Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Melissa Damian
Nominee to be United States District Judge for the Southern District of Florida

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 the statement. Judges must make decisions about the Constitution based on the text and binding precedent and not on their individual 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: I am not familiar with that statement nor the context in which it was made. To the extent the Judge was stating that he knowingly wrote opinions that were contrary to binding precedent, I do not believe that is an appropriate approach for a federal judge to take.

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 person in custody based on a sentence of a federal court may seek and receive relief pursuant to several federal statutes, depending on the type of relief sought and the basis for the complaint. The relevant statutes include the following: 28 U.S.C. § 1291 (direct appeal of a federal judgment); 28 U.S.C. § 2241 (petition for writ of habeas corpus); 28 U.S.C. § 2255 (motion to vacate, set aside, or correct a federal sentence); 18 U.S.C. § 3582(c) (compassionate release motion for modification of term of imprisonment). There is an extensive body of law and precedent that applies to each of these statutory provisions.

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: As set forth in these decisions, the University of North Carolina and Harvard College both considered race in determining whether to offer admission to prospective students. The Supreme Court held that the schools' race-based policies and processes for selecting students for admission 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.

   Response: I interviewed candidates for positions at the Damian & Valori law firm and provided feedback to those making the hiring decisions. As a Magistrate Judge, I have hired law clerks, interns, and other staff members.

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: Not that I am aware of.

If yes, please list each responsive employer and your role at that employer. Please also describe, with respect to each employer, the preference given. Please state whether you played any part in the employer's decision to grant the preference.

Response: Not applicable.

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

Response: Yes. *See Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 206-07 (2023); *Johnson v. Board of Regents of University of Georgia*, 263 F.3d 1234, 1243 (11th Cir. 2001); *Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990).

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

Response: The Supreme Court held that a Colorado law violated the First Amendment free speech rights of a website designer because it required the website designer to create designs that express messages with which the designer disagrees.

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: Yes. *Barnette* has not been overturned or abrogated and is binding precedent. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 589 (2023).

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: I would rely on Supreme Court and Eleventh Circuit precedent to make such a determination. The key questions that would inform my analysis of such an issue are set forth in Supreme Court precedent, which provides that a law that regulates speech is

content-based "if [the] law applies to [a] particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A law is content-neutral under Supreme Court precedent if it "serves purposes unrelated to the content of expression" even if that law has an "incidental effect on some speakers or messages but not others." *McCullen v. Coakley*, 573 U.S. 464, 480 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). *See also Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1259 (11th Cir. 2005).

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

Response: Under the true threats doctrine, "true threats" are not protected by the First Amendment. The standard for determining whether a statement is a "true threat" is whether the statement is a "'serious expression[ ]' conveying that a speaker means to 'commit an act of unlawful violence.'" *Counterman v. Colorado*, 600 U.S. 66, 74 (2023) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003). This determination is made based on "'what the statement conveys' to the person on the other end" rather than on what the speaker intended to convey. *Id*. (quoting *Elonis v. United States*, 575 U.S. 723, 733 (2015)).

16. Under Supreme Court and Eleventh 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 characterized facts as "questions of who did what, when or where, how or why." *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village At Lakeridge, LLC*, 583 U.S. 387, 394 (2018). The Court has also explained that questions of law are issues which have a "uniquely legal dimension" and "refer to the application of a legal standard to settled facts[.]" *Thompson v. Keohane*, 516 U.S. 99, 111-12 (1995); *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068 (2020).

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

Response: 18 U.S.C. § 3553(a)(2), which sets forth retribution, deterrence, incapacitation, and rehabilitation as four of the factors to consider when imposing sentence, does not direct the Court to assign any more weight to any of these factors than to any other. Nor am I aware of Supreme Court or Eleventh Circuit precedent directing the Court to consider any one of the relevant factors over any other. If confirmed, I will follow the Supreme Court and Eleventh Circuit precedent regarding consideration of the relevant factors and the appropriate weight to apply to each.

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 Magistrate Judge and a nominee for a District Judge position, I am prohibited from commenting on whether a Supreme Court decision was "well-reasoned." *See* Code of Conduct for United States Judges, Canon 3(A)(6). I have faithfully applied Supreme Court precedent in my role as a Magistrate Judge, and I will continue to do so if I am confirmed as a District Judge.

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

Response: As a Magistrate Judge and a nominee for a District Judge position, I am prohibited from commenting on whether an Eleventh Circuit decision was "well-reasoned." *See* Code of Conduct for United States Judges, Canon 3(A)(6). I have faithfully applied Eleventh Circuit precedent in my role as a Magistrate Judge, and I will continue to do so if I am confirmed as a District Judge.

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

Response: My understanding of 18 U.S.C. § 1507 is based on the text of the statute, which provides: "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both. Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt." If called upon to interpret the statute, I will faithfully apply Supreme Court and Eleventh Circuit precedent in doing so.

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

Response: I am unaware of any Supreme Court or Eleventh Circuit precedent holding that the statute is either constitutional or unconstitutional. I am aware that in *Cox v. Louisiana*, 379 U.S. 559, 562 (1965), the Supreme Court upheld a state statute modeled after 18 U.S.C. § 1507. As a Magistrate Judge and a nominee for a District Judge position, I am precluded by the Code of Conduct for United States Judges from offering my personal opinion about the constitutionality of a statute because that issue may come before me, and I do not want to appear to have prejudged the issue.

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?**

Response: Yes. Although as a Magistrate Judge and a nominee for a District Judge position, I would normally be precluded by the Code of Conduct for United States Judges from commenting on my personal views of whether an opinion of the Supreme Court was "correctly decided," the holding in *Brown v. Board of Education* regarding racial segregation in public schools is not likely to come before the courts again. Therefore, I believe it is permissible for me, as a sitting judge and judicial nominee, to state my opinion that the case was correctly decided.

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

Response: Yes. Although as a Magistrate Judge and a nominee for a District Judge position, I would normally be precluded by the Code of Conduct for United States Judges from commenting on my personal views of whether an opinion of the Supreme Court was "correctly decided," the holding in *Loving v. Virginia* regarding inter-racial marriage is not likely to come before the courts again. Therefore, I believe it is permissible for me, as a sitting judge and judicial nominee, to state my opinion that the case was correctly decided.

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

Response: As a Magistrate Judge and a nominee for a District Judge position, I am precluded by Canon 3(A)(6) of the Code of Conduct for United States Judges from commenting on my personal views of whether an opinion of the Supreme Court was "correctly decided." The decision in *Griswold v. Connecticut* is binding precedent, and, if confirmed as a District Judge, I will apply the decision fully and faithfully.

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

Response: As a Magistrate Judge and a nominee for a District Judge position, I am precluded by Canon 3(A)(6) of the Code of Conduct for United States Judges from commenting on my personal views of whether an opinion of the Supreme Court was "correctly decided." I note that the decision in *Roe v. Wade* was overturned by the Supreme Court in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 235 (2022). The decision in *Dobbs* is binding precedent, and, if confirmed as a District Judge, I will apply the decision fully and faithfully.

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

Response: As a Magistrate Judge and a nominee for a District Judge position, I am precluded by Canon 3(A)(6) of the Code of Conduct for United States Judges from commenting on my personal views of whether an opinion of the Supreme Court was "correctly decided." I note that the decision in *Planned Parenthood v. Casey* was overturned by the Supreme Court in *Dobbs v. Jackson Women's*

Health Organization, 597 U.S. 215, 235 (2022). The decision in *Dobbs* is binding precedent, and, if confirmed as a District Judge, I will apply the decision fully and faithfully.

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

Response: As a Magistrate Judge and a nominee for a District Judge position, I am precluded by Canon 3(A)(6) of the Code of Conduct for United States Judges from commenting on my personal views of whether an opinion of the Supreme Court was "correctly decided." The decision in *Gonzalez v. Carhart* is binding precedent, and, if confirmed as a District Judge, I will apply the decision fully and faithfully.

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

Response: As a Magistrate Judge and a nominee for a District Judge position, I am precluded by Canon 3(A)(6) of the Code of Conduct for United States Judges from commenting on my personal views of whether an opinion of the Supreme Court was "correctly decided." The decision in *District of Columbia v. Heller* is binding precedent, and, if confirmed as a District Judge, I will apply the decision fully and faithfully.

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

Response: As a Magistrate Judge and a nominee for a District Judge position, I am precluded by Canon 3(A)(6) of the Code of Conduct for United States Judges from commenting on my personal views of whether an opinion of the Supreme Court was "correctly decided." The decision in *McDonald v. City of Chicago* is binding precedent, and, if confirmed as a District Judge, I will apply the decision fully and faithfully.

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

Response: As a Magistrate Judge and a nominee for a District Judge position, I am precluded by Canon 3(A)(6) of the Code of Conduct for United States Judges from commenting on my personal views of whether an opinion of the Supreme Court was "correctly decided." The decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* is binding precedent, and, if confirmed as a District Judge, I will apply the decision fully and faithfully.

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

Response: As a Magistrate Judge and a nominee for a District Judge position, I am precluded by Canon 3(A)(6) of the Code of Conduct for United States Judges from commenting on my personal views of whether an opinion of the Supreme

Court was "correctly decided." The decision in *New York State Rifle & Pistol Association v. Bruen* is binding precedent, and, if confirmed as a District Judge, I will apply the decision fully and faithfully.

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

Response: As a Magistrate Judge and a nominee for a District Judge position, I am precluded by Canon 3(A)(6) of the Code of Conduct for United States Judges from commenting on my personal views of whether an opinion of the Supreme Court was "correctly decided." The decision in *Dobbs v. Jackson Women's Health* is binding precedent, and, if confirmed as a District Judge, I will apply the decision fully and faithfully.

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

Response: As a Magistrate Judge and a nominee for a District Judge position, I am precluded by Canon 3(A)(6) of the Code of Conduct for United States Judges from commenting on my personal views of whether an opinion of the Supreme Court was "correctly decided." The decisions in *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* are binding precedent, and, if confirmed as a District Judge, I will apply the decisions fully and faithfully.

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

Response: As a Magistrate Judge and a nominee for a District Judge position, I am precluded by Canon 3(A)(6) of the Code of Conduct for United States Judges from commenting on my personal views of whether an opinion of the Supreme Court was "correctly decided." The decision in *303 Creative LLC v. Elenis* is binding precedent, and, if confirmed as a District Judge, I will apply the decision fully and faithfully.

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

Response: I would apply the standard set forth in binding precedent of the Supreme Court and the Eleventh Circuit. In *New York Rifle & Pistol Association v. Bruen,* 597 U.S. 1 (2022), the Supreme Court established the following standard: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a

court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id*. at 17. Therefore, I would apply this standard in evaluating such an issue.

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: Based on my Response to the preceding question, none.

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 February 28, 2023, I met with Senator Rick Scott by telephone to discuss my interest in the vacancies on the District Court for the Southern District of Florida. On March 24, 2023, I was notified by an attorney from the White House Counsel's Office that I had been recommended as a potential candidate for a vacancy on the Court. I interviewed with attorneys from the White House Counsel's Office on March 27, 2023. Following that interview, on April 14, 2023, I spoke with a member of Senator Marco Rubio's staff regarding my continued interest in the vacancies on the District Court. On April 26, 2023, I was contacted by an attorney from the White House Counsel's Office who informed me that the White House would like to proceed with the next steps in the vetting process. Following that, I was in contact with officials from the Office of Legal Policy at the Department of Justice regarding the vetting process. On November 1, 2023, the President announced his intent to nominate me, and on November 6, 2023, my nomination was submitted to the Senate.

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: I am acquainted with members of the American Constitution Society, so it is possible that I spoke with someone associated with the organization during my selection process. I did not speak with any such persons regarding the selection process, nor am I aware of anyone doing so on my behalf. Any discussions on my part would have been purely social in nature.

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: I spoke with someone from the White House Counsel's Office early in the process of preparing my Senate Judiciary Questionnaire, and during that conversation, I asked for suggestions or input on how to select which cases to list on my questionnaire. I do not recall the exact date of that conversation nor who, specifically, I spoke with, but I do recall that the suggestion or advice was to select a variety of cases that reflects the complete breadth of my experience.

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

Response: On March 24, 2023, I was notified by an attorney from the White House Counsel's Office that I had been recommended as a potential candidate for a vacancy on the United States District Court for the Southern District of Florida. I interviewed with attorneys from the White House Counsel's Office on March 27, 2023. On April 26, 2023, I was contacted by an attorney from the White House Counsel's Office who informed me that the White House would like to proceed with the next steps in the vetting process. Following that, I was in contact with officials from the Office of Legal Policy at the Department of Justice regarding the vetting process, including numerous email communications beginning on April 26, 2023, regarding the completion of background investigation paperwork and the submission of the Senate Judiciary Questionnaire and supporting documents. On November 1, 2023, the President announced his intent to nominate me, and on November 6, 2023, my nomination was submitted to the Senate.

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

Response: On December 6, 2023, I received these questions from the Department of Justice, Office of Legal Policy ("OLP"). After reviewing the questions, I conducted some research and reviewed my records, and then I drafted my responses to the questions. I forwarded my responses to the OLP, which provided feedback. I reviewed and considered OLP's feedback, following which I finalized the responses and forwarded them to OLP to submit to the Committee.

Senate Judiciary Committee
Nominations Hearing
November 29, 2023
Questions for the Record
Senator Amy Klobuchar

Melissa Damian, to be United States District Court Judge for the Southern District of Florida

In 2015, you were appointed as a magistrate by the sitting Article III judges of the Middle District of Florida, who were appointed by presidents of both parties. You have since presided over two trials that went to verdict or final judgment and have written approximately 170 opinions and substantive orders.

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

  Response: My experience as a Magistrate Judge since January 2021 has undoubtedly helped me further understand and appreciate the role of federal district court judges and the court in general. Initially, my experience has given me the opportunity to transition from the role of advocate to judge, which will, of course, serve me if I am confirmed as a District Judge. Additionally, by working closely with our District Judges to assess priorities and to balance a very busy caseload against the needs of litigants, parties, and criminal defendants, I have gained a unique understanding of the District Court's role in moving cases along, both behind the scenes, on written orders, and in court. Finally, by taking on a greater load of dispositive matters and consent cases, I have gained invaluable experience handling much of the work I will see if confirmed as a District Judge.

- **Although federal district court judges hear cases individually, do you think collegiality with other judges on the court is important and can you talk about the opportunities you have had to work with the district court judges currently on the federal bench?**

  Response: I absolutely believe collegiality with other judges on the court is important. I have had many opportunities to work with the District Court judges on both case-related and administrative matters. I often work with my District Court colleagues on non-work matters stemming from my involvement in voluntary bar organizations. Additionally, I have benefitted from the collegiality of the District Court judges who have not hesitated to assist me with handling matters that have come up in my consent cases and jury trials. I have also had a particularly unique experience in my role as a Magistrate Judge due to the sudden illness and later death of one of our District Court judges with whom I was paired. When she fell ill, I worked with our Chief Judge to assess her entire caseload and determine what matters I could handle within my authority as a Magistrate Judge. I was also touched by the unhesitant willingness of her District Court colleagues to step in and take on her cases. I worked with most of the members of our District Court bench to transition her cases and keep them on schedule without matters falling through the cracks. Getting to know my colleagues on the District Court in those circumstances was certainly a silver lining to an otherwise truly unfortunate situation.

Senator Mike Lee
Questions for the Record
Melissa Damian, Nominee for District Court Judge for the Southern District of Florida

1. How would you describe your judicial philosophy?

Response: As a Magistrate Judge, my judicial philosophy has been to decide all cases that come before me based only on the law and the facts before me in each particular case. In so doing, I have always endeavored to impartially and fairly hear and decide every case and to diligently identify and apply the relevant law, including the Constitution, applicable statutes and regulations, and binding precedent from the Supreme Court and the Eleventh Circuit. If confirmed as a District Judge, I will continue to abide by this philosophy and assure that I am fully prepared for every case and that all who come before me feel their case was carefully considered and fairly decided.

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

Response: I would first consider relevant Supreme Court and Eleventh Circuit precedent to determine whether the provision's text has been interpreted in binding precedent. If it has not, I would look at the plain meaning of the text of the statute or statutory provision at issue. If it is possible to determine the plain meaning of the statutory provision from the text of the statute, my inquiry would end there. *See Bostock v. Clayton Cnty.*, *Georgia*, 140 S. Ct. 1731, 1749 (2020). If there is any ambiguity, I would interpret the text in a manner consistent with the methods of interpretation that the Supreme Court or the Eleventh Circuit has used in the most analogous circumstance, as well as any persuasive authority from other jurisdictions. If there is no relevant precedent, then I would turn to the canons of construction. And in limited circumstances where the Supreme Court has indicated it is appropriate to do so, I might review limited legislative history. If confirmed as a District Judge, I will continue to follow the binding precedent of the Supreme Court and the Eleventh Circuit regarding the appropriate method for interpreting statutory provisions.

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

Response: I would first consider relevant Supreme Court and Eleventh Circuit precedent to determine whether the provision's text has been interpreted in binding precedent. If it has not, I would look at the plain meaning of the text of the provision at issue. If it is possible to determine the plain meaning of the statutory provision from the text of the statute, my inquiry would end there. *See Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1894 (2021) (Alito, J., concurring). I would interpret the text in a manner consistent with the methods of interpretation that

the Supreme Court or the Eleventh Circuit has used in the most analogous circumstance, as well as any persuasive authority from other jurisdictions that have interpreted the provision. If confirmed as a District Judge, I will continue to follow the binding precedent of the Supreme Court and the Eleventh Circuit regarding the appropriate method for interpreting constitutional text.

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

Response: The text of a constitutional provision is the starting and end point when interpreting the Constitution. If it is possible to determine the plain meaning of a constitutional provision from the text, that is dispositive. *See Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1894 (2021) (Alito, J., concurring). The Supreme Court has held that the original meaning of text applies to the analysis and interpretation of constitutional provisions in various contexts. *See New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 34-36 (2022); *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2428 (2022); *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008); *Crawford v. Washington*, 541 U.S. 36, 42 (2004). If confirmed as a District Judge, I will continue to follow the binding precedent of the Supreme Court and the Eleventh Circuit regarding the appropriate method for interpreting constitutional text.

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.

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 has held that the original meaning of text applies to the analysis and interpretation of constitutional provisions in various contexts. *See New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 34-36 (2022); *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2428 (2022); *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008); *Crawford v. Washington*, 541 U.S. 36, 42 (2004). The meaning of the Constitution's text does not change unless it is amended. In *New York Rifle & Pistol Association v. Bruen*, 597 U.S. 1, 28 (2022), the Supreme Court explained that the Constitution is an enduring document with a "historically fixed meaning" that "applies to new circumstances." Similarly, the Supreme Court has indicated that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020). If confirmed as a District Judge, I will continue to follow the binding precedent of the Supreme Court and the Eleventh

Circuit regarding the appropriate method for interpreting the specific statutory or constitutional text at issue.

7. What are the constitutional requirements for standing?

Response: To establish standing, a plaintiff must suffer "an injury in fact—a concrete and imminent harm to a legally protected interest, like property or money—that is fairly traceable to the challenged conduct and likely to be redressed by the lawsuit." *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023).

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

Response: My belief is informed by Article I of the Constitution and the Supreme Court's interpretation of it. Article I of the Constitution enumerates the powers of Congress. Congress is limited to those powers enumerated in the Constitution. The Supreme Court has recognized, however, that the express grant of powers to Congress in the Constitution "necessarily implies the grant of all usual and suitable means for the execution of the powers granted," and that "Congress is authorized to pass all laws 'necessary and proper' to carry into execution the powers conferred on it." *McCulloch v. Maryland*, 17 U.S. 316, 323-24 (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: In *National Federation of Independent Business v Sebelius*, 567 U.S. 519, 570 (2012), the Supreme Court held, "The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Therefore, I would evaluate the constitutionality of such a law consistent with my response to Question 2.

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

Response: Yes. The Supreme Court has established the following test to determine whether a claimed right is among the unenumerated rights protected by the Due Process Clause: the asserted right must be "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted). Examples of such rights that the Supreme Court has recognized include the right to marry (*Loving v. Virginia*, 388 U.S. 1 (1967)), the right to have children (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)), the right to control the education of one's children (*Meyer v. Nebraska*, 262 U.S. 390 (1923)), and the right to marital privacy and to use contraceptives (*Griswold v. Connecticut*, 381 U.S. 479 (1965)).

11. What rights are protected under substantive due process?

Response: Please see my response to Question 10.

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: My beliefs and understandings on such matters are informed by Supreme Court and Eleventh Circuit precedent. With regard to due process protections of personal rights, like the right to contraceptives, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court held that married couples have a right to use contraceptives, which is protected under the substantive due process clause of the Constitution. On the other hand, in *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937), the Supreme Court held that the Constitution does not protect the economic rights at stake in *Lochner v. New York*, 198 U.S. 45 (1905). If confirmed as a District Judge, I will continue to follow the binding precedent of the Supreme Court and the Eleventh Circuit regarding these issues.

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

Response: The Supreme Court has identified three categories of activity that Congress may regulate under the Commerce Clause: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities" and (3) "those activities that substantially affect interstate commerce." *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: The Supreme Court has held that a suspect class is one "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." *Massachusetts Bd. Of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). The Supreme Court further explained that to reach the determination that certain classes are suspect classes, like race, religion, national origin, and alienage, the Court looked to whether a class possesses "an immutable characteristic determined solely by the accident of birth." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

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

Response: I would describe the role that checks and balances and separation of powers play as the Supreme Court has done. In *Morrison v. Olson*, 487 U.S. 654, 693 (1988), the Court explained: "[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Id*. (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)). The Court further clarified in *United States v. Lopez*, 514 U.S. 549, 552 (1995), that the "separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch."

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: I would decide such a case in the same way I would decide any other case, by faithfully applying binding precedent from the Supreme Court and the Eleventh Circuit. The Supreme Court has addressed this issue in the context of executive and congressional actions. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952), the Court held that the President has no power to act except in those cases that are expressly or implicitly authorized by the Constitution or an act of Congress. And in *United States v. Morrison*, the Court addressed the limits on Congressional authority. 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

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

Response: Empathy should play no role in a judge's consideration of a case. Rather, a judge should decide cases based upon the record facts and applicable law.

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 and should be avoided.

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: I am not familiar with these statistics nor any studies on the topic, so I have no basis to share my views on the questions. I will continue to follow Supreme

Court precedent regarding the validity and constitutionality of federal statutes if I am confirmed as a District Judge.

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

Response: Judicial review is the idea that the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judiciary. Judicial review was established in the landmark decision *Marbury v. Madison*, the first Supreme Court decision to strike down an act of Congress as unconstitutional, explaining: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. 137, 177 (1803). Judicial supremacy has been defined as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp[ecially] U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019). The concept of judicial supremacy has been recognized more sparingly than judicial review. For example, in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), the Supreme Court held that "the federal judiciary is supreme in the exposition of the law of the Constitution," finding that a state school district could not suspend a judicially-approved school integration plan because it was bound by the Court's decision in *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 347 U.S. 483 (1954).

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 question of how elected officials should balance their obligations to follow the Constitution with their need to respect judicial decisions is a matter for those elected officials to determine. However, their determination will necessarily take into consideration that all government officials, elected or appointed, are required by Article VI, Section 3 of the Constitution, to take an oath to uphold the Constitution. Elected officials are also required to follow duly rendered judicial decisions. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

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: Federalist 78 emphasizes the limited role of the judiciary. In that regard, judges do not make the law. Judges must only decide the cases and controversies brought before them that require the interpretation of the law.

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: The duty of a lower court judge is to apply and follow Supreme Court and circuit precedent regardless of whether it is the lower court's view that the precedent has "questionable constitutional underpinnings," as the Question is presented. If confirmed, I would continue to follow Supreme Court and Eleventh Circuit precedent, as I am duty bound to do and have done as a Magistrate Judge.

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: They should play no role in the sentencing analysis.

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: The word equity is used in many different contexts. I am not familiar with the statement referenced in the Question nor the context in which it was made. I do not have a personal definition of "equity." In my role as a Magistrate Judge, and if confirmed as a District Judge, if an issue comes before me in which the definition is relevant, I would look to and apply Supreme Court and Eleventh Circuit precedent. I am not aware of any Supreme Court or Eleventh Circuit precedent defining the word "equity." My understanding of the word is consistent with the definition provided by Merriam-Webster, which defines equity as "justice according to natural law or right." *Equity*, Merriam-Webster Dictionary (11th ed. 2022).

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

Response: Like the word equity, discussed in my response to Question 25, equality is also used in many different contexts. In my role as a Magistrate Judge, and if confirmed as a District Judge, if an issue comes before me in which the definitions of the words or their difference is relevant, I would look to and apply Supreme Court and Eleventh Circuit precedent.

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

Response: I am not aware of any Supreme Court or Eleventh Circuit precedent analyzing or applying the Equal Protection Clause to guarantee "equity" as defined in Question 25. As a Magistrate Judge and a nominee for a District Judge position, I am precluded by Canon 3(A)(6) of the Code of Conduct for United States Judges from opining on whether that is the case.

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

Response: I do not have a personal definition of the term "systemic racism," and I am not aware of any Supreme Court or Eleventh Circuit precedent defining the term. My understanding of the term is consistent with the definition provided by Merriam-Webster, which defines systemic racism as "the oppression of a racial group to the advantage of another as perpetuated by inequity within interconnected systems (such as political, economic, and social systems)." *Systemic Racism*, Merriam-Webster Dictionary (11th ed. 2022).

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

Response: I do not have a personal definition of the term "critical race theory," and I am not aware of any Supreme Court or Eleventh Circuit precedent defining the term. My understanding of the term is consistent with the definition provided by Merriam-Webster, which defines critical race theory as "a group of concepts (such as the idea that race is a sociological rather than biological designation, and that racism pervades society and is fostered and perpetuated by the legal system) used for examining the relationship between race and the laws and legal institutions of a country and especially the United States." *Critical race theory*, Merriam-Webster Dictionary (11th ed. 2022).

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

Response: Please see my responses to Questions 28 and 29.

Senator Josh Hawley
Questions for the Record

Melissa Damian
Nominee, U.S. District Judge for the Southern District of Florida

1. **Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?**
   a. **If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.**

Response: No.

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

Response: The Supreme Court has held that the original meaning of text applies to the analysis and interpretation of constitutional provisions in various contexts. *See New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 34-36 (2022); *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2428 (2022); *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I will continue to follow the binding precedent of the Supreme Court and the Eleventh Circuit regarding the appropriate method for interpreting constitutional text.

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

Response: The role of legislative history is very limited and should be used only when the text of the statute is ambiguous and under circumstances in which the Supreme Court has indicated it is appropriate to do so.

   a. **If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?**

Response: I follow Supreme Court and Eleventh Circuit precedent regarding the limited circumstances when legislative history may be considered and what types. For example, the Supreme Court has identified committee reports as more probative than "passing comments" from legislators or comments from floor debates. *Garcia v. United States*, 469 U.S. 70, 76 (1984). The Supreme Court has also indicated that it "gives little weight to statements, such as those of the individual legislators, made *after* the bill in question has become law." *Barber v. Thomas*, 560 U.S. 474, 486 (2010); *accord Heintz v. Jenkins*, 514 U.S. 291, 298 (1995) (rejecting such a statement made later in the year of the act's passage

because it was "not a statement upon which other legislators might have relied in voting"); *see also Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1247 (11th Cir. 2008) ("We may consult legislative history to elucidate a statute's ambiguous or vague terms, but legislative history cannot be used to contradict unambiguous statutory text or to read an ambiguity into a statute which is otherwise clear on its face. [ ] Moreover, when we consult legislative history, we do so with due regard for its well-known limitations and dangers.") (citing *Exxon Mobil Corp. v. Allapattah Svcs., Inc.,* 545 U.S. 546, 568–70 (2005)).

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

Response: The Constitution is a domestic document. I am not aware of any circumstances in which it is appropriate to consult the laws of foreign nations when interpreting the Constitution.

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: Under Supreme Court and Eleventh Circuit precedent, to succeed on a claim that a State's planned method of execution, either on its face or as applied to him, violates the Eighth Amendment's prohibition on "cruel and unusual" punishment, a death row inmate must satisfy two requirements: "First, he must establish that the State's method of execution presents a 'substantial risk of serious harm'—severe pain over and above death itself; and second, he 'must 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) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)); *Barber v. Governor of Alabama*, 73 F.4th 1306, 1318 (11th Cir. 2023).

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: Please see my response to Question 4.

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

Response: No. The Supreme Court and the Eleventh Circuit have both held to the contrary. *See Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69, (2009); *Cromartie v. Shealy*, 941 F.3d 1244, 1253 (11th Cir. 2019).

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

Response: No.

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

Response: Under Supreme Court and Eleventh Circuit precedent, a government action may incidentally burden religious practices—subject to rational basis review—so long as it is both "neutral" and "generally applicable." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) (citations omitted). As the Supreme Court explained in *Kennedy*, a government policy will not qualify as neutral if it is "specifically directed at ... religious practice." *Id*. A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemption." *Id*.; *see also Thai Meditation Ass'n of Alabama, Inc. v. City of Mobile, Alabama*, 83 F.4th 922, 928 (11th Cir. 2023). 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, 1729 (2018). As such, if a plaintiff demonstrates that a state action is not neutral or generally applicable, 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. If a plaintiff is unable to demonstrate that the state action is not neutral or generally applicable, then the action is not subject to strict scrutiny review. *See. Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1876-77 (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 my 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: Pursuant to Eleventh Circuit precedent, courts evaluating whether a person's religious belief is sincerely held require that the belief be "rooted in religion," since "personal preferences and secular beliefs do not warrant the protection of the Free Exercise Clause." *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n*, 942 F.3d 1215, 1246-48 (11th Cir. 2019) (citing *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 725 (2014) ("[I]t is 'not for [the Court] to say that [the litigant's] religious beliefs are mistaken or insubstantial'; rather, the Court's 'narrow function ... in this context is to determine' whether the line drawn reflects 'an honest conviction.'")).

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 protects the right to keep and bear arms for the purpose of self-defense and struck down a District of Columbia law that banned the possession of handguns in the home.

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

Response: No.

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: Generally, I believe Justice Holmes was emphasizing that the court should not replace the legislature's judgment with its own. As a sitting Magistrate Judge and a nominee for the District Court, I am precluded by the Canons of the Code of Conduct for United States Judges from expressing my personal beliefs regarding an opinion of the Supreme Court.

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

Response: As a sitting Magistrate Judge and a nominee for the District Court, I am precluded by the Canons of the Code of Conduct for United States Judges from expressing my personal beliefs regarding whether an opinion of the Supreme Court was correctly decided. I do note that the *Lochner* decision has been rejected and abrogated by subsequent Supreme Court decisions.

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

Response: I understand that phrase to mean that it is the view of the Supreme Court that *Korematsu* was wrongly decided. My understanding in this regard is guided by Supreme Court precedent, in which the Court explained that it was "mak[ing] express what is already obvious: *Korematsu* was gravely wrong the day it was decided." *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

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

Response: Yes.

a. If so, what are they?

Response: *Dred Scott v. Sandford*, 60 U.S. 393 (1857). Although abrogated by the Thirteenth and Fourteenth Amendments to the Constitution, the *Dred Scott* decision was not formally overruled by the Supreme Court.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: As a sitting Magistrate Judge and a nominee for the District Court, I am precluded by the Canons of the Code of Conduct for United States Judges from expressing my personal opinions regarding an issue that may come before me. I do note that in *Eastman Kodak v. Image Tech. Servs., Inc*., 504 U.S. 451, 481 (1992), the Supreme Court held that a market share of 80-95% of a service market was sufficient to survive summary judgment under Section 2 of the Sherman Act, and in *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), the Supreme Court stated that 87% of the market share was sufficient to state a prima facie case under the Sherman Act. If confirmed, I will follow Supreme Court and Eleventh Circuit precedent on this issue.

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

Response: Not applicable.

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

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

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

Response: Based on the Supreme Court's holding in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), it is my understanding that there is no federal general common law. The term "federal common law" is defined as "a group of laws established by the federal courts that is not influenced by laws and decisions of state courts." Black's Law Dictionary (11th ed. 2019).

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

Response: If confirmed as a District Judge, I will follow Supreme Court and Eleventh Circuit precedent, as I have as a Magistrate Judge, when making such a determination. Supreme Court precedent instructs lower courts to interpret a state's constitution consistent with the decisions of the state's highest court. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

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

Response: Please see my response to Question 17.

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

Response: My belief is informed by Supreme Court and Eleventh Circuit precedent. 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." *Arizona v. Evans*, 514 U.S. 1, 8 (1995). If confirmed as a District Judge, I will follow Supreme Court and Eleventh Circuit precedent, as I have as a Magistrate Judge.

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

Response: Yes. Although as a sitting judge and nominee I would normally be precluded from commenting on my personal views of whether an opinion of the Supreme Court was correctly decided, given that the holding in *Brown v. Board of Education* is not

likely to be relitigated, I believe that I may express my view on this issue consistent with the Code of Conduct for United States Judges.

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

Response: Federal Rule of Civil Procedure 65 governs injunctions generally. There is no express statutory authority for general nationwide injunctions, and neither the Supreme Court nor the Eleventh Circuit has issued binding precedent as to the precise circumstances in which a nationwide injunction may be authorized. If confirmed as a District Judge, I will follow binding precedent from the Supreme Court and the Eleventh Circuit as applied to the facts and circumstances presented if an issue concerning a nationwide injunction comes before me.

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

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: My understanding of the role of federalism in our constitutional system is informed by Supreme Court precedent. The Supreme Court explained, in *Gregory v. Ashcroft*, 501 U.S. 452 (1991): "This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Id*. at 458 (citations omitted). The Court further observed that the federalist system is a check on abuses of government power. *Id*.

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

Response: There are several doctrines of abstention, or when a federal court may abstain from deciding a case even though it has jurisdiction to do so. The Supreme Court has instructed that, generally, "[a]bstention rarely should be invoked, because the

federal courts have a virtually unflagging obligation … to exercise the jurisdiction given to them." *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (internal quotations and citations omitted).

Abstention doctrines include:

(1) The *Younger* abstention doctrine, named for *Younger v. Harris*, 401 U.S. 37 (1971), pursuant to which a federal court may abstain when there is an ongoing state proceeding that implicates important state interests that are "uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013).

(2) The *Pullman* abstention doctrine, which provides that federal courts defer to "state court resolution of underlying issues of state law." *Harman v. Forssenius*, 380 U.S. 528, 534 (1965). *Pullman* abstention is appropriate where two elements are met: "(1) the case must present an unsettled question of state law, and (2) the question of state law must be dispositive of the case or would materially alter the constitutional question presented." *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000).

(3) The *Burford* abstention doctrine, which provides that a federal court can decline to adjudicate—and can dismiss—a case that is otherwise within its jurisdiction, when, by exercising its jurisdiction, a federal court would interfere with an ongoing state administrative proceeding or action. *Deal v. Tugalo Gas Co.*, 991 F.3d 1313, 1326 (11th Cir. 2021) (citing *Siegel v. LePore*, 234 F.3d 1163, 1173 (11th Cir. 2000) (en banc) (emphasizing that *Burford* abstention is a "narrow doctrine").

(4) The *Colorado River* abstention doctrine, which is based on the policy of conserving judicial resources in situations involving the contemporaneous exercise of concurrent jurisdictions. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

(5) The *Rooker-Feldman* doctrine, which takes its name from two Supreme Court cases, *Rooker v. Fidelity Trust Co*., 263 U.S. 413 (1923), and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and "eliminates federal court jurisdiction over those cases that are essentially an appeal by a state court loser seeking to relitigate a claim that has already been decided in a state court." *Target Media Partners v. Specialty Mktg. Corp.*, 881 F.3d 1279, 1281 (11th Cir. 2018) (The purpose of the doctrine is "to ensure that the inferior federal courts do not impermissibly review decisions of the state courts—a role reserved to the United States Supreme Court.").

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

Response: The relative advantages and disadvantages of damages versus injunctive relief are based on the facts and specific circumstances of the particular case in which

the relief is at issue. The Canons of the Code of Conduct for United States Judges preclude me from opining on hypothetical situations and issues that may come before me.

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

Response: My understanding of the Supreme Court's precedents on substantive due process is informed by the Supreme Court's opinion in *Washington v. Glucksberg*, 521 U.S. 702 (1997), in which the Court explained:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," that direct and restrain our exposition of the Due Process Clause. As we stated recently in [*Reno v.*] *Flores*, the Fourteenth Amendment "forbids the government to infringe ... fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." 507 U.S. [292,] 302 (1993).

Id. at 720–21 (internal citations 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: My view is based on binding Supreme Court and Eleventh Circuit precedent, which provide that the free exercise of religion is a fundamental right and, with regard to the scope of the right, that "the Free Exercise Clause protects religious exercises, whether communicative or not." *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2421 (2022).

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

Response: The Free Exercise Clause protects religious exercises, whether communicative or not, and, as such, it includes but is not limited to the freedom to worship. *See Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2421 (2022); *Lee v. Weisman*, 505 U.S. 577, 591 (1992). The Supreme Court and the Eleventh Circuit have held that the protections of the Free Exercise Clause extend to a variety of conduct not necessarily considered worship. For example, in *Kennedy*, the Supreme Court held that a football coach's right to kneel in prayer at a public school football facility fell within the protections of the Free Exercise Clause. And, in *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868 (2021), the Supreme Court held that the City of Philadelphia was burdening a Catholic foster care agency's free exercise of religion by putting it to the choice of not providing its services or approving relationships inconsistent with its beliefs by permitting adoptions by same sex couples. *Id*. at 1876; *see also Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (holding that to prove that his religious exercise was substantially burdened, a plaintiff must present evidence that he was coerced to perform conduct that his religion forbids or prevented from performing conduct that his religion requires.).

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

Response: Please see my 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 my response to Question 10.

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

Response: The text of the Religious Freedom Restoration Act, on its face, indicates that it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3. The Act further provides that it shall not be "construed to authorize any government to burden any religious belief." *Id*.

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

Response: No.

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

Response: Neither the Supreme Court nor the Eleventh Circuit has articulated nor approved a definition of "beyond a reasonable doubt" that is stated in numerical terms. As a sitting judge and nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from opining on what that numerical definition would be.

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

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

Response: As a sitting judge and nominee, the Code of Conduct for United States Judges prohibits me from offering my opinion on this question as the issue may come before me. If confirmed and such an issue came before me, I would apply Supreme Court and Eleventh Circuit precedent to the facts and circumstances of the case presented. I do note that the *Harrington* decision does not indicate one way or the other whether a Circuit split would be indicative of whether fair-minded jurists could disagree.

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

Response: As a sitting judge and nominee, the Code of Conduct for United States Judges prohibits me from offering my opinion on this question as the issue may come before me. If confirmed and such an issue came before me, I would apply Supreme Court and Eleventh Circuit precedent to the facts and circumstances of the case presented. I again note that the *Harrington* decision does not indicate one way or the other whether a Circuit split would be indicative of whether fair-minded jurists could disagree.

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

Response: As a sitting judge and nominee, the Code of Conduct for United States Judges prohibits me from offering my opinion on this question as the issue may

come before me. If confirmed and such an issue came before me, I would apply Supreme Court and Eleventh Circuit precedent to the facts and circumstances of the case presented.

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

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

Response: My belief is informed by the Eleventh Circuit Rules, which address the matter of unpublished decisions and their precedential value. Specifically, Eleventh Circuit Rule 36–2 provides that "unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36–2. Similarly, Eleventh Circuit Internal Operating Procedure 6 provides, in pertinent part: "Opinions that the panel believes to have no precedential value are not published. Although unpublished opinions may be cited as persuasive authority, they are not considered binding precedent." 11th Cir. R. 36, I.O.P. 6. Likewise, Internal Operating Procedure 7 also notes that "[t]he court generally does not cite to its 'unpublished' opinions because they are not binding precedent." 11th Cir. R. 36, I.O.P. 7. As a sitting judge in the Eleventh Circuit and a nominee to a district court in the Eleventh Circuit, it is not appropriate for me to question the Eleventh Circuit's rules.

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

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

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

Response: No. As set forth in my response to Question 28(a), the Eleventh Circuit Rules state that unpublished opinions are not binding precedent.

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

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

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

Response: Yes. As set forth in my response to Question 28(a), the Eleventh Circuit Rules state that unpublished opinions may be cited as persuasive authority.

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

Response: No.

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

Response: No.

29. In your legal career:

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

Response: To the best of my recollection, approximately 20.

b. How many have you tried as second chair?

Response: To the best of my recollection, approximately 10.

c. How many depositions have you taken?

Response: I estimate at least 20.

d. How many depositions have you defended?

Response: I estimate at least 20.

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

Response: To the best of my recollection, 2.

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

Response: I estimate more than 10.

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

Response: I have never appeared before a federal agency.

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

Response: I estimate more than 20.

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

Response: I estimate more than 20.

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: To the best of my recollection, approximately 2000.

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

Response: To the best of my recollection, in the year in which I billed the most hours, I worked on one pro bono matter for which I estimate I recorded approximately 10 hours. During my more than ten years in private practice, I estimate I spent over 100 hours on pro bono matters.

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that if a judge is faithfully applying binding precedent and the law to the cases before him or her, he or she will not always like the results they reach.

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 to mean that it is not the role of the judiciary to make the law but only to interpret and apply it.

b. Do you agree or disagree with this statement?

Response: I agree.

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

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

Response: I understand this to mean that it is not the role of the judiciary to create what judges believe are the just laws or to create just outcomes but instead only to interpret and apply the law to the facts and circumstances presented.

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

Response: I agree.

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: Not that I recall.

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: *The Personal Librarian*, by Marie Benedict and Victoria Christopher Murray; *The Last Days of Night*, by Graham Moore; and *The Lincoln Conspiracy*, by Brad Meltzer.

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

Response: No.

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

Response: There are many matters that I worked on of which I am very proud. I am perhaps most proud of my work on *Operation Render Safe* while at the United State Attorney's Office. That operation involved a long-term international investigation into the export of commercial and military components that were being used to harm American troops in Iraq and Afghanistan. The operation was credited for stopping numerous pipelines of dangerous instrumentalities to terrorists and was recognized for the Attorney General's Award. I was the lead prosecutor on the operation and all indictments and cases that resulted from it.

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

Response: Not to my recollection.

a. How did you handle the situation?

Response: Not applicable.

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. I have read *America's Unwritten Constitution*, by Akhil Reed Amar.

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

Response: There is no single Federalist Paper that I can say most shaped my view of the law.

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

Response: I do not recall any specific judicial opinion, law review article, or other legal opinion that made me change my mind.

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

Response: As a sitting judge and nominee, the Code of Conduct for United States Judges prohibits me from offering my opinion on this question as the issue may come before me. If confirmed and such an issue came before me, I would apply Supreme Court and Eleventh Circuit precedent to the facts and circumstances of the case before me.

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: Yes. I was deposed in October and November 2022 in a guardianship proceeding in which I, individually and in my capacity as the guardian of my two children, was the petitioner in proceedings against the former trustee of the estate of my former husband and father of my children. *See In Re: Estate of Michael Joseph Visconti, Deceased*, File Nos. 2021-CP-003098(02) and 2021-CP-003707(02) (Circuit Court of the Eleventh Judicial Circuit, Miami-Dade County, Florida). The transcript can be found in the public record for these cases, filed on April 23, 2023.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: Not that I am aware of.

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

Response: Not applicable.

48. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

Response: Not applicable.

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

Response: It is my understanding that nominees must answer all questions truthfully and should be forthcoming in their responses to the best of their ability.

Senator John Kennedy
Questions for the Record

Melissa Damian

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

   Response: Yes. The Supreme Court has held that the death penalty is constitutional. *See Gregg v. Georgia*, 428 U.S. 153, 168-69 (1976). State and federal legislatures have set forth the circumstances under which death is an appropriate sentence for a criminal defendant. If confirmed, I will continue to faithfully follow binding precedent of the Supreme Court and the Eleventh Circuit and the Sentencing Guidelines when determining the appropriate sentence for a criminal defendant.

   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.

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: The Supreme Court has held that a sentencing judge may impose a sentence that varies from the Guidelines when the judge finds a particular case "outside the 'heartland' to which the Commission intends individual Guidelines to apply." *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (quoting *Rita v. United States*, 551 U.S. 338, 351 (2007)). The Sentencing Guidelines also provide grounds for departures from the applicable guidelines range. If confirmed, I will faithfully follow the binding precedent of the Supreme Court and the Eleventh Circuit and the Sentencing Guidelines when determining an appropriate sentence for a criminal defendant.

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.

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

   Response: As a Magistrate Judge, my judicial philosophy has been to decide all cases that come before me based only on the law and the facts before me in each particular case. In

so doing, I have always endeavored to impartially and fairly hear and decide every case and to diligently identify and apply the relevant law, including the Constitution, applicable statutes and regulations, and binding precedent from the Supreme Court and the Eleventh Circuit. If confirmed as a District Judge, I will continue to abide by this philosophy and assure that I am fully prepared for every case and that all who come before me feel their case was carefully considered and fairly decided.

6. **Is originalism a legitimate method of constitutional interpretation?**

   Response: The Supreme Court has held that the original meaning of text applies to the analysis and interpretation of constitutional provisions in various contexts. *See New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 34-36 (2022); *Kennedy v. Bremerton School Dist*., 142 S. Ct. 2407, 2428 (2022); *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed as a District Judge, I will continue to follow the binding precedent of the Supreme Court and the Eleventh Circuit regarding the appropriate method for interpreting constitutional text.

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: I would first look at the plain meaning of the text of the constitutional provision at issue. I would interpret the text in a manner consistent with the methods of interpretation that the Supreme Court or the Eleventh Circuit has used in the most analogous circumstance, as well as any persuasive authority from other jurisdictions.

8. **Is textualism a legitimate method of statutory interpretation?**

   Response: The Supreme Court has held that if it is possible to determine the plain meaning of a statutory provision from the text of the statute, that is dispositive. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). If confirmed as a District Judge, I will continue to follow the binding precedent of the Supreme Court and the Eleventh Circuit regarding the appropriate method for interpreting statutes.

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

   Response: It is only appropriate to look beyond the text of a statute or provision if the text is ambiguous. If that is the case, judges first consider relevant Supreme Court and Circuit precedent to aid in the interpretation of the text. If there is no relevant precedent, then judges may turn to the canons of construction. And in limited circumstances where the Supreme Court has indicated it is appropriate to do so, judges may review legislative history.

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: No. The Constitution does not change unless it is amended. In *New York Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022), the Supreme Court explained that the Constitution is an enduring document with a "historically fixed meaning" that "applies to new circumstances."

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

Response: The role of legislative history is limited and should be used only when the text of the statute is ambiguous and under circumstances in which the Supreme Court or Eleventh Circuit has indicated it is appropriate to do so.

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: Federal Rule of Civil Procedure 65 governs injunctions generally. There is no express statutory authority for general nationwide injunctions, and neither the Supreme Court nor the Eleventh Circuit has issued binding precedent as to the precise circumstances in which a nationwide injunction may be authorized. If confirmed as a District Judge, I will follow binding precedent from the Supreme Court and the Eleventh Circuit as applied to the facts and circumstances presented if an issue concerning a nationwide injunction comes before me.

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: I would use the analysis dictated by binding precedent of the Supreme Court and the Eleventh Circuit. In *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), the Supreme Court established the following standard for evaluating whether laws or regulations infringe on individuals' rights under the Second Amendment: "When

the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id*. at 17 (quoting *Konigsberg v. State Bar of California*, 366 U.S. 36, 50, n.10 (1961)). I would thus start my analysis there and follow all binding precedent of the Supreme Court and the Eleventh Circuit if an issue involving the Second Amendment came before me.

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: The Supreme Court has established the following test to determine whether a claimed right is among the unenumerated rights protected by the Due Process Clause: the asserted right must be "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

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

Response: In *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984), the Supreme Court established the following two-part test for reviewing a regulatory agency's construction of a statute: first, courts must ask "whether Congress has directly spoken to the precise question at issue [and if] the intent of Congress is clear, that is the end of the matter"; second, if the statute is ambiguous, courts will defer to the administrative agency's interpretation if it is reasonable and "based on a permissible construction of the statute." Recently, the Supreme Court and legal scholars have expressed concern that an agency's interpretation of an ambiguous statute as provided in *Chevron* "gives rise to serious vagueness concerns" when the statute imposes criminal penalties. *See Sackett v. Env't Prot. Agency*, 598 U.S 651, 680-81 (2023). The Court explained, "Due process requires Congress to define penal statutes 'with sufficient definiteness that ordinary people can understand what conduct is prohibited' and 'in a manner that does not encourage arbitrary and discriminatory enforcement." *Id*. (quoting *McDonnell v. United States*, 579 U.S. 550, 576 (2016)). I also note that the issue of deference to agency interpretations of statutes may also raise concerns under the Major Questions Doctrine, discussed below in my response Question 18. If confirmed as a District Judge, I will faithfully apply Supreme Court and Eleventh Circuit precedent if confronted with such an issue.

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

Response: As the Supreme Court explained in *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587 (2022), when determining whether an agency's action violates the Major Questions Doctrine, courts ask whether the Government can "point to 'clear congressional authorization' to regulate in that manner." *Id*. at 2614 (quoting *Utility Air v. Regul. Grp. V. Env't Prot. Agency*, 573 U.S. 302, 324 (2014)). If no such clear congressional authorization is found in the statute, then the agency may have violated the Major Questions Doctrine. Courts look to binding Circuit and Supreme Court precedent to identify whether there is clear congressional authorization or whether the action violates the Major Questions Doctrine, which is what I will do if presented with such an issue.

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

Response: As I write this, the late Justice Sandra Day O'Connor was recently laid to rest, and, thus, she is the first Justice who comes to mind. I have always been inspired by Justice O'Connor, a true trail blazer and role model. As Chief Justice Roberts explained, Justice O'Connor met the challenge of being the first female Justice "with undaunted determination, indisputable ability, and engaging candor." Justice O'Connor is an inspiration to all but especially to women jurists, like myself.

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: I estimate that I was lead counsel in approximately 20 federal jury trials when I served as a federal prosecutor between 2000-2010. The following 5 are a representative sample of some of those trials:
USA v. Jacqueline Brown, Case No. 00-CR-00480-KMM (S.D. Fla.);
USA v. Camilo Tamayo, *et. al*, Case No. 00-CR-00643-SH (S.D. Fla.);
USA v. Antrone Davis, Case No. 00-CR-01060-KMM (S.D. Fla.);
USA v. Malcolm Williams, Case No. 01-CR-00137-DLG (S.D. Fla.);
USA v. Antonio Garcia, Case No. 02-CR-20093-KMM (S.D. Fla.);

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: To the best of my recollection, I presented oral argument before U.S. Court of Appeals panels two times:
Wilhelm v. MOH, et. al, Case No. 16-11312 (11th Cir.);
SEC v. Leon Cosgrove, LLC, et. al, Case No. 19-11409 (11th Cir.).

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: I reviewed publicly available information, including the United States Constitution and Amendments thereto, landmark and recent Supreme Court and Eleventh Circuit decisions, video recordings of previous Committee hearings, and answers to written questions by previous nominees. I also participated in several preparation sessions organized by the Department of Justice, Office of Legal Policy, and White House Counsel.

23. Why should Senator Kennedy support your nomination?

Response: I would be honored to have Senator Kennedy's support. I believe Senator Kennedy should support my nomination because I am a qualified candidate for the position of District Judge based on my more than twenty years of experience as both a criminal and civil practitioner in state and federal courts and my proven track record as a Magistrate Judge of following the law and ably handling all matters before me with skill, impartiality, and integrity.

Questions from Senator Thom Tillis
For Melissa Jean Damian, nominee to to be United States District Judge for the Southern District of Florida

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

   Response: A judge's personal views and background are irrelevant to interpreting and applying the law, but a judge may benefit from their legal education, practice, and experience, especially prior judicial experience, in applying the law.

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

   Response: I believe impartiality is an expectation, as set forth in the Code of Conduct for United States Judges, Canon 2(A).

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

   Response: "Judicial activism" is defined as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, [usually] with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Black's Law Dictionary (11th ed. 2019). I do not consider judicial activism 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: Yes. As a judge, I reconcile that by continuing to faithfully interpret and apply the law while appreciating the greater benefit that is achieved from our federalist system of government and the separation of powers. If confirmed as a District Judge, I will continue to faithfully interpret and apply the law based on the Constitution, applicable statutes, and binding precedent regardless of whether I personally feel the outcome is desirable.

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 continue to faithfully follow and apply binding precedent from the Supreme Court and the Eleventh Circuit. Specifically, with regard to the Second Amendment, I will follow and apply the Supreme Court's holdings in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 34-36 (2022); *Mc Donald v. City of Chicago*, 561 U.S.

742, 791 (2010); and *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008), among other precedent interpreting and applying the Second Amendment.

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: I have and will continue to apply the processes set forth in Supreme Court and Eleventh Circuit precedent when considering qualified immunity cases. Under Supreme Court precedent, that process requires the court to engage in a two-part inquiry when a plaintiff alleges a violation of their civil rights by law enforcement: (1) whether the officer violated a federal statutory or constitutional right; and (2) whether the unlawfulness of the officer's conduct was clearly established at the time of the officer's conduct. *See District of Columbia v. Wesby*, 583 U.S. 48, 62-63 (2018). That is the process I follow and will continue to follow if confirmed.

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 Canons of the Code of Conduct for United States Judges preclude me from offering my personal opinion of the legal doctrine. If I am confirmed, I will continue to faithfully apply binding precedent from the Supreme Court and the Eleventh Circuit to the facts and circumstances in all cases before me, including those involving qualified immunity. Under Supreme Court precedent, qualified immunity protects law enforcement officers from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonably competent officer would have known. *See Malley v. Briggs*, 475 U.S. 335, 344, 106 S. Ct. 1092, 1098, 89 L. Ed. 2d 271 (1986).

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

Response: Please see my responses to Questions 7 and 8.

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

Response: My thoughts regarding the importance of ensuring that IP rights are enforced are informed by the Constitution, copyright laws, and precedent from the Supreme Court and the Eleventh Circuit. Under the Constitution, Congress has the power under the Intellectual Property Clause to grant authors and inventors exclusive rights in their writings and discoveries. U.S. Const. art. I, § 8. It is the role of the courts to enforce intellectual property rights granted by Congress to authors and inventors. *See Golan v. Holder*, 565 U.S. 302, 324-25 (2012); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001). If confirmed as a District Judge, I will faithfully apply the Constitution, applicable statutes, and

binding precedent to the facts and circumstances presented when considering issues involving the enforcement of IP rights.

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: I am not familiar with the specific issue. Generally, intentional forum shopping is improper. In the Southern District of Florida, cases are randomly assigned so that no litigant should be able to choose a particular judge.

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 sitting judge and judicial nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on the reasoning of Supreme Court precedent. If confirmed as a District Judge, I will faithfully apply the Constitution, applicable statutes, and binding precedent when considering IP rights and patent eligibility matters.