**Senator Lindsey Graham, Ranking Member**
**Questions for the Record**
**Judge David Seymour Leibowitz**
**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 above statement. Judges should follow the law (including text, precedent, structure, and approved canons of legal interpretation) in making judgments about what the Constitution means, permits, prohibits, or requires.

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: No. While I am not aware of the statement or the context in which it was made, I do not agree that such an approach or attitude is ever appropriate for a federal judge to take.

3. **You signed a statement of Former United States Attorneys and Assistant United States Attorneys opposing President Trump's executive order: "Protecting the Nation from Foreign Terrorist Entry into the United States." Among other things, your statement said: "If we were called upon to defend the Executive Order, could we do it within the guidelines we learned and lived by as lawyers for the United States? We could not."**

   a. **Would this statement be appropriate for a sitting United States Attorney or Assistant United States Attorney to sign? 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 "yes."**

      Response: In my view, the answer to the above question is "no." I do not believe it would have been appropriate for me to sign that statement as an active Assistant United States Attorney, and I would not have signed the statement if I was an active Assistant United States Attorney at the time.

   b. **Would you sign this statement today? 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 "yes."**

Response: No. As a current nominee to be a United States District Judge, I would not sign that statement today (even assuming similar facts were present). Regardless of my personal policy views or even the correctness of any legal analysis, I believe it would not be appropriate for me to make such a statement as a nominee because doing so could be seen as prejudging issues that could come before me if I was confirmed.

c. **Particularly in light of Hamas's brutal attack against our Israeli allies, do you believe the President has the legal authority to stop potential terrorists from entering our country?**

Response: Yes. My understanding of current federal law (including federal statute and binding Supreme Court precedent), is that the President has substantial legal authority to stop potential terrorists from entering the United States. This authority, of course, must be executed in a lawful manner, including long-established constitutional and statutory requirements.

4. **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. Such a public endorsement or statement of praise for any designated Foreign Terrorist Organization (including Hamas or the Popular Front for the Liberation of Palestine) would be disqualifying for a potential clerkship in my chambers.

5. **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. Such a public statement would be disqualifying for a potential clerkship in my chambers.

6. **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: After direct review of a conviction becomes final, a prisoner in custody under sentence of a federal court can seek and receive relief from the sentence through two main avenues: (1) a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255; or (2) a motion for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. The procedural requirements and legal standards for relief for each of the methods are very detailed and complex.

Under 28 U.S.C. § 2255, a federal prisoner must demonstrate that their sentence was imposed in violation of the Constitution or laws of the United States, imposed by a court without jurisdiction, in excess of the maximum sentence authorized by law, or otherwise subject to collateral attack. The "cause and prejudice" standard enunciated by the Supreme Court applies to all such motions.

Under 28 U.S.C. § 2241, the petitioner must show that they are being held in custody in violation of the Constitution or laws of the United States. Among other things, the petitioner must be in actual or constructive custody of the United States government, and the petitioner must demonstrate that their current custody is unlawful. The petitioner must also demonstrate that they have no other adequate remedy available to them, such as a motion under 28 U.S.C. § 2255.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") made significant changes to both § 2255 and § 2241, and those changes have been addressed in many Supreme Court decisions over the last 25 years. Overall, the AEDPA significantly narrowed the scope of available relief under § 2255 and § 2241.

7. **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: In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (No. 20-1199), and *Students for Fair Admissions, Inc. v. University of North Carolina et al.* (No. 21-707), the United States Supreme Court held that the undergraduate admissions programs utilized by Harvard University and the University of North Carolina violated the Equal Protection Clause of the Fourteenth Amendment. (Harvard's program was evaluated under the Equal Protection Clause by way of the Civil Rights Act of 1964 and the Court's precedent in *Gratz v. Bollinger*, 539 U.S. 244, 276 n. 23 (2003). *See SFFA v. President and Fellows of Harvard Univ.*, Slip Op. at 6 n.2). In these consolidated cases, Harvard University and the University of North Carolina explicitly considered the race of the applicant in different ways as part of their admissions determinations. In the Harvard admissions process, for example, race was "a

determinative tip for" a significant percentage "of all admitted African-American and Hispanic applicants." In the UNC process, for example, an admissions reader could provide an applicant with a substantial "plus" depending on the applicant's race.

First, the Court held that the organizational plaintiff, Students for Fair Admission ("SFFA"), had Article III standing. The Court applied well-established standing requirements which require a plaintiff to demonstrate that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." (Slip Op. at 7, citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).) The Court further explained that an organizational plaintiff like SFFA can satisfy these standing requirements under its "organizational standing" precedents, and that SFFA did so. (Slip Op. at 7-9 (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975), and *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).)

Then, turning to the merits of SFFA's constitutional challenge, the Court explained that many of its decisions regarding the Equal Protection Clause reflected the "core purpose" of the Clause: "do[ing] away with all governmentally imposed discrimination based on race." (Slip Op. at 14 (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).) The Court applied "strict scrutiny" to Harvard's and UNC's admissions programs because they made explicit distinctions on the basis of race, which meant that the programs could only survive if the racial classification was used to "further compelling governmental interests," and whether the use of race was "narrowly tailored," or "necessary to achieve that interest." (Slip Op. at 15 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), and *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311-12 (2013).)

While the Court had previously upheld the use of race in university admissions programs in cases like *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), and *Grutter*, 539 U.S. at 325-26, the Court invalidated the programs implemented by Harvard and UNC, holding that they (1) failed strict scrutiny, (2) used race "as a stereotype or negative," and (3) had no "logical end point." (Slip Op. at 22-34.)

8. **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: In my role as Secretary and General Counsel of Braman Management Association, I participated in hiring decisions (with others) in approximately 5 instances over a period of about 8 years (2015-2022).

9. **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.

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

    Response: No.

11. **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: To my knowledge, I have never worked for such an employer.

    **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.**

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

    Response: Yes.

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

    Response: A graphic design business, 303 Creative LLC, offered services for couples seeking wedding websites. The business owner brought a pre-enforcement challenge under the First Amendment seeking to enjoin the State of Colorado from using the Colorado Anti-Discrimination Act ("CADA") to compel the business owner to create websites celebrating same-sex marriages. The CADA prohibits all "public accommodations" from denying "the full and equal enjoyment" of its goods and services to any customer based on the customer's race, creed, disability, sexual orientation, or other statutorily enumerated trait.

    Before the district court, the parties stipulated to the following facts: (1) the business owner was "willing to work with all people regardless of classifications such as race,

creed, sexual orientation, and gender" and "will gladly create custom graphics and websites" for clients of any sexual orientation; (2) the business owner will not produce content that "contradicts biblical truth" regardless of who orders it; (3) the business owner' belief that marriage is a union between one man and one woman is a sincerely held conviction; (4) the business owner provides design services that are "expressive" and her "original, customized" creations "contribut[e] to the overall message" her business conveys "through the websites" it creates; and (5) the wedding websites the business owner planned to create "will be expressive in nature" and will be "customized and tailored" through close collaboration with the customers. (Slip Op. at 4-5.)

On these facts, the Supreme Court held that the Free Speech Clause of the First Amendment prohibited Colorado from compelling 303 Creative to create expressive designs that convey messages with which the business owner disagreed. Citing cases like *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), and *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), the Court held that the designed websites constituted the business owner's "pure speech" that Free Speech Clause protects, and that the State cannot compel her to provide speech without violating the First Amendment. (Slip Op. at 6-10.) The State through the CADA put 303 Creative's owner to an "impermissible choice" under these First Amendment cases: either speak as the State demands or face sanctions (such as compulsory remedial training or monetary fines) for expressing one's own beliefs. (Slip Op. at 11.) Among other key points, the Court emphasized the importance of the parties' factual stipulations that resulted in a finding that the offered websites constituted the business owner's "pure speech," and not merely a non-expressive product that would be subject to a different type of scrutiny. (Slip Op. at 15-16.)

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

**Is this a correct statement of the law?**

Response: The above statement by Justice Robert Jackson in his Opinion for the Court in *Barnette* is widely recognized as a landmark statement of First Amendment principle. Although the above statement is not strictly part of the holding of the *Barnette* case (which held that that First Amendment prohibits compelling public school students from being forced to salute the American flag or say the Pledge of Allegiance, overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)), it is a statement of legal principle that has been repeated and cited approvingly by the Supreme Court and the courts of appeals in many

other cases. *See, e.g., 303 Creative, LLC v. Elenis*, 600 U.S. ___, at 7 (2023) (citing *Barnette*); *ACLU of Florida, Inc. v. Miami-Dade County School Board*, 557 F.3d 1177, 1199 (11th Cir. 2009) (same).

15. **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: The Supreme Court has explained this distinction in many First Amendment cases, all of which are highly fact-dependent. If a speech regulation is "content-based," it is subject to strict scrutiny; if a speech regulation is content-neutral, it is not. A large body of caselaw has developed around content-neutral "time, place, or manner" restrictions and the First Amendment.

In general, for a regulation to be a valid content-neutral restriction, the regulation cannot be based on the content of the speech or viewpoint of the speaker. This means that the regulation must apply to all types of speech, regardless of the message being conveyed. The regulation must also be narrowly tailored and leave open ample alternative channels of communication and not completely suppress the ability to communicate the message. In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), for example, the Court held that a city's sound-amplification guideline and denial of a permit for a rock concert based upon concerns about noise was a valid time, place, and manner restriction.

By contrast, Supreme Court cases determining whether speech regulations are content-based have discussed several key factors, including the focus and purpose of the regulation, the regulation's effect and incidental impact upon speech, and the government's stated justifications for the regulation. In *Texas v. Johnson*, 491 U.S. 397 (1989), for example, the Court examined a conviction under a Texas statute that prohibited the desecration of the American flag. In that case, the Court held that flag burning was a form of "symbolic speech" that was protected by the First Amendment. In particular, the Court explained that the Texas law specifically discriminated based upon viewpoint, as the statute exempted from prosecution those actions that were respectful of venerated objects.

If I am confirmed as a United States District Judge, I would consult these and other precedents if such an issue were presented in a case before me.

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

Response: In *Watts v. United States*, 394 U.S. 705 (1969), the Supreme Court established that "true threats" were outside of the First Amendment's protection. The defendant in Watts was at a public rally at which he expressed his opposition to the military draft,

saying, "[i]f they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." He was convicted of violating a federal statute that criminalized any threat to take the life or inflict bodily harm upon the President. The Supreme Court reversed the conviction, holding that the defendant had not made a "true threat," but had instead indulged in "political hyperbole." 394 U.S. at 708.

Recently, in *Counterman v. Colorado* (No. 22-138 (2023)), the Supreme Court reviewed a conviction under a Colorado statute that made it unlawful to "[r]epeatedly . . . make [ ] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." The defendant moved to dismiss the charge on First Amendment grounds, arguing that his Facebook messages were not "true threats" and therefore could not form the basis of a criminal prosecution. The Colorado courts held that to constitute a true threat the State only needed to satisfy an "objective reasonable person standard," and that the State did not need to prove that the defendant had any kind of "subjective intent to threaten." (Slip Op. at 3.) The Supreme Court disagreed and vacated the conviction, holding that a subjective *mens rea* requirement is required to be proven by the State in order to constitute a "true threat" beyond the First Amendment's protection. (Slip Op. at 4-10.) Importantly, the Court also explained that a "reckless" standard of *mens rea* was sufficient to satisfy the subjective standard of proof. (Slip Op. at 11.)

If I am confirmed as a United States District Judge, I would consult these and other precedents if such an issue were presented in a case before me.

17. **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: A question of fact is an issue to be resolved by a trier of fact, *i.e.* a jury or, at a bench trial, a judge. A trier of fact weighs the strength of the evidence and the credibility of witnesses. Conversely, a question of law is always resolved by a judge. In general, an appellate court reviews findings of fact for "clear error," while determinations of law are reviewed *de novo*. *See generally*, *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (explaining standards of review for questions of fact, questions of law, and matters of discretion). Determinations of whether something is a question of fact, a question of law, or a mixed question can depend upon statutory language, the tradition of appellate practice, or a determination that "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller v. Fenton*, 474 U.S. 104, 114 (1985). The Supreme Court itself has explained that "the appropriate methodology for distinguishing questions of fact from questions of law has been . . . elusive," and the Court has not yet provided a "rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Id.* at 113. The

Eleventh Circuit has followed the Supreme Court's approach. *See*, *e.g.*, *United States v. Johnson*, 293 F.3d 1295 (11th Cir. 2002) (explaining that determination of voluntariness of a confession is a mixed question of fact and law); *United States v. Williams*, 18 F.3d 1524 (11th Cir. 1994) (explaining that the factual findings underlying the issuance of a search warrant are reviewed for clear error, while the ultimate determination of legal sufficiency is reviewed *de novo*).

If I am confirmed as a United States District Judge, I would consult these and other precedents if such an issue were presented in a case before me.

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

Response: The purposes of sentencing set forth in the question are embodied in the sentencing factors listed in Title 18, United States Code, Section 3553(a). A United States District Judge at sentencing must consider all of the factors set forth in the statute. The statute does not set forth a ranking or hierarchy of the factors, and I will faithfully consult binding precedent if such an issue were presented in a case before me.

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

Response: Given the Code of Conduct for United States Judges (including Canon 3(A)(6)), I do not believe it is appropriate for me to comment upon the merits or "well-reasoned" nature of these decisions. I would also note that if I am confirmed to be a United States District Judge, I will follow Supreme Court precedent, regardless of my personal views of whether a decision is well-reasoned or not.

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

Response: Given the Code of Conduct for United States Judges (including Canon 3(A)(6)), I do not believe it is appropriate for me to comment upon the merits or "well-reasoned" nature of these opinions. I would also note that if I am confirmed to be a United States District Judge, I will follow Eleventh Circuit precedent, regardless of my personal views of whether a decision is well-reasoned or not.

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

Response: Title 18, United States Code, Section 1507 is a criminal statute and states as follows: "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 [punished.]"

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

Response: If I was confirmed as a United States District Judge, and I was presented with a case that required consideration of the constitutionality of the above statute, I would consider the text and structure of the statute, all binding Supreme Court and Eleventh Circuit precedent, and all of the arguments of the parties in deciding the matter. Among other legal authorities, such a case would require consideration of *Cox v. Louisiana*, 379 U.S. 559 (1965). In that case, the Supreme Court upheld a state statute modeled on 18 U.S.C. § 1507 against a First Amendment challenge. Furthermore, the particular facts and litigation posture of the case before me (such as whether there is a facial or as-applied challenge) could bear heavily upon the determination of the legal issue presented.

23. **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. *Brown* was correctly decided. This question may be answered consistent with the Code of Conduct for United States Judges, as well as consistent with the practice of other nominees, because there is no serious likelihood that *de jure* school segregation will be imposed again.

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

Response: Yes. *Loving* was correctly decided. This question may be answered consistent with the Code of Conduct for United States Judges, as well as consistent with the practice of other nominees, because there is no serious likelihood that restrictions on interracial marriage will be imposed again.

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

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

Response: The nature of the above decisions, the ongoing and potential litigation related to these decisions, and the Code of Conduct for United States Judges prevent me from commenting upon the "correctness" or "incorrectness" of these decisions. I would note that *Roe v. Wade* and *Planned Parenthood v. Casey* were overruled by *Dobbs v. Jackson Women's Health*.

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

Response: The Supreme Court in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), announced a two-step framework for courts to use in determining whether a regulation violates the Second Amendment. First, does the Second Amendment's plain text, as informed by history, cover the individual's conduct being regulated? (Slip Op. at 8, 10, 13.) If so, the Second Amendment presumptively protects that conduct, and to justify its regulation the government must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation. (Slip Op. at 8, 10, 15 ("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.").) The second step calls for analogical reasoning: to justify the regulation the government must "identify a well-established and representative historical *analogue*, not a historical *twin*." (Slip Op. at 21.)

25. **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: Not to my knowledge.

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

Response: Not to my knowledge.

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

Response: Not to my knowledge.

26. **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: Not to my knowledge.

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

       Response: Not to my knowledge.

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

       Response: Not to my knowledge.

27. **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?**
    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.**
    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.**
    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: To my knowledge, I have not had any contact with any of the organizations listed above.

28. **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: Not to my knowledge.

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

    Response: Not to my knowledge.

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

    Response: Not to my knowledge.

29. **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: Not to my knowledge.

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

    Response: Not to my knowledge.

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

    Response: Not to my knowledge.

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

Response: In or about March 2021, I learned that members of the Florida Democratic congressional delegation were screening interested applicants for federal judicial vacancies in the Southern District of Florida. I submitted my application to this "Federal Judicial Nominations Conference" on or about April 8, 2021.

In May 2021, I learned that Senator Marco Rubio formed a Judicial Advisory Commission ("JAC") that was screening applicants for these federal judicial vacancies. I submitted my application to the JAC on or about May 25, 2021. Shortly thereafter, I was invited to interview with the JAC, and the JAC held the interview on July 22, 2021. Shortly thereafter, I was informed that I was a "finalist" of this JAC process.

In or about August 2021, I provided my JAC application and related documents to Senator Rick Scott's General Counsel. From this point until about January 2023, I estimate that I had a few short contacts with representatives of Senator Rubio's and Senator Scott's offices, but these contacts mainly consisted of providing copies of documents or statements already provided.

On or about January 31, 2023, I participated in a telephone interview with Senator Rick Scott regarding the potential nomination. On or about March 24, 2023, I was contacted by the Office of the White House Counsel. I was interviewed by attorneys from the White House Counsel's Office on March 27, 2023. Since about April 27, 2023, I have been in contact with officials from the White House Counsel's Office and the Office of Legal Policy at the Department of Justice. On or about November 1, 2023, the President announced his intent to nominate me. On or about November 6, 2023, the President nominated me, and my nomination was submitted to the Senate.

31. **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: Not to my knowledge.

32. **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: Not to my knowledge.

33. **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: Not to my knowledge.

34. **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: Not to my knowledge.

35. **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: Not to my knowledge.

36. **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? 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 "yes."**
    a. **If yes:**
        i. **Who?**
        ii. **What advice did they give?**
        iii. **Did they suggest that you omit or include any particular case or type of case in your questionnaire?**

Response: No.

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

Response: On or about March 24, 2023, I was contacted by the Office of the White House Counsel. I was interviewed by attorneys from the White House Counsel's Office on March 27, 2023. Since about April 27, 2023, I have been in contact with officials from the White House Counsel's Office and the Office of Legal Policy at the Department of Justice.

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

Response: On or about December 6, 2023, I received these questions from the Department of Justice. I conducted legal research and drafted answers to each question.

I sent these draft answers back to the Department of Justice on or about December 11, 2023. Later in December 2023 and January 2024, I received comments from the Department of Justice on my draft answers. I considered these comments and revised my answers in some instances, and on or about January 7, 2024, I provided a final set of answers to the Department of Justice so that they could be provided to the Committee.

Thank you for the opportunity to answer these questions, and for your consideration of my nomination.

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

**For David Leibowitz, nominee to be U.S. District Court Judge for the Southern District of Florida**

**You served as an Assistant U.S. Attorney in the Southern District of New York from around 2003 to 2012. While serving on the Securities and Commodities Fraud Task Force, you served as the lead attorney in a wide-ranging investigation that led to one of the largest insider trading takedowns in the history of the Southern District of New York. You also worked on narcotics, violent crimes, and national security matters.**

- **How will your experience as a prosecutor inform your approach to interpreting and applying the law?**

  Response: My experience as prosecutor has definitely shaped my development as a lawyer, and if I am confirmed I am sure that the experience will make me a better judge.

  One of the great rewards of working as a prosecutor is the opportunity to meet and work with all different kinds of people: judges, attorneys, court staff, law enforcement agents, witnesses, crime victims, and on occasion those who commit crimes. I was also fortunate to be trusted to work on many different kinds of cases, which further increased my exposure to different kinds of people. Through these many relationships and interactions, you get to see how the law works and impacts people up close.

  But perhaps most importantly, as former federal prosecutor in the Southern District of New York, I was taught by some of the finest attorneys in the nation to take the Supreme Court's statements in *Berger v. United States*, 295 U.S. 78, 88 (1935), very seriously:

  "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed."

For nine years I witnessed some of our nation's best federal judges preside over many criminal cases. I saw that each of them, within the bounds of their authority, made sure every day that the prosecutor before them adhered to the letter and spirit of *Berger v. United States*. That is what I would endeavor to do if confirmed, and it is one of the most important services I can render as a federal judge.

- **Can you speak to some of the challenges you faced as a prosecutor and how your work on complex cases has informed your view of the criminal justice system?**

  Response: As an Assistant United States Attorney in the Southern District of New York, I was fortunate to be trusted to work on large and complex cases and investigations. One of the challenges you face as a prosecutor (for very good reason) is that you can only go as far as the developed evidence takes you, and no further.

  Ultimately, obtaining admissible evidence to combat sophisticated criminal conspiracies and enterprises is a function of various factors, including the investigative tools authorized by law, the availability of experienced and talented investigators to devote time to investigations and complex subject matter over many years, and the cultural independence and courage of investigative and prosecution offices to pursue investigations that may yield no tangible results for many years, if ever.

  I believe that one of the great strengths of our criminal justice system, having seen it up close, is the reservoir of credibility that builds up over time when good people serve the public in smart, effective ways while abiding by clear rules. That reservoir must be tended to and protected, above all else.

Thank you for the opportunity to answer these questions, and for your consideration of my nomination.

**Senator Mike Lee**
**Questions for the Record**
**David Seymour Leibowitz**
**Nominee for District Court Judge for the Southern District of Florida**

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

Response: I would describe my judicial philosophy as being impartial, consistent, and considering all of the facts, relevant legal authority, and the parties' arguments.

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

Response: First, I would see if there is any binding Supreme Court or Eleventh Circuit precedent that resolves the case. If no such authority existed, I would consider the plain text of the statute and construe it "in accord with the original public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020). If the text is clear, the inquiry ends there. If the text is ambiguous, I would employ other interpretive tools approved by the Supreme Court and Eleventh Circuit, including canons of construction and certain types of legislative history deemed reliable by the Supreme Court and Eleventh Circuit. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984) (describing reliable sources of legislative history).

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

Response: First, I would look at the plain meaning of the text and consider any binding Supreme Court or Eleventh Circuit precedent that resolves the case. If no such authority existed, I would follow the methods of interpretation authorized by the Supreme Court and the Eleventh Circuit. For example, the Supreme Court has directed lower federal courts to focus on historical interpretive methods in certain areas. *See, e.g., Kennedy v. Bremerton*, 142 S. Ct. 2407 (2022); (Establishment Clause); *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (Second Amendment); *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment).

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

Response: They play a critical role. In certain areas, the Supreme Court has explained that they are critical tools of interpretation. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 605 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

**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: For a judge called upon to resolve the meaning of a legal text, the semantic meaning of the statutory or constitutional provision does not change with evolving social norms or linguistic conventions. As to the interpretation of constitutional provisions, "when it comes to interpreting the Constitution, not all history is created equal[,]" *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2136 (2022), because "constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Id.* (internal quotation marks omitted). With respect to the interpretation of statutes, it is "a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute." *New Prime, Inc. v. Oliveira*, 139 S.Ct. 532, 539 (2019) (internal quotation marks omitted); *see also Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020).

**7. What are the constitutional requirements for standing?**

Response: "[A] plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

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

Response: One of the enumerated powers in the Constitution is the Necessary and Proper Clause, which authorizes Congress to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Under the Necessary and Proper Clause, Congress may legislate, where the end is "within the scope of the constitution[,]" by "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution." *McCulloch v. Maryland*, 17 U.S. 316, 421 (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: Congress does not have to recite the specific power under which it acts in order for the action to be constitutional. *See National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 570 (2012) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.") (internal quotation marks omitted). If such a case came

before me, I would evaluate the statute based upon the facts, binding precedent, and the arguments of the parties.

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

Response: Under the Supreme Court's precedents under the "substantive due process" doctrine, there are certain constitutional rights that are not expressly enumerated. Examples include: (1) the right to interracial marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); (2) the right to direct the education of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); (3) the right of adults to engage in private, consensual sexual acts, *Lawrence v. Texas*, 539 U.S. 558 (2003); and (4) the right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015). The Supreme Court's test in *Washington v. Glucksberg*, 521 U.S. 702 (1997), is used by courts to determine if a claimed unenumerated right, not already recognized by the Supreme Court, is to be recognized under substantive due process. That test requires that unenumerated rights be both "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 719–21.

**11. What rights are protected under substantive due process?**

Response: Please see my response to Question 10 above. *See also Dobbs v. Jackson Women's Health Organization*, 152 S. Ct. 2228, 2257-58 (2022) (listing recognized unenumerated rights); *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 453-54 (1993) (limiting civil punitive damages under substantive due process).

**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: Please see my responses to Questions 10 and 11, above. In addition, I would note that since 1937 the Supreme Court has clearly repudiated and abandoned the cases and principles which cited and undergirded *Lochner v New York* in the area of economic legislation. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923)). The same cannot be said for the Supreme Court's treatment of substantive due process protections for some personal rights. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Dobbs v. Jackson Women's Health Organization*, 152 S. Ct. 2228, 2257-58 (2022) (listing recognized unenumerated rights).

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

Response: Under the Commerce Clause, Congress may regulate: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce,

or persons or things in interstate commerce," and (3) "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). This power does not allow Congress to require "individuals to become active in commerce by purchasing a product." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012).

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

Response: Supreme Court authority has explained that a "suspect class" is one that refers to "an immutable characteristic determined solely by accident of birth," or "such disabilities, or . . . such a history of purposeful equal treatment, or . . . such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). Race, religion, national origin, and alienage have all been identified by the Supreme Court as "suspect classifications." *See New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: "The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). "The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *INS v. Chadha*, 462 U.S. 919, 951 (1983).

**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 like any other: carefully considering the facts in the record, all binding precedent and legal authority, and the parties' arguments. I would also note that a basic legal framework in this area was enunciated by Justice Robert Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Justice Jackson's *Youngstown* opinion has been cited favorably in subsequent cases. *See, e.g., Medellin v. Texas*, 552 U.S. 491 (2008).

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

Response: None.

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

Response: Both results constitute legal error and should be avoided. Any failure to decide a case in accord with the Constitution is error.

**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 do not have a developed theory or explanation for the statistical change you observe that leads to your first question. Regarding your second and third questions, please see my response to Question 18.

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

Response: Judicial supremacy is a term that may mean different things in different contexts. It is, however, often taken to stand for "the principle that the federal judiciary is supreme in the exposition of the law of the Constitution." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Judicial review, on the other hand, was explained by Chief Justice Marshall as follows: "It is emphatically the province and duty of the judicial department to say what the law is[,]" and as part of that duty judges must sometimes determine whether legislative or executive actions comport with the Constitution. *Marbury v. Madison*, 5 U.S. 137 (1803).

**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: Given my current status as a nominee to be a federal judge, I do not think it is appropriate to express my personal beliefs as to how elected officials should balance their obligations to follow the Constitution and the need to respect judicial decisions. With that said, I would note that Article V of the Constitution contains the procedure for amending the Constitution, and the Congress has used that procedure in American history to abrogate Supreme Court decisions. For example, *Dred Scott v. Sanford*, 60 U.S. 393 (1857), was abrogated by the Reconstruction Amendments, and *Chisholm v. Georgia*, 2 U.S. 419 (1793), was abrogated by the Eleventh Amendment.

**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: Hamilton's aphorism is critically important to keep in mind for a federal judge. In the parlance of the founding era and for those like Hamilton who cared deeply about the separation of powers to preserve liberty, "force" was the domain of the executive branch, and "will" was the domain of the legislative branch. The judiciary does not have the power to enforce its judgments or the power to enact new laws, and by design the judiciary does not derive any legitimacy from a popular elective mandate. Therefore, for Hamilton the judiciary's legitimacy is bound up in the real and perceived legitimacy of its publicly-reasoned rulings. That is why in the same Federalist Paper Hamilton explained that those that would wield the federal judicial power would and must be bound by "strict rules and precedents" to avoid arbitrary discretion and to maintain the judiciary's independence from the other branches.

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

Response: If I am confirmed, I must apply binding precedent. Even if the "underpinnings" of a decision become questionable, I must apply the precedent unless and until the Supreme Court or the Eleventh Circuit alters, overrules, or abrogates the decision.

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

Response: None.

**25. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons**

**otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?**

Response: I am not familiar with the quoted definition. "Equity" is a term that means different things to different people in different contexts. According to Merriam-Webster's dictionary, "equity" has several definitions, including "justice according to natural law or right," or "something that is equitable," or "a risk interest or ownership right in property," or "a body of legal doctrines and rules developed to enlarge, supplement, or override a narrow rigid system of law."

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

Response: Please see my response to Question 25. Given the above definitions of equity, depending on the context there are clear differences in meaning between the terms. "Equality" is defined in Merriam-Webster's dictionary and the Oxford English dictionary as "the quality or state of being equal," or "the state of being equal, especially in status, rights, and responsibilities."

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

Response: Section 1 of the Fourteenth Amendment contains the Equal Protection Clause. It reads, in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." I am not aware of any decision of the Supreme Court or the Eleventh Circuit that has applied any definitions of "equity" as within the meaning of the Equal Protection Clause.

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

Response: That term means different things to different people, and I am neither an expert nor do I have a precise personal definition. In general, I understand some usages of the term to mean that a given system can generate racist outcomes or results. Merriam-Webster's dictionary defines the term 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)."

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

Response: My understanding of that term is rudimentary, but I generally understand it to reference a set of beliefs held by certain legal academics and intellectuals. Critical race theorists believe that racism and racist beliefs are inherent in the law and American legal institutions. Merriam-Webster's dictionary defines the term as, "a group of concepts . . . used for examining the relationship between race and the laws and legal institutions of a country and especially the United States."

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

Response: I do not have a detailed, sophisticated, or refined sense of these different terms, but I provided my understanding of the terms in my responses to Questions 28 and 29.

**31. In 2017, you signed a letter titled "Statement of Former United States Attorneys and Assistant United States Attorneys in Opposition to Enforcement of the Executive Order Titled 'Protecting the Nation from Foreign Terrorist Entry Into the United States.'" That letter alleges that—among other things—Executive Order 13769 was "a thinly veiled attempt to exclude Muslims from certain countries based on their religion," and states that you would not have enforced this E.O. because it "[bans people] based solely on the fact that others of their religion are perceived to be potential security threats."**

**Out of the 53 Muslim-majority nations, only seven were listed in that temporary moratorium. None of the five most-populous Muslim nations (representing 804 million Muslim citizens in 2017) were impacted in any way by this order. The moratorium applied to all citizens of the seven nations—regardless of that person's religion—and those nation were already subject to heightened scrutiny under President Obama's administration.**

**Your letter contained blatant, partisan attacks on E.O. 13769 apparently taken straight from media pundits. Is it appropriate for a former United States Attorney to make a public statement condemning an Executive Order?**

Response: Respectfully, I signed the statement in or about February 2017, when I was a former Assistant United States Attorney and a private citizen. I do not believe it is inappropriate for a former federal prosecutor and private citizen to make such a statement, especially a statement that specifically criticized the legality (not the policy) of Executive Order 13769 ("the Original EO"). Nor do I agree with your characterization that I engaged in "blatant, partisan attacks on E.O. 13769" by signing the letter.

I signed the statement in opposition to the enforcement of the Original EO, which was the first of multiple Executive Orders and Proclamations issued by the President on the subject of entry restrictions applied to foreign nationals of specific listed nations. The Original EO was issued on January 27, 2017, and in the days that followed hundreds of former federal prosecutors across the country had signed similar statements opposing enforcement of the Original EO. The statement addressed the legal defects in the Original EO, and how the Original EO would present substantial problems for prosecutors appearing in federal court to defend it.

At and near the time I signed, my statements regarding the legality of the Original EO were supported by the rulings of three different federal courts that had entered orders enjoining the enforcement of major portions of the Original EO. Moreover, *less than*

*two weeks after I signed the statement*, on February 16, 2017, the President's administration itself stated in court filings and to the media that they were going to replace the Original EO with a new Executive Order. In short, my statements regarding the legality of the Original EO were entirely consistent with the rulings of multiple federal courts, and the administration itself saw that the Original EO failed to overcome legal hurdles that are a part of our constitutional and statutory law.

On March 6, 2017, President Trump issued a second Executive Order ("EO 13780") that significantly modified and replaced the Original EO. On September 24, 2017, Presidential Proclamation 9645 was issued, which further modified and replaced EO 13780. I have made no public statement of any kind regarding EO 13780 or Presidential Proclamation 9645, and the public statements I did make in February 2017 would not apply to those subsequent orders and proclamations. The U.S. Supreme Court upheld Presidential Proclamation 9645 on June 26, 2018. Presidential Proclamation 9645 is no longer in effect (because a subsequent administration revoked it, not because of any ruling of illegality), but if it was reinstated the Supreme Court's ruling on its legality would be binding upon me if I was confirmed, and I would follow it.

**32. Your letter stated, "[i]t would be our job, if we were representing the United States today, to say, no, this Executive Order is wrong and should not be defended." Does that type of statement comport with the separation of powers?**

Response: The statement you reference, and the entire letter I signed as a private citizen, fully comports with the separation of powers.

**33. In an article you wrote in 2001, you counseled against the application of *United States* v. *Morrison* in future cases:**

**"…if the Court finds that all federal regulations of non-economic activity are equally precluded by the Constitution's limitations on congressional power, then such a decision would so violate *social expectations* and needs that it would likely require the Court to turn to a different approach in order to define the commerce power in a way consistent with the four corners of the Constitution and the pressing needs of a growing national and *international society*." (emphasis added).**

**Should "social expectations," including pressure from "international society," drive the jurisprudence of the Court? If so, who should decide which social expectations are so important as to require the Court to find new and expansive interpretations of Constitutional provisions?**

Response: Social expectations, including pressure from international society, should absolutely *not* drive the jurisprudence of the Supreme Court. My entire approach to the law, including constitutional interpretation, rejects such a jurisprudence.

Here is the complete last paragraph of the article, from which the quote above is taken (additional emphasis added in bold and italics):

**"The jurisprudential history of the Commerce Clause includes a variety of doctrinal trends that have moved in and out of prominence under varying administrations and social conditions. The Supreme Court recently revived some old trends in *United States v. Morrison*,** when it struck down § 13981 of the Violence Against Women Act and ostensibly eliminated congressional commerce authority over any intrastate, non-economic activity. The Court reviewed a similar statute this term in *Solid Waste Agency v. United States Army Corps of Engineers,* but avoided applying *Morrison* by resolving the case on nonconstitutional grounds. It similarly avoided interpreting *Morrison* by denying certiorari in *Gibbs.* The Court remains faced, therefore, with an important question regarding the future of federal civil rights legislation: do federal civil rights statutes interfere in areas of law traditionally reserved for the state in ways other federal regulations of non-economic activity do not? Answering this question in the affirmative will single out civil rights laws as being uniquely beyond the scope of Congress's commerce power, thereby making it virtually impossible to enact such legislation without explicitly overturning *Morrison.* **Alternatively, *if the Court finds* that all federal regulations of non-economic activity are equally precluded by the Constitution's limitations on congressional power, then such a decision would so violate social expectations and needs *that it would likely require the Court* to turn to a different approach in order to define the commerce power *in a way consistent with the four corners of the Constitution* and the pressing needs of a growing national and international society.**" The statement itself explained that any "different approach" the Court might take after 2001 was dependent upon the Court making further doctrinal extensions in future cases, *and* that any "different approach" needed to be "consistent with the four corners of the Constitution."

As I stated at the hearing, at the time I co-wrote the article, we were guessing how far the Court was going to go in continuing the doctrinal trends it announced in *Morrison*. I believe it was fair to speculate (in 2001) whether the *Morrison* Court was going to continue to revive and expand doctrinal trends that were similar to those that had been prominent in pre-1937 Commerce Clause decisions, but that had been dormant for more than sixty years at the time *Morrison* was decided. I believe it also was fair to state, as we did in the article and as a matter of historical review of the Supreme Court's precedents, that the Court has employed different doctrinal trends over time that have expanded and contracted Congress's power to regulate under the Commerce Clause. There is no serious dispute that the doctrine employed by the *Morrison* Court greatly restricted the commerce power compared to Court decisions handed down in the previous 65 years, including in comparison to *United States v. Lopez*, decided by the Court only five years earlier.

Finally, with respect but so that my position is clear, in the article I did not "counsel against application of *United States v. Morrison* in future cases," as you state above. If I was confirmed as a United States District Judge, I would never do so.

**34. During the hearing on November 29, 2023, I asked you if the Commerce Clause permitted Congress to regulate bare intrastate noncommercial activity—outside the scope of civil rights legislation. You did not answer this question directly. If**

***Morrison* was decided incorrectly as you indicated in your article and as you defended in the hearing, what rights to regulate intrastate commerce remain reserved to the states under the Tenth Amendment?**

Response: If I am confirmed and confronted with a case that raised this issue, I would faithfully follow all Supreme Court and Eleventh Circuit precedent that bears upon the matter. Of course, I am precluded under the Code of Conduct for United States Judges from offering my personal opinions on the "correctness" or "incorrectness" of Supreme Court decisions (with very limited exceptions), which I am bound to follow. That said, the article (written in 2001) did critique the Court's majority opinion in *Morrison*, noting the very significant doctrinal change compared to previous decades, and even compared to the Court's decision just five years earlier in *United States v. Lopez*, 514 U.S. 549 (1995). (*See* Article, at 956.) The article's description of the *Morrison* Court's decision as a break from past precedent does not mean that I "defend" an antagonistic approach, either then as a student or today as a nominee.

One direct answer to your question is found in *Gonzalez v. Raich*, 545 U.S. 1 (2005), decided four years after *Morrison*. In *Raich*, the Court upheld the federal Controlled Substances Act as applied against California residents who cultivated and used marijuana for their own medicinal purposes, which was permitted under California law. All of the parties in *Raich* stipulated that the cultivation and use of the marijuana in that case was entirely local and did not involve any interstate activity. The respondents relied on *Lopez* and *Morrison* to enjoin application of the federal law, but the Court upheld the CSA as applied to purely local (intrastate) conduct.

Justice Scalia was in the majority in both *Morrison* and *Raich*, and his concurring opinion in *Raich* was sensitive to the Tenth Amendment concerns you raise while still upholding the federal law. Facing similar criticism from Justices O'Connor and Thomas as you offer here, Justice Scalia answered your question succinctly: "*Lopez* and *Morrison* affirm that *Congress may not regulate certain purely local activity within the States based solely on the attenuated effect that such activity may have in the interstate market.* But those decisions do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government." *Id.* at 38-39 (emphasis added) (Scalia, J., concurring).

*Lopez*, *Morrison*, and *Raich* are the law of the land, and I will follow them and all other relevant precedent if I am confirmed.

Thank you for the opportunity to answer these questions, and for your consideration of my nomination.

**Senator Josh Hawley**
**Questions for the Record**

**David Seymour Leibowitz**
**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?**

   Response: No.

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

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 explained that "original public meaning" is an important interpretive method in many areas of constitutional interpretation. "[T]he public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008). The Supreme Court has directed lower federal courts to focus on original public meaning of the Constitution in a number of areas. *See, e.g., Kennedy v. Bremerton*, 142 S. Ct. 2407 (2022) (Establishment Clause); *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (Second Amendment); *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *Crawford v. Washington*, 514 U.S. 36 (2006) (Confrontation Clause).

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

   Response: In a case involving statutory interpretation, first I would see if there is any binding Supreme Court or Eleventh Circuit precedent that resolves the case. If no such authority existed, I would consider the plain text of the statute (and not legislative history) and construe it "in accord with the original public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020). If the text is clear, the inquiry ends there. *Id.* If the text is ambiguous, I would employ other interpretive tools approved by the Supreme Court and Eleventh Circuit, including canons of construction and certain types of approved legislative history deemed reliable by the Supreme Court and Eleventh Circuit. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984) (describing reliable sources of legislative history).

   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: Supreme Court precedent instructs that certain types of legislative history are more reliable than others. *See, e.g., NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("floor statements by individual legislators rank among the least illuminating forms of legislative history").

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

Response: Generally it is not appropriate to consult the laws of foreign nations when interpreting the Constitution. Excepting common law and statutory authorities from England during the founding period, which are part of historical or originalist interpretations of various constitutional provisions, I am only aware of one area where the Supreme Court has approved consulting the law of foreign nations when interpreting a constitutional provision. That provision is the Eighth Amendment. *See Roper v. Simmons*, 543 U.S. 551, 575 (2005) ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."). Unless the Supreme Court or the Eleventh Circuit specifically instructed me to do so, I would not consult the laws of foreign nations when interpreting a constitutional provision.

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

Response: The Supreme Court in *Glossip v. Gross*, 576 U.S. 863 (2015), and *Nance v. Ward*, 597 U.S. ___ (2022), has set forth the standard for such a claim.

"A death row inmate may attempt to show 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. To succeed on that claim, the Court held in *Glossip [v. Gross]*, he 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. *Id.*, at 877. Second . . . he 'must identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]' the risk of harm involved. *Ibid.* (internal quotation marks omitted)." *Nance v. Ward*, 142 S. Ct. 2214, 2219-20 (2022).

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

Response: Yes. Please see my response to Question 4 above.

**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: To my knowledge, neither the Supreme Court nor the Eleventh Circuit has recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime. *See District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 73-74 (2009). The Eleventh Circuit also has stated explicitly that habeas relief on a freestanding innocence claim is not available in non-capital cases. *See Cunningham v. Dist. Attorney's Office for Escambia Cty.*, 592 F.3d 1237, 1272 (11th Cir. 2010) (citing *Jordan v. Sec'y Dept. of Corr.*, 485 F.3d 1351, 1356 (11th Cir. 2007)).

**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: The standard announced by the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990), would apply to this question. In that case, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879. (internal quotations omitted). But if the law or state action is not neutral, or is not generally applicable, then it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

Recent cases have provided additional interpretation to key terms set forth in *Smith*. A law is not "neutral" if "the object or purpose of the law is suppression of religion or religious conduct." *City of Hialeah*, 508 U.S. at 533; *see also Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246, 2256-57 (2020). Similarly, state action is not "neutral" if enforcement of the law was motivated by hostility to religion. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). A law is not "generally applicable" if the law provides a mechanism for individual exemptions, *see, e.g., Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021), or if the law prohibits religious conduct while permitting secular conduct that is comparable

in terms of the stated governmental interests, *see Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

The Free Exercise Clause also prohibits enforcement of employment laws when they would interfere with a religious institution's decision to employ certain employees. *See, e.g. Our Lady of Guadalupe School. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

**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 above.

**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: "To plead a claim for relief under the Free Exercise Clause . . . a plaintiff 'must allege that the government has impermissibly burdened one of [its] "sincerely held religious beliefs."' *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1294 (11th Cir. 2007). This belief must be "rooted in religion," since "personal preferences and secular beliefs do not warrant the protection of the Free Exercise Clause." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1256 (11th Cir. 2012) (internal quotations omitted).

The Eleventh Circuit has read this pleading requirement as having two components: "(1) the plaintiff holds a belief, not a preference, that is sincerely held and religious in nature, not merely secular; and (2) the law at issue in some way impacts the plaintiff's ability to either hold that belief or act pursuant to that belief." *Cambridge Christian School, Inc. v. Florida High School Athletic Ass'n, Inc.*, No 17-12802, Slip Op. at 56 (2019) (internal quotations omitted). What constitutes a "sincerely held belief" is not a probing inquiry, and "courts have rightly shied away from attempting to gauge how central a sincerely held belief is to the believer's religion." *Id.* at 58 (quoting *Watts*, 495 F.3d at 1295). In short, "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Id.* at 59 (quoting *Watts*, 495 F.3d at 1295).

**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: The Supreme Court in *Heller* held that the Second Amendment confers an individual right. An individual who is part of "the People" referenced in the Amendment has a right to keep and bear a firearm in his home for self-defense. The

"prefatory clause" of the Second Amendment ("A well-regulated militia, being necessary to the security of a free State,") does not mean that the Second Amendment is a group right or a right tied to a militia. The case struck down a District of Columbia law that violated that individual right.

**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.**

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: Holmes wrote his dissenting opinion in *Lochner* at a time when an activist Court was striking down state and federal legislation on the basis of an unwritten, unspecified, "liberty of contract" principle that was elevated to the status of a constitutional right by the Supreme Court. When Holmes wrote that statement in his *Lochner* dissent, Herbert Spencer's ideas of social Darwinism were very much in vogue and considered to be desirable social policy. Holmes's basic point was that, whether or not you believed that social Darwinism or similar laissez-faire economic principles were good policy, it was wrong (in Holmes's view) to give that policy the status of a constitutional right. Holmes's dissent would be vindicated years later, when the Court in 1937 and thereafter retreated from "*Lochner*-ism," and cases since 1937 have disapproved of *Lochner* and its method of interpretation. *See, e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hospital*, 264 U.S. 525 (1923)); *Ferguson v. Skrupa*, 372 U.S. 726, 729-30 (1963) ("The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases -- that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely -- has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.").

Given the Code of Conduct for United States Judges (including Canon 3(A)(6)), I do not believe it is appropriate for me to comment upon the "correctness" or my agreement or disagreement with these decisions. I would also note that if I am confirmed to be a United States District Judge, I will follow Supreme Court precedent, regardless of my personal views.

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

Response: Given the Code of Conduct for United States Judges (including Canon 3(A)(6)), I do not believe it is appropriate for me to comment upon my personal view of *Lochner* or the later cases which departed from *Lochner*'s reasoning. I would also note that if I am confirmed to be a United States District Judge, I will follow Supreme Court precedent, regardless of my personal views.

**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: Chief Justice Roberts (for the Court) stated in *Trump v. Hawaii* (quoting Justice Jackson's *Korematsu* dissent): "The dissent's reference to *Korematsu,* however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"

I understand this to mean that *Korematsu* was wrongly decided.

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

**a. If so, what are they?**

Response: Some Supreme Court decisions have been overruled in other ways. For example, *Dred Scott v. Sanford*, 60 U.S. 393 (1857), was abrogated by the Reconstruction Amendments. *Chisholm v. Georgia*, 2 U.S. 419 (1793), was abrogated by the Eleventh Amendment.

**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: I have not studied Judge Hand's antitrust views carefully or become especially familiar with current Supreme Court or Eleventh Circuit antitrust precedent with respect to monopolies. I do not have a personal view on Judge Hand's statement.

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

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

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

Response: I am not able to provide a numerical answer to this question. Very generally, my understanding of the precedent I have reviewed is that market share is an aspect of monopoly power under Section 2 of the Sherman Act. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966) (noting that the corporations controlled by defendant had "over 87%" of the market). To my knowledge, the Supreme Court has not set a minimum percentage of market share that always establishes monopoly in every context. The "relative effect of percentage command of a market varies with the setting in which that factor is placed." *Times-Picayune Publishing Corporation v. United States*, 345 U.S. 594, 612 (1953). If confirmed and presented with a case that required me to assess a given percentage of market share for Sherman Act monopoly purposes, I would examine all applicable case law, the parties' arguments, and the facts in the record.

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

Response: Ever since the Supreme Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), "[t]here is no federal general common law." Starting in 1938, the Court recognized that the Constitution, except for what is specifically vested in Congress's enumerated legislative powers, reserves most other regulatory authority to the States. Because of this, except for specific, limited areas where judges may craft the rule of decision or where Congress has specifically directed federal courts to engage in common-law making, "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role." *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020).

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

Response: A state's highest court determines the meaning and scope of that state's law, including its state constitutional provisions. The views of the state's highest court with respect to state law are binding upon federal courts. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983); *see also Michigan v. Long*, 463 U.S. 1032, 1040-43 (1983) (explaining "adequate and independent state ground" doctrine). If I was confirmed to be a judge in the Southern District of Florida and faced a question regarding a state constitutional provision, I would look to the views of the state's highest court to determine its meaning. Such a case may also raise issues of abstention as well.

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

Response: Because this question follows Question 17, I interpret it to be asking whether a state constitutional provision that is worded identically to a federal constitutional provision should be interpreted identically to the federal provision. Please see my response to Question 17 above.

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

Response: Yes. In addition to referring to my response to Question 17 above, the Supremacy Clause requires that a state constitutional provision that conflicts with a federal constitutional provision must give way to the federal provision. This means that the federal provision is binding upon the states and thereby provides a "floor" of protection. States may choose to give greater protection than a federal provision, but they may not give less. *See generally PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

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

Response: Yes. *Brown* was correctly decided. This question may be answered consistent with the Code of Conduct for United States Judges, as well as consistent with the practice of other nominees, because there is no serious likelihood that *de jure* school segregation will be imposed again.

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

Response: I will follow any Supreme Court and Eleventh Circuit precedent on the subject. Under Rule 65 of the Federal Rules of Civil Procedure and Supreme Court precedent, an injunction is an extraordinary remedy and a court's equitable power is constrained by the historical limits on equity. *See, e.g., Grupo Mexicano de Desarrollo, S.A. v. All Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). While the Supreme Court has affirmed the issuance of a nationwide injunction, *see Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017), neither the Supreme Court nor the Eleventh Circuit have issued binding precedent as to whether, when, and on what basis lower federal courts can issue nationwide injunctions. *See, e.g. Griffin v. HM Florida-Orl, LLC*, 601 U.S. ___ (2023) (statement of Kavanaugh, J., respecting denial of application for stay) ("The question of whether a district court, after holding that a law violates the Constitution, may nonetheless enjoin the government from enforcing that law against non-parties to the litigation is an important question that could warrant our review in the future."). If confirmed and presented with a request to issue a nationwide injunction, I would consider Rule 65, all of the facts, all relevant legal authorities, and the parties' arguments.

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

Response: Please see my response to Question 19, above.

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

Response: Please see my response to Question 19, above.

**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, above.

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

Response: Federalism is a fundamental and intrinsic aspect of our constitutional system. The founding generation emphasized the great importance of federalism, and the entire history of American law is filled with legal rulings and opinions that pay great respect to principles of federalism.

**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 numerous federal abstention doctrines that have been developed throughout American history, and the meaning and interpretation of these doctrines are the subject of many federal judicial decisions. Some of the most well-known federal abstention doctrines are as follows: (a) *Pullman* abstention; (b) *Younger* abstention; (c) *Colorado River* abstention; (d) *Burford* abstention; and (e) the *Rooker-Feldman* doctrine.

*Pullman* abstention applies when a federal constitutional question is intertwined with an unsettled question of state law. *Younger* abstention applies when a state criminal proceeding is ongoing while the federal civil claim is pending. *Colorado River* abstention applies when parallel state and federal court proceedings address the same issues. *Burford* abstention applies when the federal court's decision would disrupt a complex and important state administrative process. The *Rooker-Feldman* doctrine generally prevents federal court review of final state court judgments.

I would follow Supreme Court and Eleventh Circuit precedent regarding these doctrines if I was confirmed.

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

Response: In general, injunctive relief is an extraordinary remedy which should only be granted when, among things, there is a likelihood of irreparable harm, which means that the party seeking the injunction will suffer harm that cannot adequately be remedied by monetary damages. The advantages and disadvantages of legal damages versus injunctive relief depends heavily upon the facts of the case.

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

Response: Under the Supreme Court's precedents under the "substantive due process" doctrine, there are certain constitutional rights that are not expressly enumerated. Examples include: (1) the right to interracial marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); (2) the right to direct the education of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); (3) the right of adults to engage in private, consensual sexual acts, *Lawrence v. Texas*, 539 U.S. 558 (2003); and (4) the right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015). The Supreme Court's test in *Washington v. Glucksberg*, 521 U.S. 702 (1997), is used by courts to determine if a claimed unenumerated right, not already recognized by the Supreme Court, is to be recognized under substantive due process. That test requires that unenumerated rights be both "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 719–21.

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

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

Response: Please see my response to Question 8, above.

**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 "not only belief and profession but the performance of (or abstention from) physical acts[.]" *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878 (1990); *see also, e.g., Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2421 (2022) (the Free Exercise Clause "protects religious exercises, whether communicative or not," and "does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts") (quotation marks and citations omitted).

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

Response: Please see my response to Question 8, above.

**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, above.

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

Response: The Religious Freedom Restoration Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a).

**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: A standard Eleventh Circuit pattern jury instruction defining the "beyond a reasonable doubt" standard includes the following language: "'Proof beyond a reasonable doubt' is proof so convincing that you would be willing to rely and act on it without hesitation in the most important of your own affairs." *See also United States v. Daniels*, 986 F.2d 451 (11th Cir. 1993), *readopted on rehearing*, 5 F.3d 495 (11th Cir. 1993) (approving definition and instruction). This standard is the highest burden of proof in the American legal system. I cannot reduce the evidentiary threshold to a numerical answer, but it is certainly a higher evidentiary threshold than the "preponderance of the evidence" or "clear and convincing" standards.

**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: If I were confirmed and the question was presented to me in a case, I would consult all relevant legal authority on the question, including any binding Supreme Court and Eleventh Circuit precedent on the interpretation of 28 U.S.C. § 2254(d), *Harrington v. Richter*, and whether a circuit split satisfies the standard *per se*. Moreover, given the Code of Conduct for United States Judges (including Canon 3(A)(6)), I do not believe it is appropriate for me to comment upon this question as it could be viewed as prejudging the issue.

**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: If I were confirmed and the question was presented to me in a case, I would consult all relevant legal authority on the question, including any binding Supreme Court and Eleventh Circuit precedent on the interpretation of 28 U.S.C. § 2254(d), *Harrington v. Richter*, and whether a state court determination can satisfy the standard *per se*. Moreover, given the Code of Conduct for United States Judges (including Canon 3(A)(6)), I do not believe it is appropriate for me to comment upon this question as it could be viewed as prejudging the issue.

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

Response: Please see my responses to Questions 27(a) and 27(b), above,

**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: I believe that the Code of Conduct for United States Judges precludes me from offering my personal view as to the "correctness" or "appropriateness" of this practice. Federal Rule of Appellate Procedure 32.1(a) generally permits citation of recent opinions, orders, judgments, or other written dispositions when a party provides a copy of the relevant order. Eleventh Circuit Rule 36-2 states, in relevant part: "Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." *See also* FRAP 36, 11th Cir. I.O.P. 6, 7. The question calls for me to comment upon the "appropriateness" of current

rules and practices of the Eleventh Circuit, and to do so could undermine public confidence in the independence of judges, and call into question whether I have personal views on matters that are before a court, or could come before a court.

**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), above.

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

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

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

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

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

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

**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: Please see my response to Question 28(a), above.

**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: Please see my response to Question 28(a), above.

**29. In your legal career:**

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

Response: Approximately four trials.

**b. How many have you tried as second chair?**

Response: Approximately six trials.

**c. How many depositions have you taken?**

Response: None.

**d. How many depositions have you defended?**

Response: None.

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

Response: Two (oral argument).

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

Response: Three (oral argument estimate).

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

Response: None.

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

Response: I do not know the precise number, but I have argued numerous dispositive motions (motions to dismiss the indictment, motions for judgment of acquittal, motions for new trial) during my tenure as a federal prosecutor over a period of approximately nine years.

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

Response: I do not know the precise number, but I would conservatively estimate that I have argued scores of evidentiary motions during my tenure as a federal prosecutor over a period of approximately nine years.

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

Response: None of my previous jobs required me to track billable hours.

**a. What is the maximum number of hours that you billed in a single year?**
**b. What portion of these were dedicated to pro bono work?**

Response: Please see my response to Question 30, above.

**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 judges must not decide cases based upon their personal preferences or opinions; instead, they must decide cases

based upon the facts, law, and arguments, even if that decision deviates from their personal preferences or opinions.

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

**a. What do you understand this statement to mean?**

Response: I understand this statement to mean that judges apply rules and standards to cases that come before them. Judges do not decide the standards and rules that will be applied.

**b. Do you agree or disagree with this statement?**

Response: I largely agree with the above statement. I do note that sometimes judges are given discretion to make choices within a range of legal options, because the law explicitly confers to the judge such discretion in certain situations. In that sense, when the law specifically confers discretion, judges are not only "applying rules." But even when judges do more than "apply rules," they only do so because legal rules and standards have conferred that authority to them.

**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 generally understand this to mean that Justice Holmes viewed the role of judging as applying external rules and standards to given cases, and not simply deciding what was "just" in a given case as a matter of his own personal sense or personal preference.

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

Response: I largely agree with the above statement. I do note that sometimes judges are given discretion to make choices within a range of legal options, because the law explicitly confers to the judge such discretion in certain situations. In that sense, when the law specifically confers discretion, judges are not only "applying the law." But even when judges do more than "apply the law," they only do so because legal rules and standards have conferred that authority to them.

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

Response: No.

**a. If yes, please provide appropriate citations.**

**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: I have not deleted or attempted to delete any content from any social media account since I was first contacted about being considered for this nomination.

**36. What were the last three books you read?**

Response: (1) Erik Larson, *The Splendid and the Vile: A Saga of Churchill, Family, and Defiance During the Blitz* (2020); (2) Jonathan Eig, *King: A Life* (2023); (3) Michael Lewis, *Going Infinite: The Rise and Fall of a New Tycoon* (2023).

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

Response: In my experience, people use and understand the term "systemic racism" to mean different things, which can obscure communication and mutual understanding. That said, given my very general and rudimentary understanding of the term, I do not believe that America is a systemically racist country.

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

Response: There are many cases and representations during my tenure as a prosecutor that I was honored to be a part of, but one would certainly be *In re Saleh Ali Nabhan* (U.S. District Court, S.D.N.Y. 2009). The target of the investigation was a leader of al-Qaeda in Somalia, and he was wanted in connection with his alleged involvement in the 1998 attacks on U.S. embassy personnel and for his links to the al-Shabab terrorist organization. This investigation, in conjunction with an FBI counter-terrorism unit, involved the debriefing of cooperating witnesses and developing criminal charges for providing material support to a designated Foreign Terrorist Organization. The target was killed in U.S. military raid; there was no prosecution. *See generally*, "U.S. Kills Top Qaeda Militant in Southern Somalia," *N.Y. Times*, Sept. 14, 2009 (https://www.nytimes.com/2009/09/15/world/africa/15raid.html). Although my role was relatively minor when compared to the efforts of the law enforcement agents and others involved, I was grateful to have the opportunity to participate in this team effort.

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

Response: No.

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

Response: Yes, as long as the legislation is constitutional.

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

Response: Although it is difficult for me to limit this answer to just three, over the last thirty years I would estimate that the following professors would be among my most read: (1) Michael W. McConnell, Stanford Law School; (2) Richard A. Posner, University of Chicago Law School; (3) Akhil Amar, Yale Law School.

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

Response: Federalist 10, 51, and 78.

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

Response: *Texas v. Johnson*, 491 U.S. 397 (1989).

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

Response: *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___, (slip op. at 65) (2022): "The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate those disputes, and the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the 'original constitutional proposition' that 'courts do not substitute their social and economic beliefs for the judgment of legislative bodies.'" (Citing *Ferguson v. Skrupa*, 372 U.S. 726, 729–30 (1963)).

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

Response: No.

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

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

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: Yes.

**b. Amazon?**

Response: Yes.

**c. Google?**

Response: Yes.

**d. Facebook?**

Response: Yes.

**e. Twitter?**

Response: Yes.

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

Response: Not to my knowledge.

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

**48. Have you ever confessed error to a court?**

Response: No.

**a. If so, please describe the circumstances.**

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

Response:  I understand that it is my duty to answer all questions posed by the Committee honestly, candidly, and ethically, to the best of my ability.

Thank you for the opportunity to answer these questions, and for your consideration of my nomination.

**Senator John Kennedy**
**Questions for the Record**

**David Leibowitz**

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

   Response: Yes. If confirmed, I will follow all relevant federal statutes and case law, including but not limited to 18 U.S.C. § 3591. In addition, various procedural protections must be observed and provided to a defendant charged with death-eligible offense. There is a substantial amount of binding Supreme Court and Eleventh Circuit precedent that must be observed in such a case. *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that imposition of death penalty does not violate Eighth and Fourteen Amendment if jury is given standards to direct and limit sentencing discretion and jury's decision is subject to meaningful appellate review).

   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 law requires a federal sentencing judge to consider all of the factors contained in Title 18, United States Code, Section 3553(a) when imposing sentence. Section 3553(a) includes a requirement that the Sentencing Guidelines be properly calculated, and Supreme Court case law is clear that the guideline calculation should be "the starting point and the initial benchmark." *See Gall v. United States*, 552 U.S. 38, 49 (2007). Other precedent allows a sentencing court to "tailor the sentence in light of other statutory concerns," reflected in Section 3553(a). *See Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (quoting *United States v. Booker*, 543 U.S. 220, 245-46 (2005)). If confirmed, I would consult these and other Supreme Court and Eleventh Circuit cases if faced with such an issue.

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: I would describe my judicial philosophy as being impartial, consistent, and considering all of the facts, relevant legal authority, and the parties' arguments. I would also endeavor to treat all parties before me with respect and resolve the issues presented in their cases in a timely fashion.

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

   Response: Yes. Originalism is a legitimate and important method of constitutional interpretation. The Supreme Court has directed lower federal courts to use originalism when interpreting various provisions of the Constitution. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022).

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

   Response: If no such authority existed (which in my experience would be extremely unlikely), I would follow the methods of interpretation authorized by the Supreme Court and the Eleventh Circuit. For example, the Supreme Court has directed lower federal courts to focus on historical interpretive methods in certain areas. *See, e.g., Kennedy v. Bremerton*, 142 S. Ct. 2407 (2022); (Establishment Clause); *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S.1 (2022) (Second Amendment); *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment).

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

   Response: Yes. It is a legitimate and important method of statutory interpretation. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020).

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

   Response: In a case involving statutory interpretation, first I would see if there is any binding Supreme Court or Eleventh Circuit precedent that resolves the case. If no such authority existed, I would consider the plain text of the statute and construe it "in accord with the original public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020). If the text is clear, the inquiry ends there. If the text is ambiguous, I would employ other interpretive tools approved by the Supreme Court and Eleventh Circuit, including canons of construction and certain types of legislative history deemed reliable by the Supreme Court and Eleventh Circuit. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984) (describing reliable sources of 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: The Constitution is an enduring document that does not change its semantic meaning unless amended through the process set forth in Article V. For a judge called upon to resolve the meaning of a constitutional provision, the semantic meaning of the provision does not change over time with evolving social norms or linguistic conventions. The fixed meaning must still be applied to new and changing applications. *See, e.g., New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 25 (2022) ("Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.").

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

Response: In a case involving statutory interpretation, first I would see if there is any binding Supreme Court or Eleventh Circuit precedent that resolves the case. If no such authority existed, I would consider the plain text of the statute and construe it "in accord with the original public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020). If the text is clear, the inquiry ends there. Legislative history would play no role in determining a statute's meaning. If the text is ambiguous, I would employ other interpretive tools approved by the Supreme Court and Eleventh Circuit, including canons of construction and certain types of approved legislative history deemed reliable by the Supreme Court and Eleventh Circuit. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984) (describing reliable sources of legislative history). Supreme Court precedent also instructs that certain types of legislative history are more reliable than others. *See, e.g., NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("floor statements by individual legislators rank among the least illuminating forms of legislative history").

**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: I will follow any Supreme Court and Eleventh Circuit precedent on the subject. Under Rule 65 of the Federal Rules of Civil Procedure and Supreme Court precedent, an injunction is an extraordinary remedy and a court's equitable power is constrained by the historical limits on equity. *See, e.g., Grupo Mexicano de Desarrollo, S.A. v. All Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). While the Supreme Court has affirmed the issuance of a nationwide injunction, *see Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017), neither the Supreme Court nor the Eleventh Circuit have issued binding precedent as to whether, when, and on what basis lower federal courts can issue nationwide injunctions. *See, e.g., Griffin v. HM Florida-Orl, LLC*, 601 U.S. __(2023) (statement of Kavanaugh, J., respecting denial of application for

stay) ("The question of whether a district court, after holding that a law violates the Constitution, may nonetheless enjoin the government from enforcing that law against non-parties to the litigation is an important question that could warrant our review in the future."). If confirmed and presented with a request to issue a nationwide injunction, I would consider Rule 65, all of the facts, all relevant legal authorities, and the parties' arguments.

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

Response: No.

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

Response: Yes.

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

Response: The Supreme Court in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), announced a two-step framework for courts to use in determining whether a regulation violates the Second Amendment. First, does the Second Amendment's plain text, as informed by history, cover the individual's conduct being regulated? (Slip Op. at 8, 10, 13.) If so, the Second Amendment presumptively protects that conduct, and to justify its regulation the government must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation. (Slip Op. at 8, 10, 15 ("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.").) The second step calls for analogical reasoning: to justify the regulation the government must "identify a well-established and representative historical *analogue*, not a historical *twin*." (Slip Op. at 21.)

**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's test in *Washington v. Glucksberg*, 521 U.S. 702 (1997), is used by courts to determine if a claimed unenumerated right, not already recognized by the Supreme Court, is to be recognized under the doctrine of substantive due process. That test requires that unenumerated rights be both "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 719–21.

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

Response: This question raises a legal issue known as "*Chevron* deference." *Chevron* deference refers to the Supreme Court's requirement that "a court review[ing] an agency's construction of the statute which it administers," must defer to the agency's authoritative interpretation of that statute in certain circumstances. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

In order to determine whether or not to defer under *Chevron*, courts employ a two-step framework. In the first step, the court must determine "whether Congress has directly spoken to the precise question at issue[,]" using "traditional tools of statutory construction[.]" *Chevron*, 467 U.S. at 842, 843 n.9. "If the intent of Congress is clear," the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. There is no deference afforded to the agency when the statutory text is clear.

However, "if the statute is silent or ambiguous with respect to the specific issue," the court must proceed to determine whether the agency's interpretation is "based on a permissible construction of the statute[,]" *id.* at 843, and, if so, the court must defer to the agency's interpretation.

A great deal of guidance on this question has been provided by the Supreme Court and the Eleventh Circuit. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) ( "[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."); *Bowers v. U.S. Parole Comm'n*, 775 F. App'x 504 (slip op. at 27) (11th Cir. 2019) ("Because the *Chevron* standard is generous, its application is limited. . . . Generally speaking, we grant *Chevron* deference only to agency statements that carry the force of law or otherwise bind future agency action, such as rules or regulations promulgated under statutory authority." (citations omitted)).

If confirmed and presented with such a question, I would consider all of these binding precedents, as well as the facts presented in the record and the parties' arguments.

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

Response: The Supreme Court's test first considers whether the agency's action addresses an issue of "major political or economic significance," and if so, then examines whether Congress "clearly authorized" the agency's action. *See West Virginia v. EPA*, 597 U.S. ___, at 19 (2022) ("Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. . . . To

convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims." (citations omitted)). *See also, Biden v. Nebraska*, 600 U.S. ___ (2023) (Barrett, J., concurring) (devoting significant discussion to the nature and contours of the "major questions" doctrine). If confirmed and presented with such a question, I would consider all of these binding precedents as well as the facts presented in the record and the parties' arguments.

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

Response: The Honorable Jed S. Rakoff, United States District Judge, Southern District of New York. In my humble view, Judge Rakoff is a jewel of the federal bench and a role model for any aspiring federal district judge. In a judicial career spanning more than 25 years, he has issued thousands of decisions, orders, opinions, and rulings. I was very fortunate to have three trials before Judge Rakoff when I was a federal prosecutor, and his overall legal knowledge, work rate, efficiency, fairness, and clarity of thought was awe-inspiring to witness. My colleagues and I would watch him mid-trial in utter amazement at the record he would make without a single note. To give just one example of his towering legal acumen: A 2015 opinion he wrote while sitting by designation in the United States Court of Appeals for the Ninth Circuit, *United States v. Salman*, 792 F.3d 1087 (9th Cir. 2015), was adopted unanimously by the Supreme Court and resolved an important circuit split in the law of insider trading. *Salman v. United States*, 580 U.S. ___, 137 S. Ct. 420 (2016). In addition to his activity on the bench, Judge Rakoff is widely-recognized as a leading authority on the federal mail and wire fraud statute, as well as federal securities law and regulation. He is a current co-author of "Modern Federal Jury Instructions," a leading treatise of civil and criminal jury instructions followed and used by many trial lawyers. He is a long-time lecturer at Columbia Law School. But perhaps most importantly, every day I saw him take the bench he demonstrated that a federal judge serves one "client" only– the rule of law.

**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: The following is a list of cases where I served as lead counsel or co-lead counsel in cases tried before a jury.

1. *United States v. Fleishman*, 11 Cr. 32 (Rakoff, J.) (S.D.N.Y. 2011).
2. *United States v. Jiau*, 11 Cr. 161 (Rakoff, J.) (S.D.N.Y. 2011), *aff'd*, 734 F.3d 147 (2d Cir. 2013).
3. *United States v. Soler*, 05 Cr. 165 (Holwell, J.) (S.D.N.Y. 2007), *aff'd*, 325 F. App'x 19 (2d Cir. 2009).
4. *United States v. Iqbal and Elahwal*, 06 Cr. 1054 (Berman, J.) (S.D.N.Y. 2006)
5. *United States v. Sanchez et al.*, 04 Cr. 36 (Patterson, J.) (S.D.N.Y. 2006).
6. *United States v. Minaya et al.*, 01 Cr. 619 (Carter, J.) (S.D.N.Y. 2006), *aff'd*, 321 F.

App'x 37 (2d Cir. 2009).
7. *United States v. Robles et al.*, 04 Cr. 1036 (Lynch, J.) (S.D.N.Y. 2006).
8. *United States v. Oquendo et al*., 03 Cr. 502 (Sand, J.) (S.D.N.Y. 2005).
9. *United States v. Zito*, 04 Cr.352 (S.D.N.Y. 2004) (Kram, J.), *aff'd*, 304 F. App'x 898 (2d Cir. 2008).
10. *United States v. Rodin*, No. 2003-CR01499 (S.D.N.Y. 2004) (Rakoff, J.), *aff'd*, 225 F. App'x 33 (2d Cir. 2007).

**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: The following is a list of cases in which I presented oral argument before the United States Court of Appeals for the Second Circuit.

1. *United States v. Zito*, 04 Cr.352 (S.D.N.Y. 2004) (Kram, J.), *aff'd*, 304 F. App'x 898 (2d Cir. 2008).
2. *United States v. Rodin*, No. 2003-CR01499 (S.D.N.Y. 2004) (Rakoff, J.), *aff'd*, 225 F. App'x 33 (2d Cir. 2007).

**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: After my nomination, I met with attorneys from the White House Counsel's Office ("WHCO") and the Office of Legal Policy of the Department of Justice ("DOJ") to discuss what to expect at the hearing and for mooting. Materials that I received included a list of website links showing past Senate Judiciary Committee hearings of judicial nominees, and a list of questions that Senators have asked nominees in the past, either at the hearing or in Questions for the Record. I watched past hearings, reread many Supreme Court and Eleventh Circuit cases, reviewed the Federal Rules of Civil and Criminal Procedure, and reviewed responses provided by past nominees to Questions for the Record.

**23. Why should Senator Kennedy support your nomination?**

Response: I would hope that Senator Kennedy— upon reviewing my personal background, education, record of achievement, responses to questions, and personal references— would see me as a person with the potential to serve the public fairly, impartially, and with excellence.

As a nation, all Americans have been given a unique inheritance of constitutional democratic governance that in my view remains a standard for the world. One of the pillars of that inheritance is set forth in Article III of our Constitution. For more than 234 years, at their best, Article III Judges have been central to ensuring that every person is able to utilize fundamental legal rights and remedies that are the very definition of what it

means to be an American.  To even be considered for such a position is a great honor to me and my entire family.

Thank you for the opportunity to answer these questions, and for your consideration of my nomination.

**Questions from Senator Thom Tillis**
**For David Seymour Leibowitz, nominee 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 in interpreting and applying the law.

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

   Response: I believe that impartiality is an expectation for a judge.

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

   Response: My understanding is that the term "judicial activism" is used in different ways by people in different contexts. I have seen different kinds of uses of the term in academic literature and legal conversation.

   Black's Law Dictionary (6th Edition 1990) defines the term as follows: "Judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favor of progressive and new social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions into legislative and executive matters." In this sense, "judicial activism" occurs when judges allow their personal views about policy to affect their judicial decisions. I do not consider judicial activism in this sense to be 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: Faithfully interpreting the law may sometimes result in an outcome that the judge personally finds undesirable as a matter of policy or personal preference. As Justice Scalia once said: "The judge who always likes the result he reaches is a bad judge." (Justice Antonin Scalia, "Remarks to Southern Methodist University Dedman School of Law," January 28, 2013.) But a judge in each case should aim for a decision based solely on the facts in the record, the applicable law, and the parties' arguments. In doing so, the outcome

is legally appropriate and desirable. Even if it leads to a result that is personally undesirable, I will follow the law.

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 follow all Supreme Court and Eleventh Circuit precedent and all legal authority, as well as the facts in the record and the parties' arguments, in any case that comes before me. Important precedents that clearly define and discuss various aspects of Second Amendment rights include *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022); and *Nat'l Rifle Ass'n v. Bondi*, 61 F.4th 1317 (11th Cir. 2023).

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: Since *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Supreme Court has held that a person acting in their official capacity is immune from damages and does not have to stand trial or face the burdens of litigation "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks omitted). A right is "clearly established" when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Rivas-Villegas v. Coresluna*, 142 S. Ct. 4, 7 (2021) (*per curiam*); *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (*per curiam*). "Existing precedent must have placed the statutory or constitutional question beyond debate." *Rivas-Villegas*, 142 S. Ct. at 7-8.

   As a procedural matter, "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Qualified immunity can be raised as part of a motion to dismiss under Rule 12(b)(6) of the Federal Rule of Civil Procedure. If the Rule 12(b)(6) motion is denied, an interlocutory appeal can be taken, *see Behrens v. Pelletier*, 516 U.S. 299, 307 (1996), or the parties can proceed with the case, including to summary judgment. At that point, qualified immunity can again be raised, this time as part of a summary judgment motion under Rule 56 of the Federal Rule of Civil Procedure.

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: If I am confirmed, my personal views are not relevant on whether the current law of qualified immunity provides or does not "provide sufficient protection for law enforcement officers." The Code of Conduct for United States Judges precludes me from opining on whether current law "provides sufficient protection for law enforcement officers." I will follow all binding precedent of the Supreme Court and the Eleventh Circuit bearing upon the legal question presented.

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

Response: Please see my response to Question 8.

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

Response: In general, the decision to seek "enforcement" of any legal rights (including intellectual property rights) is initially for a plaintiff to decide by bringing an appropriate case into court. There are four basic categories of intellectual property (patent, copyright, trademark, and trade secrets), and patents and copyrights are regulated exclusively by federal law. As with any other area of legal rights, I believe that parties should pursue legal and equitable remedies when they can show that intellectual property right they possess has been violated. If confirmed, I would faithfully apply binding precedent regarding intellectual property 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: While improper "forum shopping" has been recognized by the Supreme Court as a concern in certain contexts, *see generally Hanna v. Plumer*, 380 U.S. 143, 154 (1987), I believe your question touches upon matters specifically within the province of Congress to determine. The creation of specific judicial districts and divisions is the product of Acts of Congress, which stems from Article III. ("The judicial Power of the United States, shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish.") Given this, I do not believe it is appropriate for me to comment as a nominee, as this is a policy matter for Congress.

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: If I am confirmed, patent eligibility issues could be presented in cases that could come before me. Given this, I do not believe I should provide any views on this question. If confirmed, the parties before me are entitled to a fair, impartial, and open-minded judge, and I would not want to suggest how I might think about potential cases. In any case that comes before me, I will consider all of the facts in the record, all applicable law including binding Supreme Court and Eleventh Circuit precedent, and the parties' arguments.

Thank you for the opportunity to answer these questions, and for your consideration of my nomination.