. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**

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

Response: No.

b. **Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.**

Response: Including the subsidiaries does not change my answer.

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

Response: No.

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

Response: No**.**

27. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**

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

Response: No.

b. **Are you currently in contact with anyone associated with the Open Society Foundations?**

Response: No.

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

Response: No.

28. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**

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

Response: No.

b. **Are you currently in contact with anyone associated with Fix the Court? If so, who?**

Response: No.

c. **Have you ever been in contact with anyone associated with Fix the Court? If so, who?**

Response: No.

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

Response: On May 23, 2023, I was contacted by an attorney from the White House Counsel's Office inviting me to interview for a vacancy on the United States District Court for the District of South Carolina. On May 25, 2023, I interviewed with attorneys from the White House Counsel's Office. On June 6, 2023, I was contacted by staff for Senator Lindsey O. Graham, and on June 8, 2023, I participated in a call with his staff. On July 26, 2023, I received an email from the White House Counsel's Office advising me that I would be proceeding with the next steps in the vetting process. Since July 26, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On November 1, 2023, the President announced his intent to nominate me.

30. **During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

31. **During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

32. **During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

33. **During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundations, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

34. **During your selection process did you talk with any officials from or anyone directly associated with Fix the Court, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

35. **Since you were first approached about the possibility of being nominated, did anyone associated with the Biden administration or Senate Democrats give you advice about which cases to list on your committee questionnaire?**
    a. **If yes,**
        i. **Who?**
        ii. **What advice did they give?**
        iii. **Did they suggest that you omit or include any particular case or type of case in your questionnaire?**

Response: No. I followed the instructions provided with the committee questionnaire and provided cases I determined were responsive to the questions.

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

Response: Please see response to Question 29.

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

Response: I received these questions from the Office of Legal Policy at the Department of Justice on December 6, 2023. After reviewing Fourth Circuit and Supreme Court caselaw to provide specific answers, I submitted a draft of my responses to the Office of Legal Policy. I received limited feedback, finalized, and submitted my answers.

Senator Mike Lee
Questions for the Record

Jacquelyn D. Austin, Nominee for District Court Judge for the District of South Carolina

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

   Response: As a judge, I am responsible to ensure that each litigant has a sufficient opportunity to be heard and has a fair and impartial process. Additionally, as a judge, I am committed to developing a comprehensive understanding of the facts of each case, diligently researching the law applicable to those facts, and carefully applying that law in an objective and unbiased manner.

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

   Response: I would first determine if there is any Supreme Court or Fourth Circuit precedent construing the language at issue. If there is, that interpretation would be binding on me. The Supreme Court has clarified that, when the text is unambiguous, the inquiry ends. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020). However, if the text is ambiguous, I would consider other sources that the Supreme Court and the Fourth Circuit have relied on in interpreting legal texts—including ordinary meaning of the text, statutory context, canons of statutory interpretation, and legislative history—but only to the extent that Supreme Court and Fourth Circuit precedent allows. Legislative history should be considered with caution because, as the Supreme Court has observed, "legislative history is itself often murky, ambiguous and contradictory" and reliance on it may place undue weight on unrepresentative views, including those of staff who assisted in the drafting process. *Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 568 (2005).

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

   Response: I would first determine if there is any Supreme Court or Fourth Circuit precedent construing the provision at issue. If there is, that interpretation would be binding on me. In the unlikely event the interpretation is a matter of first impression, I would look to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution. *District of Columbia v. Heller*, 554 U.S. 570 (2008). In interpreting the text, the Court is guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *Id*. at 576 (alteration in original) (internal quotation marks and citation omitted). If ambiguity remains, I will look to the precedent of other circuits and to the interpretations of analogous provisions by the Supreme Court, Fourth Circuit or other circuits.

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

Response: In interpreting the meaning of a constitutional provision, the Supreme Court has looked to original public meaning in various contexts. *E.g., N.Y. State Rifle & Pistol Assoc. v. Bruen*, 597 U.S. 1 (2022) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment Confrontation Clause). The original meaning of a constitutional provision is dispositive. I have applied the precedent established by the Supreme Court and the Fourth Circuit in interpreting and applying constitutional provisions as a United States magistrate judge, and I will continue to do so if I am confirmed as a district judge.

5. How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?

Response: Please see my response to Question 2. The plain text of the statute is the first and the primary source of interpretation. *Reno v. Koray*, 515 U.S. 50, 56 (1995) ("it is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation but must be drawn from the context in which it is used.'"). *See also United States v. Morison*, 844 F.2d 1057, 1064 (4th Cir. 1988) ("[W]hen the terms of a statute are clear, its language is conclusive, and courts are not free to replace that clear language with an unenacted legislative intent." (internal quotation marks and alterations omitted)).

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

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

7. What are the constitutional requirements for standing?

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

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

Response: No. However, the Supreme Court has interpreted the Necessary and Proper Clause in Article I, Section 8 to provide Congress with implicit authorization

to carry out the powers expressly conferred on it by the Constitution. *McCulloch v. Maryland*, 17 U.S. 316, 324 (1819).

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

Response: If confirmed and if confronted with this dispute, I would evaluate the arguments presented and the legal authority related to the arguments before faithfully and objectively applying binding precedent from the Supreme Court and the Fourth Circuit. *See generally, e.g., United States v. Comstock*, 560 U.S. 126, 134 (2010) (holding that to determine "whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute," courts should determine "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power"); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co*., 333 U.S. 138, 144 (1948) for the proposition that the "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise").

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

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

11. What rights are protected under substantive due process?

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), the Supreme Court held that substantive due process protects "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." I would follow *Glucksberg* and any other binding precedent, which include cases involving: the right to marital privacy and the use of contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to interracial

marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); the right for unmarried individuals to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); the right to engage in intimate sexual conduct, *Lawrence v. Texas*, 539 U.S. 558 (2003); and the right of same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

Response: As a United States magistrate judge and judicial nominee, I am precluded by the Code of Conduct for United States Judges from offering commentary concerning any personal opinions I might hold regarding Supreme Court precedent because related issues could come before me, and I would not want litigants to think I have prejudged those issues. I am committed to faithfully and objectively applying all Supreme Court and Fourth Circuit precedent without regard to any personal views. The Supreme Court, however, overturned *Lochner* in *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.").

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

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

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

Response: When an act of government distinguishes between groups of people, the Supreme Court has described the "traditional indicia of suspectness" to include those classifications that pertain to "an immutable characteristic determined solely by the accident of birth," and also those that pertain to classes of persons who are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (internal quotation marks and citations omitted). To date, when there is a constitutional challenge, the Supreme Court has determined that race, religion, national origin, and alienage are suspect classes that are subject to heightened ("strict") scrutiny. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371–32 (1971).

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

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

16. 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: The "separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch," *United States v. Lopez*, 514 U.S. 549, 552 (1995), and was regarded by the framers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other," *Buckley v. Valeo*, 424 U.S. 1, 96 (1976). Thus, if confronted with an argument concerning the possible assumption of authority by one branch of government not granted to it by the constitution, I would evaluate the arguments presented and the legal authority related to the arguments before faithfully and objectively applying binding precedent from the Supreme Court and the Fourth Circuit concerning the specific government actions at issue in the case.

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

Response: Empathy may be useful in respectfully listening to the facts and arguments presented by litigants. Empathy does not, however, have any effect on my duty to carefully apply binding precedent to the facts presented.

18. Which is worse; invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: Both outcomes are equally undesirable. As a judge, I must render all decisions impartially. Those that seek to invalidate a law and those seeking to uphold a law in the face of a constitutional attack both deserve a fair and unbiased judge who will follow the law wherever it leads.

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

downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: In my career practicing complex civil litigation and as a United States magistrate judge, I have not encountered any arguments concerning the frequency (or trends in the frequency) with which the Supreme Court has stricken federal statutes. In the absence of additional information and careful study, I am unable to provide an informed response to this question.

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

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

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

Response: The Supreme Court has explained that state executive and legislative officials do not have authority to nullify a judgment of the courts of the United States. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Moreover, our country has been served well by *Marbury v. Madison's* holding that the Supreme Court can review the acts of coordinate branches in a manner that binds those branches and ensures the rule of law. 5 U.S. 137 (1803). Allowing another official to ignore an order of the Supreme Court would call into question the preservation of liberty. *See Cooper*, 358 U.S. at 19–20 ("The principles announced in [*Brown v. Board of Education*] and the obedience of the States to them, according to the command of the Constitution are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us.").

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

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

23. 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: If I am confirmed as a District Judge, I would be duty bound to apply all binding precedent from the Supreme Court and the Fourth Circuit. A trial court judge is obliged to ensure the proper development of the factual record and to apply the law to the facts. It is not the trial court's role to disregard or reinterpret binding precedent. Rather, a judge "must apply the Court's precedents—limits and all—wherever they can, rather than widen them unnecessarily at the first opportunity." *Collins v. Yellen*, 141 S. Ct. 1761, 1801 (2021)((Kagan, J., concurring in part and concurring in the judgment).

24. 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.

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

Response: I am not familiar with the definition offered in this question. Black's Law Dictionary (11th ed. 2019), however, defines the term "equity" as "[f]airness; impartiality; evenhanded dealing." If I am confirmed, I would treat all persons in a fair, impartial, and evenhanded manner without regard to their race, gender, or status as I have done as a judge over the last 12 years.

26. Without citing Black's Law Dictionary, do you believe there is a difference between "equity" and "equality?" If so, what is it?

Response: As the words written on the Supreme Court's building recognize, judges must perform their duties impartially and ensure equal justice under law. I believe these obligations are consistent with the duty to be fair, impartial, and evenhanded.

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

Response: The Equal Protection Clause of the 14th Amendment provides that, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Equal Protection Clause does not specifically refer to "equity." If I am confirmed as a district court judge, it will be my duty to follow and apply Supreme Court and Fourth Circuit precedent to all cases and issues that come before me**.**

28. Without citing Black's Law Dictionary, how do you define "systemic racism?"

Response: The term "systemic racism" means different things to different people, and I have not developed my own specific definition of that term. Nor am I aware of any Supreme Court or Fourth Circuit precedent that defines "systemic racism." Cambridge Dictionary defines "systemic racism" as "policies and practices that exist throughout a whole society or organization and that result in and support a continued unfair advantage to some people and unfair or harmful treatment of others based on race." *Systemic Racism*, CAMBRIDGE DICTIONARY. Merriam-Webster's Dictionary defines it 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)." *Systemic Racism*, MERRIAM-WEBSTER'S DICTIONARY (2022).

29. Without citing Black's Law Dictionary, how do you define "critical race theory?"

Response: I have not developed my own specific definition of that term. Nor am I aware of any Supreme Court or Fourth Circuit precedent that defines "critical race theory." The Encyclopedia Britannica defines critical race theory as an "intellectual and social movement and loosely organized framework of legal analysis based on the premise that race is not a natural, biologically grounded feature of physically distinct subgroups of human beings but a socially constructed (culturally invented) category that is used to oppress and exploit people of colour." *Critical Race Theory,* ENCYCLOPEDIA BRITANNICA.

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

Response: See responses to Questions 28 and 29.

Senator Josh Hawley
Questions for the Record

Jacquelyn D. Austin
Nominee, U.S. District Judge for the District of South Carolina

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

   Response: No.

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

      Response: Not applicable.

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

   Response: In interpreting the meaning of a constitutional provision, the Supreme Court has looked to original public meaning in various contexts. *E.g.*, *N.Y. State Rifle & Pistol Assoc. v. Bruen*, 597 U.S. 1 (2022) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment Confrontation Clause). I have applied the precedent established by the Supreme Court and the Fourth Circuit in interpreting and applying constitutional provisions as a United States magistrate judge, and I will continue to do so if I am confirmed as a district judge.

3. **Do you consider legislative history when interpreting legal texts?**
   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?**
   b. **When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?**

      Response: In interpreting legal texts, I would first determine if there is any Supreme Court or Fourth Circuit precedent construing the language at issue. If there is not, I would turn to the text of the statute. The Supreme Court has held that, when the text is unambiguous, the inquiry ends. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020). However, if the text is ambiguous, I would consider other sources that the Supreme Court and the Fourth Circuit have relied on in interpreting legal texts—including statutory context, canons of statutory interpretation, and legislative history—but only to the extent that Supreme Court and Fourth Circuit precedent allows. Legislative history should be considered with caution because, as the Supreme Court has observed, "legislative history is itself often murky, ambiguous and contradictory" and reliance on it may place undue weight on the views of unrepresentative member of Congress. *Exxon*

Mobil Corp. v. Allapattah Servs. Inc., 545 U.S. 546, 568 (2005). The Supreme Court has also stated that certain forms of legislative history are more persuasive than others. *See, e.g.*, *N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288, 307 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history."); *United States v. Craft*, 535 U.S. 274, 287 (2002) ("[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.") (internal quotation marks omitted); *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("Committee Reports are more authoritative than comments from the floor.")(internal quotation marks omitted). The Constitution is a domestic document and, thus, foreign law is not binding on United States constitutional interpretation, although it may have some relevance depending on the particular clause and question at issue. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (studying English historical materials and concluding that, by "the time of the founding, the right to have arms had become fundamental for English subjects"). If confirmed, I would refrain from consulting the laws of foreign nations when interpreting the Constitution unless Supreme Court and Fourth Circuit precedent instruct otherwise.

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

Response: The Supreme Court has held that a death row inmate must first "establish that the State's method of execution presents a 'substantial risk of serious harm'—severe pain over and above death itself," and he must also "'identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]' the risk of harm involved." *Nance v. Ward*, 597 U.S. 159, 164 (2022) (alterations in original) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)).

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

Response: Yes. Please see response to Question 4.

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

Response: The Supreme Court has held that there is no freestanding substantive due process right to DNA evidence. *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 72–74 (2009). Nevertheless, it identified a liberty interest grounded in Alaska's general post-conviction relief statutes that made evidence from

DNA testing available to defendants. *Id*. at 68–70; *accord Howard v. City of Durham*, 68 F.4th 934, 946–47 (4th Cir. 2023).

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: A plaintiff challenging state governmental action as placing a substantial burden on the free exercise of religion must initially demonstrate that such action has burdened a sincere religious practice pursuant to a policy that is neither "neutral" nor "generally applicable," *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2421–22 (2022), such as when a law prohibits particular religious activity while simultaneously permitting or treating more favorably comparable secular activity. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). In addition, facially neutral state action is not actually neutral if it encompasses hostility concerning or targets a religion. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Once a plaintiff's initial burden is met, the government action is subject to strict scrutiny review to determine whether the government action "was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Kennedy*, 142 S. Ct. at 2422; *see Fulton v City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021).

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 response to Question 8.

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

Response: Federal courts are generally forbidden from evaluating the objective truth or correctness of an individual's religious beliefs. *United States v. Seeger*, 380 U.S. 163, 184 (1965). To merit protection under the Free Exercise Clause of the First Amendment, the plaintiff's proffered belief must be sincerely held, and the claim must be rooted in religious belief. *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972); *Thomas v. Review Brd. of Indiana Empl. Sec. Div*., 450 U.S. 707, 713–14 (1981). In the Fourth

Circuit, in evaluating whether a belief is religious in nature, the courts "must take care to 'avoid any predisposition toward conventional religions so that unfamiliar faiths are not branded mere secular beliefs.'" *Doswell v. Smith*, 139 F.3d 888, 1998 WL 110161, at * 3 (4th Cir. March 13, 1998) (quoting *Africa v. Com. of Pa*., 662 F.2d 1025, 1031 (3d Cir.1981)).

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 (2008), the Supreme Court held that the Second Amendment ensures the right of an American citizen to keep and bear arms at home for the purposes of self-defense.

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: In his dissent, Justice Holmes appears to be stating that the Constitution does not mandate a particular economic theory. As a United States magistrate judge and judicial nominee, I am precluded by the Code of Conduct for United States Judges from offering commentary concerning any personal opinions I might hold about the correctness of any judicial opinion.

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

Response: As a United States magistrate judge and judicial nominee, I am precluded by the Code of Conduct for United States Judges from offering commentary concerning any personal opinions I might hold regarding Supreme Court precedent because related issues could come before me, and I would not want litigants to think I have prejudged those issues. I am committed to faithfully and objectively applying all Supreme Court and Fourth Circuit precedent without regard to any personal views. The Supreme Court, however, has overturned *Lochner v. New York. Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes

courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.").

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

Response: The Supreme Court explained this statement as "mak[ing] express what is already obvious: *Korematsu* was gravely wrong the day it was decided" and "has no place in law under the Constitution." *Trump v Hawaii*, 138 S. Ct. 2392, 2423 (2018); *see Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 207 n.3 (2023) ("We have since overruled *Korematsu*, recognizing that it was 'gravely wrong the day it was decided.'" (quoting *Trump*, 138 S. Ct. at 2423)).

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?

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

Response: *Dred Scott v. Sandford*, 60 U.S. 393 (1857), was abrogated by the Thirteenth and Fourteenth Amendments to the Constitution, as opposed to being overruled by the Supreme Court. With this exception noted, I commit to faithfully applying all other Supreme Court precedents as decided.

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

a. Do you agree with Judge Learned Hand?

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

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

Response: As a United States magistrate judge and judicial nominee, I am precluded by the Code of Conduct for United States Judges from offering commentary concerning any personal opinions I might hold about the correctness of any judicial opinion. Based on a review of relevant precedent, control of 80% to 95% of a market "with no readily available substitutes" is sufficient to constitute a monopoly. *Eastman Kodak Co. v. Image Tech. Servs., Inc*., 504 U.S. 451, 481 (1992). The Fourth Circuit has noted that "there is no fixed percentage market share that conclusively resolves whether monopoly power exists." *Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 174 (4th Cir. 2014).

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." The Supreme Court has long emphasized, however, that "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Nonetheless, federal common law exists in "limited areas . . . in which federal judges may appropriately craft the rule of decision." *Rodriguez v. F.D.I.C.*, 140 S. Ct. 713, 717 (2020) (recognizing that these areas include "admiralty disputes and certain controversies between States" and that "strict conditions must be satisfied" before federal judges expand federal common law).

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?

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

Response: The Supreme Court held in *Wainwright v. Goode*, 464 U.S. 78, 84 (1983), that "the views of the state's highest court with respect to state law are binding on the federal courts." As a United States magistrate judge, I apply all binding precedent from the Supreme Court and Fourth Circuit Court of Appeals, and I would follow this same precedent if confirmed as a district judge.

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

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

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

Response: Generally, the Code of Conduct for United States Judges precludes me from offering commentary concerning any personal opinions I might hold on whether Supreme Court precedent was correctly decided because related issues could come before me, and I would not want litigants to think I have prejudged those issues. However, because the constitutionality of de jure segregation is unlikely to be litigated again, I can note my opinion that *Brown* was correctly decided.

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

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

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

Response: Rule 65 of the Federal Rules of Civil Procedure provides the general power for a federal court to issue an injunction. "A court should not impose an injunction lightly, as it is 'an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it.'" *Cantley v. W. Virginia Reg'l Jail & Corr. Facility Auth*., 771 F.3d 201, 207 (4th Cir. 2014) (*quoting Centro Tepeyac v. Montgomery Cnty*., 722 F.3d 184, 188 (4th Cir. 2013) (en banc*)). See also, Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right.") The Supreme Court has not issued any precedential opinions that specifically address whether such an injunction is generally permissible, *see Summers v. Earth Island Inst*., 555 U.S. 488, 500–01 (2009) (stating, "[w]e likewise do not reach the question whether . . . a nationwide injunction would be appropriate"). As a United States magistrate judge and judicial nominee, I am precluded by the Code of Conduct for United States Judges from opining on an issue that may come before me, and I would not want litigants to think I have prejudged the issue. I have faithfully applied Supreme Court and Fourth Circuit precedent in my role as a United States magistrate judge, and I will continue to do so if I am confirmed as a district judge.

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

Response: Please see response to Question 19.

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

Response: The Supreme Court has held that "[f]ederalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 567 U.S. 387, 398 (2012). As a result, federalism gives rise to "a healthy balance of power between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (stating that the federalist structure "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").

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

Response: Based on my experience practicing in federal court for 14 years, and my over 12 years as a United States magistrate judge, I am familiar with the following abstention doctrines:

Rooker-Feldman doctrine: "Under the *Rooker-Feldman* doctrine, a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court." *Am. Reliable Ins. Co. v. Stillwell*, 336 F.3d 311, 316 (4th Cir. 2003) (internal quotation marks omitted).

Younger abstention: Under this doctrine, federal courts should refrain from deciding disputes initiated in federal court if: (1) the case in federal court concerns a state criminal prosecution, a state civil enforcement proceeding akin to a criminal prosecution, or a state civil proceeding involving certain orders that are uniquely in furtherance of a state court's ability to perform its judicial function; (2) the state proceeding is ongoing; (3) the state proceeding implicates important state interests; and (4) the parties will have an opportunity in the state proceeding to raise constitutional challenges. *See Air Evac EMS, Inc. v. McVey*, 37 F.4th 89, 96 (4th Cir. 2022).

Brillhart abstention: Under this doctrine, a federal court has the discretion to abstain from adjudicating a case in which a party seeks the issuance of a declaratory judgment that might interfere with the adjudication of an ongoing state case. The factors to consider when deciding whether to exercise *Brillhart* abstention include: "(1) whether the state has a strong interest in having the issues decided in its courts; (2) whether the state courts could resolve the issues more efficiently than the federal courts; (3) whether the presence of 'overlapping issues of fact or law' might create unnecessary 'entanglement' between the state and federal courts; and (4) whether the federal action is mere 'procedural fencing,' in the sense that the action is merely the product of forum-shopping." *United Capitol Ins. Co. v. Kapiloff*. 155 F.3d 488, 493–94 (4th Cir. 1998).

Burford abstention: This type of abstention may be applied when state regulations are at issue in a case. This abstention doctrine requires abstention in "cases (1) that present 'difficult questions of state law . . . ' or (2) whose adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy'" in important areas of public concern. *Johnson v. Collins Ent. Co.*, 199 F.3d 710, 719 (4th Cir.1999).

Pullman abstention: "*Pullman* abstention . . . is appropriate where there are unsettled questions of state law that may dispose of the case and avoid the need for deciding the constitutional question." *Meredith v. Talbot Cnty.*, 828 F.2d 228, 231 (4th Cir. 1987). This doctrine applies when "there is (1) an unclear issue of state law presented for decision (2) the resolution of which may moot or present in a different posture the federal constitutional issue such that the state law issue is 'potentially dispositive.'" *Educ. Servs., Inc. v. Md. State Bd. for Higher Educ*., 710 F.2d 170, 174 (4th Cir.1983).

Colorado River abstention: The threshold question in deciding whether *Colorado River* abstention is appropriate is whether there are parallel federal and state suits. *New Beckley Mining Corp. v. Int'l Union, UMWA*, 946 F.2d 1072, 1073 (4th Cir. 1991). "If parallel suits exist, then a district court must carefully balance several factors, with the balance heavily weighted in favor of the exercise of jurisdiction." *Chase Brexton Health Servs., Inc. v. Maryland*, 5411 F.3d 457, 463 (4th Cir. 2005) (internal quotation marks omitted). The following six factors guide the analysis: "(1) whether the subject matter of the litigation involves property where the first court may assume *in rem* jurisdiction to the exclusion of others; (2) whether the federal forum is an inconvenient one; (3) the desirability of avoiding piecemeal litigation; (4) the relevant order in which the courts obtained jurisdiction and the progress achieved in each action; (5) whether state law or federal law provides the rule of decision on the merits; and (6) the adequacy of the state proceeding to protect the parties' rights." *Id*. at 463–64.

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

Response: Whether the issuance of an injunction or an award of damages is an appropriate result in a case is specific to the facts of that case and the requests of the party bringing the action. The law provides that "[a] court should not impose an injunction lightly, as it is 'an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it.'" *Cantley v. W. Virginia Reg'l Jail & Corr. Facility Auth*., 771 F.3d 201, 207 (4th Cir. 2014) (*quoting Centro Tepeyac v. Montgomery Cnty*., 722 F.3d 184, 188 (4th Cir. 2013) (en banc)). *See also, Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right.") As a United States magistrate judge and judicial nominee, I am precluded by the Code of Conduct for United States Judges from opining on what type of relief would be appropriate in a hypothetical case.

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

Response: The Supreme Court has explained the "established method" for substantive due process analysis: first, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept or ordered liberty," and second, due process cases require "a careful description of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks omitted).

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

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

Response: Please see 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: Yes. The Supreme Court has held that that the Free Exercise Clause "protects religious exercises, whether communicative or not," and "does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2421 (2022) (internal quotation marks omitted).

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 response to Question 8.

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 response to Question 10**.**

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

Response: Please see my responses to Questions 8 and 10. The Religious Freedom Restoration Act, on its face, "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a). In addition, the statute provides that it shall not be "construed to authorize any government to burden any religious belief." *Id*. § 2000bb-3(c)

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: Yes. I have searched electronic databases to identify all items responsive to this question and have identified the following cases:

1. *Richburg v. Williams,* No. 10-cv-981-DCN-JDA, 2011 WL 1631007 (D.S.C. Mar. 31, 2011), *Report and Recommendation adopted by* 2011 WL 1638049 (D.S.C. Apr. 29, 2011).

2. *Pelzer v. McCall,* No. 8:10-cv-1603-MBS-JDA, 2011 WL 4549387 (D.S.C. June 29, 2011), *Report and Recommendation adopted by* 2011 WL 4549368 (D.S.C. Sept. 30, 2011).

3. *Bennett v. Cannon*, 8:10-cv-1623-HFF-JDA, 2011 WL 4055387 (D.S.C. July 21, 2011), *Report and Recommendation adopted by* 2011 WL 4055381 (D.S.C. Sept. 12, 2011).

4. *Leitgeb v. S.C. Dep't of Motor Vehicles*, No. 7:10-cv-2989-HFF-JDA, 2011 WL 5878160 (D.S.C. Aug. 23, 2011), *Report and Recommendation adopted by* 2011 WL 5878157 (D.S.C. Nov. 23, 2011).

5. *Bermea-Cepeda v. Chartier,* No. 8:11-cv-1231-JMC-JDA, 2012 WL 2366437 (D.S.C. May 8, 2012), *Report and Recommendation adopted by* 2012 WL 2366454 (D.S.C. June 21, 2012), *aff'd*, 487 F. App'x 78 (4th Cir. 2012).

6. *Morton v. Avery,* No. 8:11-cv-1696-MBS-JDA, 2012 WL 3637794 (D.S.C. June 22, 2012), *Report and Recommendation adopted by* 2012 WL 3637898 (D.S.C. Aug. 22, 2012).

7. *Tucker v. Helbig,* No. 8:13-cv-00401-RMG, 2013 WL 6288674 (D.S.C. Dec. 4, 2013).

8. *Perry v. Cartledge*, No. 8:13-cv-1656-BHH, 2014 WL 4700885 (D.S.C. Sept. 19, 2014).

9. *Somers v. EEOC*, No. 6:13-cv-00257-MGL-JDA, 2014 WL 12799324 (D.S.C. Feb. 21, 2014), *Report and Recommendation adopted by* 2014 WL 1268582 (D.S.C. Mar. 26, 2014), *aff'd*, 589 F. App'x 178 (4th Cir. 2015).

10. *Am. Humanist Assoc. v. S.C.Dep't of Educ*., No. 6:13-cv-02471-BHH, 2015 WL 1268036 (D.S.C. Feb. 18, 2015), *Report and Recommendation adopted by* 2015 WL 1268157 (D.S.C. Mar. 19, 2015).

11. *Brant v. Cartledge*, No. 8:14-cv-01799-RBH, 2015 WL 4633819 (D.S.C. Aug. 3, 2015).

12. *Phillips v. S.C. Dep't of Corr.*, No. 8:14-BHH, 2015 WL 4727028 (D.S.C. Aug. 10, 2015).

13. *Watson v. Pressley*, No. 8:14-cv-04653-JMC-JDA, 2016 WL 580286 (D.S.C. Jan. 21, 2016), *Report and Recommendation adopted by* 2016 WL 562102 (D.S.C. Feb. 12, 2016).

14. *Walker v. Koon*, No. 8:16-cv-815-JMC-JDA, 2016 WL 11423528 (D.S.C. Apr. 11, 2016), *Report and Recommendation adopted by* 2016 WL 4161098 (Aug. 5, 2016).

15. *Roudabush v. Maddox,* No. 8:17-cv-3254-BHH-JDA, 2018 WL 1225208 (D.S.C. Jan. 19, 2018), *Report and Recommendation adopted by* 2018 WL 1182517 (D.S.C. Mar. 7, 2018).

16. *Piucci v. Dennis*, No. 8:20-cv-01157-SAL-JDA, 2020 WL 3130257 (D.S.C. May 19, 2020), *Report and Recommendation adopted by* 2020 WL 3130250 (D.S.C. June 12, 2020).

17. *Muquit v. Stirling*, No. 8:22-cv-02009-RBH-JDA, 2023 WL 3998170 (D.S.C. Apr. 28, 2023), *Report and Recommendation adopted by* 2023 WL 3996916 (D.S.C. June 14, 2023).

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

Response: The Fourth Circuit has cautioned that "attempting to explain the words 'beyond a reasonable doubt' is more dangerous than leaving a jury to wrestle with only the words themselves." *United States v. Hornsby*, 666 F.3d 296, 310–11 (4th Cir. 2012) (internal quotation marks omitted). If I am confirmed, questions about reasonable doubt instructions could come before me. Therefore, I am precluded by the Code of Conduct for United States Judges from offering an opinion on this matter.

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

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

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

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

Response: As a United States magistrate judge and judicial nominee, I am precluded by the Code of Conduct for United States Judges from opining on an

issue that may come before me, and I would not want litigants to think I have prejudged the issue. I have faithfully applied *Harrington*, other Supreme Court precedent, and Fourth Circuit precedent in my role as a United States magistrate judge when addressing a petition for writ of habeas corpus under 28 U.S.C. §2254(d), and I will continue to do so if I am confirmed as a district judge.

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.

Response: Opinions designated "unpublished," "not for publication," "non-precedential," or "not precedent" are permitted by Rule 32.1 of the Federal Rules of Appellate Procedure. As a United States magistrate judge and judicial nominee, it is not appropriate for me to opine about the appropriateness of a court rule currently in place. I treat all decisions as set forth in precedent and the relevant rules.

29. In your legal career:

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

Response: To the best of my recollection, I have not tried any cases as first chair.

b. How many have you tried as second chair?

Response: To the best of my recollection, I have tried three cases as second chair.

c. How many depositions have you taken?

Response: There is no way for me to determine the number of depositions I took during my 14 years in private practice. However, I can confidently state that I have taken at least 75 depositions.

d. How many depositions have you defended?

Response: There is no way for me to determine the number of depositions I defended during my 14 years in private practice. However, I can confidently state that I have defended at least 75 depositions**.**

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

Response: I have not argued before a federal appellate court.

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

Response: I have not argued before a state appellate court.

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

Response: I have not argued before a federal agency. I have presented written arguments to the U.S. Patent Office regarding decisions related to the issuance of patents.

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

Response: There is no way for me to determine the number of dispositive motions I argued over my 14 years in private practice. However, I can confidently state that I have argued at least 50 dispositive motions.

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

Response: There is no way for me to determine the number of evidentiary motions I argued over my 14 years in private practice. However, I can confidently state that I have argued at least 50 evidentiary motions.

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

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

Response: I do not recall the exact number of billable hours that was the maximum that I billed in a single year; however, to the best of my recollection, the number of hours was more than 1,800 but less than 2,400.

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

Response: There is no way for me to determine the number of hours of pro bono work I performed in a particular year; however, I billed hundreds of hours of pro bono work during my 13 years of private practice.

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

a. What do you understand this statement to mean?

Response: I understand this quote to mean that a judge should weigh the facts and the law for each case in an objective manner without regard to his or her personal opinions.

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

a. What do you understand this statement to mean?

Response: I understand this quote to mean that judges are to abide by precedent, statutes, and relevant pre-existing rules when arriving at decisions.

b. Do you agree or disagree with this statement?

Response: I agree with the statement.

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: Like my response to Question 32(a), I understand this quote to mean that judges are to abide by precedent, statutes, and relevant pre-existing rules when arriving at decisions.

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

Response: I agree that judges are to abide by precedent, statutes, and relevant pre-existing rules when arriving at decisions.

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: No.

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

Response: No.

36. What were the last three books you read?

Response: (1) *The Four Agreements* by Don Miguel Ruiz; (2) *The Big Leap* by Gay Hendricks; and (3) *Difficult Conversations* by Douglas Stone, Bruce Patton, and Sheila Henn.

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

Response: No.

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

Response: I'm proud of several cases I litigated while in private practice. No one specific case, however, stands out as seminal.

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

a. How did you handle the situation?

Response: Not to my recollection.

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

Response: Yes.

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

Response: I do not regularly read works by law professors.

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

Response: I am unable to state whether one particular Federalist Paper 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: I cannot recall a judicial opinion, law review article, or other legal opinion that changed my mind.

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

Response: As a United States magistrate judge and judicial nominee, I am precluded by the Code of Conduct for United States Judges from opining on an issue that may come before me, and I would not want litigants to think that I have prejudged the issue. I

understand that the *Dobbs* decision, the seminal decision of the Supreme Court in this area of law, "is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 263 (2022). If I am confirmed as a district judge, I will faithfully apply Supreme Court and Fourth Circuit precedent in this area of law.

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

Response: No.

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

a. *Roe v. Wade,* 410 U.S. 113 (1973)?
b. The Supreme Court's substantive due process precedents?
c. Systemic racism?
d. Critical race theory?

Response: No as to all the above.

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

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

Response: No.

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: No.

48. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: No.

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

Response: I must respond to all questions with honesty, candor, and to the best of my ability.

Senator John Kennedy
Questions for the Record

Jacquelyn Austin

1. **Are there any circumstances under which it is justifiable to sentence a criminal defendant to death? Please explain.**

   Response: Under federal law, a defendant becomes eligible for the death penalty if the jury finds at least one statutory intent factor, *see* 18 U.S.C. § 3591(a)(2), and at least one statutory aggravating factor, *see* 18 U.S.C. § 3592(c). *See Jones v. United States*, 527 U.S. 373, 376–377 (1999); *see also* 18 U.S.C. § 3593. The Supreme Court has found the death penalty is not unconstitutional *per se*. *See Gregg v. Georgia*, 428 U.S. 153, 169 (1976) ("We now hold that the punishment of death does not invariably violate the Constitution.")

   a. **Should a judge's opinions on the morality of the death penalty factor into the judge's decision to sentence a criminal defendant to death in accordance with the laws prescribed by Congress and the Eighth Amendment?**

      Response: No. A judge's opinion regarding the morality of the death penalty is not a factor in determining death penalty eligibility.

2. **Except when a statutory maximum controls, when is it appropriate for a sentencing judge to impose a sentence below the range provided by the Sentencing Guidelines?**

   Response: With the exception of a few factors that the Guidelines specifically note may not be considered as grounds for departures by the sentencing court, the Guidelines do not limit "the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." *Koon v. United States*, 518 U.S. 81, 93 (1996) (quoting U.S. Sent'g Guidelines Manual ch. 1, pt. A, introductory cmt. 4(b)). As the Guidelines explain:

   > The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

   Id.

3. **Is the U.S. Supreme Court a legitimate institution?**

   Response: Yes.

4. Is the current composition of the U.S. Supreme Court legitimate?

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

5. Please describe your judicial philosophy. Be as specific as possible.

Response: As a judge, I am responsible to ensure that each litigant has a sufficient opportunity to be heard and has a fair and impartial process. Additionally, as a judge, I am committed to developing a comprehensive understanding of the facts of each case, diligently researching the law applicable to those facts, and carefully applying that law in an objective and unbiased manner.

6. Is originalism a legitimate method of constitutional interpretation?

Response: Originalism is characterized by a commitment to two core principles: first, the meaning of the constitutional text is fixed at the time of its ratification and, second, the historical meaning of the text has legal significance and is authoritative in most circumstances. Originalism focuses on the Framers' general concepts when drafting a particular constitutional provision rather than their specific intent at the time. *See, e.g.,* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 19 (3d ed. 2006). The Supreme Court in *Dist. of Columbia v. Heller* indicated that accessing the original public meaning is the proper interpretive methodology in Second Amendment cases. 554 U.S. 570 (2008).

7. If called on to resolve a constitutional question of first impression with no applicable precedents from either the U.S. Supreme Court or the U.S. Courts of Appeals, to what sources of law would you look for guidance?

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

8. Is textualism a legitimate method of statutory interpretation?

Response: Textualism is a mode of legal interpretation that focuses on the plain meaning of the text of a legal document. Textualism usually emphasizes how the terms in the Constitution would be understood by people at the time they were ratified, as well as the context in which those terms appear. *See* Hon. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 23–38 (Amy Gutmann ed., 1997).

9. When is it appropriate for a judge to look beyond textual sources when determining the meaning of a statute or provision?

Response: If the statutory text is plain and unambiguous, the language of the statute is considered conclusive as to its meaning. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc*., 447 U.S. 102, 108 (1980). In certain circumstances, a court may defer to the agency's reasonable construction of the statute. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 843–44 (1984). A court may also look to traditional tools of statutory construction, such as considering the construction of the statute as a whole, to discern the meaning of the text. *See Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997). The Supreme Court has also looked to sources such as the dictionary to determine a statute's meaning. *See Muscarello v. United States*, 524 U.S. 125, 128–31 (1998) (recounting the phrase in context from dictionaries, literature, and newspaper articles found in computerized databases).

10. Does the meaning (rather than the applications) of the U.S. Constitution change over time? If yes, please explain the circumstances under which the U.S. Constitution's meaning changes over time and the relevant constitutional provisions.

Response: The Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316 (1819). Thus, "although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *N. Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2126, 2132 (2022).

11. What is the role of legislative history in determining a statute's meaning?

Response: If the plain meaning of a statute's text is unclear after reliance on traditional tools of statutory interpretation, the Supreme Court has occasionally considered legislative history in interpreting ambiguous statutory text, *see Cnty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471--72 (2020), and I would follow that guidance if confirmed. The Supreme Court has also stated that certain forms of legislative history are more persuasive than others. For example, the Court has stated that "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *United States v. Craft*, 535 U.S. 274, 285 (2002) (internal quotation marks and citation omitted).

12. When is it appropriate for a district judge to issue a nationwide injunction? Please also explain the legal basis for issuing nationwide injunctions and the relevant factors a district judge should consider before issuing one.

Response: Under Article III of the U.S. Constitution, federal courts exercise "Judicial Power," which includes the power to issue equitable remedies for legal violations. Federal Rule of Civil Procedure 65 permits federal district courts to issue preliminary and permanent injunctions. A party seeking an injunction, however, must show a substantial

likelihood of success on the merits and irreparable harm; the court in turn must balance the equities between the parties if the injunction is granted and must also consider public interest in the matter. *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008). "A court should not impose an injunction lightly, as it is 'an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it.'" *Cantley v. W. Virginia Reg'l Jail & Corr. Facility Auth*., 771 F.3d 201, 207 (4th Cir. 2014) (quoting *Centro Tepeyac v. Montgomery Cnty*., 722 F.3d 184, 188 (4th Cir. 2013) (*en banc*)).

13. Is there ever an appropriate circumstance in which a district judge may ignore or seek to circumvent a precedent set by the circuit court under which it sits or the U.S. Supreme Court?

Response: No

14. Would you faithfully apply all precedents of the U.S. Supreme Court?

Response: Yes.

15. Please describe the analysis you would use to evaluate whether a law or regulation infringes on an individual's rights under the Second Amendment in light of the Supreme Court's opinion in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

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

16. When should a district judge deem a previously unrecognized unenumerated right to be "fundamental" and therefore entitled to protection under the Fourteenth Amendment?

Response: In considering whether an unrecognized unenumerated right is fundamental and entitled to protection under the Due Process Clause of the Fourteenth Amendment, a judge would need to consider whether the claimed right is "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S.702, 720-21 (1997).

17. Should a district judge give deference to an agency's interpretation of a statute that imposes criminal penalties? Please explain.

Response: Where a statute is ambiguous and, importantly, Congress has delegated to an agency the power to fill in the statutory gaps, then deference is owed to the agency in determining the meaning of the statute. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984). *See also*, *United States v. Mead Corp*., 533 U.S. 218, 226–227 (2021) (An agency's interpretation of its own statute is entitled to deference, 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."). The Supreme Court has applied *Chevron* deference to regulations with criminal implications. *See, e.g., United States v. O'Hagan*, 521 U.S. 642, 673 (1997) (granting "controlling weight" to the SEC's interpretation of a statutory provision that rendered defendant's conduct a crime).

18. Please describe how courts determine whether an agency's action violates the Major Questions Doctrine.

Response: The Major Questions Doctrine, as formulated by the Court, requires that, absent "clear congressional authorization," courts presume that Congress did not delegate issues of major political or economic significance to executive agencies. *See West Virginia v. Env'l Prot. Agency*, 142 S. Ct. 2587 (2022). In this case, the Supreme Court held that "[p]recedent teaches that 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." *Id*. at 2595 (internal citations omitted).

19. Please identify one member of the federal judiciary, current or former, whose service on the bench most inspires you and explain why.

Response: The service of the late Matthew J. Perry, Jr., on the bench inspires me most. Judge Perry, for whom I clerked, was the consummate jurist, thoughtful, fair, kind and always with an ear to listen to all that came before him. Judge Perry respected and loved the practice of law and that love showed in the way he conducted every proceeding in his courtroom. I hope to emulate his demeanor, character, and wisdom if I'm confirmed to the district court.

20. You have been nominated to serve as a federal district judge. To the best of your recollection, please list up to 10 cases in which you served as lead counsel in a case tried before a jury in federal district court.

Response: While at Womble Carlyle, I served as second chair in the following case that proceeded to trial in federal court before a jury. I was involved in several cases that settled just prior to trial.

1. *United States ex. rel. Drakeford v. Tuomey*, No. 3:05-cv-02858-MJP, 2010 WL 4000188 (D.S.C. July 13, 2010), *judgment vacated*, 675 F.3d 394 (4th Cir. 2012), *on remand*, 976 F. Supp. 2d 776 (D.S.C. 2013), *aff'd*, 792 F.3d 364 (4th Cir. 2015).

I've also tried two bench trials as a United States United States magistrate judge:

1. *Moats Constr., Inc. v. New Beach Constr. Partners, Inc*., No. 8:17-cv-02009-JDA, 2020 WL 7979018 (D.S.C. Nov. 30, 2020), *aff'd*, No. 21-1017, 2022 WL 4548802 (4th Cir. Sept. 29, 2022).

2. *Floyd v. City of Spartanburg*, No. 7:20-cv-01305-TMC, 2022 WL 1057191 (D.S.C. Jan. 31, 2022), *Report and Recommendation adopted by* 2022 WL 796819 (D.S.C. Mar. 16, 2022).

21. To the best of your recollection, please list up to 10 instances in which you presented oral argument before a U.S. Court of Appeals panel.

Response: In my 27-year legal career, including 1 year as a district court law clerk, 14 years as an intellectual property and complex litigation attorney, and over 12 years as a United States magistrate judge, I have not presented argument before a U.S. Court of Appeals.

22. Please describe the process by which you prepared for your hearing before the U.S. Senate Committee on the Judiciary, including materials or sources provided to you or consulted by you.

Response: In preparing for my hearing before the Senate Judiciary Committee, I reviewed the information that I provided to the Senate in my SJQ, reviewed prior hearings available online, and reviewed publicly available questions asked of prior nominees. I also reviewed significant Supreme Court and Fourth Circuit cases as part of my preparation. Additionally, I attended hearing prep sessions with members of the DOJ and White House Counsel's office and, likewise, attended one meeting in person the day prior to the hearing.

23. Why should Senator Kennedy support your nomination?

Response: Senator Kennedy should support my nomination because I am not only qualified to perform the job, but I'm eager to serve the Greenville community as the only fulltime sitting district judge. My 27-year legal career, including my experience clerking for a district judge for 1 year, prosecuting patent applications and litigating intellectual property and other complex matters for 14 years, and serving as a United States magistrate judge for over 12 years makes me immensely qualified to handle the matters that would come before me if confirmed as a district judge. I not only have the mental acumen to handle the position, I have the temperament and the confidence of the district judges in South Carolina and the community in which I currently serve.

Questions from Senator Thom Tillis

For Jacquelyn Denise Austin, nominee to be United States District Judge for the District of South Carolina

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

   Response: The rule of law depends on judges setting aside any personal beliefs and, instead, following precedent. *See* Code of Conduct for United States Judges, Canon 3. This is what I have done for the past 12 years as United States magistrate judge. If I am fortunate to be confirmed as a federal district court judge, I would faithfully apply the precedent of the Fourth Circuit and the Supreme Court in all cases.

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

   Response: The Constitution calls for an independent judiciary and impartial judges. Consequently, every judge takes an oath, to apply the law fairly and impartially. *See* 28 U.S.C. § 453.

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

   Response: Black's Law Dictionary (11th ed. 2019) 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." Judicial activism is not appropriate.

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: In every judicial decision at least one party will have an undesirable outcome. The only outcome a judge may pursue is the faithful application of the law to the case.

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

   Response: If confirmed, I will faithfully and impartially apply Supreme Court and Fourth Circuit precedent defining individual rights under the Second Amendment. *See, e.g., N.Y.*

State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

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

   Response: The Supreme Court has held that "officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). If confirmed, I would evaluate the facts and law presented in each case and faithfully apply precedent.

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

   Response: The sufficiency of the protection provided to law enforcement officers through qualified immunity under § 1983 is a question for policy makers. As a judicial nominee, I am precluded from commenting on the merits of qualified immunity. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

   Response: Please see my response to Question 8.

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

    Response: Intellectual property protection is critical to fostering innovation. As I learned during my 14 years of litigating intellectual property and complex business litigation matters, without the protection of ideas, businesses and individuals would not reap the full benefits of their inventions and would focus less on research and development. In my almost 13 years as a United States magistrate judge, I have faithfully applied all relevant Supreme Court, Federal Circuit and Fourth Circuit precedent to resolve intellectual property issues that have come before me and will continue to do so if confirmed.

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

Response: "Judge shopping" and "forum shopping" is a problem to the extent it undermines the perception of fairness and of the judiciary's evenhanded administration of justice. In the District of South Carolina, judge assignments are randomly made by the Clerk's office which makes judge shopping difficult.

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

Response: As a judicial nominee, I am precluded from commenting on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6).