Senator Richard J. Durbin
Chair, Senate Judiciary Committee
Written Questions for Nicole Berner
Nominee to be United States Circuit Judge for the Fourth Circuit
December 20, 2023

1. **Throughout the course of your legal career, you have devoted more than two decades to public interest work, advocating for the rights of workers and women.**

   a. **How do you understand the difference between serving as an advocate and serving as a judge?**

      Response: I have had the privilege throughout my career of zealously advocating on behalf of millions of working men and women. I understand that the role of a judge is a very different role than the role of an advocate. I began my legal career as a law clerk to two esteemed jurists who served on the Ninth Circuit Court of Appeals and the Northern District of California, where I saw firsthand the importance of approaching every case with an open mind, deeply and thoroughly studying the record in the case, understanding the relevant and binding precedent, and applying the precedent to the facts without regard to prior representation or personal opinions on any issue. That would be my commitment were I to be so fortunate as to be confirmed.

   b. **How do you think your public interest work has prepared you to serve as a federal appellate judge?**

      Response: For the past 17 years, I have served as counsel to the Service Employees International Union (SEIU), and I have served as the organization's General Counsel since 2017. My work requires me to become familiar with a broad range of legal issues, to be able to see all sides of complex and nuanced matters, to be rigorous and decisive in advising my clients, and to work closely with colleagues from hundreds of other local and international unions. I believe the experience, expertise, and skills I developed in this work have prepared me to serve as a federal appellate judge.

2. **For the past 17 years, you have worked at the Service Employees International Union (SEIU), and you have served as the organization's General Counsel since 2017. Your work requires you to apply a broad range of legal skills, from litigation and advocacy before regulatory bodies to providing legal advice on legislation at the state and federal levels.**

   a. **Can you explain the difference between local union affiliates and the SEIU organization as a whole?**

      Response: As General Counsel to SEIU, I serve as the lead attorney to an international union representing approximately two million working people. According to the SEIU Constitution and Bylaws, SEIU's legal structure is comprised of an international union and separately chartered local unions. Each local union has its own personnel, leadership,

constitution and bylaws, policies, and other governing documents. The international union's executive board, which is elected by representatives of the union's membership at the union's quadrennial conventions, is the highest governing body of the international union with the final authority to direct its activities, affairs, and functions.

As I testified during my hearing before this Committee, each member of SEIU is a member of a separately chartered local union. Local unions of SEIU are autonomous labor unions with their own constitution and bylaws, as required by the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 431. A local union's leaders, typically called a local union executive board, are elected by that local union's members in direct elections or at local union conventions. As I also testified during the hearing, each local union is a separate legal entity and has its own legal counsel, policies, and other governing documents. Local unions are responsible for the management and supervision of their own budget and personnel, pursuing their own initiatives, and directly representing their own members.

The autonomy of local unions from the international union is recognized and protected by federal law. In fact, the international union SEIU is precluded, as a general matter, from intervening in its local unions' operations except as specifically authorized by the relevant sections of the SEIU Constitution and Bylaws and the Labor-Management Reporting and Disclosure Act. 29 U.S.C. §§ 461–464. Local Union personnel matters, including allegations of sexual harassment made by local union staff, are handled by the local unions themselves, which are their staffs' employers. As I testified during my hearing before this Committee, as General Counsel of the international union, I am not responsible for, nor do I advocate on behalf of, local unions, unless specifically authorized to do so by the local union affiliate and with the approval of the international union leadership. Accordingly, as General Counsel I do not become involved in local union personnel matters, which are within SEIU local unions' authority to oversee, manage, and resolve.

Senator Lindsey Graham, Ranking Member
Questions for the Record
Ms. Nicole Berner
Nominee to the United States Court of Appeals for the Fourth Circuit

Instructions:
You must provide an answer specific to each question and sub-question. You may not group your answer to one question with other questions nor may you answer questions by cross-referencing other answers. Failure to follow these instructions will be interpreted as an intentional evasion of the question.

With respect to questions that ask for a yes or no answer, please start your response with 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 follow these instructions will be interpreted as an intentional evasion of the question.

Questions:

1. **According to your Committee Questionnaire, you have been the General Counsel of the Service Employees International Union ("SEIU") since 2017, and previously worked as a Deputy General Counsel and Associate General Counsel for the SEIU since 2006. In a 2019 article titled "*SEIU Prez Knew of Sexual Misconduct and Personally Promoted Staffer Anyhow*," Mike Elk, a labor reporter with the Payday Report, wrote the following:**

   "***A more than year-long investigation by Payday Report reveals that top officers of the 1.9 million-member SEIU, including President Mary Kay Henry, have not only failed to take action against sexual predators in its union, but have actually promoted some men after being accused of sexual misconduct. Exclusive interviews with dozens of union staffers, as well as court documents obtained by Payday Report, show that SEIU has not only failed to take action but has often retaliated against whistleblowers. A review of the cases of six men, who are accused of sexual misconduct and still employed by the SEIU, paints a troubling picture of a union that has been plagued by sexual misconduct scandals.***"

   a. **Were you aware of allegations of sexual misconduct or sexual harassment by SEIU officers, supervisors, affiliates or employees while you were the General Counsel, Deputy General Counsel, or Associate General Counsel for the SEIU? If yes, please explain what you knew in detail.**

      Response: Yes. I am aware from the public record of such allegations. SEIU policy prohibits sexual misconduct and sexual harassment. In my capacity as General Counsel of SEIU, I have taken seriously every allegation of sexual misconduct or sexual harassment I have ever received and have faithfully discharged my legal duties including with respect to the handling of allegations of sexual misconduct or sexual harassment by SEIU officers, supervisors, affiliates, or employees.

I categorically condemn sexual misconduct and sexual harassment of any kind. As I testified during the hearing before this Committee, I have dedicated my career to representing women and families. Through my advocacy I have always worked to ensure safety and dignity of all workers in the workplace, and that advocacy has continued in my various roles as counsel to SEIU, an international union that represents approximately two million members.

Beyond information available in the public record, I am otherwise precluded from answering specific factual questions about information I may have received as counsel to SEIU by my duty of confidentiality to my client, *see* Md. R. Att'y 19-301.6; D.C. R. Prof'l Conduct 1.6.

b. Were you involved in responding to or investigating allegations of sexual misconduct or sexual harassment by SEIU officers, supervisors, affiliates or employees while you were the General Counsel, Deputy General Counsel, or Associate General Counsel for the SEIU? If yes, please explain your involvement in detail, including what actions you took to address the misconduct.

Response: Yes. See my response to Question 1(a) above.

c. Were you aware of allegations that SEIU retaliated against whistleblowers while you were the General Counsel, Deputy General Counsel, or Associate General Counsel for the SEIU? If yes, please explain what you knew in detail.

Response: No, I am not aware from the public record of any such allegations against SEIU. I categorically condemn unlawful retaliation against those engaged in protected whistleblowing activity. SEIU policy prohibits retaliation against whistleblowers. *See* SEIU Bylaws App. C §§ 24–25.

Beyond information available in the public record, I am otherwise precluded from answering specific factual questions about information I may have received as counsel to SEIU by my duty of confidentiality to my client, *see* Md. R. Att'y 19-301.6; D.C. R. Prof'l Conduct 1.6. I can state unequivocally that I have always taken extremely seriously any complaints brought forward by whistleblowers and have faithfully discharged my legal duties with respect to such complaints.

d. Were you ever involved in any effort to retaliate against, to sue, to threaten legal action, to threaten discipline, to threaten reassignment, to punish, or to silence any person alleging sexual misconduct or sexual harassment by SEIU officers, supervisors, affiliates or employees while you were the General Counsel, Deputy General Counsel, or Associate General Counsel for the SEIU? If yes, please explain your involvement in detail.

Response: No.

e. While you were the General Counsel, Deputy General Counsel, or Associate General Counsel for the SEIU, did the SEIU ever sue or threaten to sue someone who reported sexual misconduct, sexual harassment, or a hostile work environment that implicated SEIU officers, supervisors, affiliates or employees?

Response: No. As far as I am aware, SEIU has never sued or threatened to sue any individual for reporting sexual misconduct, harassment, or a hostile work environment. Moreover, I would never condone such behavior.

i. If yes, please describe the lawsuit(s).

Response: Not applicable.

ii. If yes, please explain whether any SEIU membership dues were used to prosecute the litigation against the reporting individual.

Response: Not applicable.

f. While you were the General Counsel, Deputy General Counsel, or Associate General Counsel for the SEIU, were any SEIU membership dues used to defend SEIU officers, supervisors, affiliates or employees against allegations of sexual misconduct, sexual harassment, or a hostile work environment?

Response: No. As far as I am aware, SEIU has not expended funds to defend any individual accused of workplace misconduct, including officers, supervisors, or other employees, except to the extent that the litigation sought to attribute an individual's conduct to the organization itself.

2. One example of alleged sexual misconduct that received public attention involves Dave Regan—a Vice President on the SEIU International Executive Board and the President of SEIU-United Healthcare Workers West (SEIU-UHW). According to sworn statements filed in the Superior Court of California in 2019, multiple women accused Mr. Regan of sexual misconduct or harassment and reported the misconduct to SEIU. Sworn statements from five different women (and one man) include the following allegations:

- **"*Early on in my employment, I was told by my supervisor that instead of complaining about workplace issues, I should 'put my big girl panties on.' I was also told that if I wanted to get ahead at UHW, I should hang out and drink with [SEIU-UHW] President Dave Regan and the upper management around him*."**
- **"*I have often seen [Dave Regan] staring at women in meetings, and he will sometimes turn to watch women go by. I have heard him make inappropriate comments about women's bodies, too*."**
- **"*At a multi-day union event in Portland in August 2017, I was standing near Mr. Regan in a room where women from other unions were dancing. He told me I should get out on the dance floor because all the 'fat ass' nurses were***

***dancing. He also referred to them as 'fat bitches.' It was not the first time I had heard him use that term to refer to someone—he used it once in his office (where other managers were present) to refer to the wife of one of the employers with whom we deal.*"**

- ***"[Dave Regan] also made a comment to me, 'Does the carpet match the drapes'. I learned that it was a reference to the color of my pubic hair, and it made me very uncomfortable."***
- ***"When Mr. Regan made the comment 'what would you do for some jewelry?' we were in his office with others on staff. I remember Chief of Staff Greg Pullman giving Mr. Regan a funny look. It was evident at the time that Mr. Regan was drunk, and the comment was said in a suggestive manner. It made me uncomfortable."***
- ***"I personally observed Mr. Regan staring at former Political Director [redacted] at union events. I have also seen him on the dance floor grinding against women union members or staff in an inappropriate manner, and he has done this with me, too. It was embarrassing."***
- ***"Mr. Regan screamed profanity at me in public for talking with him about sexual harassment issues."***
- ***"I regularly saw Marcus Hatcher and Dave Regan drinking and dancing wildly and inappropriately at union events. Dave was always the last to leave the bar. I also saw his eyes follow attractive women as they went by."***
- ***"I attended a lot of meetings at which I was able to observe Dave Regan. He was often intoxicated and inappropriate with board members. I sometimes saw him when his walk was affected by his drinking. I also saw him turn and stare at attractive women as they went by. I saw him grinding on the dance floor at these meetings. I was conservative, did not drink, and was Republican. Mr. Regan referred to me as 'church lady.' I wrote an email to SEIU President Mary Kay Henry, telling her that Mr. Regan acted inappropriately. I sent the email via my SEIU-UHW email account."***
- ***"At one Eboard event I saw Dave Regan standing with Division Director Chokri Bensaid. A woman member from Kaiser passed by (her name was [redacted]) and Dave Regan said, "The only way she is getting a job [with UHW] is if she sucks my dick." Later, I learned that the woman was given a staff job with UHW. I found Mr. Regan's behavior to be very inappropriate."***
- ***"I was sent to Arizona for about two weeks…While there, I was asked to drive Dave Regan and UHW Vice President Stan Lyles to 'the nearest watering hole' (bar). While the three of us were in the car together, Dave Regan said 'hopefully I can pick up some 'ho's' because all the 'ho's' in the Arizona office are ugly."***
- ***"It is my experience from being on Eboard that if you do not agree with everything Dave Regan wants to do, you will be shunned or the union will try to find a way to retaliate against you. I have personally seen this happen to people on Eboard."***
- ***"Mr. Regan is a notorious 'boob gazer', meaning he would stare at women's breasts. One member, [redacted], told me that she had to tell Mr. Regan, 'Dave, my eyes are up here' when he would be staring at her breasts."***

- ***"After the last plenary, when he was off duty and drinking, he would make comments as he passed attractive women, 'you're lucky I'm a married man.' He would also flirt with members…"***
- **Additionally, Mr. Elk reported the following: "*At a training in October of 2017, Regan is alleged to have shown up drunk to a meeting and asked women if he could smell their panties. 'I was at a gathering of some of the other women contract specialists, and Mr. Regan went around asking the women if he could sniff their panties,' said contract specialist [redacted] in an affidavit obtained by Payday Report. 'At one point, another woman's cell phone rang, and it was that woman's husband. Mr. Regan took the phone from her and said, 'I'II smell your panties, too,' or words to that effect into the cell phone.*'"**

On November 2, 2018, a female staff member of SEIU-UHW wrote to SEIU leadership to report "the behavior of some of the other men in power at SEIU-UHW" and to express that "prior complaints about some of the men who created this hostile environment have gone nowhere." She complained about Dave Regan specifically, and asked SEIU to "come to California and investigate what is going on at this union."

On November 20, 2018, you responded to this letter and said "the International Union does not have a direct role in investigating allegations or concerns that may arise in local unions regarding personnel matters. Those matters are subject to the processes established by the locals themselves." You then "encourage[d]" the complainant to go through the local union to address the sexual harassment.

a. Does Dave Regan currently hold a position with SEIU? If so, please state his current title.

Response: Yes. Mr. Regan was elected under the relevant provisions of SEIU's Constitution and Bylaws at SEIU's quadrennial convention by delegates representing SEIU's approximately 2 million members to serve as one of 25 vice presidents and, therefore, he is also a member of SEIU's international executive board, which is comprised of more than 70 union leaders from throughout the United States and Canada. Mr. Regan is also an elected President of an SEIU local union affiliate, SEIU-United Healthcare Workers West (SEIU-UHW).

b. Was it appropriate to tell a victim of sexual harassment to go through her local union to investigate her allegations, when one of her alleged harassers—Dave Regan—was himself the president of the local union?

Response: The referenced letter from Ms. Sturge to SEIU Executive Vice President Leslie Frane did not allege that Mr. Regan had engaged in sexual harassment. In her letter, Ms. Sturge said she had reported to her employer SEIU-UHW that she had been sexually harassed by her supervisor (not Mr. Regan). Ms. Sturge also wrote that SEIU-UHW had already investigated the matter and that the alleged harassing supervisor had been fired. Ms. Sturge's letter further made clear that she had already filed a civil lawsuit

against SEIU-UHW, and that the matter was being handled through a civil litigation process.

In my letter responding to Ms. Sturge, which I wrote in my capacity as General Counsel of SEIU, I repeatedly thanked her for sharing her concerns about her experience as a local union staff person and made clear that the issues she had raised are important. I also explained in my response that "because each local of SEIU employs its own staff and sets its own personnel policies and protocols the International Union does not have a direct role in investigating allegations or concerns that may arise in local unions regarding personnel matters." To be clear, I had no discretion to initiate an investigation of a personnel matter at an independent local union affiliate. In my letter to Ms. Sturge, I encouraged her to continue to utilize the processes that she had already initiated. It is my understanding from the public record that the lawsuit Ms. Sturge brought against SEIU-UHW has now been settled. I had no role in the litigation or settlement of the lawsuit.

c. Was it appropriate to tell a victim of sexual harassment that the "International Union does not have a direct role in investigating allegations or concerns that arise in local unions," when one of the alleged harassers—Dave Regan—was a Vice President of the International Union?

Response: Please see my response to question 2(b).

d. Did the International Union ever install Dave Regan as a trustee of a local union?

Response: Yes, in 2009, Mr. Regan was appointed as a trustee of a local union. I had no involvement in that appointment.

e. As the General Counsel of SEIU, have you ever investigated any of the numerous allegations against Dave Regan?

Response: I am precluded from answering specific factual questions about any actions I may have taken as counsel to SEIU by my duty of confidentiality to my client, *see* Md. R. Att'y 19-301.6; D.C. R. Prof'l Conduct 1.6. I can confirm, however, that SEIU policy prohibits sexual harassment. I can also state unequivocally that I have taken seriously any allegation of sexual harassment I have ever received and have faithfully discharged my legal duties.

f. If yes, please explain the outcome of your investigation?

Response: Please see my response to Question 2(e).

g. If no, please explain why not?

Response: Please see my response to Question 2(e).

3. **According to Mr. Elk's reporting, Martin Manteca, the "*Organizing Director of the 95,000 member SEIU Local 721*" was "*accused of inappropriate behavior and retaliation by multiple junior staffers who said they felt pressured into sexual relationships with Manteca then banished to an undesirable assignment if they rejected his sexual advances*." More specifically, Mr. Elk reported that "*in the spring of 2016, a former SEIU staffer told SEIU international that she had reported to SEIU that Manteca sexually harassed her. The report was not the first time Manteca had been accused of sexual harassment. However, the staffer said she felt she was retaliated against and transferred to a more remote local.*"**

   a. **Is. Mr. Manteca currently affiliated with the SEIU? If so, please explain his affiliation?**

      Response: Yes. It is my understanding that Mr. Manteca is an employee of SEIU Local 721.

   b. **Were you aware of allegations of sexual misconduct or sexual harassment against Mr. Manteca?**

      Response: Yes. The public record reflects the existence of such allegations. I am precluded from answering specific factual questions about information I may have received as counsel to SEIU by my duty of confidentiality to my client, *see* Md. R. Att'y 19-301.6; D.C. R. Prof'l Conduct 1.6. I can confirm, however, that SEIU policy prohibits sexual misconduct and sexual harassment. I can also state unequivocally that I have taken seriously any allegation of sexual misconduct and sexual harassment I have ever received and have faithfully discharged my legal duties.

      i. **If yes, please explain what you knew.**

         Response: Please see my response to Question 3(b).

      ii. **If yes, did you take any steps to address the allegations? Please describe what, if any, steps you took.**

         Response: Please see my response to Question 3(b).

4. **Question 11(a) of the Committee Questionnaire states: "*List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.*"**

   In response to this question, you did not disclose that in 2020 you (unsuccessfully) campaigned and ran for election to the World Zionist Congress as a candidate for "Hatikvah,"—a political party and electoral slate. According to the American Zionist

Movement's website, "*The delegates and the bodies they form at the [World Zionist Congress] determine the leadership and influence the policies of Israel's National Institutions: the World Zionist Organization (WZO), the Jewish Agency for Israel (JAFI), Jewish National Fund-Keren Kayemet LeIsrael (JNF) and Keren Hayesod – which together allocate nearly $1 billion annually in funding in support of Israel and Jewish communities around the world*." The American section of the World Zionist Organization is registered as a foreign agent under the Foreign Agents Registration Act.

a. Why did you not disclose your membership on the Hatikvah electoral slate in response to Question 11 until you were confronted with the omission?

Response: I disclosed my membership on the Hatikvah slate to the Committee. In response to Question 12(e) Committee Questionnaire, I included an article entitled "Two True Allies of Israel," dated February 16, 2020, which describes my participation in the Hatikvah slate.

I did not list my inclusion on the Hatikvah slate in response to Question 11 of the Committee Questionnaire because Hatikvah is not an organization, club, working group, advisory or editorial board, panel, committee, conference, or publication. For this reason, I did not conclude my inclusion on the Hatikvah slate was responsive to Question 11.

b. Do you believe that the Judiciary Committee, in exercising its constitutional responsibilities in the nominations process, should be aware that a nominee has run as a member of a partisan electoral slate to exercise control over nearly one billion dollars of funding for the benefit of a foreign state?

Response: I have faithfully and diligently provided all requested documents and responded to all questions put before me by the Senate Judiciary Committee in connection with the judicial confirmation process. It would not be appropriate for me, as a judicial nominee, to express a view on the manner in which the Committee chooses to exercise its constitutional responsibilities.

I would also note that the World Zionist Congress does not exercise control over funding for the sole benefit of a foreign state. Rather, it controls allocation of funding for Jewish communities throughout the world, including those who are facing antisemitism.

5. Question 12(c) of the Committee questionnaire instructed you to: "*Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials*."

In response to this question, you failed to disclose a 2020 "Americans for Peace Now" letter you signed urging the government of Israel to "Stop Annexation" of the West Bank. In the letter, you urged "*the government of Israel to abandon its unilateral*

***annexation plan and to instead pursue negotiations with the Palestinian leadership to reach a conflict-ending peace accord*.**"

a. Why did you not disclose this letter to the Committee as required?

Response: In response to the Senate Judiciary Questionnaire, I produced to this Committee approximately 950 pages including over 150 separate documents. As I stated responding to questions in the Questionnaire, I searched my files and electronic databases in an effort to identify all responsive materials. I identified all responsive materials I was able to find but there may have been documents I inadvertently missed. I subsequently disclosed to the Committee all relevant documents that were later brought to my attention as having been missed and responsive. In a letter to the Chair and Ranking Member of the Committee dated December 12, 2023, I disclosed the letter referenced above.

6. Question 12(e) of the Committee questionnaire instructed you to "*List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you*."

In response to this question, you failed to disclose a 2006 "Alternet" article where you were quoted arguing that a planned Catholic community in Florida could not favor pharmacies that shared their religious views on contraceptives.

a. Why did you not disclose this article to the Committee as required?

Response: I disclosed the article referenced above to the Committee in a letter to the Chair and Ranking Member of the Committee dated December 12, 2023. In the referenced article, I was interviewed discussing Supreme Court precedent regarding the obligations of "company towns" to comply with constitutional requirements.

7. In light of the nondisclosures described above (and others) can you confirm to the Committee that you have conducted a diligent search for missing documents, and that you have disclosed all documents, affiliations, and memberships as required?

Response: Yes. In response to the Senate Judiciary Questionnaire, I produced to this Committee approximately 950 pages including over 150 separate documents. As I stated responding to questions in the Questionnaire, I searched my files and electronic databases in an effort to identify all responsive materials. I identified all responsive materials I was able to find but there may have been documents, affiliations, or memberships I inadvertently missed. I subsequently disclosed to the Committee all relevant documents, affiliations, and memberships that were later brought to my attention as having been missed and responsive.

8. In 2020, you were a working group member of Clean Slate for Worker Power, a project of Harvard Law School's Labor and Worklife Program. In this capacity, you helped prepare a report titled: *"Clean Slate for Worker Power: Building a Just Economy and Democracy*."

Response: I was one of more than 70 working group members who engaged with the project. As stated in the referenced report's executive summary, working group members are not responsible for the recommendations in the report. I did not review the recommendations of the report prior to its publication, nor was I asked to do so.

a. One of the recommendations is to allocate 40% of corporate board to seats to workers. Specifically, the report states the following: "*We recommend that larger corporations (e.g., those with 500 or more employees, or, as noted below, those with a federal charter) be required to reserve at least 40 percent of the seats on their corporate boards for worker-designated representatives. In addition, we recommend that a certain category of board decisions that most directly and significantly affect workers' working conditions- such as decisions to declare bankruptcy, close a plant, lay off a significant number of workers, or take any other action that would substantially decrease the proportion of corporate revenue devoted to paying wages-be supported by a supermajority of board members to be adopted*." Do you agree with this recommendation?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from giving an opinion on a policy matter.

b. One of the recommendations in this report is to grant new labor rights to prisoners. Do you agree with this recommendation?

Response: As a judicial nominee, it would be inappropriate for me to give an opinion on a policy matter.

c. Another recommendation is to extend explicit labor protections to illegal immigrants and make "it an unfair labor practice for an employer to inquire about a worker's immigration status during an organizing campaign." Do you agree with these recommendations?

Response: As a judicial nominee, it would be inappropriate for me to give an opinion on a policy matter.

d. Another recommendation requires the creation of "workplace monitors" and "workers councils" at many companies. Do you agree with this recommendation?

Response: As a judicial nominee, it would be inappropriate for me to give an opinion on a policy matter.

e. Another recommendation is to replace America's "enterprise bargaining" system with a "sectoral system." Do you agree with this recommendation?

Response: As a judicial nominee, it would be inappropriate for me to give an opinion on a policy matter.

f. Another recommendation is to require the creation of "virtual picket lines." Specifically, the report recommends creating "*mechanisms for digital picket lines by requiring employers to allow workers to mirror real-life collective action in online transactions. Functioning essentially as a disclosure regime, the digital picket line would require employers to allow workers to inform online customers about strikes occurring at the employer's physical site.*" Do you agree with this recommendation?

Response: As a judicial nominee, it would be inappropriate for me to give an opinion on a policy matter.

9. In speech notes dated "2/21" relating to a presentation about a 2018 Supreme Court case, you wrote: "At its core, the right-to-work movement is deeply racist." You went on to write: "Don't be fooled by the rhetoric: the push to weaken unions is not about freedom, but about oppression."

a. Do you believe the right to work movement is deeply racist?

Response: No. I do not. I delivered the referenced remarks at an event organized by the American Constitution Society in February 2018 in my capacity as General Counsel of the Service Employees International Union (SEIU). My notes for these remarks include the statement quoted above but they make clear that I was discussing the history of the right-to-work movement. Following the statement quoted above, my notes go on to discuss the role of Vance Muse, one of the architects of the early right-to-work laws in the 1940's, and include Muse's statement that "[f]rom now on white women and white men will be forced into organization with black African apes whom they will have to call brother or lose their jobs."

As I testified during my hearing before this Committee, I do not believe individuals who support right-to-work laws today are racist.

b. Do you believe that right-to-work states like South Carolina are animated by racism?

Response: No. Please see my response to Question 9(a)

c. Do you believe that those who are critical of unions are animated by racism or a desire to oppress?

Response: No. Please see my response to Question 9(a)

10. Although the SEIU has publicly called the NLRB's 2023 "*Standard for Determining Joint Employer Status*" final rule "welcome and necessary," the SEIU recently filed a Petition for Review before the U.S. Court of Appeals for the District of Columbia Circuit challenging the scope of the NLRB's 2023 Rule.

a. Was the SEIU's petition in the D.C. Circuit designed to litigate this rule in a friendly venue?

Response: Any discussion of strategy or other matters within my representation as General Counsel of SEIU would violate my obligations under the doctrine of attorney-client privilege, *see* Md. R. Att'y 19-301.6; D.C. R. Prof'l Conduct 1.6. However, the bases for SEIU's legal challenges to the cited rule are publicly available on the docket of the referenced case.

b. Did you personally communicate or coordinate with the NLRB about this litigation prior to SEIU filing the petition in the D.C. Circuit?

Response: No.

c. Are you aware of anyone at SEIU communicating or coordinating with the NLRB about this litigation prior to filing the petition in the D.C. Circuit?

Response: Yes. As is common practice, counsel for SEIU communicated with opposing counsel prior to filing suit.

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

Response: I disagree with this statement. If I am so fortunate as to be confirmed, I would carefully read the briefs, study the facts and record, listen carefully to oral arguments, and faithfully apply Supreme Court and Fourth Circuit precedent.

12. 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.

13. 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. If am so fortunate as to be confirmed, I would expect every clerk in my office to have a record of exercising good judgment. The public endorsement of or praise for an organization listed as a Foreign Terrorist Organization would be disqualifying.

14. 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. If I am so fortunate as to be confirmed, I would expect every clerk in my office to have a record of exercising good judgment. The statements quoted above would be disqualifying.

15. 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: 28 U.S.C. § 2255 governs how a prisoner held under a federal sentence may seek relief from that sentence. A federal prisoner in custody may show that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack." *Id.* § 2255(a). A § 2255 motion is subject to a one-year limitation period and may only be sought once without certification from the applicable court of appeals. *Id.* § 2255(f).

A prisoner may also challenge the constitutionality of their conviction or sentence by filing a civil action against the warden of the facility in which they are located. 28 U.S.C. § 2241. "A habeas application under 28 U.S.C. § 2241 generally attacks the execution of a sentence rather than its validity." *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1041 (10th Cir. 2017).

16. 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: *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* addressed claims that the admissions process operated by Harvard College and the University of North Carolina that took race into consideration violated Title VI of the 1964 Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment. 600 U.S. 181, 191(2023). First, the Court concluded that Students for Fair Admissions had Article III standing. Then, it concluded that strict scrutiny applied to these admissions processes. Finally, it found that strict scrutiny was not satisfied because the justification for both programs—the educational benefits of diversity—was not sufficiently measurable to permit judicial review. The Court reasoned that the connection between race-conscious admissions and achieving the educational benefits of diversity articulated by the schools was not coherent enough to survive strict scrutiny. Thus, the Court ruled that the programs violated the Constitution and Title VI.

17. 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.

In every job I have held since graduating from law school I have participated in hiring decisions.

18. 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: I have worked for employers that sought diversity of all kinds in employment and considered such diversity in a manner that was consistent with existing law. With respect to every decision in which I participated, the most qualified candidate was selected among a broad pool of candidates.

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

Response: No.

20. 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 the best of my knowledge, my employers have based hiring decisions on a broad range of qualifications, including performance, academics, prior work, and personal background. I have worked for employers that sought diversity of all kinds in employment and considered such diversity in a manner that was consistent with existing law.

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

Response: As I stated above in response to Question 17, I have participated in hiring decisions in every job I have held since graduating from law school, all of which are listed on my Senate Judiciary Questionnaire. Each employer for whom I have worked valued having a diverse workforce and considered diversity in a manner that was consistent with existing law. With respect to every decision in which I participated, the most qualified candidate was selected among a broad pool of candidates.

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

Response: Yes, under *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023), classifications on the basis of race are subject to strict scrutiny.

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

Response: In *303 Creative LLC v. Elenis*, 600 U.S. 570, 579 (2023), the Supreme Court held that Colorado's anti-discrimination law, that would require a website designer to provide services for same-sex weddings with which the designer disagreed for religious reasons, constituted compelled speech prohibited by the First Amendment prohibition on laws that abridge the freedom of speech.

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

Response: Yes. *Barnette* is binding precedent which the Supreme Court recently cited in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). If I am so fortunate as to be confirmed, I would faithfully apply Supreme Court and Fourth Circuit precedent.

24. 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 first step in this inquiry is to determine whether the law is content-neutral on its face. If the answer is yes, then the Court determines the law's justification or purpose, and whether it was promulgated because of a disagreement with the message to be regulated. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). If I am so fortunate as to be confirmed, I would faithfully apply all binding precedent of the Supreme Court and Fourth Circuit.

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

Response: The Supreme Court in *Virginia v. Black*, 538 U.S. 343, 359 (2003), held that "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" are "true threats" that are not protected by the Constitution.

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

Response: The Court must determine whether the matter is a question of fact, a question of law, or a mixed question of fact and law. In *Miller v. Fenton*, 474 U.S. 104, 114 (1985), the Supreme Court observed, "[a]t least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." The Supreme Court and the Fourth Circuit have noted the difficulty in distinguishing between questions of law, questions of fact, and mixed questions of fact and law. *See Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (noting the "vexing nature of the distinction."); *Younger v. Crowder*, 79 F.4th 373, 381 (4th Cir. 2023) (noting the "difficulty" of making the distinction).

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

Response: Federal sentencing is governed by 18 U.S.C. § 3553(a). Congress has not directed that one of these purposes of sentencing is entitled to greater weight than any other.

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

Response: As a nominee for a federal judicial position, the Code of Conduct for United States Judges precludes me from commenting on the merits of a particular Supreme Court binding precedent, all of which I would faithfully apply as a lower court judge.

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

Response: As a nominee for a federal judicial position, the Code of Conduct for United States Judges precludes me from commenting on Fourth Circuit binding precedent, all of which I would faithfully apply as precedent of the Circuit.

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

Response: According to 18 U.S.C. § 1507, "[w]hoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both. Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt."

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

Response: As a nominee for judicial office, the Code of Conduct for United States Judges precludes me from commenting on an issue that could come before me as a judge. In *Cox v. Louisiana*, 379 U.S. 559, 561 (1965), the Supreme Court upheld the constitutionality of a state statute that was modeled after 18 U.S.C. § 1507. The Court determined that "[a] State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence." *Id.* at 562.

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

a. Was *Brown v. Board of Education* correctly decided?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of binding precedent by the Supreme Court, which I would faithfully apply as a judge. Additionally, as a judicial nominee, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me.

Following the practice of prior judicial nominees, however, I would make an exception for *Brown v. Board of Education*. I believe the subject of *de jure* segregation of schools is unlikely to ever come before me. Therefore, I can state that I believe *Brown* was correctly decided.

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

Response: As a judicial nominee the Code of Conduct for United States Judges precludes me from commenting on the merits of binding precedent by the Supreme Court, which I would faithfully apply as a judge. Additionally, as a judicial nominee, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me.

Following the practice of prior judicial nominees, however, I would make an exception for *Loving v. Virginia*. I believe the constitutionality of bans on interracial marriage is unlikely to ever come before me. Therefore, I can state that I believe *Loving* was correctly decided.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of binding precedent by the Supreme Court, which I would faithfully apply as a judge. Additionally, as a judicial nominee, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me.

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

Response: The Supreme Court's decision in *Dobbs v. Jackson Women's Health* overturned *Roe v. Wade.*

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

Response: The Supreme Court's decision in *Dobbs v. Jackson Women's Health* overturned *Planned Parenthood v. Casey*.

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

Response: As a judicial nominee, it would generally be inappropriate for me to comment on the merits of binding precedent by the Supreme Court, which I would faithfully apply as a judge. Additionally, as a nominee for judicial office, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me.

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

Response: As a judicial nominee, it would generally be inappropriate for me to comment on the merits of binding precedent by the Supreme Court, which I would faithfully apply as a judge. Additionally, as a nominee for judicial office, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me.

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

Response: As a judicial nominee, it would generally be inappropriate for me to comment on the merits of binding precedent by the Supreme Court, which I would faithfully apply as a judge. Additionally, as a nominee for judicial office, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me.

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

Response: As a judicial nominee, it would generally be inappropriate for me to comment on the merits of binding precedent by the Supreme Court, which I would faithfully apply as a judge. Additionally, as a judicial nominee, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me.

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

Response: As a judicial nominee, it would generally be inappropriate for me to comment on the merits of binding precedent by the Supreme Court, which I would faithfully apply

as a judge. Additionally, as a judicial nominee, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me.

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

Response: As a judicial nominee, it would generally be inappropriate for me to comment on the merits of binding precedent by the Supreme Court, which I would faithfully apply as a judge. Additionally, as a judicial nominee, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me.

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

Response: As a judicial nominee, it would generally be inappropriate for me to comment on the merits of binding precedent by the Supreme Court, which I would faithfully apply as a judge. Additionally, as a judicial nominee, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me

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

Response: As a judicial nominee, it would generally be inappropriate for me to comment on the merits of binding precedent by the Supreme Court, which I would faithfully apply as a judge. Additionally, as a judicial nominee, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me.

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

Response: In *New York State Rifle & Pistol Ass'n v. Bruen,* 597 U.S. 1, 17 (2022), the Supreme Court held, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."

34. 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: Yes. In my capacity as General Counsel of SEIU, members of my legal department and I worked with Demand Justice as a member of a broad coalition of organizations on a number of matters. Since I submitted my application to serve as a judge on the Fourth Circuit Court of Appeals, however, I have not been in contact with anyone associated with Demand Justice regarding any requests to provide any such services.

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

Response: No.

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

Response: Yes. Please see my response to Question 34(a). In my capacity as General Counsel of SEIU, I have been in contact with a number of individuals associated with Demand Justice including, among others, Chris Kang and Tamara Brummer.

35. 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: Yes. In my capacity as General Counsel of SEIU, members of my legal department and I worked with Alliance for Justice as a member of a broad coalition of organizations on a number of matters. Since I submitted my application to serve as a judge on the Fourth Circuit Court of Appeals, however, I have not been in contact with anyone associated with Alliance for Justice regarding any requests to provide any such services.

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

Response: No.

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

Response: Yes. I understand this question to be asking about contacts with individuals associated with Alliance for Justice, not Demand Justice. Please see my response to Question 35(a). In my capacity as General Counsel of SEIU, I have been in contact with a

number of individuals who were at the time (or are) associated with Alliance for Justice including Nan Aaron, Rakim Brooks, Dan Goldberg, and Jake Faleschini, among others.

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

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

Response: Not to my knowledge.

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

Response: Not to my knowledge.

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

Response: Not to my knowledge.

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: Not to my knowledge.

37. 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.

38. 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.

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

Response: In December 2021, I submitted an application to Maryland Senators Ben Cardin and Chris Van Hollen to be considered for a position on the United States Court of Appeals for the Fourth Circuit. On June 10, 2022, and again on October 3, 2023, I interviewed with Senators Cardin and Van Hollen. On July 21, 2023, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On November 15, 2023, the President announced his intent to nominate me.

40. 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: On one occasion in 2021, I spoke with Chris Kang, who provided me with information regarding the judicial selection and nomination process.

41. 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: On several occasions, I spoke with officials from or associated with the American Constitution Society (ACS), including while attending ACS events. On these occasions, we spoke about developments in the law as well as about my having submitted an application to serve as a judge.

42. 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.

43. 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.

44. 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.

45. 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?

Response: I have had general discussions with counsel from the Office of Legal Policy about the types of cases to list on the Committee Questionnaire. I received no advice, however, about which specific cases to list.

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?

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

Response: On July 21, 2023, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On November 15, 2023, the President announced his intent to nominate me.

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

Response: On December 20, 2023, I received these questions from the Office of Legal Policy (OLP). I reviewed the questions, conducted legal research, consulted my records, prepared answers, and reviewed my answers. OLP provided feedback on my draft, which I considered, before submitting my final answers to the Committee.

Senator Mike Lee
Questions for the Record
Nicole G. Berner, Nominee for Circuit Court Judge for the Fourth Circuit

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

   Response: My judicial philosophy would be to approach each case with an open mind and treat all litigants with the utmost respect. I would carefully read the briefs, study the facts and record, listen carefully to oral arguments, and apply Supreme Court and Fourth Circuit precedent. This is the judicial philosophy to which the judges for whom I served as a judicial law clerk adhered, and it is the philosophy I would apply as well if I am so fortunate as to be confirmed as a judge.

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

   Response: If I am so fortunate as to be confirmed, when deciding a case that turned on the interpretation of a federal statute, I would thoroughly research Supreme Court and Fourth Circuit precedent interpreting that statute. If there was binding precedent, I would apply that precedent to the case before me. If presented with an issue of first impression for which there was no binding authority, I would look first at the text of the statute. For words not defined in the statute, I would look to the plain meaning of the words, considered in their context in the statute as a whole. If the language was clear, then the inquiry would end there. If the plain meaning was not sufficient to complete the analysis, I would then turn to other tools of statutory interpretation, such as textual analysis, structural analysis, judicial interpretations from courts other than the Supreme Court and the Fourth Circuit, related statutes, and congressional purpose all to the extent permitted by Supreme Court and Fourth Circuit precedent.

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

   Response: If I am so fortunate as to be confirmed, when deciding a case that turned on the interpretation of a constitutional provision, I would look to the text of the Constitution. I would also examine precedent of the Supreme Court and the Fourth Circuit to apply the appropriate interpretive methodology. If a constitutional issue of first impression came before me, I would look to Supreme Court and Fourth Circuit cases for methods of interpretation that would be most analogous to the issue presented.

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

   Response: If I am so fortunate as to be confirmed, I would be bound to follow Supreme Court and Fourth Circuit precedent that addresses the role of text and original meaning when interpreting constitutional provisions. The Supreme Court has looked to the text and original meaning to interpret various constitutional provisions. *See, e.g.*, *N.Y. State Rifle & Pistol*

Ass'n v. Bruen, 597 U.S. 1 (2022) (Second Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (same); *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment).

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: If I am so fortunate as to be confirmed, when deciding a case that turned on the interpretation of a federal statute, I would thoroughly research Supreme Court and Fourth Circuit precedent interpreting that statute. If there was binding precedent, I would apply that precedent to the case before me. If presented with an issue of first impression for which there was no binding authority, my first step in interpreting a statute would be to look at the text of the statute, which is consistent with Supreme Court and Fourth Circuit precedent. If a word is not defined in the statute, I would look to the plain meaning of the words, considered in their context in the statute as a whole. The Fourth Circuit also looks to dictionaries published at the time a law was enacted to determine the plain meaning of a statute. If the language is clear, the inquiry would end there. If the plain meaning was not sufficient to complete the analysis, I would then turn to other tools of statutory interpretation, such as textual analysis, structural analysis, judicial interpretations, related statutes, and congressional purpose all to the extent permitted by Supreme Court and Fourth Circuit precedent.

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

Response: The Supreme Court has stated that courts should normally interpret "a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). The Court has also explained that "[w]hen called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them." *Niz-Chavez v. Garland*, 593 U.S. 155, 160 (2021). Additionally, the Court stated that "[a]lthough its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022).

7. What are the constitutional requirements for standing?

Response: Article III of the Constitution requires that the plaintiff demonstrate the following for standing: (1) the plaintiff suffered an injury-in-fact that is concrete, particularized, and actual or imminent; (2) the identified injury was likely caused by the defendant; and (3) the injury likely would be redressed by judicial relief. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021).

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

Response: "Congress's authority is limited to those powers enumerated in the Constitution." *U.S. v. Lopez*, 514 U.S. 549, 566 (1995). The Supreme Court held in *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), that the Necessary and Proper Clause grants Congress powers considered necessary to implement its enumerated powers.

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

Response: If I am so fortunate as to be confirmed, I would follow precedent from the Supreme Court and Fourth Circuit. The Supreme Court has held that "the 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (internal quotation marks omitted).

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

Response: The Supreme Court held in *Washington v. Glucksberg* that the Due Process Clauses of the Fifth and Fourteenth Amendments protect certain unenumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). This concept is known as substantive due process. The Court provides a summary of those rights in *Glucksberg*:

> The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them'") (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993); *Casey*, 505 U.S., at 851. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Casey*, supra. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S., at 278– 279.

521 U.S. 702, 719-20 (1997).

Since *Glucksberg*, *Casey* has been overturned. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

11. What rights are protected under substantive due process?

Response: Please see my response to Question 10.

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

Response: If I am so fortunate as to be confirmed, I would faithfully apply Supreme Court and Fourth Circuit precedent regarding substantive due process rights, notwithstanding any personal views I may hold. The Supreme Court's Lochner era ended with the decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which overruled *Adkins v. Children's Hosp. of the D.C.*, 261 U.S. 525, (1923).

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

Response: Article I, § 8, cl. 3 of the Constitution provides that Congress shall have the power to regulate Commerce with foreign nations, among the States, and with Indian Tribes. The Supreme Court has identified three categories in which Congress is authorized to act under the commerce clause: (1) Congress can regulate the channels of interstate commerce; (2) Congress may regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) Congress may regulate activities that substantially affect interstate commerce. *Gonzalez v. Raich*, 545 U.S. 1, 16-17 (2005).

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

Response: Suspect classes are generally based on immutable characteristics, including race, national origin, and alienage. *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard Coll.*, 600 U.S. 181 (2023); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1734 (2018); *Hernandez v. Texas*, 347 U.S. 475, 479 (1954). The Supreme Court has identified "suspect" classes in recognition of "an immutable characteristic determined solely by the accident of birth" or "such disabilities, or … such a history of purposeful unequal 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) (citations and internal quotation marks omitted).

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

Response: Checks and balances and separation of powers ensure our democracy has a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (internal quotation marks omitted).

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: If I am so fortunate as to be confirmed, I would analyze the relevant constitutional text and apply binding precedent from the Supreme Court and Fourth Circuit. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952), the Supreme Court noted "[t]he President's power, if any, to issue [an order] must stem either from an act of Congress or from the Constitution itself."

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

Response: The role of a judge is to apply the law to the facts before them, without regard to any personal views.

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

Response: If I am so fortunate as to be confirmed, I would strive to do neither. Neither is acceptable.

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 have not studied the historical trends of judicial review as it relates to striking down statutes, so I cannot speak to the causes of any such trends. If I am so fortunate as to be confirmed, I would apply relevant precedent faithfully and without bias if the question of a statute's constitutionality is brought before the court.

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

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

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

Response: The Supreme Court has ruled that state legislators and executive and judicial officers are bound to follow the Court's decisions interpreting the Constitution. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on how elected officials should conduct their affairs or make policy decisions.

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: My understanding is that in Federalist 78, Hamilton was emphasizing the limited role that federal judges play in our governmental system. The judiciary is limited to "judgment," which refers to deciding cases. The role does not include making policy or enforcing laws.

23. As a circuit court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a circuit 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 circuit court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: If I am so fortunate as to be confirmed as a circuit court judge, I would be bound to uphold Supreme Court and Fourth Circuit precedent, faithfully applying the law to the facts of the case before me. I would follow the Supreme Court's directive that if "a precedent of [the Supreme Court] has direct application in a case, [and] yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quotation marks omitted).

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: Race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S.S.G. § 5H1.10.

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 Biden Administration's definition of equity, and I do not have a personal definition for the word. As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on statements made by the President or other elected officials, or on policy matters.

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

Response: I do not have a personal definition for these words, but Merriam-Webster provides different definitions for equity and equality. *Merriam-Webster Dictionary* describes equity as "justice according to natural law or right; specifically: freedom from bias or favoritism." *Merriam-Webster Dictionary* describes equality as "the quality or state of being equal."

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

Response: The Equal Protection Clause of the Fourteenth Amendment provides that, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. If I am so fortunate as to be confirmed, I would determine cases arising under the Fourteenth Amendment's equal protection clause by applying binding precedent of the Supreme Court and Fourth Circuit.

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

Response: I do not have a personal definition for systemic racism. *Merriam-Webster Dictionary* defines systemic racism as "the oppression of a racial group to the advantage of another as perpetuated by inequity within interconnected systems (such as political, economic, and social systems)."

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

Response: I do not have a personal definition for critical race theory. *Oxford English Dictionary* describes critical race theory as: "A movement or theoretical approach within jurisprudence which holds that racial bias is inherent to the justice system as a result of its basis in beliefs and practices that benefit white people; (now also more generally) a theoretical framework for examining the influence of racial bias on social and cultural institutions and practices."

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

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

31. You failed to disclose your involvement in a high-profile SEIU sexual harassment scandal to this Committee. Whether or not you believe the numerous women who accused the SEIU executives of sexual harassment, do you think it would have been important for you to disclose your role in this sexual harassment scandal to this Committee?

Response: I categorically condemn sexual harassment and sex-based discrimination in all forms. As I testified during my hearing, I have dedicated my career to representing women and families, and I take every allegation of sexual harassment seriously. While it is not clear from the question what "sexual harassment scandal" is referenced, what I can say is that throughout the confirmation process I have diligently disclosed accurately, comprehensively, and to the best of my knowledge all information requested of me by the Senate Judiciary Committee. In response to the Senate Judiciary Questionnaire, I produced to this Committee approximately 950 pages, including more than 150 separate documents.

32. Do you believe that Dave Regan, one of the particularly egregious alleged harassers mentioned in the letter from victim Mindy Sturge to SEIU Vice President Leslie Frane that you responded to, should still be the President of SEIU-UHW and a Vice president on the SEIU International Executive Board? What message do you believe this sends to his victims?

Response: I categorically condemn sexual harassment and sex-based discrimination in all forms. As I testified during the hearing before this Committee, I have dedicated my career to representing women and families, and I take every allegation of sexual harassment seriously. The referenced letter from Ms. Sturge to SEIU Vice President Leslie Frane did not allege that Mr. Regan engaged in sexual harassment. As I testified during the hearing before this Committee, local union affiliates of SEIU are autonomous labor unions. The leaders of SEIU-UHW, including the local union president, are elected by the local union's members in direct elections.

33. 18 U.S.C. §§ 1461-1462 explicitly states that anything intended for producing abortion is prohibited from being conveyed in the mail or delivered from any post office or by any letter carrier, and it levies criminal penalties for using the mail to do so. If confirmed as a Circuit Court judge, will you uphold 18 U.S.C. §§ 1461-1462?

Response: If I am so fortunate as to be confirmed, I would faithfully follow Supreme Court and Fourth Circuit precedent and uphold the Constitution and interpret the law as it has been written. If faced with a case concerning the application of any federal statute, I would carefully read the briefs, study the facts and records, listen carefully to oral arguments, and faithfully apply Supreme Court and Fourth Circuit precedent.

Nicole Berner QFR Responses

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Nicole Gina Berner nominated to be United States Circuit Judge for the Fourth Circuit

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. Is racial discrimination wrong?

Response: Yes. Discrimination on the basis of race is prohibited by a number of federal and state laws, as well as under several provisions of the United States Constitution and the vast majority of state constitutions.

2. **Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?**

   Response: Claims for unenumerated rights are typically brought under the Due Process Clauses of the Fifth and Fourteenth Amendments. In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court held that the Due Process Clauses protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and are "implicit in the concept of ordered liberty." Because these issues could come before me if I am so fortunate as to be confirmed, I am precluded by the Code of Conduct for United States Judges from giving any view as to what such rights might or might not be.

3. **How would you characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.**

   Response: My judicial philosophy would be to approach each case with an open mind and treat all litigants with the utmost respect. I would carefully read the briefs, study the facts and record, listen to oral arguments, and apply Supreme Court and Fourth Circuit precedent. This is the judicial philosophy to which the judges that I served as a judicial law clerk adhered, and it is the philosophy I would apply if I am so fortunate as to be confirmed as a judge.

   As a lower court judge, my role would be very different from that of a Supreme Court justice. I cannot say that any particular justice's philosophy is analogous to my own.

4. **Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an "originalist"?**

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

   If I am so fortunate as to be confirmed, I would faithfully apply methods of constitutional and statutory interpretation based on Supreme Court and Fourth Circuit precedent as I would be bound to do. In certain cases, the Supreme Court has evaluated original public meaning and considered the Framers' original intent of a constitutional provision at issue. *See United States v. Jones*, 565 U.S. 400, 404-05, 411 (2012); *District of Columbia v. Heller*, 554 U.S. 570, 576-600 (2008); *Crawford v. Washington*, 541 U.S. 36, 53-61 (2004).

5. **Please briefly describe the interpretive method often referred to as living constitutionalism. Would you characterize yourself as a 'living constitutionalist'?**

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

If I am so fortunate as to be confirmed, I would faithfully apply methods of constitutional and statutory interpretation based on Supreme Court and Fourth Circuit precedent.

6. **If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?**

Response: If I am so fortunate as to be confirmed, I would faithfully apply Supreme Court and Fourth Circuit precedent to the cases before me. If the meaning of the relevant text was unambiguous, I would be bound by that meaning under Supreme Court precedent. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022); *Florida v. Jardines*, 569 U.S. 1 (2013); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

7. **Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?**

Response: If I am so fortunate as to be confirmed, I would faithfully apply Supreme Court and Fourth Circuit precedent to every case before me. The Supreme Court explained in *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) that a textual analysis of the Constitution should be "guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." (internal quotation marks omitted). When determining the meaning of statutory text, the Court has explained that a court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

8. **Do you believe the meaning of the Constitution changes over time absent changes through the Article V amendment process?**

Response: The Constitution is an enduring document and, "[a]lthough its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022). Judges are bound to apply relevant Supreme Court and circuit court precedent to the facts of a case. Article V details the amendment process required to change the Constitution.

9. Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?

Response: *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent.

a. Was it correctly decided?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me. If I am so fortunate as to be confirmed, I would faithfully follow *Dobbs* as binding precedent.

10. Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?

Response: *New York Rifle & Pistol Ass'n v. Bruen* is binding Supreme Court precedent.

a. Was it correctly decided?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me. If I am so fortunate as to be confirmed, I would faithfully follow *Bruen* as binding precedent.

11. Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?

Response: *Brown v. Board of Education* is binding Supreme Court precedent.

a. Was it correctly decided?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me. There are, however, very limited exceptions to this general rule. As prior nominees have noted, the Supreme Court's decision in *Brown* is unlikely to be revisited or challenged, and thus qualifies as such an exception. As such, I believe it is appropriate for me to state that I do think *Brown* was correctly decided.

12. Is the Supreme Court's ruling in *Students for Fair Admissions v. Harvard* settled law?

Response: *Students for Fair Admissions v. Harvard* is binding Supreme Court precedent.

a. Was it correctly decided?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me. If I am so fortunate as to be confirmed, I would faithfully follow *Students for Fair Admissions* as binding precedent.

13. Is the Supreme Court's ruling in *Gibbons v. Ogden* settled law?

Response: *Gibbons v. Ogden* is binding Supreme Court precedent.

a. Was it correctly decided?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from providing a view on a Supreme Court case that involves issues that could come before me. If I am so fortunate as to be confirmed, I would faithfully follow *Gibbons v. Ogden* as binding precedent.

14. What sort of offenses trigger a presumption in favor of pretrial detention in the federal criminal system?

Response: The Bail Reform Act, 18 U.S.C. § 3142(e)(2) establishes a rebuttable presumption for certain drug offenses carrying a possible penalty of more than ten years, certain violent crimes or crimes involving acts of terrorism, and certain crimes with minor victims.

a. What are the policy rationales underlying such a presumption?

Response: The Bail Reform Act asks that judicial officers weigh the risks of flight and danger to the community in determining whether to order pre-trial release or detention. 18 U.S.C. § 3142(e)(2); *cf.* 18 U.S.C. § 3142(e)(3). The Supreme Court has noted "Congress specifically found that these individuals [who have been arrested for a specific category of extremely serious offenses] are far more likely to be responsible for dangerous acts in the community after arrest." *United States v. Salerno*, 481 U.S. 739, 750 (1987), *citing* S. Rep. No. 98-225, at 6-7. I am not aware of the Fourth Circuit addressing the policy reasons underlying the presumption.

15. Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be a religious organization like Little Sisters of the Poor or small businesses operated by observant owners?

Response: Federal statutes, case law, and the Constitution limit what the government may impose or require of private institutions. The Religious Freedom Restoration Act (RFRA), for example, forbids the federal government from "substantially burden[ing] a person's exercise of religion," even if that burden arises from a generally applicable rule, unless it is the "least restrictive means" of furthering "a compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b). The Supreme Court has held that RFRA's protections extend to religious institutions, *see Little Sisters of the Poor Saints Peter and*

Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020), as well as to small businesses that are run by observant owners, *see Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014). Additionally, the "ministerial exception," rooted in the First Amendment, bars certain employment discrimination claims against religious institutions. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012).

If I am so fortunate as to be confirmed, I would faithfully apply the Constitution and all relevant precedents to the facts of the cases before me.

16. Is it ever permissible for the government to discriminate against religious organizations or religious people?

Response: The First Amendment's Free Exercise Clause dictates that "Congress shall make no law . . . prohibiting the free exercise" of religion. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1731 (2018), the Supreme Court held that, if the government is to respect this constitutional guarantee of free exercise, it "cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." Other cases have echoed this restriction. In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876-77 (2021), the Supreme Court held that the government "fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." Similarly, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court stated that "a law targeting religious beliefs as such is never permissible," and that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." 508 U.S. 520, 533, 546 (1993).

17. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

Response: The Supreme Court, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), determined that the religious entity-applicants met the requirements for a preliminary injunction against the government regulations being challenged. The Court found that the applicants were likely to prevail on the merits of their First Amendment claims and had made a strong showing that the challenged regulations were not neutral to religion and "single out houses of worship for especially harsh treatment." *Id*. at 66. Under a strict scrutiny analysis, the Court held the challenged regulations were not narrowly tailored to achieve the compelling interest of stemming the spread of COVID-19. *Id.* at 67. The Court further held that the applicants would be irreparably harmed without the injunction, as "[t]he loss of First Amendment freedoms, for even minimal

periods of time, unquestionably constitutes irreparable injury." *Id.* (quotation marks omitted). Finally, the Court concluded that there was no showing that granting the injunction would be harmful to the public. *Id*. at 68.

18. Please explain the U.S. Supreme Court's holding and rationale in *Tandon v. Newsom*.

Response: In *Tandon v. Newsom*, 593 U.S. 61 (2021), the Supreme Court held that the challenged "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Id*. at 62. It also determined that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* The Court reasoned that "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather." *Id*. In addition, it ruled that to withstand strict scrutiny, the government must "show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Id*. at 63.

The Supreme Court further stated that a case is not necessarily moot when the government withdraws or modifies a COVID restriction during litigation. *Id*. "[S]o long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Id*. (citation omitted). In applying these legal principles, the Court concluded that the applicants were entitled to a preliminary injunction of the State's COVID restrictions that treat some comparable secular activities more favorably than at-home religious exercise. *Id*. at 63-64. The Court noted that the lower court did not conclude that the comparable secular activities pose a lesser risk of COVID transmission than the applicants' proposed religious exercise at home. *Id*. It stated: "The State cannot 'assume the worst when people go to worship but assume the best when people go to work.'" *Id.* at 64 (citation omitted). The Court further concluded that a change in the State's policy, which still allowed the challenged prohibitions to remain in effect for a period of time and left the door open for reinstatement of the restrictions, did not render the case moot. *Id*.

19. Do Americans have the right to their religious beliefs outside the walls of their houses of worship and homes?

Response: Yes. In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court held a governmental entity impermissibly burdened sincere religious expression with a policy prohibiting a football coach from praying on the field in public.

20. Explain your understanding of the U.S. Supreme Court's holding in *Masterpiece Cakeshop v. Colorado Civil Rights Commission.*

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that the government's application of a facially neutral public accommodations law violated the Free Exercise Clause where the record from commission meetings showed a religious animus against the sincerely held religious beliefs of the cakeshop owner.

21. Under existing doctrine, are an individual's religious beliefs protected if they are contrary to the teaching of the faith tradition to which they belong?

Response: An individual's religious beliefs are protected if they are sincerely held. A sincere religious belief need not be consistent with any particular faith tradition. *See, e.g.*, *Frazee v. Ill. Dep't of Emp. Sec*., 489 U.S. 829, 834 (1989). ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."). Courts do not determine whether religious beliefs are mistaken or insubstantial; they simply determine whether they are honest convictions. *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 725 (2014).

a. Are there unlimited interpretations of religious and/or church doctrine that can be legally recognized by courts?

Response: Individuals with sincere religious beliefs are entitled to invoke the Free Exercise Clause if their religion prevents or requires certain action, without judicial evaluation of the validity of their interpretations. *Frazee v. Ill. Dep't of Emp. Sec*., 489 U.S. 829 (1989). If I were so fortunate as to be confirmed to the Fourth Circuit and a case came before me that presented this issue, I would carefully research and faithfully follow applicable Supreme Court and Fourth Circuit precedent.

b. Can courts decide that anything could constitute an acceptable "view" or "interpretation" of religious and/or church doctrine?

Response: Individuals with sincere religious beliefs are entitled to invoke the Free Exercise Clause if their religion prevents or requires certain action, without judicial evaluation of the validity of their interpretations. *Frazee v. Illinois Dep't of Employment Sec*., 489 U.S. 829 (1989). If I were so fortunate as to be confirmed to the Fourth Circuit and a case came before me that presented this issue, I would carefully research and faithfully follow applicable Supreme Court and Fourth Circuit precedent.

c. Is it the official position of the Catholic Church that abortion is acceptable and morally righteous?

Response: As a judicial nominee, I do not believe it would be appropriate for me to comment on the official position of a religion.

22. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court reaffirmed that, under the "ministerial exception," the First Amendment protects religious institutions' ability to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id*. at 2055 (quotation marks omitted). The Supreme Court reasoned that under the "ministerial exception," "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions," and ruled that the school's employment decisions were subject to that exception. *Id.* at 2060. The Court based its decision on "abundant record evidence that [the teachers] performed vital religious duties," such as providing religious instruction. *Id*. at 2066. That the teachers' "titles did not include the term 'minister'" was not dispositive because "their core responsibilities as teachers of religion were essentially the same." *Id*.

23. In *Fulton v. City of Philadelphia*, the U.S. Supreme Court was asked to decide whether Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment. Explain the Court's holding in the case.

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that a city policy refusing to contract with state-licensed foster care agencies affiliated with religious organizations that did not certify same-sex couples as foster parents was unconstitutional because it burdened the agencies' free exercise of religion by endorsing policies inconsistent with their religious beliefs. The Supreme Court determined that, because the policy granted individual exemptions at the sole discretion of the Commissioner, the City's foster care program policies were not generally applicable under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990), and therefore subject to strict scrutiny. The Supreme Court held that, because Philadelphia could not demonstrate that it had a compelling interest in denying an exception to the religious organization, the policy could not pass muster under strict scrutiny and violated the Free Exercise Clause.

24. In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.

Response: *Carson v. Makin*, 596 U.S. 767 (2022), concerned a tuition assistance program operated by the State of Maine for individuals living in areas that do not operate public schools. Maine's program stipulated that the funds could only be used for "non-sectarian"

schools. The Supreme Court held that this limitation violated the Free Exercise Clause. First, the Court reasoned that individuals were prohibited from using funds for the school of their choosing only based on the religious character of the school. And second, the Court found that Maine failed to satisfy strict scrutiny for justifying the funding restriction because there was no compelling interest in preventing the funds from being used at religious entities more broadly than is required by the Establishment Clause.

25. Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District.*

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court held that a public school district violated the Free Speech and Free Exercise Clauses of the First Amendment by preventing a football coach from praying on the field after a game. The Court ruled that the school district's policy was not neutral and generally applicable, and that strict scrutiny was not satisfied because there was no compelling interest. The Court concluded that the coach's prayer was protected, private speech and, furthermore, did not implicate Establishment Clause concerns.

26. Explain your understanding of Justice Gorsuch's concurrence in the U.S. Supreme Court's decision to grant certiorari and vacate the lower court's decision in *Mast v. Fillmore County.*

Response: Justice Gorsuch's concurrence in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), clarified that "compelling interests" should not be generally defined in determining when to apply strict scrutiny. Justice Gorsuch put forth some additional factors that administrative authorities should consider when enforcing certain regulations requiring Amish houses to have septic systems to dispose of used water. Justice Gorsuch determined that the Religious Land Use and Institutionalized Persons Act had been inflexibly applied to the disputes between the County and its Amish residents that had been ongoing for years. He explained that courts had erred by "treating the County's general interest in sanitation regulations as 'compelling' without reference to the specific application of those rules to this community." *Id*. at 2432 (Gorsuch, J., concurring) (emphasis omitted). He also explained that the courts failed to consider exceptions available for other groups, such as owners of rustic cabins and campers. Thus, Justice Gorsuch concluded that the County had not demonstrated why "the same flexibility" had not been "extended to the Amish." *Id*.

27. Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?

Response: As a judicial nominee, I am precluded by the Code of Conduct for United States Judges from opining as to how I might apply any statute that could come before me.

28. Would it be appropriate for the court to provide its employees trainings which include the following:

a. One race or sex is inherently superior to another race or sex;
b. An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;
c. An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or
d. Meritocracy or related values such as work ethic are racist or sexist?

Response: No.

29. Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?

Response: Yes.

30. Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?

Response: Yes.

31. Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?

Response: If I am so fortunate as to be confirmed, I would evaluate any challenges to Executive Branch appointments under the relevant law and binding precedent from the Supreme Court and Fourth Circuit. As a judicial nominee, the Code of Conduct for United States Judges precludes me from providing a view on issues that could come before me.

32. If a program or policy has a racially disparate outcome, is this evidence of either purposeful or subconscious racial discrimination?

Response: The Supreme Court has identified some circumstances where a program or policy having a racially disparate impact can be used as evidence of illegal discrimination. *See, e.g., Ricci v. DeStefano*, 557 U.S. 557, 577-78 (2009). If I am so fortunate as to be confirmed, I would faithfully follow binding precedent from the Supreme Court and the Fourth Circuit.

33. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.

Response: The question of the Court's composition is a policy question left to the legislative branch. It would be inappropriate for me as a judicial nominee to comment on that issue. Whatever the composition of the Court, if I am so fortunate as to be confirmed, I would faithfully follow binding precedent of the Court.

34. In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?

Response: No.

35. What do you understand to be the original public meaning of the Second Amendment?

Response: The Supreme Court has held that the Second Amendment protects a personal right to keep and bear arms in the home and in public, and that the state cannot regulate or restrict the right in a manner inconsistent with the Nation's historical tradition of doing so. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008). If I am so fortunate as to be confirmed, I would faithfully follow binding precedent of the Court, including with respect to the Second Amendment.

36. What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?

Response: As stated in my response to Question 35, the state may not take action to regulate or restrict Second Amendment rights in a manner that is inconsistent with the "Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022). If I am so fortunate as to be confirmed, I would faithfully follow binding precedent of the Court, including with respect to the Second Amendment.

37. Is the ability to own a firearm a personal civil right?

Response: The right to bear arms is a personal right under the Second Amendment incorporated and applicable to the States under the Due Process Clause. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The Supreme Court also recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the ability to own a firearm is a personal right that is not dependent upon service in a militia.

38. Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the Constitution?

Response: No. "The constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of

Rights guarantees." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 70 (2022) (internal quotation marks omitted).

39. Does the right to own a firearm receive less protection than the right to vote under the Constitution?

Response: No. Please see my response to Question 38.

40. Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.

Response: Under Article II of the Constitution, the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The Executive Branch generally has "absolute discretion" to decide whether to initiate civil or criminal enforcement proceedings. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *United States v. Nixon*, 418 U.S. 683, 693 (1974). If I am so fortunate as to be confirmed, and this issue were to arise, I would faithfully apply binding Supreme Court and Fourth Circuit precedent.

41. Explain your understanding of what distinguishes an act of mere 'prosecutorial discretion' from that of a substantive administrative rule change.

Response: "Prosecutorial discretion" is "[a] prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." *Black's Law Dictionary* (11th ed. 2019). An "administrative rule" is "[a]n officially promulgated agency regulation that has the force of law." *Id*.

42. Does the President have the authority to abolish the death penalty?

Response: No. The federal death penalty is codified in the United States Code at 18 U.S.C. § 3591. The President does not have the authority to abolish a statute.

43. Explain the U.S. Supreme Court's holding on the application to vacate stay in *Alabama Association of Realtors v. HHS*.

Response: In *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court held that the Centers for Disease Control (CDC) could not promulgate a nationwide moratorium on evictions to protect tenants from the spread of COVID-19. The Court concluded that petitioners were likely to succeed on the merits of their claim because Congress would otherwise have spoken "clearly when authorizing an agency to exercise powers of vast economic and political significance" if it had intended to authorize such CDC action. *Id*. at 2489 (internal quotation marks omitted).

44. Is it appropriate for a prosecutor to publicly announce that they are going to prosecute a member of the community before they even start an investigation as to that person's conduct?

Response: As a judicial nominee, I am precluded by the Code of Conduct for United States Judges from commenting on a hypothetical that could mirror a question or fact pattern likely to come before me.

45. Did you give a presentation in 2020 that categorized Senate Republicans as ignoring or belittling women —besides Christine Blasey Ford— that accused Justice Brett Kavanaugh of misconduct?

Response: I delivered the referenced remarks in my capacity as General Counsel of the Service Employees International Union. As I testified during the hearing before this Committee, I believe Justice Kavanaugh and all the Justices of the Supreme Court are legitimately confirmed, and I would faithfully apply precedent of the Supreme Court regardless of the Justice who penned the ruling.

46. Do you believe Mindy Sturge made credible sexual harassment accusations against Dave Regan?

Response: In November 2018, a letter from Mindy Sturge, a former staff person at an SEIU local union affiliate SEIU-UHW, was forwarded to my attention. The letter from Ms. Sturge to SEIU Executive Vice President Leslie Frane did not allege that Mr. Regan had engaged in sexual harassment. Ms. Sturge's letter said she had reported sexual harassment by her supervisor (not Mr. Regan) to SEIU-UHW, that SEIU-UHW had investigated the report, and that SEIU-UHW had fired the alleged harassing supervisor. Ms. Sturge's letter further made clear that she had already filed a civil lawsuit against the local union, and that the matter was being handled through a civil litigation process.

In my letter responding to Ms. Sturge, which I sent in my capacity as General Counsel of SEIU, I repeatedly thanked her for sharing her concerns about her experience as a local union staff person and made clear that the issues she had raised are important. I also explained in my response that "because each local of SEIU employs its own staff and sets its own personnel policies and protocols the International Union does not have a direct role in investigating allegations or concerns that may arise in local unions regarding personnel matters." To be clear, I had no discretion to initiate an investigation of personnel issues within an autonomous local union affiliate. In my letter to Ms. Sturge, I encouraged her to continue to utilize the processes that she had already initiated. It is my understanding from the public record that the matter has now been settled. I had no role in the litigation or settlement of that matter.

I categorically condemn sexual harassment. As I testified during the hearing before this Committee, I have dedicated my career to representing women and families. Before attending law school, I directed a national organization in Israel which was dedicated to fighting domestic violence and sexual assault against women. It was in that capacity that

I first came to meet attorneys, and I saw the power that the law can bring to protect those who are not always able to protect themselves. I was inspired by that work to apply to law school. Through my advocacy I have always worked to ensure safety and dignity of all workers in the workplace, and that advocacy has continued in my various roles as counsel to SEIU, an international union with two million members.

I am precluded from answering specific factual questions about any actions I may have taken as counsel to SEIU by my duty of confidentiality to my client. *see* Md. R. Att'y 19-301.6; D.C. R. Prof'l Conduct 1.6. What I can say, however, is that SEIU policy prohibits sexual harassment. I can also state unequivocally that I have taken seriously any allegation of sexual harassment I have ever received and have faithfully discharged my legal duties.

a. What steps did you take to investigate Ms. Sturge's claims?

Response: Please see my response to Question 46.

b. Are you aware that other women have likewise accused Mr. Regan of sexual harassment?

Response: I am aware that the public record reflects that women have accused Mr. Regan of sexual harassment. As far as I am aware, however, there has never been a legal finding that he did so. As I have stated in response to previous questions, SEIU policy prohibits sexual harassment. I can also state unequivocally that I have taken seriously any allegation of sexual harassment I have ever received and have faithfully discharged my legal duties.

c. Did you use union dues to defend Mr. Regan?

Response: No.

d. If given the opportunity to address the matter again, would you still tell Ms. Sturge to direct her sexual harassment complaint to her alleged harasser for adjudication?

Response: Please see my response to Question 46. I did not tell Ms. Sturge to direct her sexual harassment complaint to her alleged harasser for adjudication.

e. What kind of message does it send to women that Mr. Regan remains President of the SEIU-UHW?

Response: I categorically condemn sexual harassment and sex-based discrimination in all forms. As I testified during the hearing before this Committee, I have dedicated my career to representing women and families, and I take every allegation of sexual harassment seriously.

As I testified during the hearing before this Committee, local union affiliates of SEIU are autonomous labor unions. The leaders of SEIU-UHW, including the local union president, are elected by the local union's members in direct elections. As I also testified during the hearing, each local union has its own legal counsel and its own constitution and governing body. Local unions are responsible for management and supervision of their own budget and personnel, pursue their own initiatives, and directly represent their own members. In fact, the international union SEIU is precluded, as a general matter, from intervening in local affiliates' operations and can only become involved in very specific circumstances. *See* 29 U.S.C. §§ 461–464.

f. Will you demand that Dave Regan resign from SEIU-UHW?

Response: Please see my response to Question 46(e).

47. Mike Elk, the reporter who broke the Mindy Sturge story, claims that the newspaper *The Guardian* was initially interested in publishing the piece. However, despite the efforts of Dominic Rushe (one of *The Guardian's* editors) to help Mr. Elk publish the piece, *The Guardian's* legal team ultimately "killed" the story "under a series of legal threats from SEIU."

a. What legal threats is Mr. Elk describing?

Response: I have no knowledge of any legal threats from SEIU against *The Guardian.*

b. Did you, your staff, outside counsel, or any SEIU resources play a part in having Mr. Elk de-platformed?

Please see my response to Question 47(a).

48. Did you disclose all relevant documents, records, and communications to the Committee?

Response: In response to the Senate Judiciary Questionnaire, I produced to this Committee approximately 950 pages, including over 150 separate documents. As I stated responding to questions in the Questionnaire, I searched my files and electronic databases in an effort to identify all responsive materials. I identified all responsive materials I was able to find but there may have been documents, records, or communications I inadvertently missed. I subsequently disclosed to the Committee all relevant documents, records, and communications that were later brought to my attention as having been missed and responsive.

a. Did you disclose your candidacy for "Hatikvah" in the 2020 World Zionist Congress elections?

Response: I was never a candidate for Hatikvah. As I disclosed to the Committee, in 2020 I was included on a list of individuals called the "Hatikvah slate" that was

brought together for the purpose of running for seats on the World Zionist Congress (WZC). The WZC is an international non-governmental organization that makes decisions regarding institutions which allocate charitable funds to support Israel and Jewish communities throughout the world.

In response to Question 12(e) of the Committee Questionnaire, I included an article entitled "Two True Allies of Israel," dated February 16, 2020. The article describes my participation in the Hatikvah slate. Additionally, in a letter to the Chair and Ranking Member of the Committee dated December 12, 2023, I supplied a document containing the full list of individuals on the 2020 Hatikvah slate.

b. Did you disclose a 2020 letter you signed organized by "Americans for Peace Now" opposing the Israeli annexation of the West Bank?

Response: Yes. In a letter to the Chair and Ranking Member of the Committee dated December 12, 2023, I disclosed a public letter that was signed by a number of individuals including myself. The letter had been organized by Americans for Peace Now. As I noted in response to Question 48, to respond to the Committee questionnaire, I searched my files and electronic databases in an effort to respond to all material responsive to the questions. I identified all responsive materials I was able to find, but there may have been documents I missed inadvertently. I subsequently disclosed to the Committee all relevant and responsive documents that were brought to my attention.

c. Did you disclose 2006 interview with "AlterNet"? In this interview, you criticized the planned Catholic community of Ave Maria in Florida.

Response: Yes. I disclosed a 2006 article from Alternet in a letter to the Chair and Ranking Member of the Committee dated December 12, 2023. In the article, I am quoted discussing Supreme Court precedent regarding the obligations of "company towns" to comply with constitutional requirements. I did not criticize the planned Catholic community of Ave Maria. As I noted in response to Question 48, to respond to the Committee questionnaire, I searched my files and electronic databases in an effort to respond to all material responsive to the questions. I identified all responsive materials I was able to find, but there may have been documents I missed inadvertently. I subsequently disclosed to the Committee all relevant and responsive documents that were brought to my attention.

d. If you did not disclose these documents, why did you fail to do so?

Response: Please see my response to Questions 48, 48(a), 48(b) and 48(c). I disclosed these documents.

e. Under penalty of perjury, are there other documents, records, or communications you did not turn over to the Committee?

Response: As I indicated in my Senate Judiciary Questionnaire, I searched my files and electronic databases in an effort to identify all documents, records, and communications responsive to the questions. I subsequently disclosed all relevant documents, records, and communications that were asked of me to the Committee, but there may have been documents, records, and communications I missed inadvertently.

f. Who helped you prepare for this hearing regarding documents to submit to the Committee? Please be specific.

Response: I had general discussions with counsel from the Office of Legal Policy about the types of documents that are responsive to the Committee's questionnaire. Thereafter, I searched my files and electronic databases in an effort to identify all documents responsive to the questions. I subsequently disclosed all responsive documents to the Committee, but there may have been some documents I missed inadvertently.

49. In 2014 you identified Margaret Sanger as one of your childhood heroes.

a. You made the statement a decade ago, so is she still your hero?

Response: On October 26, 2014, I spoke at an award ceremony for Jews United for Justice where I described Margaret Sanger as one of my childhood Jewish heroes. I would not describe Margaret Sanger as one of my heroes today.

50. Your name is on an SEIU brief in *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Parson*. This case concerned whether Missouri's prohibition of abortions performed solely because of Down Syndrome was per se invalid under *Planned Parenthood v. Casey* and whether Missouri's restrictions on abortions performed at or after eight weeks, fourteen weeks, eighteen weeks, and twenty weeks of gestational age were per se invalid under existing precedent.

a. Do you believe that aborting a child solely because it has Down Syndrome is moral?

Response: I am a mother and a grandmother, and these roles bring the greatest joys to my life. The referenced brief was filed by my client, the SEIU, at a time when the Supreme Court's applicable precedents in *Casey* set the standard under which courts evaluated the constitutionality of restrictions on abortion. As a judicial nominee, I am precluded by the Code of Conduct for United States Judges from providing any personal views I might have on issues that could come before me if I am so fortunate as to be confirmed. If confirmed, however, I would not apply the *Casey* standard as the Supreme Court overturned that decision in *Dobbs*.

b. Do you oppose the death penalty as a policy matter?

Response: The federal death penalty is codified in the United States Code at 18 U.S.C. § 3591. If I am confirmed, I would faithfully follow relevant Supreme Court and Fourth Circuit precedent in ruling on death penalty cases.

51. Your brief in the amici interest section explains, "SEIU and its members know that having access to safe, affordable reproductive healthcare, including abortion care, advances women's health, autonomy, and economic security."

a. Is it the position of the SEIU that abortions "advance women's economic security"?

Response: I filed the quoted brief in my capacity as General Counsel of the SEIU. It represents the position of SEIU in that case.

52. In 2020, as a working group member of Clean Slate for Worker Power, a project of Harvard Law School's Labor and Worklife Program, you helped prepare "Clean Slate for Worker Power: Building a Just Economy and Democracy."

a. One recommendation in there was that prisoners should have bargaining rights. Do you think prisoners should be able to strike?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from giving an opinion on a policy matter. I was one of more than 70 working group members who engaged with the referenced project. As stated in the referenced report's executive summary, working group members are not responsible for the particular recommendations in the report. As I testified before this Committee, I have not advocated for the referenced recommendation. I did not review the recommendations of the report prior to its publication, nor was I asked to do so.

b. Do you disagree with any of recommendations in the report?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from opining on policy matters.

c. If you disagree, please explain your reasoning on each issue.

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from opining on policy matters.

Senator John Kennedy
Questions for the Record

Nicole G. Berner

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

   Response: The federal death penalty is codified in the United States Code at 18 U.S.C. § 3591. If I am so fortunate as to be confirmed, I would faithfully apply this law and relevant precedent from the Supreme Court and the Fourth Circuit to the facts of every case to reach a well-reasoned decision.

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

   Response: Yes.

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

   Response: Yes.

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

   Response: My judicial philosophy would be to approach each case with an open mind and treat all litigants with the utmost respect. I would carefully read the briefs, study the facts and record, listen carefully to oral arguments, and apply Supreme Court and Fourth Circuit precedent. This is the judicial philosophy to which the judges that I served as a judicial law clerk adhered, and it is the philosophy I would apply if I am so fortunate as to be confirmed as a judge.

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

   Response: Yes. If I am so fortunate as to be confirmed, I would be bound to apply methods of constitutional and statutory interpretation based on Supreme Court and Fourth Circuit precedent. The Supreme Court has evaluated original public meaning and considered the Framers' original intent of a constitutional provision at issue. *See United States v. Jones*, 565 U.S. 400, 404-05, 411 (2012); *District of Columbia v. Heller*, 554 U.S. 570, 576-600 (2008); *Crawford v. Washington*, 541 U.S. 36, 53-61 (2004).

6. 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 I am so fortunate as to be confirmed and I am called on to resolve a constitutional question of first impression with no applicable precedents from either the U.S. Supreme Court or the United States Court of Appeals for the Fourth Circuit, I would look first to the text in question, and if necessary interpretive methodologies the Supreme Court and the Fourth Circuit have employed in interpreting the relevant provision, analogous provisions, or relevant canons of construction. If the relevant text was unambiguous in its meaning, I would be bound by that meaning in many contexts under Supreme Court precedent. *See, e.g., New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022). Where the Supreme Court or the Fourth Circuit has set forth a method of interpretation of a provision, such as looking to the original public meaning of the Second Amendment and the Confrontation Clause, I would faithfully apply that interpretative method to the case before me. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). I would also examine whether other Circuit Courts had addressed the question.

7. Is textualism a legitimate method of statutory interpretation?

Response: Yes. If I am so fortunate as to be confirmed, I will be bound to apply methods of constitutional and statutory interpretation utilized in applicable Supreme Court and Fourth Circuit precedent. The Supreme Court has held that the text should be the starting point to analyzing questions of constitutional or statutory interpretation. *See, e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (interpretation of Article III of the Constitution); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738-39 (2020) (interpreting text of Title VII); *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (interpretation of Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (interpretation of Sixth Amendment).

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

Response: Following precedent from the Supreme Court and the Fourth Circuit, my first step in interpreting a statute would be to look at the text. For words not defined in the statute, I would look to the plain meaning of the words, considered in their context in the statute as a whole. If the language is clear, then the inquiry would end there. If the plain meaning was not sufficient to complete the analysis, I would then turn to other tools of statutory interpretation, such as textual analysis, structural analysis, and the canons of construction.

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

Response: No.

10. Please summarize Part II(A) of the U.S. Supreme Court's decision in *Brown v. Davenport*, 596 U.S. 118 (2022).

Response: Part II(A) of *Brown v. Davenport*, 596 U.S. 118 (2022), provides an overview of the common law approach to habeas corpus petitions, especially the writ of habeas corpus *ad subjiciendum*. The Court emphasized that while the writ was used to ensure adequate process, there were limits to the writ, such as the inability to challenge a final judgment of conviction issued by a court of competent jurisdiction. *Id.* The Court wrote that the common law approach was applied in the United States, but federal habeas practice began to shift following *Brown v. Allen*, 344 U.S. 443 (1953), which found that a state-court judgment is not *res judicata* in federal habeas proceedings with respect to a petitioner's federal constitutional claims. As a result, the number of federal habeas cases filed grew significantly in the years following *Brown v. Allen*.

11. Please summarize Part IV of the U.S. Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023).

Response: In Part IV of *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023), the Supreme Court found that strict scrutiny, which applied to these admissions systems, was not satisfied because the justification for both programs—the educational benefits of diversity—was not sufficiently measurable to permit judicial review. The Court reasoned that the connection between race-conscious admissions and achieving the educational benefits of diversity articulated by the schools was not coherent enough to survive strict scrutiny. Thus, the Court ruled that the programs violated the Constitution and Title VI.

12. Please summarize Part III of the U.S. Supreme Court's decision in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

Response: In Part III of *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), the Supreme Court found that Colorado's anti-discrimination law, that would require a website designer to provide services for same-sex weddings with which the designer disagreed for religious reasons, constituted compelled speech prohibited by the First Amendment.

13. Please summarize Part II of the U.S. Supreme Court's decision in *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021).

Response: In Part II of the decision in *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021), the Supreme Court held under the doctrine of sovereign immunity that the state-court judge and state-court clerk should be dismissed from the lawsuit. The Court found that the exception provided in *Ex Parte Young* did not apply to state-court judges and state-court clerks. Further, the Court found that the Texas Attorney General should be dismissed from the lawsuit because the petitioners did not identify any enforcement authority that he possessed in connection with the law that a federal court may enjoin him from exercising. Additionally, the Court found that the executive licensing official defendants should not be

dismissed from the lawsuit because sovereign immunity did not bar a pre-enforcement challenge to the law against them.

14. Please summarize Part II of the U.S. Supreme Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

Response: In *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022), the Supreme Court held "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." This means the government may not restrict Second Amendment rights in a way that is inconsistent with the "Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id*. at 24.

15. Please summarize Part II of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* (2022).

Response: In Part II of *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 250 (2022), the Supreme Court provided an historical analysis of *Roe v. Wade*, 410 U.S. 113 (1973), finding that the right to abortion is not "deeply rooted in the Nation's history and traditions." The Court also concluded that the right to abortion is not a part of a broader entrenched right and lacks a sound basis in precedent. 597 U.S. at 256.

16. Please summarize Part III of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

Response: In Part III of *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), the Supreme Court considered the doctrine of stare decisis. The Court analyzed five factors that weighed in favor of overturning *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992): "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance." 597 U.S. at 268.

17. Please summarize Part III of the U.S. Supreme Court's decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

Response: In Part III of *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the Supreme Court held that Congress did not give the Environmental Protection Agency the authority in Section 111(d) of the Clean Air Act to adopt its own regulatory scheme by capping carbon dioxide emissions. Instead, the Court found that "decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." *Id*. at 2616.

18. Please describe the legal rule employed in *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021), and explain why the U.S. Supreme Court sided with the Petitioner.

Response: When cases are not obvious with regard to clearly established precedent for qualified immunity, a plaintiff must identify a case that put an officer on notice that their specific conduct was unlawful. Precedent involving similar facts can help prove that an officer was provided notice about that specific conduct. In *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021), the Supreme Court found that the cited precedent, *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000), was materially distinguishable and did not govern the facts of the case.

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

Response: Federal courts typically rely upon Rule 65 of the Federal Rules of Civil Procedure to issue an injunction. The Fourth Circuit has held that "[a] district court may issue a nationwide injunction so long as the court molds its decree to meet the exigencies of the particular case." *HIAS, Inc. v. Trump*, 985 F.3d 309, 326 (4th Cir. 2021) (internal quotation marks and alteration omitted). A nationwide injunction may be appropriate to grant "when the government relies on a 'categorical policy,' and when the facts would not require different relief for others similarly situated to the plaintiffs." *Id*. The Supreme Court has noted that "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) (internal citation omitted).

20. Is there ever a circumstance in which a circuit judge may seek to circumvent a U.S. Supreme Court decision?

Response: No.

21. If confirmed, please describe what role U.S. Supreme Court dicta would play in your decisions.

Response: My opinions would refer to holdings as binding precedent in my decisions, if I am so fortunate as to be confirmed as a judge. The Supreme Court has held that clearly established federal law includes only "the holdings, as opposed to the dicta, of th[e] Court's decisions." *White v. Woodall*, 572 U.S. 415, 419 (2014) (internal citations and quotations omitted).

22. To the best of your recollection, please list up to 10 cases in which you presented oral argument before a federal appellate court.

Response: I presented oral argument before a federal appellate court in *Planned Parenthood Cincinnati Region v. Taft*, 337 F. Supp. 2d 1040 (S.D. Ohio 2004) (Dlott, J.), *aff'd in part, vacated in part*, 444 F.3d 502 (6th Cir. 2006) (McKeague, Rogers & Moore, JJ.), and *Manor*

Care of Easton, PA., LLC v. NLRB, 661 F.3d 1139 (D.C. Cir. 2011) (Rogers, Williams, and Randolph, JJ). In addition to these cases, I served as either chief counsel or associate counsel in dozens of other cases in federal courts of appeals throughout the United States. I also served as counsel in more than three dozen cases before the Supreme Court of the United States, including several cases in which I was part of a litigation team but not listed as counsel of record.

23. When reviewing applications from persons seeking to serve as a law clerk in your chambers, what role if any would the race and/or sex of the applicants play in your consideration?

Response: If I am so fortunate as to be confirmed, I would hire the most qualified applicants based on their academic records, prior work performance, and sound judgment.

24. Please list all social-media accounts you have had during the past 10 years with Twitter/X, Facebook, Reddit, Instagram, Threads, TikTok, and LinkedIn and the approximate time periods during which you had the account. If the account has been deleted, please explain why and the approximate date of deletion.

Response: In advance of my nomination, after reviewing the Administrative Office of the U.S. Courts' guidance on social media use by judges, I decided that for privacy reasons I would no longer maintain a LinkedIn profile, a private Facebook account, a private Instagram account, or a TikTok account (on which I had never posted). Prior to deactivation of these accounts, I had submitted all information and documents required by the Senate Judiciary Committee's Questionnaire for Judicial Nominees.

25. On October 26, 2014, did you speak at an award ceremony for Jews United for Justice and describe eugenicist Margaret Sanger as one of your "heroes"?

Response: On October 26, 2014, I spoke at an award ceremony for Jews United for Justice where I described Margaret Sanger as one of my childhood Jewish heroes. I would not describe Margaret Sanger as one of my heroes today.

26. Please answer in one word. In February 2018, did you speak to the American Constitution Society with notes that say: "At its core, the right-to-work movement is deeply racist."

Response: I delivered the referenced remarks at an event organized by the American Constitution Society in February 2018 in my capacity as General Counsel of the Service Employees International Union (SEIU). My notes for these remarks include the statement quoted above but they make clear that I was discussing the history of the right-to-work movement. Following the statement quoted above, my notes go on to discuss the role of Vance Muse, one of the architects of the early right-to-work laws in the 1940's, and include Muse's statement that "[f]rom now on white women and white men will be forced into organization with black African apes whom they will have to call brother or lose their jobs."

As I testified during my hearing before this Committee, I do not believe individuals who support right-to-work laws today are racist.

27. Why should Senator Kennedy support your nomination?

Response: I have practiced law for more than 25 years, and, as General Counsel of SEIU, I have had the privilege of representing millions of working people, including over 1,000 working people in the State of Louisiana who are represented by SEIU. I began my legal career as a law clerk to two esteemed jurists who served on the federal Court of Appeals and the federal District Court, respectively, where I saw firsthand the importance of approaching every case with an open mind, deeply studying the record in the case, and faithfully applying the precedent to the facts without regard to personal opinions. That would be my commitment were I to be so fortunate as to be confirmed.

Questions from Senator Thom Tillis
for Nicole G. Berner nominee to be United States Circuit Judge for the Fourth Circuit

1. **At the December 13 hearing, you were asked about statements you made calling the right to work movement "racist." You responded that you were referring to the history and origin of early right to work laws. Both North Carolina and Virginia are in the 4th Circuit and have right to work laws dating back to 1947. Do you still believe these laws have "racist" origins?**

   Response: I delivered the referenced remarks at an event organized by the American Constitution Society in February 2018 in my capacity as General Counsel of the Service Employees International Union (SEIU). My notes for these remarks include the statement quoted above but they make clear that I was discussing the history of the right-to-work movement. Following the statement quoted above, my notes go on to discuss the role of Vance Muse, one of the architects of the early right-to-work laws in the 1940's, and include Muse's statement that "[f]rom now on white women and white men will be forced into organization with black African apes whom they will have to call brother or lose their jobs."

   As I testified during my hearing before this Committee, I do not believe individuals who support right-to-work laws today are racist.

2. **Given your past statements that right to work laws have "racist" origins will you commit to recusing yourself from any case involving right to work laws?**

   Response: I would make any recusal decision in an individual case by considering 28 U.S.C. § 455, the Code of Conduct for United States Judges, the Published Advisory Opinions issued by the Committee on Codes of Conduct, and any relevant judicial decisions defining conflicts of interest or the appearance of a conflict of interest.

3. **As counsel for the SEIU what work did you perform on *SEIU v. Knox* at the Supreme Court or in lower courts?**

   Response: None. My role at SEIU at the time did not include work on this matter.

4. **Did you work on amicus briefs or in any other fashion on *Friedrichs v. California Teachers Association* or *Janus v. AFSCME*?**

   Response: Yes.

5. **Summarize the Supreme Court's holding in *Janus v. AFSCME*.**

   Response: In *Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018), the Supreme Court held that the First Amendment bars the government from requiring a public employee to pay dues or fees to a union as a condition of employment.

6. **Given that *Janus v. AFSCME* created a national right to work for public sector employees and that you have made past statements that right to work laws were passed with "racist" motivations, will you commit to recusing yourself from any cases interpreting *Janus v. AFSCME*?**

   Response: As I testified during the hearing before this Committee, and as I explained in response to Question 1 above, the notes used for my remarks were referencing the historic underpinnings of the original right-to-work laws during the 1940's. I would make any recusal decision in an individual case by considering 28 U.S.C. § 455, the Code of Conduct for United States Judges, the Published Advisory Opinions issued by the Committee on Codes of Conduct, and any relevant judicial decisions defining conflicts of interest or the appearance of a conflict of interest.

7. **Summarize the Supreme Court's holding in *Pattern Makers' v. NLRB*.**

   Response: In *Pattern Makers' League of North America, AFL-CIO v. NLRB*, 473 U.S. 95 (1985), the Supreme Court considered the National Labor Relation Board's decision that, by fining union members who resigned during a strike and returned to work, a labor union committed an unfair labor practice in violation of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A). The Supreme Court held that the Board's decision reasonably interpreted the relevant provision of the National Labor Relations Act.

8. **Given the holding in *Pattern Makers'*, is it accurate to say that a North Carolina employee whose employer is under NLRA jurisdiction can resign union membership and stop dues deduction at any time?**

   Response: *Pattern Makers* upheld as reasonable the NLRB's determination that a union member can resign from the union during a strike without facing fines and other sanctions. Because this question poses a hypothetical beyond the holding of *Pattern Makers*, as a judicial nominee the Code of Conduct for United States Judges precludes me from providing a view on an application of *Pattern Makers* to different facts that could potentially come before me, should I be so fortunate as to be confirmed as a judge. If I am confirmed and a case came before me concerning the application of *Pattern Makers*, I would carefully read the briefs, study the facts and record, listen carefully to oral argument, and faithfully apply Supreme Court and Fourth Circuit Precedent.

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

   Response: The right to bear arms is a personal right under the Second Amendment that has been incorporated onto the States under the Due Process Clause. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The state cannot regulate or restrict the right in a manner inconsistent with the Nation's historical tradition of doing so. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008). If I am so fortunate as to be confirmed, I would faithfully follow precedent from the Supreme Court and the Fourth Circuit.

10. 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: If I am so fortunate as to be confirmed, I would evaluate qualified immunity cases by following Supreme Court and Fourth Circuit precedent. The Supreme Court has held that "qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation marks omitted).

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from giving an opinion on a policy matter. If I am so fortunate as to be confirmed, I would faithfully follow relevant Supreme Court and Fourth Circuit precedent on this subject.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from giving an opinion on a policy matter. If I am so fortunate as to be confirmed, I would faithfully follow relevant Supreme Court and Fourth Circuit precedent on this subject.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from giving an opinion on a policy matter. If I am so fortunate as to be confirmed, I would faithfully follow relevant Supreme Court and Fourth Circuit precedent on this subject. The Intellectual Property Clause in the Constitution empowers Congress to grant authors and inventors exclusive rights in their writings and discoveries. U.S. Const. Art. I, § 8.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of particular Supreme Court opinions, which are binding precedents that I would faithfully apply as a judge. I am, further, precluded from commenting on issues that could come before me. If I am so fortunate as to be confirmed, I would faithfully follow Supreme Court and Fourth Circuit precedent.