Senator Lindsey Graham, Ranking Member
Questions for the Record
Mr. Eric C. Schulte
Nominee to be United States District Judge for the District of South Dakota

1. **Are you a citizen of the United States?**

   Response: Yes.

2. **Are you currently, or have you ever been, a citizen of another country?**
   a. **If yes, list all countries of citizenship and dates of citizenship.**
   b. **If you are currently a citizen of a country besides the United States, do you have any plans to renounce your citizenship?**
      i. **If not, please explain why.**

   Response: No.

3. **Is it appropriate for a federal judge to consider an immutable characteristic of an attorney (such as race or sex) when deciding whether to grant oral argument? If yes, please describe in which circumstances such consideration would be appropriate.**

   Response: No. It is not appropriate for a judge to consider an immutable characteristic when deciding whether to grant oral argument.

4. **Is it appropriate for a federal judge to consider an immutable characteristic of an attorney (such as race or sex) when deciding whether to grant additional oral argument time? If yes, please describe in which circumstances such consideration would be appropriate.**

   Response: No. It is not appropriate for a judge to consider an immutable characteristic of an attorney when considering whether to grant additional oral argument time.

5. **Is it ever appropriate to consider foreign law in constitutional interpretation? If yes, please describe in which circumstances such consideration would be appropriate.**

   Response: No. It is not appropriate to consider foreign law when interpreting the U.S. Constitution.

6. **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. Judgments about the U.S. Constitution are not "value judgments." Judgments about the U.S. Constitution must be based on the text at issue and any binding precedent established by the Supreme Court. Judges should be fair and impartial when rendering decisions interpreting a statute or the U.S. Constitution and should not be making personal value judgments when doing so.

7. **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. I do not believe this is an appropriate approach for a federal judge to take. If confirmed, I will faithfully and fully apply binding precedent established by the Supreme Court.

8. **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.

9. **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.

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

    Response: A prisoner in custody or under sentence of a federal court may seek relief from a sentence of imprisonment in a variety of ways. The prisoner may file a direct appeal of his sentence. If the sentence was imposed by a federal magistrate judge for a misdemeanor, the prisoner may file an appeal to the district court. If the prisoner is appealing from a sentence imposed by a district court, an appeal may be made to the Eighth Circuit Court of Appeals. A prisoner may also file a motion collaterally attacking

the sentence for various reasons pursuant to 28 U.S.C. § 2255. A prisoner may also file a writ for habeas corpus pursuant to 28 U.S.C. § 2241. A prisoner may also potentially seek compassionate release in accordance with 18 U.S.C. § 3582(c). Finally, the prisoner may file a motion to reduce a sentence based on a range that was ultimately lowered by the Sentencing Commission in accordance with 28 U.S.C. § 944(o) and 28 U.S.C. § 3582(c)(2).

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

    Response: In *Students for Fair Admissions*, plaintiffs in separate cases sued Harvard College and the University of North Carolina alleging violations of Title VI of the 1964 Civil Rights Act and the Fourteenth Amendment to the U.S. Constitution due to the respective educational institutions' use of race-based admissions programs. The Supreme Court decided the separate cases against Harvard and the University of North Carolina jointly. Ultimately, the Court ruled that both educational institutions' admissions programs were unconstitutional and violated the Equal Protection Clause of the Fourteenth Amendment. The Court instructed "both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 230 (2023).

12. **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?**
    If yes, please list each job or role where you participated in hiring decisions.

    Response: Yes. I have served on my law firm's recruitment committee since approximately 2001. In this role, I have participated in numerous interviews with potential interns, associates, and lateral partner candidates.

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

    Response: No.

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

    Response: No.

15. **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?**

    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: No. I have never worked for an employer that gave a preference to a candidate for employment or other benefit on account of that candidate's race, ethnicity, religion, or sex.

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

    Response: Yes. *See Students for Fair Admission, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023); *Sherebrook Turf, Inc. v. Minnesota Dep't. Transp.*, 345 F.3d 964 (8th Cir. 2003).

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

    Response: In *303 Creative*, the plaintiff owned a limited liability company involved in graphic design and website services and sought to enter the wedding website business 600 U.S. 570 (2023). The plaintiff brought an action against the Colorado Civil Rights Commission and the Colorado Attorney General to enjoin them from compelling the plaintiff to create wedding websites that violated her religious belief that marriage is between one man and one woman. *Id*. The Colorado Anti-Discrimination Act prohibited, in part, "public accommodations" from denying "the full and equal enjoyment of goods and services based on … sexual orientation." *Id*. at 580-81. The Supreme Court ruled that Colorado law violated the plaintiff's free speech rights under the First Amendment, as it compelled speech the owner did not believe in. *Id*. at 603.

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

    Is this a correct statement of the law?

Response: Yes. *Barnette* has not been overruled and the passage quoted above was recently cited by the Supreme Court in *303 Creative LLC v. Elenis*, 600 U.S. 570, 585 (2023).

19. **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: "Content based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The Court has further instructed that speech is facially content based under the First Amendment if it "applies to particular speech because of the topic discussed or the idea or message expressed." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022). In order to determine whether a law is content based, a court must "consider whether a regulation of speech on its face draws distinctions based on the message the speaker conveys." *Reed*, 576 U.S. at 163. My review would therefore focus on whether the speech at issue is content neutral on its face. The Supreme Court has instructed that some "facial distinctions based on a message are obvious, defining regulated speech by a particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id*. If confirmed, I would review these factors and other applicable binding precedent from the Eighth Circuit Court of Appeals and Supreme Court in deciding whether speech is content based or content neutral.

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

Response: A true threat of violence is an historically "unprotected category of communication[]." *Counterman v. Colorado*, 600 U.S. 66, 74 (2023). The Supreme Court has instructed that "[t]he existence of a threat depends not on the mental state of the author, but on what the statement conveys to the person on the other end." *Id*. When the statement is understood as a true threat, all the harms that have long made threats unprotected naturally follow. *Id*. Regardless, in *Counterman* the Court also stated that some subjective element from the speaker must be evaluated in deciding whether a statement is a true threat without First Amendment protection. Specifically, the Court instructed that a recklessness standard for making this determination was appropriate as it offered "enough breathing space for protected speech without sacrificing too many of the benefits of enforcing laws against true threats." *Id*. at 82 (*citing Elonis v. United States*, 575 U.S. 723, 748 (2001)).

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

Response: The Supreme Court has instructed that determining "basic" or "historical" facts involves answering questions about who did what, when or where, how or why. *U.S. Bank v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 394 (2018) (*citing Thompson v. Keohane*, 516 U.S. 99, 111 (1995)). Determining whether something is a question of fact or a question of law is an inquiry the Supreme Court has described as both "vexing," *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982), and "sometimes slippery." *Keohane*, 516 U.S. at 111. The Court has further instructed that "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 than another to decide the issue in question." *Merck Sharp & Dohne Corp. v. Albrecht*, 139 Sup. Ct. 1668, 1680 (2019). Thus, in *Merck* the Court determined a judge was better suited to address whether the FDA would have approved a change of a drug label as a question of law rather than a jury as a question of fact. *Id.*

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

Response: Under federal law, a district court should "consider all of the § 3553(a) factors to determine whether they support the sentence requested by the party." *Gall v. United States*, 552 U.S. 38, 49-50 (2007). The statute does not provide that one factor should be given more weight than any of the other factors. If confirmed, I will abide by all applicable statutes, the United States Sentencing Guidelines, and binding precedent from the Supreme Court and Eighth Circuit Court of Appeals in all criminal sentencings that come before me.

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

Response: As a District Judge nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on whether Supreme Court decisions are particularly well reasoned. If confirmed, I will faithfully apply binding precedent from the Supreme Court on all matters that come before me.

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

Response: As a District Judge nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on whether Eighth Circuit Court of Appeals decisions are particularly well reasoned. If confirmed, I will faithfully apply

binding precedent from the Supreme Court and Eighth Circuit Court of Appeals on all matters that come before me.

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

Response: 18 U.S.C. § 1507 provides "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both.

Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt."

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

Response: I am unaware of any Supreme Court or Eighth Circuit Court of Appeals decision holding that 18 U.S.C. § 1507 is unconstitutional. I am precluded, further, by the Canons of the Code of Conduct for United States Judges from commenting on whether a statute is unconstitutional as the matter may come before me if I am confirmed.

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

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

Response: Yes. As a judicial nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on whether I believe a Supreme Court decision was properly decided. Regardless, the constitutionality of racial segregation in public schools is unlikely to come before me should I be confirmed, so I believe it is appropriate for me to respond to this inquiry under the Canons of the Code of Conduct for United States Judges.

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

Response: Yes. As a judicial nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on whether I believe a Supreme Court decision was properly decided. Regardless, the constitutionality of laws banning marriage between people of different races is unlikely to come before me should I be confirmed, so I believe it is appropriate for me to respond to this inquiry under the Canons of the Code of Conduct for United States Judges.

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

Response: As a judicial nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on whether I believe a Supreme Court decision was properly decided. If confirmed, I will faithfully apply binding precedent from the Supreme Court and Eighth Circuit Court of Appeals.

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

Response: As a judicial nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on whether I believe a Supreme Court decision was properly decided. Regardless, *Roe v. Wade* was overruled by *Dobbs v. Jackson Women's Health Org*., 597 U.S. 215 (2022). *Dobbs* is binding precedent, and I will faithfully apply it should I be confirmed.

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

Response: As a judicial nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on whether I believe a Supreme Court decision was properly decided. Regardless, *Planned Parenthood v. Casey* was overruled by *Dobbs v. Jackson Women's Health Org*., 597 U.S. 215 (2022). *Dobbs* is binding precedent, and I will faithfully apply it should I be confirmed.

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

Response: As a judicial nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on whether I believe a Supreme Court decision was properly decided. If confirmed, I will faithfully apply binding precedent from the Supreme Court and Eighth Circuit Court of Appeals. *Gonzalez v. Carhart* is binding precedent, and I would faithfully apply it if confirmed.

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

Response: As a judicial nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on whether I believe a Supreme Court decision was properly decided. If confirmed, I will faithfully apply binding precedent from the Supreme Court and Eighth Circuit Court of Appeals. *District of Columbia v. Heller* is binding precedent, and I would faithfully apply it if confirmed.

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

Response: As a judicial nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on whether I believe a

Supreme Court decision was properly decided. If confirmed, I will faithfully apply binding precedent from the Supreme Court and Eighth Circuit Court of Appeals. *McDonald v. City of Chicago* is binding precedent, and I would faithfully apply it if confirmed.

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

Response: As a judicial nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on whether I believe a Supreme Court decision was properly decided. If confirmed, I will faithfully apply binding precedent from the Supreme Court and Eighth Circuit Court of Appeals. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* is binding precedent, and I would faithfully apply it if confirmed.

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

Response: As a judicial nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on whether I believe a Supreme Court decision was properly decided. If confirmed, I will faithfully apply binding precedent from the Supreme Court and Eighth Circuit Court of Appeals. *New York State Rifle & Pistol Assoc. v. Bruen* is binding precedent, and I would faithfully apply it if confirmed.

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

Response: As a judicial nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on whether I believe a Supreme Court decision was properly decided. If confirmed, I will faithfully apply binding precedent from the Supreme Court and Eighth Circuit Court of Appeals. *Dobbs v. Jackson Women's Health* is binding precedent, and I would faithfully apply it if confirmed.

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, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on whether I believe a Supreme Court decision was properly decided. If confirmed, I will faithfully apply binding precedent from the Supreme Court and Eighth Circuit Court of Appeals. *Students for Fair Admissions, Inc. v. Univ. of North Carolina and Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* is binding precedent, and I would faithfully apply it if confirmed.

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

Response: As a judicial nominee, I am precluded by the Canons of the Code of Conduct for United States Judges from commenting on whether I believe a Supreme Court decision was properly decided. If confirmed, I will faithfully apply binding precedent from the Supreme Court and Eighth Circuit Court of Appeals. *303 Creative LLC v. Elins* is binding precedent, and I would faithfully apply it if confirmed.

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

Response: I would apply the standard articulated by the Supreme Court in *New York State Rifle & Pistol Assoc., Inc. v. Bruen,* 597 U.S. 1 (2022). In *Bruen*, the Supreme Court reaffirmed that the right to keep and bear arms was a fundamental right provided by the Second Amendment. *Id*. The Court held that:

> [W]hen 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. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'

Id. at 17. I would apply this standard and other binding precedent from the Eighth Circuit Court of Appeals and Supreme Court when determining whether a regulation or statutory provision infringed on Second Amendment rights.

29. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**

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

    Response: No.

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

    Response: No.

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

Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

31. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: I am not aware of any information responsive to this inquiry.

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

Response: No.

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

Response: No.

32. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: No.

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

    Response: No.

33. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**
    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: No.

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

Response: No.

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

Response: On January 9, 2023, I spoke to Mr. Randy Seiler, the Chair of the South Dakota Democratic Party, about my interest in applying for the position of United States District Court Judge for the District of South Dakota. My understanding is Mr. Seiler forwarded my resume to the White House's representative to review. On March 16, 2023, I was interviewed by attorneys from the White House Counsel's Office. Since March 16, 2023, I have occasionally been in contact with officials of the Office of Legal Policy. I have spoken briefly with representatives from the offices of Senators Thune and Rounds. I met with Senator Rounds on June 28, 2023, and Senator Thune on July 31, 2023. On February 7, 2024, the President announced his intent to nominate me.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

    Response: No.

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

    Response: No. No representative of the Biden administration or Senate Democrats gave me advice about what cases to list on my committee questionnaire. I made the decision about what cases to include on the questionnaire.

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

    Response: Please see my response to Question 34.

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

    Response: I received these questions from the Office of Legal Policy ("OLP") on March 13, 2024. On receipt of these questions I drafted my responses and sent them to OLP.

Senate Judiciary Committee
Nominations Hearing
March 6, 2024
Questions for the Record
Senator Amy Klobuchar

Eric Claude Schulte, nominee to be United States District Court Judge for the District of South Dakota

You have worked as a private practitioner for over two decades and have tried approximately 22 cases to verdict, judgment, or final decision before a jury. You have also argued seven cases before the South Dakota Supreme Court.

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

  Response: For nearly 24 years I have worked as a trial lawyer in South Dakota. I have handled a variety of cases during my career, including both civil and criminal matters, in both state and federal court. My civil work has included litigating contract disputes, insurance matters, plaintiff's personal injury matters, commercial disputes, and various other matters. My criminal work has included handling both felony and misdemeanor cases. I have also served as a mediator in civil cases. In believe the wide variety of cases I have handled has prepared me to serve as a federal district court judge.

- **What did your time as a practitioner teach you about how a judge should conduct themselves in the courtroom to ensure that the parties who appear before the court believe that the court reached a fair and just decision?**

  Response: My time as a practitioner has taught me that a judge should always conduct themselves in a manner demonstrating humility and professionalism. Parties need to know they will be treated with dignity and respect while in the courtroom. I have also learned that a judge must be prepared to make a reasoned and informed decision. It is critical for a judge to know the file well and be prepared on all aspects of the law pertaining to a particular case. All of these traits are necessary, in my opinion, for parties to believe a court reached a fair and just decision applying all binding Supreme Court and Eighth Circuit Court of Appeals precedent.

Senator Mike Lee
Questions for the Record
Eric Claude Schulte, Nominee for District Court Judge for the District of South Dakota

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

   Response: If confirmed, I would apply the law as written. I would fairly and impartially decide all matters brought before me. I would faithfully apply all binding precedent from the Eighth Circuit Court of Appeals and Supreme Court and uphold the U.S. Constitution. I would be well prepared for every matter that came before me on both the facts and applicable law of the case. I would strive to make timely decisions and to likewise manage my docket to ensure that cases are resolved in a timely fashion. Finally, I would strive to conduct myself with humility and professionalism.

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

   Response: If confirmed, I would apply any binding precedent from the Supreme Court and Eighth Circuit Court of Appeals when interpreting a statute. If no binding precedent existed from the Eighth Circuit Court of Appeals or Supreme Court, I would look for decisions from other federal courts for guidance. I would also examine the plain text of the statute at issue. If the text was unambiguous, I would apply its plain meaning. If the text was ambiguous, I would apply applicable canons of statutory and constitutional construction adopted by the Eighth Circuit Court of Appeals and Supreme Court. I might also review the statute's legislative history to the extent doing so would be consistent with Supreme Court and Eighth Circuit Court of Appeals precedent.

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

   Response: If confirmed, I would apply any binding precedent from the Supreme Court and Eighth Circuit Court of Appeals when interpreting a constitutional provision. If no binding precedent existed from the Eighth Circuit Court of Appeals or Supreme Court, I would look for decisions from other federal courts for guidance. I would also examine the plain text of the constitutional provision at issue. If the text was unambiguous, I would apply its plain meaning. If the text was ambiguous, I would apply applicable canons of statutory and constitutional construction adopted by the Eighth Circuit Court of Appeals and Supreme Court. I might also review the provision's legislative history to the extent doing so would be consistent with Supreme Court and Eighth Circuit Court of Appeals precedent.
   .

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

Response: The Supreme Court has applied the original meaning and text of the U.S. Constitution, stating, "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 34 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008)).

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

Response: Please see my response to Question 2.

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

Response: The meaning of the U.S. Constitution and a statute does not change over time. "Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 26 (2022).

7. What are the constitutional requirements for standing?

Response: Article III standing requires (1) the plaintiff suffered an injury in fact, (2) the injury is fairly traceable to the actions of the defendant, and (3) it is likely the injury will be redressed in the subject lawsuit. *Biden v. Nebraska*, 143 S.Ct. 2355, 2365 (2023).

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

Response: The powers of Congress are enumerated in Article I, Section 8 of the Constitution. The Supreme Court ruled in *McCulloch v. Maryland*, 17 U.S. 316 (1819) that Congress has implied powers under the Necessary and Proper Clause of the Constitution in order to effectuate 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: The Supreme Court instructed that the "question of the constitutionality of action taken by Congress does not depend on recitals of power which it undertakes to exercise." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). If confirmed, I will apply binding precedent from the Supreme Court and Eighth Circuit Court of Appeals when addressing the constitutionality of any law brought before me for review. I would use the process outlined in Question 3 for reviewing the constitutional provision at issue.

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

Response: Yes. The Supreme Court has made it clear that certain rights not expressly identified in the Constitution are protected by the U.S. Constitution. Likewise, the Constitution itself references unenumerated rights, with the Ninth Amendment providing the "enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Supreme Court has instructed that the Due Process Clauses of the Fourth and Fifteenth Amendments protects fundamental rights and liberties "objectively, deeply rooted in this Nation's history and tradition … and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotations and citations omitted). The Supreme Court has recognized various unenumerated rights, including the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), the right to obtain contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), the right to have children and not be sterilized, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) and the right to make certain decisions about the education of one's child, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

11. What rights are protected under substantive due process?

Response: See my response to Question 10. Further, the text of the Fifth Amendment provides, in part, that "no person shall be...deprived of life, liberty, or property, without due process of law…." The text of the Fourteenth Amendment provides, in part, that no state shall "deprive any person of life, liberty, or property, without due process of law…."

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 fortunate enough to be confirmed, I would apply binding precedent from the Supreme Court and Eighth Circuit Court of Appeals when determining constitutional issues on fundamental rights. *Lochner* has been overruled, so it is not binding precedent. *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (stating the doctrine that prevailed in *Lochner* "that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely - has long since been discarded."). For analyzing rights under the U.S. Constitution, please see my response to Question 10 and the Supreme Court's decision in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

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

Response: The Supreme Court addressed the limits on Congress's power under the Commerce Clause in *United States v. Lopez*, 514 U.S. 549 (1996). In *Lopez*, the Court instructed there are three broad categories of activity Congress may regulate under its commerce power. First, Congress may regulate the channels of interstate commerce. *Id.* at 558. Second, Congress may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though they come from intrastate activities. *Id*. Third, Congress may regulate activities having a substantial relation to interstate commerce. *Id*. *See also United States v. Morrison*, 529 U.S. 598 (2000) (striking down a civil remedy in the Violence Against Women Act as it exceeded Congressional authority under the Commerce Clause because it did not substantially affect interstate commerce).

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

Response: The Supreme Court has instructed that race, national origin, religion, or alienage constitute suspect classes requiring strict scrutiny. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). The traditional indicia of a suspect class include those "subjected to a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). In addressing legislation aimed at suspect classes, the Court has instructed that "laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving of others. For these reasons and because discrimination is unlikely to soon be rectified by legislative means, these laws are subject to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

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 the separation of powers play an essential role in our system of government. They define our democracy. The Supreme Court has "consistently given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinated Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (*citing Morrison v. Olson*, 487 U.S. 654 (1988); *Bowshar v. Synar*, 478 U.S. 714, 725 (1986)). "Madison, in writing about the principle of separated powers, said 'No political truth is certainly of greater, intrinsic value or is stamped with the authority of more enlightened patrons of liberty." *Id*. (citing THE FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed., 1961)).

16. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

Response: I would review the U.S. Constitution and apply binding precedent from the Supreme Court and Eighth Circuit Court of Appeals to determine whether the branch of government exceeded its powers.

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

Response: None.

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

Response: Both are equally undesirable. Judges must base their rulings on constitutional challenges to statutes on binding precedent. A judge should not invalidate a law the judge knows is constitutional. Likewise, a judge should not uphold a law the judge knows is unconstitutional. If confirmed, I would faithfully and fully apply binding Supreme Court and Eighth Circuit Court of Appeals precedent.

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 personally researched judicial trends in striking down statutes and I am not aware of the reason behind the statistics cited in Question 19. I also do not subscribe to the concepts of "aggressive exercise" of judicial review or "judicial passivity." Both concepts imply abdicating a trial court's duty to fairly and impartially decide cases coming before it and to faithfully and fully apply all binding precedent. If confirmed, I will fairly and impartially decide all cases coming before me to the best of my ability. I will also faithfully and fully apply binding precedent from the Eighth Circuit Court of Appeals and Supreme Court.

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

Response: Judicial review is defined by Black's Law Dictionary as the "power of courts to review decisions of another department or level of government. *Marbury v. Madison*, 5 U.S. 137 (1803)." I do not know of an agreed upon definition for the term "judicial supremacy." I generally understand the term to refer to the Supreme Court's instruction that "the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and

the Country as a permanent and indispensable feature of our constitutional system." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

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: All elected officials take an oath to support and defend the U.S. Constitution. The Supreme Court has instructed that no "state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Further, "[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." *Id*. (quoting *United States v. Peters*, 9 U.S. 115, 136 (1809)).

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: I believe Hamilton's writing highlights the limited nature of the judiciary. According to the express provisions of Article III, the judicial power of the United States is limited to "Cases" and "Controversies." Judges do not legislate. They are not policy makers. Instead, our judiciary interprets and upholds the U.S. Constitution and laws drafted by Congress.

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

Response: If confirmed, I would be bound to follow Supreme Court precedent and Eighth Circuit Court of Appeals precedent. The Supreme Court is the only entity that can overrule its precedent. A lower court cannot do so. If I am confronted with a case that is not controlled by binding precedent, I would utilize the methods outlined in my answers to Questions 2 and 3 when interpreting a statute or constitutional provision.

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

Response: None.

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

Response: I am not familiar with the quote from the Biden Administration cited in Question 25, and it is not binding precedent. If confirmed and presented with a case requiring interpretation of the term "equity," I would apply binding precedent from the Supreme Court and Eighth Circuit Court of Appeals when addressing the issue.

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

Response: The New Lexicon Webster's Dictionary of the English Language defines equity as "fairness and justice, esp. the common fairness that follows the spirit rather than the letter of justice." Equality is defined in the same dictionary as "the state or an instance of being equal in number, amount, rank, meaning, etc…."

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

Response: As noted in my answer to Question 25, I am not familiar with the definition of equity attributed to the Biden Administration that is cited. If confirmed and presented with a case requiring interpretation of the term "equity," I would apply binding precedent from the Supreme Court and Eighth Circuit Court of Appeals when addressing the issue.

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

Response: I do not have a personal definition for this phrase. Merriam-Webster Dictionary defines the term as "the oppression of a racial group to the advantage of another as perpetuated by inequality 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 this phrase. Merriam-Webster Dictionary defines the term as "a group of concepts (such as the idea that race is a sociological rather than biological designation, and that racism pervades society and is fostered and perpetuated by the legal system) used for examining the relationship between race and the laws and legal institutions of a country and especially the United States.".

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. In 2014, you wrote an article that criticized the Supreme Court's holding in *Shelby County v. Holder*. In your article, you said "I respectfully but strongly disagree with the majority's ruling. I think the majority's ruling strikes right at the heart of the equality Dr. King spoke about so passionately 50 years ago." In 2012, when the Court heard *Shelby County v. Holder*, black voter turnout exceeded white voter turnout in five of the six states originally covered, with the gap in the sixth state being less than a 1% difference. In the November 2020 election, the Census Bureau reported that black voter turnout rates were substantially higher in states like Mississippi, Arizona, and Georgia, than in states like California, Massachusetts, or New York. Do you believe that "pervasive, flagrant, widespread, and rampant" race-based voter discrimination still exists today in the states identified by the Voting Rights Act of 1965?

Response: As the Supreme Court indicated in *Shelby County*, "voting discrimination still exists; no one doubts that." *Shelby County v. Holder*, 570 U.S. 529, 536 (2013). However, since the passage of the Voting Rights Act "things have changed dramatically." *Id*. at 547. "Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Id*. If confirmed, I would fully and faithfully apply *Shelby County v. Holder* if any case requiring its application came before me.

32. In November of 2015, as President of the South Dakota State Bar, you authored the President's Page Newsletter. In that letter, you said, "[w]hile we do not keep statistics on the ethnicity of our members, the best estimate is that there are 20 to 30 Native American lawyers in our organization." If you did not collect statistics on the ethnicity of your members, how did you arrive at this relatively specific estimate of the racial composition of the attorneys in your organization? Do you regularly categorize the people you interact with in your professional career by the color of their skin?

Response: The number cited in the article was an educated guess based on personal knowledge I have acquired after practicing law in South Dakota for 24 years and meeting many lawyers. We do not have a particularly large bar compared to other states and many people know each other. I also recall asking members of South

Dakota's Indian Country Bar Association and others about how many Native American lawyers practice in South Dakota.

No. I do not regularly categorize the people I interact with in my professional career by the color of their skin.

Senator John Kennedy
Questions for the Record

Eric C. Schulte

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

   Response: Yes. The Supreme Court has held the death penalty is constitutional. *See Gregg v. Georgia*, 428 U.S. 153 (1976). 18 U.S.C. § 3591 provides that criminal defendants may be sentenced to death under federal law for committing certain offenses. Further, South Dakota state law provides the death penalty may be imposed under certain circumstances pursuant to SDCL § 23A-27A-1. If confirmed, I will follow applicable statutory law and binding precedent established by the United States Supreme Court and Eighth Circuit Court of Appeals for the sentencing of criminal defendants, including any applicable case or statutory law pertaining to the death penalty.

2. **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.

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

   Response: Yes.

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

   Response: Yes.

5. **Please describe your judicial philosophy, including your approach to constitutional and statutory interpretation. Be as specific as possible.**

   Response: If confirmed, I would apply the law as written. I would fairly and impartially decide all matters brought before me. I would faithfully apply all binding precedent from the Eighth Circuit Court of Appeals and United States Supreme Court and uphold the U.S. Constitution. I would be well prepared for every matter that came before me on both the facts and applicable law of the case. I would strive to make timely decisions and to likewise manage my docket to ensure that cases are resolved in a timely fashion. Finally, I would strive to conduct myself with humility and professionalism.

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

Response: Yes. The Supreme Court has instructed that, "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 34 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008)).

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

Response: If no binding precedent existed from the Eighth Circuit Court of Appeals or Supreme Court, I would initially examine the plain text of the constitutional provision at issue. If the text was unambiguous, I would apply its plain meaning. If the text was ambiguous, I would apply applicable canons of statutory and constitutional construction adopted by the Eighth Circuit Court of Appeals and Supreme Court.

8. Is textualism a legitimate method of statutory interpretation?

Response: Yes. *See Bostock v. Clayton Cty.*, 590 U.S. 644, 674 (2020) (stating "when the meaning of the statute's term is plain, our job is at an end").

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

Response: See my responses to Questions 7 and 8. To the extent authorized by Supreme Court and Eighth Circuit Court of Appeals precedent, I might consult legislative history when the text of a statute is ambiguous and other sources of statutory interpretation have not resolved the ambiguity. *See Bostock v. Clayton Cty.*, 590 U.S. 644, 674 (2020). I would apply the plain meaning of the text if the statute was not ambiguous.

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

Response: No. The meaning of the U.S. Constitution does not change over time. "Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 26 (2022).

11. 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: In *Rivas*, the plaintiff filed a claim pursuant to 42 U.S.C. § 1983 alleging that a law enforcement officer used excessive force in violation of the Fourth Amendment. On appeal, the Supreme Court reviewed a ruling by the Ninth Circuit Court of Appeals

finding that the officer was not entitled to qualified immunity. The Supreme Court reversed, holding that the officer's conduct did not violate a clearly established right against excessive force. In so ruling, the Court examined the defense of qualified immunity and instructed that it attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would know. Based on the facts in the record, the Supreme Court determined the law enforcement officer was entitled to qualified immunity and reversed the Ninth Circuit Court of Appeals.

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

Response: Federal Rule of Civil Procedure 65 governs the issuance of injunctions in federal court. I am not aware, however, of any binding precedent from the Supreme Court or Eighth Circuit Court of Appeals on issuing universal injunctions. The Eighth Circuit Court of Appeals has instructed that when ruling on a petition seeking an injunction, a court should consider (1) the threat of irreparable harm to the movant, (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant, (3) the probability the movant will succeed on the merits, and (4) the public interest. *See Dataphase Sys., Inc., v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). If confirmed, I would follow Fed.R.Civ.P. 65, the *Dataphase* factors articulated by the Eighth Circuit Court of Appeals, and any other applicable binding precedent when ruling on petitions seeking an injunction.

13. Is there ever a circumstance in which a district judge may seek to circumvent, evade, or undermine a published precedent of the U.S. Court of Appeals under which the judge sits or the U.S. Supreme Court?

Response: No.

14. Will you fully and faithfully apply all precedents of the U.S. Supreme Court and the U.S. Court of Appeals under which you would sit?

Response: Yes.

15. In a 2014 article in the South Dakota Trial Lawyers Magazine, you criticized the U.S. Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013).

a. Please summarize the majority opinion's reasoning and holding in *Shelby County*.

Response: In *Shelby County*, the Supreme Court addressed a provision of the Voting Rights Act of 1965 that required certain states to obtain federal preclearance before implementing any changes to voting laws. Section 4(b) contains a coverage formula that determines whether jurisdictions are subject to preclearance based on their respective histories of voting discrimination. The

Court ruled that Section 4(b) of the Voting Rights Act of 1965 was unconstitutional because it was based on dated information that was over 40 years old. The Court instructed that "[c]overage today is based on decades-old data and eradicated practices." *Shelby Cty. v. Holder*, 570 U.S. 529, 551 (2013). As a result, the Court ruled the "formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance." *Id*. at 557.

b. Please elaborate how, in your view, the majority struck "right at the heart of the equality Dr. King spoke about so passionately 50 years ago."

Response: I wrote the subject article as an advocate. My intention was to use Dr. King's "I Have a Dream" speech to motivate lawyers to perform pro bono legal work and to volunteer in their respective communities. If confirmed, I will fully and faithfully apply the majority's ruling.

c. Please summarize how the power to enforce the Fourteenth and Fifteenth Amendments has been interpreted by the U.S. Supreme Court.

Response: The Supreme Court addressed Congress's power under the Fourteenth Amendment in *Boerne v. Flores*, 521 U.S. 507 (1997). In *Flores*, the Court struck down the Religious Freedom Restoration Act and held that Congress's power to enforce rights secured by the Fourteenth Amendment is limited to remedying state violations. *Id*. at 519. "The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *Id*. Accordingly, Congress "has been given the power to 'enforce,' not the power to determine what constitutes a constitutional violation." *Id*. *See also United States v. Morrison*, 529 U.S. 598, 625-26 (2000) (holding that the enforcement clause of the Fourteenth Amendment did not provide Congress with the authority to enact a civil remedy in the Violence Against Women Act).

The Supreme Court has instructed that the Fifteenth Amendment "is not designed to punish for the past; its purpose is to ensure a better future." *Shelby Cty.*, 570 U.S. at 553. Further, the Court has instructed that "the Fifteenth Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for the enactment." *Id*. (quoting *Rice v. Cayetano*, 528 U.S. 495, 512 (2000)).

d. Will you fully and faithfully apply the U.S. Supreme Court's decision in *Shelby County*?

Response: Yes.

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

Response: Dicta is not the law and is not considered binding precedent. If confirmed, I would consider binding precedent from the Eighth Circuit Court of Appeals and Supreme Court when making decisions. I would not base my decisions on dicta.

17. Have you ever considered an applicant's race, sex, or religion when making a hiring decision? If so, please provide full details.

Response: No.

18. When reviewing applications from persons seeking to serve as an intern, extern, or law clerk in your chambers, what role would the race, sex, or religion of the applicants play in your consideration?

Response: None.

Questions from Senator Thom Tillis
for Eric Claude Schulte, nominated to serve as U.S. District Judge for the District of South Dakota

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

   Response: A judge's personal views and background are irrelevant in interpreting and applying the law.

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

   Response: Impartiality is an expectation for a judge.

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

   Response: I am unaware of an agreed upon definition for the term "judicial activism." I do not believe, however, that judges should allow personal views or opinions to guide their decisions. I likewise do not believe it is proper for a judge to ignore the law or binding precedent when they conflict with a judge's personal views. Judges are not policy makers and do not draft legislation. Instead, judges interpret the law. A judge's personal views and opinions are irrelevant when deciding how to interpret the law. If confirmed, I will follow the law as written and adhere to any binding precedent from the Eighth Circuit Court of Appeals and Supreme Court.

4. **Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

   Response: No.

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

   Response: If confirmed, I will follow the law and any binding precedent from the Eighth Circuit Court of Appeals and the Supreme Court regardless of my personal opinions on any outcome. As noted by Justice Kennedy, judges are compelled to make decisions "because they are right, right in the sense that the law and Constitution, as we see them, compel the result." *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring).

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

   Response: If confirmed, I will follow binding precedent established by the Supreme Court on Second Amendment rights. This binding precedent includes *District of Columbia v.*

Heller, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022).

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

   Response: If presented with a question regarding qualified immunity, I will follow binding precedent established by the Eighth Circuit Court of Appeals and Supreme Court. "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021). In order to determine whether qualified immunity shields a law enforcement officer from liability, two inquires must be made: (1) whether the plaintiff has alleged a violation of a constitutional right, and (2) whether the right was clearly established at the time of the alleged misconduct. *Mullenix v. Luna*, 577 U.S. 7, 11-12 (2015). If confirmed, I will follow binding precedent from the Eighth Circuit Court of Appeals and Supreme Court on all cases involving the defense of qualified immunity.

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

   Response: The Supreme Court has instructed that "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quoting *Malley v. Briggs*, 475 U.S. 335, 441 (1986)). It balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The protection of qualified immunity applies to a law enforcement officer regardless of whether the officer's error was "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Id*. As a nominee for United States District Court Judge, it would be improper for me to comment on whether an area of the law has been correctly decided. If confirmed, I will follow binding precedent from the Eighth Circuit Court of Appeals and Supreme Court on all cases involving the defense of qualified immunity.

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

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

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

Response: Congress has the power under Article I § 8 of the Constitution to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This provision enables Congress to grant both copyrights and patents. *Allen v. Cooper*, 589 U.S. 248, 256 (2020). The Supreme Court has instructed that "patents endow their holders with certain superpowers, but only for a limited time." *Kimble v. Marvel Entm't*, LLC, 576 U.S. 446, 451 (2015). If confirmed, I would apply applicable statutory law and any binding Eighth Circuit Court of Appeals, Federal Circuit, and Supreme Court precedent when presented with a case involving the protection of lawfully provided IP rights.

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

Response: I am unaware of the practice of forum shopping in the District of South Dakota in patent litigation. If presented with a case where it is alleged that inappropriate forum shopping has occurred in patent litigation, I will apply the applicable law and any binding Federal Circuit, Eighth Circuit Court of Appeals, or Supreme Court precedent.

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

Response: As a nominee for United States District Court, I am precluded under the Canons of the Code of Conduct for United States Judges from commenting on the quality or soundness of Supreme Court precedents. If confirmed, I will faithfully and fully apply all binding precedent from the Supreme Court, Eighth Circuit Court of Appeals, and Federal Circuit that may come before me.