Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Embry J. Kidd
Nominee to be United States Circuit Judge for the Eleventh Circuit
June 12, 2024

1. **The Eleventh Circuit hears cases on appeal from the district courts in Alabama, Florida, and Georgia. You were born in Alabama, attended university in Georgia, and established your legal career in Florida. As such, you have ties to all of the states within the jurisdiction of the Eleventh Circuit.**

   Please elaborate on your background and the unique perspective you would bring to the bench given your connections to all states in the Eleventh Circuit.

   Response: I have been fortunate to live for extended periods in each of the states within the jurisdiction of the Eleventh Circuit and to have close personal and professional ties in each state. The Eleventh Circuit is truly my home, and I appreciate the custom of the circuit to hold oral arguments in several different cities throughout the circuit. I believe that this practice allows the judges to stay rooted in the communities that the circuit covers while also providing greater access to the litigants and members of the public. In my role as a member of the judiciary, I also have spoken, and will continue to speak, to students in each of the Eleventh Circuit's states. If confirmed, I hope that my presence on the Eleventh Circuit will serve as inspiration to students in those states who aspire one day to become federal court practitioners and judges—including those students from very small, rural towns like the one where I grew up in Alabama.

2. **Since 2019, you have served as a United States Magistrate Judge for the Middle District of Florida. As a part of your role, you have performed naturalization ceremonies on several occasions.**

   Please discuss your experience swearing in new Americans and what that experience has meant to you personally?

   Response: Presiding over naturalization ceremonies, and being the first to welcome our country's newest citizens, is one of the joys of my current role as a U.S. Magistrate Judge. I personally administer the oath to the new citizens and lead them in the Pledge of Allegiance before making my welcoming remarks, in which I remind them of the importance of voting and jury duty. We also typically invite a speaker who is either a naturalized citizen or a child of a naturalized citizen to offer words of encouragement. After the ceremony concludes, I like to remain in the courtroom to take pictures with the new citizens and their families, and to speak with many of them about their journeys to citizenship. I leave each ceremony inspired by their stories and with renewed appreciation for our country and the Constitution.

Senator Lindsey Graham, Ranking Member
Questions for the Record
Embry Jerode Kidd
Nominee to be United States Circuit Judge for the Eleventh 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.

1. **The Senate Judiciary Committee's Questionnaire Question 13(f) instructed you to:**

   Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings.

   In both *U.S. v. King* (6:23-CR-6, M.D. Fla.) and *U.S. v. D'Haiti* (22-cr-127, M.D. Fla.), you ordered a defendant released, and your decision was overturned by the reviewing district judge.

   a. **Why did you not disclose this case in response to the Committee's Questionnaire?**

      Response: To prepare my responses to the Committee's Questionnaire, I reviewed each question and then sought guidance from the Department of Justice's Office of Legal Policy regarding what material might be responsive to the Committee's Questionnaire. I then thoroughly searched my own records, court databases, legal databases, and other sources to supply this Committee with each and every responsive record that I had identified, consistent with the advice that I received.

      In each of the cases cited above, I did not issue an opinion. Instead, I made findings of fact on the record and entered an order setting conditions of release. While completing the Questionnaire, I reviewed Questionnaires previously submitted by other magistrate judges and did not see any release or detention orders listed. Additionally, I considered that, even if the release orders could be construed as opinions, since the district judge's review of a release decision is *de novo*, the district judge need not review the initial detention hearing, or any reasoning that I articulated, in deciding whether to release a defendant. *See United States v. Gaviria*, 828 F.2d 667, 670 (11th Cir. 1987) ("[*D*]*e novo* review requires

the [district] court to exercise independent consideration of all facts properly before it . . . .").

In each of these cases, the district judge held a new detention hearing and received new evidence. In each case, the district judge noted that her decision was based on information that had not been presented to me, and she did not criticize my findings. Therefore, I did not consider the district judge's independent decisions to detain these defendants to be reversals of my decisions. In each case, if the government had presented the same evidence to me that it presented to the district judge, I would have detained each defendant. Further, based on guidance from the Department of Justice's Office of Legal Policy, I was under the impression that, because the district judge's decision in each case was based on new evidence not presented to me, it was not responsive to the Questionnaire.

b. Why should the Committee not consider your omission of materials requested in the plain language of the questionnaire disqualifying?

Response: I take seriously my duty of candor to the Senate and to the American people. I responded to the question in good faith after carefully considering the question asked, reviewing prior responses from magistrate judges, and consulting with the Department of Justice's Office of Legal Policy. Upon learning that these decisions were viewed as potentially responsive, I promptly updated my Committee Questionnaire. Had I known at the time of filing that these decisions were potentially responsive, I would have supplied them in my initial filing.

2. **With regard to *U.S. v. King,* did you disclose or discuss this case with :**

a. Any member of the Biden Administration—to include the Department of Justice or White House staff?

Response: Yes. To prepare my responses to the Committee's Questionnaire, I reviewed each question and then sought guidance from the Department of Justice's Office of Legal Policy regarding what material might be responsive to the Committee's Questionnaire. I then thoroughly searched my own records, court databases, legal databases, and other sources to supply this Committee with each and every responsive record that I had identified, consistent with the advice that I received. I discussed this case—and whether it was responsive to the Questionnaire—with the Department of Justice's Office of Legal Policy. I also discussed the substance of the case with staff from the White House Counsel's Office.

b. Any Democratic Senator or their staffs?

Response: No. I have not discussed this case with any Senators or their staffs.

c. Any Democratic Florida Congressmen or their staffs?

Response: No. I have not discussed this case with any Congressmen or their staffs.

d. Anyone else involved in preparing you for your nomination or analyzing your nomination?

Response: No. I have not discussed this case with anyone other than those previously listed in preparation for my nomination.

3. **With regard to *U.S. v. D'Haiti,* did you disclose or discuss this case with:**
   a. Any member of the Biden Administration—to include the Department of Justice or White House staff?

   Response: Yes. To prepare my responses to the Committee's Questionnaire, I reviewed each question and then sought guidance from the Department of Justice's Office of Legal Policy regarding what material might be responsive to the Committee's Questionnaire. I then thoroughly searched my own records, court databases, legal databases, and other sources to supply this Committee with each and every responsive record that I had identified, consistent with the advice that I received. I discussed this case—and whether it was responsive to the Questionnaire—with the Department of Justice's Office of Legal Policy. I also discussed the substance of the case with staff from the White House Counsel's Office.

   b. Any Democratic Senator or their staffs?

   Response: No. I have not discussed this case with any Senators or their staffs.

   c. Any Democratic Florida Congressman or their staffs?

   Response: No. I have not discussed this case with any Congressmen or their staffs.

   d. Anyone else involved in preparing you for your nomination or analyzing your nomination?
   Response: No. I have not discussed this case with anyone other than those previously listed in preparation for my nomination.

4. **If you answered yes to any part of questions 3 or 4 please answer the following questions:**
   a. Who did you disclose the cases to?

   Response: To prepare my responses to the Committee's Questionnaire, I reviewed each question and then sought guidance from the Department of Justice's Office of Legal Policy regarding what material might be responsive to the Committee's Questionnaire. I then thoroughly searched my own records, court databases, legal databases, and other sources to supply this Committee with each and every responsive record that I had identified, consistent with the advice that I received. I

discussed this case—and whether it was responsive to the Questionnaire—with the Department of Justice's Office of Legal Policy. I also discussed the substance of the case with staff from the White House Counsel's Office.

b. When did you disclose the cases?

Response: I discussed the cases with the Department of Justice's Office of Legal Policy while preparing my responses to the Senate Judiciary Committee's Questionnaire. I discussed the cases with White House staff while preparing for the nomination hearing.

c. How did you disclose the cases?

Response: I disclosed these cases to the Department of Justice's Office of Legal Policy as I sought guidance about what material was responsive to the Senate Judiciary Committee's Questionnaire. I disclosed the cases to staff from the White House Counsel's Office in the course of preparations for my nomination hearing.

5. **In *U.S. v. D'Haiti* you issued an oral ruling (which is not indexed on Westlaw or LexisNexis) on July 15, 2022 at the defendant's initial appearance and detention hearing.**

The United States argued for the defendant to be detained based on the danger he posed to the community. The defendant was arrested for possession of child pornography while working as a teacher and coach at two local high schools. The defendant also owned a cheerleading gym. In one instance at this gym, defendant reached up a minor's sports bra, fondled her, and repeatedly Snapchatted the victim thereafter. Thus, the United States argued that because defendant's profession required him to be constantly around children, he was a danger to the community.

You ultimately elected to release the defendant on home detention based on his "high character," "ties to the community," and lack of criminal history.

On August 17, 2022, District Judge Wendy W. Berger found that the defendant did in fact pose a danger to the community and ordered the defendant to pretrial detention, based on over a decade of contact and arrests involving minors. Judge Berger noted that an indictment filed after your order added further counts (of enticement of minors) that created a statutory presumption of detention. Although the government informed you at D'Haiti's initial detention hearing that "15 to 20 minor victims" had "come forward that have alleged sexual molestation by the defendant," the initial complaint did not include charges based on those allegations.

a. Did you fail to disclose this case because you believed it would reflect badly on your nomination?

Response: No, I did not list this case for the reasons stated in response to Question 1.

As I testified at the nomination hearing in response to Senator Durbin's question, when I first saw this defendant, the only pending charge was one count of possession of child pornography, which did not carry a statutory presumption. Nevertheless, I placed him on home detention with a GPS monitor, which restricted the defendant to his residence at all times unless he received prior court authorization to leave the residence. Additionally, he was placed under the supervision of U.S. Pretrial Services, prohibited from any direct or indirect contact with the victims, prohibited from any contact with minors generally, restricted from possessing firearms, not allowed to leave the Middle District of Florida, ordered to undergo psychiatric treatment, and restricted from any use or possession of any electronic device capable of connecting to the Internet.

By the time of the hearing before the district judge, the government had obtained an indictment charging the defendant with one count of possession of child pornography and two counts of enticement of a minor to engage in sexually explicit conduct, the latter of which triggered the statutory presumption of detention. This was the first time that the government presented an indictment charging conduct related to sexual activity, and the first time that the government presented an indictment with charges related to a second victim. At the second detention hearing, the government emphasized that the charges had "gotten more serious since the first detention hearing. We now have two minor victims that are charged by a grand jury in an indictment." (Tr. (Doc. 64) at 50:12–15.) Based on the new charges that had not yet been filed when the matter was before me, the statutory presumption that was not applicable to the one charge that was before me, and additional evidence that was not presented at the initial detention hearing, the district judge found that the defendant should be detained. In the second detention hearing, the district judge also specifically noted that this additional information had not been presented to me.

If I had been presented with the same charges and evidence as the district judge, I also would have ordered that the defendant be detained pending trial.

6. **In *U.S. v. King* the defendant was charged with receipt and possession of child sexual abuse material. You made an oral ruling (which is not indexed on Westlaw or LexisNexis) on April 27, 2023.**

   The United States argued for detention, noting that King is a convicted sex offender, and detailing his 2009 convictions for various hands-on offenses, "including sodomy with a child under the age of 12 by force and without consent" and the fact that he has an unstable residence, and multiple local charges for failure to register as a sex offender. Defense noted his gainful employment as a street sweeper and that he

engaged in an intensive sex treatment program while in prison. You released him on conditions, noting that:

> ***It's certainly true that your prior conviction is concerning, and if that victim or those victims that were involved in the prior offense were in the area, I think there would certainly be a -- I would have a concern about that. But that's not what's been presented to me. All that's been presented is that you downloaded images and that you had them on your phone, that you admitted to having them. While that does pose some danger, the danger that's articulated is that the victims will be revictimized.***

On May 15, 2023, District Judge Berger revoked your detention order. Judge Berger was particularly concerned by "the defendant's statements that he has a compulsion that he cannot control" as well as the testimony of HSI Special Agent Albert Grooms who testified about the defendant's recent attraction to a child at a restaurant. This new evidence had not been presented to you. Judge Berger concluded there were no conditions "that can assure the safety of the community, particularly young children."

On November 15, 2023, Judge Berger sentenced the defendant to 293 months (~24 years) imprisonment and supervised release for life.

a. Did you fail to disclose this case because you believed it would reflect badly on your nomination?

Response: No, I did not list this case for the reasons stated in response to Question 1.

When I first saw this defendant, the only concern that the government articulated as to why the defendant would pose a danger to any individual or to the community is that he could possibly distribute more images, thereby revictimizing the victims of the charged crime. To address that concern, I placed the defendant on home detention with a GPS monitor, which restricted the defendant to his residence at all times unless he received prior court authorization to leave the residence. Additionally, he was placed under the supervision of U.S. Pretrial Services, prohibited from any direct or indirect contact with the victims, prohibited from any contact with minors generally, restricted from possessing firearms, not allowed to leave the Middle District of Florida, ordered to undergo psychiatric treatment, and restricted from any use or possession of any electronic device capable of connecting to the Internet.

As noted in the summary for this question, the district judge was presented with the defendant's statements regarding a compulsion that he could not control, which led her to decide that he should be detained. Those statements were not presented to me. If they had been, I also would have ordered the defendant to be detained.

7. **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: Yes, but only as set forth in my responses to Questions 1–4.

   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: Please see my responses to Questions 1–4. I was advised that the release orders referenced above were not responsive to Question 13(f). No one suggested that I omit or include any particular case or type of case in my questionnaire.

8. **In 2007, Monica C. Bell wrote an article titled "Grassroots Death Sentences: The Social Movement for Capital Child Rape Laws." On the article's first page she thanks you writing "[m]any thanks to . . . Embry Kidd . . . for conversations that shaped this Article."**
   a. **Please describe the conversations you had that "shaped" Prof. Bell's article.**

      Response: To the best of my knowledge, none. I did not contribute to Prof. Bell's article and do not adopt any of her statements. Prof. Bell and I were in law school at the time this article was published. As a law student, I would often have conversations and debates about cases and course material with my law school classmates, including Prof. Bell. I do not recall, and do not have records of, any conversations with her about this subject.

9. **In the above mentioned article, Prof. Bell wrote:**

   Child rape statutes, though not laden with the exact same racial baggage as more general rape statutes, are still racialized. The "child molester" image has been deployed by some against Latino men in particular, a troubling stereotype in an age of rampant anti-immigrant bias that has focused primarily on Latinos. The molester image has also been attached to the LGBT community as a weapon against gay marriage and gay adoption.

   a. **Do you agree with Prof. Bell's analysis?**

      Response: No. As a former Assistant U.S. Attorney who prosecuted individuals for crimes against children and witnessed the devastating impact that those crimes had on the children involved, I believe that individuals who commit such crimes should be held accountable to the full extent of the law. To the extent that Prof.

Bell suggests otherwise in her article, I disagree. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent when evaluating any child rape statutes.

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

    Response: Yes.

11. **Are you currently, or have you ever been, a citizen of another country?**

    Response: No.

    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.**

12. **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.

13. **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.

14. **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 am not familiar with this statement, and I disagree with it. If confirmed, I would not exercise my own independent value judgments when interpreting the Constitution; instead, I would follow Supreme Court and Eleventh Circuit precedent.

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

Response: I am not familiar with this statement, and I disagree with it. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent.

16. **In a concurrence in the denial of rehearing en banc in *Al–Bihani v. Obama* then-Judge Kavanaugh wrote: "international-law norms are not domestic U.S. law in the absence of action by the political branches to codify those norms." Is this a correct statement of law?**

    Response: Yes. If confirmed, I would interpret U.S. law in accordance with Supreme Court and Eleventh Circuit precedent.

17. **Do you believe it is appropriate for the Eleventh Circuit to grant a petition for rehearing en banc because the relevant panel decision made a factual error?**

    Response: Federal Rule of Appellate Procedure 35 states that en banc review "is not favored and ordinarily will not be ordered" unless it is "necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance." If confirmed, I would follow this standard in deciding whether to vote for or against rehearing en banc.

18. **Do you believe it is appropriate for the Eleventh Circuit to grant a petition for rehearing en banc because the relevant panel decision reached an undesirable policy outcome?**

    Response: Federal Rule of Appellate Procedure 35 states that en banc review "is not favored and ordinarily will not be ordered" unless it is "necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance." If confirmed, I would follow this standard in deciding whether to vote for or against rehearing en banc.

19. **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.

20. **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.

21. **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 serving a federal sentence has several avenues to receive relief from a sentence: First, a prisoner may file a direct appeal pursuant to 28 U.S.C. § 1291. Second, a prisoner may file a motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255. Third, a prisoner may seek a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Fourth, a prisoner may seek to modify a term of imprisonment under 18 U.S.C. § 3582(c). Fifth, a prisoner may seek a presidential pardon or apply for presidential clemency.

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

Response: In *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023), the Supreme Court considered whether the race-conscious admissions systems used at the University of North Carolina and at Harvard College violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, respectively. The Supreme Court held that the admissions systems at both schools failed strict scrutiny because "[b]oth 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." *Id.* at 230.

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

Response: Yes.

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

Response: As a law clerk, I helped the judge screen applicants for clerkships and interviewed selected applicants. As a law firm associate, I returned to Yale Law School to interview students for summer associate positions and interviewed applicants from other schools when they visited the firm for call-back interviews. As an Assistant U.S. Attorney, I interviewed candidates for attorney and legal

assistant positions. As a judge, I select students for internships and hire law school graduates for clerkships.

24. **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, sex, sexuality, or gender identity?**

    Response: No.

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

    Response: No.

26. **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, sex, sexuality, or gender identity?**

    Response: To my knowledge, no.

    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.

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

    Response: Yes, under current Supreme Court precedent, government classifications on the basis of race are subject to strict scrutiny. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023).

28. **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 (2023), the Supreme Court held that the Free Speech Clause of the First Amendment prohibited a state from compelling a website designer to engage in expressive speech concerning a same-sex marriage, which was inconsistent with her religious beliefs.

29. **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. *See 303 Creative LLC v. Elenis,* 600 U.S. 570, 585–89 (2023).

30. **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 are those that "target speech based on its communicative content," such as "the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). The Supreme Court has directed courts to consider whether the law draws distinctions based on a particular subject matter or by its function or purpose. *Id.* at 163–64. Restrictions that focus on the time, place, or manner of the speech do not require a strict scrutiny review. *City of Austin v. Reagan Nat'l Advert. of Austin*, *LLC*, 596 U.S. 61, 62 (2022). But "[i]f there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction . . . that restriction may be content based." *Id.* at 76.

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

Response: The Supreme Court defines true threats as "serious expressions conveying that a speaker means to commit an act of unlawful violence" *Counterman v. Colorado*, 600 U.S. 66, 74 (2023) (internal quotation marks omitted). The government must prove that the defendant acted at least with recklessness as to the threatening nature of the communication. *Id.* at 69.

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

Response: Questions of fact involve "who did what, when or where, how or why." *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 394 (2018). By contrast, questions of law "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard." *Id.* at 396. The "fact/law distinction at times has turned on a determination that, as a matter of sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

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

Response: Congress has mandated that federal judges consider the sentencing factors set forth in 18 U.S.C. § 3553(a). Congress has not directed that one purpose is entitled to greater importance than another. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent regarding those sentencing factors rather than any personal weighting I would accord them.

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

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on the quality of any Supreme Court decision, or on issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent.

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

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on the quality of any Eleventh Circuit decision, or on issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent.

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

Response: As enacted by Congress, 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."

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

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent. The Supreme Court and the Eleventh Circuit have not determined whether this statute is constitutional. However, in *Cox v. Louisiana*, 379

U.S. 559 (1965) the Supreme Court reviewed and upheld a state statute modeled after 18 U.S.C. § 1507. *Id.* at 561, 564.

38. **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:**

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

Response: Yes. As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. However, the constitutionality of racial segregation of schools is not likely to come before the courts again, so I may state my opinion that *Brown* was correctly decided. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Brown*.

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

Response: Yes. As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. However, the constitutionality of interracial marriage is not likely to come before the courts again, so I may state my opinion that *Loving* was correctly decided. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Loving*.

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

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Griswold*.

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

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. The Supreme Court overruled *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Dobbs*.

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

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. The Supreme Court overruled *Casey* in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Dobbs*.

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

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Gonzales v. Carhart*.

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

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Heller*.

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

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *McDonald*.

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

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Hosanna-Tabor*.

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

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on

issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Bruen*.

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

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Dobbs*.

m. **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 current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Students for Fair Admissions*.

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

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *303 Creative*.

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

Response: According to the Supreme Court: "We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1, 24 (2022).

40. **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, including Brian Fallon, Christopher Kang, Tamara Brummer, Jen Dansereau, and/or Becky Bond, 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, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Jen Dansereau, and/or Becky Bond,? If so, who?**

Response: No.

c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Jen Dansereau, and/or Becky Bond,? If so, who**?

Response: No.

41. **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, including, but not limited to, Rakim Brooks, Betsy Miller Kittredge, Nan Aron, Jake Faleschini, and/or Zachery Morris, 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 including, but not limited to: Rakim Brooks, Betsy Miller Kittredge, Nan Aron, Jake Faleschini, and/or Zachery Morris? If so, who?**

Response: No.

c. **Have you ever been in contact with anyone associated with Alliance for Justice, including, but not limited to: Rakim Brooks, Betsy Miller Kittredge, Nan Aron, Jake Faleschini, and/or Zachery Morris? If so, who?**

Response: No.

42. **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?**
        i. **Please include in this answer anyone associated with Arabella's subsidiaries, including the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, the North Fund, or any other such Arabella dark-money fund.**

    Response: No.

    b. **Are you currently in contact with anyone associated with Arabella Advisors, including, but not limited to: Eric Kessler, Himesh Bhise, Joseph Brooks, Isaiah Castilla, and/or Saurabh Gupta?**
        ii. **Please include in this answer anyone associated with Arabella's subsidiaries, including the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, the North Fund, or any other such Arabella dark-money fund that is still shrouded.**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Arabella Advisors, including, but not limited to: Eric Kessler, Himesh Bhise, Joseph Brooks, Isaiah Castilla, and/or Saurabh Gupta?**
        iii. **Please include in this answer anyone associated with Arabella's subsidiaries, such as the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, the North Fund, or any other such Arabella dark-money fund that is still shrouded.**

    Response: No.

43. **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, including but not limited to: George Soros, Alexander Soros, Mark Malloch-Brown, and/or Binaifer Nowrojee?**

Response: No.

c. **Have you ever been in contact with anyone associated with the Open Society Foundations including but not limited to: George Soros, Alexander Soros, Mark Malloch-Brown, and/or Binaifer Nowrojee?**

Response: No.

d. **Have you ever received any funding, or participated in any fellowship or similar program affiliated with the Open Society network?**

Response: No.

44. **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, including, but not limited to: Gabe Roth, and/or Josh Cohen? If so, who?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Fix the Court including, but not limited to: Gabe Roth, and/or Josh Cohen? If so, who?**

    Response: No.

45. **The Raben Group is a lobbying group that "champions diversity, equity, and justice as core values that ignite our mission for impactful change in corporate, nonprofit, government and foundation work." The group prioritizes judicial nominations and its list of clients have included the Open Society Foundations, the American Civil Liberties Union, the New Venture Fund, the Sixteen Thirty Fund, and the Hopewell Fund. It staffs the Committee for a Fair Judiciary.**

a. **Has anyone associated with The Raben Group 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 Raben Group, including but not limited to: Robert Raben, Donald Walker, Patty First, Joe Onek, Gara LaMarche, Steve Sereno, Dylan Tureff and/or Katherine Huffman? If so, who?**

Response: No.

c. **Have you ever been in contact with anyone associated with The Raben Group including but not limited to: Robert Raben, Donald Walker, Patty First, Joe Onek, Gara LaMarche, Steve Sereno, Dylan Tureff, and/or Katherine Huffman? If so, who?**

Response: No.

d. **Has anyone associated with the Raben Group offered to assist you with your nomination, including but not limited to organizing letters of support?**

Response: No.

46. **The Committee for a Fair Judiciary "fights to confirm diverse and progressive federal judges to counter illegitimate right-wing dominated courts" and is staffed by founder Robert Raben.**
    a. **Has anyone associated with the Committee for a Fair Judiciary requested that you provide 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 Committee for a Fair Judiciary, including, but not limited to: Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, and/or Joe Onek? If so, who?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with the Committee for a Fair Judiciary, including, but not limited to: Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, and/or Joe Onek? If so, who?**

Response: No.

d. **Has anyone associated with the Committee for a Fair Judiciary offered to support your current nomination in any way, to include organizing letters of support, endorsements, or any other effort?**

Response: No.

47. **The American Constitution Society is "the nation's foremost progressive legal organization" that seeks to "support and advocate for laws and legal systems that redress the founding failures of our Constitution, strengthen our democratic legitimacy, uphold the role of law, and realize the promise of equality for all, including people of color, women, LGBTQ+ people, people with disabilities, and other historically excluded communities."**

b. **Has anyone associated with the American Constitution Society, 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.

c. **Are you currently in contact with anyone associated with the American Constitution Society including, but not limited to Russ Feingold? If so, who?**

Response: I have spoken recently to attorneys whom I believe to be members of the American Constitution Society about the nomination process.

d. **Have you ever been in contact with anyone associated with the American Constitution Society including, but not limited to Russ Feingold? If so, who?**

Response: Since 2021, I have spoken with attorneys whom I believe to be associated with the American Constitution Society regarding the nomination process. I previously met Mr. Feingold during an event hosted by the Wilkie D. Ferguson, Jr. Bar Association, which is an affiliate chapter of the National Bar Association.

48. **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: On January 22, 2024, I was contacted by the White House Counsel's Office about my interest in an upcoming vacancy on the U.S. Court of Appeals for the Eleventh Circuit. On January 24, 2024, I interviewed with attorneys from the White House

Counsel's Office. On March 18, 2024, I had a follow-up meeting with attorneys from the White House Counsel's Office. Since March 18, 2024, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On May 8, 2024, the President announced his intent to nominate me.

49. **During or leading up to 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.

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

    Response: No.

51. **During or leading up to 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.

52. **During or leading up to 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.

53. **During or leading up to 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.

54. **During or leading up to your selection process, did you talk with any officials from or anyone directly associated with the Raben Group or the Committee for a Fair Judiciary, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

55. **During or leading up to 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: Since 2021, I have spoken with attorneys whom I believe to be associated with the American Constitution Society regarding the nomination process.

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

Response: On January 22, 2024, I was contacted by the White House Counsel's Office about my interest in an upcoming vacancy on the U.S. Court of Appeals for the Eleventh Circuit. On January 24, 2024, I interviewed with attorneys from the White House Counsel's Office. On March 18, 2024, I had a follow-up meeting with attorneys from the White House Counsel's Office. Since March 18, 2024, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On May 8, 2024, the President announced his intent to nominate me.

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

Response: On June 12, 2024, I received the Questions for the Record from the Office of Legal Policy at the Department of Justice. I reviewed and answered the questions after conducting legal research and searching my records. I submitted my draft responses to the Office of Legal Policy. After receiving limited feedback from the Office of Legal Policy, I finalized my answers.

Senate Judiciary Committee
Nominations Hearing
June 5, 2024
Questions for the Record
Senator Amy Klobuchar

For Embry Jerode Kidd, nominee to be U.S. Circuit Judge for the Eleventh Circuit

Since 2019, you have served as a U.S. Magistrate Judge in the Middle District of Florida. You were appointed as a magistrate by the sitting Article III judges of the court, and have issued over 13,700 opinions since your appointment as a magistrate judge, of which less than 1% have been reversed or received significant criticism from a reviewing court.

- **What have you learned in your time as a magistrate judge and how will that inform your approach if confirmed as a circuit court judge?**

  Response: As a U.S. Magistrate Judge for the Middle District of Florida, I am privileged to be able to assist the district judges in handling the matters before the court in one of the nation's largest and busiest federal districts, with a caseload of over 700 cases per judge. I am randomly assigned to each type of case that is filed in my division, resulting in a wide breadth of experience in reviewing, researching, and ruling upon the types of civil and criminal matters that are appealed to the Eleventh Circuit, which covers my district. For instance, I am often referred motions to dismiss and motions for summary judgment, which require me to make factual and legal findings; I have several cases in which the parties have consented to my entering final judgment; and I have presided over criminal sentencings and a criminal trial.

  Additionally, the Middle District of Florida has a heavy docket of appeals from the Social Security Administration, which I typically handle to conclusion by consent of the parties. Since 2019, I have entered final orders in over 120 social security appeals. Each appeal requires me to review the administrative record and the briefing of the parties, and at times, I will also hear oral argument. At the conclusion of each appeal, I issue an opinion applying the law to the facts developed at the administrative level, giving appropriate deference to the factfinder. The standard of review in those social security appeals is the same as that for the Eleventh Circuit.

  I believe that the breadth of experience that I have gained during my time as a U.S. Magistrate Judge, as outlined above, will serve me well if I am fortunate to be confirmed as a judge on the Eleventh Circuit.

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

  Response: As a U.S. Magistrate Judge since 2019, I have a deep understanding of the role of a trial judge, the pace and volume of a district court's docket, the development of the factual record in a case, and the personal importance of each case to the litigants. If confirmed, I would bring this understanding with me as a circuit judge. I would treat each

party with respect, carefully review the record to ensure that no error occurred in making findings of fact, and take care to accord the appropriate deference to the factfinders at the trial level.

Senator Mike Lee
Questions for the Record
Embry Kidd, Nominee for the United States Circuit Judge for the Eleventh Circuit

1. How would you describe your judicial philosophy?

Response: My judicial philosophy is to approach each case with an open mind, to consider the issues before me fairly, thoroughly, and in accordance with the law, to explain my decisions in a way that the average citizen can understand, and to treat all of the parties before me with respect.

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

Response: If confirmed, I would begin my analysis of a federal statute by first determining whether the Supreme Court or the Eleventh Circuit has interpreted the statutory provision at issue. If no precedent exists, then I would review the plain text of the statute, including any statutory definitions, and I would also consider any applicable canons of construction and other interpretive principles set forth by the Supreme Court and the Eleventh Circuit. If appropriate, I would also consider legislative history and persuasive authority from other circuits.

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

Response: If confirmed, I would begin my analysis of a constitutional provision by first determining whether the Supreme Court or the Eleventh Circuit has interpreted the provision at issue. In the unlikely event that there is no precedent, I would consider the text of the provision at issue and utilize the method of interpretation that the Supreme Court or the Eleventh Circuit has used in the most analogous context, along with any persuasive authority from other circuits.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court stated that "the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." *Id.* at 605.

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 the "plain language" of a statute is unambiguous, then the "inquiry begins with the statutory text, and ends there as well." *National Ass'n of Manufacturers v. Department of Defense*, 138 S. Ct. 617, 631 (2018) (internal quotation marks and citation omitted).

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

Response: The plain meaning of a statute or constitutional provision refers to the ordinary public meaning of the terms at the time of enactment. *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 654 (2020).

7. What are the constitutional requirements for standing?

Response: To establish standing, a plaintiff must plausibly establish three requirements: 1) an injury in fact that is concrete, particularized, and actual or imminent; 2) that the defendant likely caused the injury; and 3) that a favorable judicial decision would likely redress the injury. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021); *Drazen v. Pinto*, 74 F.4th 1336, 1342 (11th Cir. 2023) (en banc).

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

Response: The Necessary and Proper Clause of the Constitution grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution" its powers. U.S. Const. art. 1, § 8, cl. 18. In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court recognized that this clause grants Congress powers beyond those expressly enumerated in the Constitution.

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

Response: I would follow Supreme Court and Eleventh Circuit precedent in evaluating the constitutionality of the law. For instance, I would consider "whether the statute constitutes a means that is rationally related to the implementation of a constitutionality enumerated power." *United States v. Comstock*, 560 U.S. 126, 134 (2010).

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

Response: The Supreme Court has held that the Constitution protects rights that are not expressly enumerated in the Constitution when they are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Unenumerated rights the Supreme Court has recognized include the right to interstate travel, *Memorial Hospital v. Maricopa Cnty.*, 415 U.S. 250 (1974); the right to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); the right to marry, *Loving v. Virginia*, 388 U.S. 1

(1967); *Obergefell v. Hodges*, 576 U.S. 644 (2015); and the right to vote, *Harper v. Bd. of Elections*, 383 U.S. 663 (1966).

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: In *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937), the Supreme Court abrogated *Lochner v. New York*, 198 U.S. 45 (1905) and held that economic rights are "necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community." *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937). In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment protects the right to contraceptives. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent.

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

Response: Congress's powers under the Commerce Clause are enumerated in Article I, Section 8, Clause 3 of the Constitution. Under the Commerce Clause, Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609 (2000) (internal quotation marks omitted).

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 stated that a suspect class is a class "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). The Supreme Court has identified race, religion, national origin, and alienage as suspect classes. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

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

Response: The system of separated powers and checks and balances established in the Constitution has been regarded by the Framers as "a self-executing safeguard against

the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

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 confirmed, I would follow Supreme Court and Eleventh Circuit precedent in deciding whether one branch has assumed an authority not granted it by the text of the Constitution. *See, e.g.*, *Bond v. United States*, 564 U.S. 211 (2011) (finding that "a person indicted for violating a federal statute has standing to challenge its validity on grounds that, by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (limiting the authority of the President to seize steel mills to avoid a national strike).

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

Response: A judge's consideration of a case should be based on the law and the facts presented, while treating the parties with respect. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent regardless of any personal views or feelings.

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

Response: Both are improper, and if confirmed, I would do neither of those things.

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 historical trends regarding judicial review. Moreover, as a current U.S. Magistrate Judge, and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on Supreme Court practices and trends. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent when assessing the constitutionality of federal statutes.

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

Response: According to the Supreme Court, judicial review is the "duty to evaluate the constitutionality of legislative acts[.]" *Moore v. Harper*, 600 U.S. 1, 19 (2023). This duty was set forth in *Marbury v. Madison*, 5 U.S. 137 (1803). *Id*. Black's Law

Dictionary (11th ed. 2019) defines "judicial supremacy" as "[t]he 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 Constitution and the laws enacted by Congress are the supreme law of the Land pursuant to Article VI, Clause 2 of the Constitution. Elected officials are bound by public oath or affirmation to uphold the Constitution, which includes judicial decisions interpreting the law. *See Cooper v. Aaron*, 358 U.S. 1, 17–20 (1958). Additionally, Article V of the Constitution allows Congress and state legislatures to amend the Constitution. As a current U.S. Magistrate Judge, and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on how elected officials should exercise their duties.

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: The United States Constitution established three separate but equal branches of government. I understand this statement to mean that judges are responsible for interpreting the law and applying the law to the facts of each case. Judges do not enact legislation or enforce the laws.

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 follow Supreme Court and Eleventh Circuit precedent. If "a precedent of [the Supreme Court] has direct application in a case, 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) (internal citation 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 judge's sentencing analysis?

Response: That is not a factor set forth in 18 U.S.C. § 3553. If confirmed, I would assess any sentence on appeal in accordance with that statute and Supreme Court and Eleventh Circuit precedent.

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 statement or the context in which it was made. Black's Law Dictionary defines "equity" as "[f]airness; impartiality; evenhanded dealing[.]" Black's Law Dictionary (11th ed. 2019).

26. Without citing a dictionary definition, do you believe there is a difference between "equity" and "equality?" If so, what is it?

Response: Without a definition of these two words, I do not have an opinion as to whether there is a difference between them.

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 "[n]o State shall . . .deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. I am not aware of any Supreme Court or Eleventh Circuit precedent addressing whether the Fourteenth Amendment's Equal Protection Clause guarantees equity.

28. According to your current understanding, and without citing a dictionary definition, how do you define "systemic racism?"

Response: I do not have a personal definition of "systemic racism."

29. According to your current understanding, and without citing a dictionary definition, how do you define "Critical Race Theory?"

Response: I do not have a personal definition of "Critical Race Theory."

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. What are the competing standards of review? When are they applied?

Response: The Eleventh Circuit has held that factual findings are reviewed for clear error, and the application of law to facts is reviewed de novo. *CFTC v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1343 (11th Cir. 2008). "An abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases [a determination] upon findings of fact that are clearly erroneous." *Id.* (internal citation and quotation marks omitted).

32. At the drafting of the Constitution, our Founders could not have foreseen the invention of radios, TV, airplanes, and the internet, yet all of these things are, for the most part, governed by federal law. Is that constitutional? Why or why not?

Response: The Necessary and Proper Clause of the Constitution grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution" its powers. U.S. Const. art. 1, § 8, cl. 18; *see also McCulloch v. Maryland*, 17 U.S. 316 (1819). The Supreme Court has recognized that, even though the "activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). "But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *United States v. Lopez*, 514 U.S. 549, 556–57 (1995); *see also United States v. Morrison*, 529 U.S. 598 (2000).

33. What are the limiting principles of the commerce clause?

Response: Congress's powers under the Commerce Clause are enumerated in Article I, Section 8, Clause 3 of the Constitution. Under the Commerce Clause, Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609 (2000) (internal quotation marks omitted).

34. What are the limiting principles of the dormant commerce clause?

Response: The Supreme Court recently expounded upon the dormant Commerce Clause and held that "the Commerce Clause prohibits the enforcement of state laws driven by economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Nat'l Pork*

Producers Council v. Ross, 598 U.S. 356, 369 (2023) (internal citations and quotation marks omitted, alterations adopted). "Today, this antidiscrimination principle lies at the very core of our dormant Commerce Clause jurisprudence." *Id.* (quotation marks omitted).

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

Questions for the Record for Embry J. Kidd, nominated to be United States Circuit Judge for the Eleventh 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.

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: As a current U.S. Magistrate Judge, and as a nominee for the Eleventh Circuit, I have no opinion on unenumerated rights that have not been articulated in a decision by the United States Supreme Court.

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 is to approach each case with an open mind, to consider the issues before me fairly, thoroughly, and in accordance with the law, to explain my decisions in a way that the average citizen can understand, and to treat all of the parties before me with respect. I have not thoroughly studied the judicial philosophies of the Supreme Court Justices and cannot provide an opinion on which is most analogous to mine. Instead, I commit to following Supreme Court and Eleventh Circuit precedent, if confirmed.

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

   Response: 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; specifically, 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." I would not characterize myself using any particular label, but if I am confirmed, I will apply the methods of constitutional and statutory interpretation set forth in Supreme Court and Eleventh Circuit precedent. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

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

   Response: 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." I would not characterize myself using any particular label, but if I am confirmed, I will apply the methods of constitutional and statutory interpretation set forth in Supreme Court

and Eleventh Circuit precedent, and I am not aware of Supreme Court or Eleventh Circuit precedent that has applied "living constitutionalism" as a method of interpretation.

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 confirmed, in the unlikely event I were to encounter a constitutional issue that is truly one of first impression, I would first review the plain language of the provision at issue. I would then try to find Supreme Court and Eleventh Circuit precedent in an analogous context and apply the method of interpretation that was utilized in that context. In many cases, the Supreme Court has instructed that interpretation of a constitutional provision should begin with the original public meaning of the text of that provision. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022); *Crawford v. Washington*, 541 U.S. 36 (2004). If there were no analogous Supreme Court or Eleventh Circuit precedent, I would look to persuasive case law from other circuit courts to guide my analysis.

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 confirmed, I would follow Supreme Court and Eleventh Circuit precedent in determining the meaning of the Constitution or a statute. When interpreting the Constitution, the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008), looked at the "normal and ordinary" meaning of words and not "secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *Id.* In the statutory context, the Supreme Court has instructed that a statute should "normally" be interpreted "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.,* 590 U.S. 644, 654 (2020).

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

Response: If confirmed, I would follow Supreme Court and Eleventh Circuit precedent in determining the meaning of the Constitution. The Supreme Court has noted that, "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 v. Bruen*, 597 U.S. 1, 28 (2022).

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 precedent from the Supreme Court, which lower courts must follow.

a. **Was it correctly decided?**

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Dobbs*.

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

Response: *New York Rifle & Pistol Association v. Bruen*, is binding precedent from the Supreme Court, which lower courts must follow.

a. **Was it correctly decided?**

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Bruen*.

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

Response: *Brown v. Board of Education*, is binding precedent from the Supreme Court, which lower courts must follow.

a. **Was it correctly decided?**

Response: Yes. As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. However, the constitutionality of racial segregation of schools is not likely to come before the courts again, so I may state my opinion that *Brown* was correctly decided. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Brown*.

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 precedent from the Supreme Court, which lower courts must follow.

a. Was it correctly decided?

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Students for Fair Admissions*.

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

Response: *Gibbons v. Ogden*, is binding precedent from the Supreme Court, which lower courts must follow.

a. **Was it correctly decided?**

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on whether the Supreme Court correctly decided a case, or on issues that may come before me if I am confirmed. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent, including *Gibbons v. Ogden*.

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

Response: The offenses that trigger a presumption of pretrial detention are set forth in 18 U.S.C. § 3142(e) and include controlled substance offenses for which the maximum term of imprisonment is ten years or more, certain violent crimes, and certain crimes involving minor victims.

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

Response: The language of the Bail Reform Act does not set forth policy rationales for the presumption, and I am not aware of any Supreme Court or Eleventh Circuit case law setting forth the policy rationales.

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: The Religious Freedom Restoration Act ("RFRA"), limits what the government may impose or require of private institutions. *See* 42 U.S.C. § 2000bb-1. The Supreme Court has held that RFRA protects religious organizations, *see Little Siter of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), and small businesses operated by observant owners, *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

Additionally, if a law burdening the free exercise of religious practices is not neutral and generally applicable, then the First Amendment would demand strict scrutiny review of the law. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021). The First Amendment's ministerial exception may also prevent religious organizations from being subjected to certain employment discrimination claims. *See Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732 (2020).

If confirmed, I would follow Eleventh Circuit and Supreme Court precedent when interpreting the Constitution and federal statutory law.

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

Response: The Supreme Court has "made clear that the government, if it is to respect the Constitution's guarantee of free exercise, 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." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citation omitted). Laws that burden religion, and which are not neutral and generally applicable, are subject to strict scrutiny review. *Tandon v. Newsom*, 593 U.S. 61 (2021).

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: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court 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. Analyzing the executive order under strict scrutiny review, the Court held that the challenged regulations were not narrowly tailored to achieve a compelling interest. *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.* (citation omitted). The Court also found that there was no showing that granting the preliminary injunction would harm the public interest. *Id.* at 68.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that "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 1296. The Court reasoned that the regulations at issue were not neutral and did not pass strict scrutiny because they permitted non-religious entities—hair salons, retail stores, and movie theaters—to engage in comparable activity by bringing together more than three households at a time while prohibiting at-home religious gatherings from doing the same. *Id.* at 1297–98.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop*, the Supreme Court held that the Free Exercise Clause bars "even subtle departures from neutrality" concerning religion. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n.*, 138 S. Ct. 1719, 1731 (2018). The Court found that the government's application of a facially neutral public accommodations law violated the Free Exercise Clause because the commission meetings exhibited a religious animus against the sincerely held religious beliefs of the cakeshop owner. *Id*. at 1729–32 (2018).

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: Yes. According to the Supreme Court, sincerely held religious beliefs are protected regardless of whether they derive from a particular religious organization or agree with the mainstream of their religious membership. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833–34 (1989).

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

Response: The Supreme Court has found that only sincerely held religious, not secular, beliefs are protected by the Free Exercise Clause. *See Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829 (1989). 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). If confirmed, I would follow Supreme Court and Eleventh Circuit precedent on this issue.

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

Response: The Supreme Court has stated that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 887 (1990). If confirmed, I would follow Supreme Court and Eleventh Circuit precedent on this issue.

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

Response: I am not familiar with the Catholic Church's official position on abortion.

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*, the Supreme Court clarified that the "ministerial exception" recognized in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), applies not only to "ministers," but also to individuals such as lay teachers whose religious teaching responsibilities "lie at the very core of the mission of a private religious school." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020).

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*, 593 U.S. 522 (2021), the Supreme Court held that a governmental restriction on a religious entity pursuant to a policy that allowed for discretionary exemptions on a case-by-case basis was not generally applicable and was, therefore, subject to strict scrutiny. The Court found that the policy failed strict scrutiny review and was therefore a violation of the Free Exercise Clause of the First Amendment. *Id.*

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: In *Carson v. Makin*, 596 U.S. 767 (2022), the Supreme Court held that Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments violated the Free Exercise Clause of the First Amendment. The Court found that offering a benefit to the public, but excluding religious schools solely because of their religious character, failed strict scrutiny analysis and was a violation of the Free Exercise Clause. *Id*. at 767–70.

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 Sch. Dist.*, 597 U.S. 507 (2022), the Supreme Court held that the Free Exercise and Free Speech Clauses of the First Amendment protected a high school football coach who was engaging in a personal religious observance from government reprisal, as the Constitution neither mandates nor permits the government to suppress such religious expression. The school district's policy was not neutral and generally applicable, and it therefore failed strict scrutiny review. *Id.*

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: *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), involved the application of an ordinance requiring the installation of modern septic systems to members of an Amish community. In his concurrence, Justice Gorsuch stated that *Fulton v. Philadelphia*, 593 U.S. 522 (2021), makes clear that the Religious Land Use and Institutionalized Persons Act requires strict scrutiny—that is, the government must show that its land use regulation is narrowly tailored to serve a compelling governmental interest. *Mast*, 141 S. Ct. at 2432. Justice Gorsuch reasoned that courts "cannot rely on broadly formulated governmental interests but must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Id.* (internal quotation marks, alterations, and citations omitted). He also stated that governments and courts must give due weight to exemptions given to other groups and to regulations used in other jurisdictions. *Id.* at 2432–33. Finally, he concluded that the government cannot reject alternatives based on assumptions or supposition. *Id*. at 2433.

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 current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on issues that may come before me if I am confirmed. I am not aware of any Supreme Court or Eleventh Circuit precedent addressing whether the First Amendment right to peaceably assemble restricts the application of 18 U.S.C. § 1507 as to protests in front

of the homes of U.S. Supreme Court Justices following the *Dobbs* leak. If confirmed, I would follow binding Supreme Court and Eleventh Circuit precedent.

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;**

    Response: No.

    b. **An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;**

    Response: No.

    c. **An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or**

    Response: No.

    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: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on political issues or issues that may come before me if I am confirmed. If confirmed, I would follow binding Supreme Court and Eleventh Circuit precedent.

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 held that a racially disparate impact may be used as evidence of illegal discrimination in certain contexts. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 577–78 (2009). However, disparate impact alone is typically insufficient to establish a violation of the Equal Protection Clause. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

If confirmed, I will apply Supreme Court and Eleventh Circuit precedent to the facts presented before me.

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

Response: As a current U.S. Magistrate Judge and a nominee for the Eleventh Circuit, it would be inappropriate for me to comment on a matter of policy reserved to the legislative and executive branches.

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 an individual's right to keep and bear arms for self-defense both within and outside the home. *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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: "[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." *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 17 (2022) (internal citation omitted).

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

Response: Yes. *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

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

Response: No. The Supreme Court has explained that the constitutional right to keep and bear arms is not a "second-class right." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

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

Response: No.

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

Response: The President "shall take care that the laws be faithfully executed." U.S. Const. art. II, § 3. The Supreme Court has held that the executive's discretion is "broad" but not "unfettered," and is "subject to constitutional constraints." *Wayte v. United States*, 470 U.S. 598, 608 (1985) (internal quotation marks omitted). As a current U.S. Magistrate Judge and nominee for the Eleventh Circuit, I am precluded from commenting on a matter of policy reserved to the executive branch.

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.

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

Response: The Supreme Court, in vacating a stay pending appeal of a court order, held that the plaintiffs were likely to succeed in their argument that the Centers for Disease Control exceeded its statutory authority by issuing a nationwide moratorium on evictions during the COVID-19 pandemic. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021).

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: No.

45. **In *United States v. D'Haiti*, you granted pre-trial release to Defendant D'Haiti who had a history of sexually assaulting minors at a school, and was arrested for possession of child pornography. Your decision was subsequently reversed by the district judge who had determined that the Defendant posed a danger to the community. You had determined that Defendant's danger to any person or the community was minimal because the defendant's acts were confined to his activities while employed at gyms and schools.**

a. **If the Defendant was dangerous toward children while employed, why did you mandate that he seek out further employment within the community in your Conditional Release Order?**

Response: I ordered the Defendant to maintain, actively seek, or commence verifiable employment at the recommendation of U.S. Pretrial Services. Any employment would have been first approved by Pretrial Services and likely would have involved employment that he could engage in at home. Additionally, the remaining restrictions, which included GPS monitoring, no contact with victims and minors, and no internet usage, would have remained in place, so the Defendant would not have been able to resume his prior employment that put him in contact with minors.

Moreover, at the time D'Haiti appeared before me, the government's complaint included a single allegation of possession of child pornography and did not include any allegations related to sexual activity. By the time the government appeared before the district judge, they had obtained an indictment charging the defendant with one count of possession of child pornography and two counts of enticement of a minor to engage in sexually explicit conduct, the latter of which triggered the statutory presumption of detention. This was the first time that the government presented an indictment charging conduct related to sexual activity, and the first time that the government presented an indictment with charges related to a second victim. At the second hearing, the government emphasized that the charges had "gotten more serious since the first detention hearing. We now have two minor victims that are charged by a grand jury in an indictment." (Tr. (Doc. 64) at 50:12–15.)

If this additional information had been provided to me, I would have detained the Defendant. In the second detention hearing, the district judge also specifically noted that this information had not been presented to me.

b. **On what grounds did you determine that the Defendant seeking employment elsewhere would not endanger the safety of any other person or the**

community?

Response: I ordered the Defendant to maintain, actively seek, or commence verifiable employment at the recommendation of U.S. Pretrial Services. Any employment would have been first approved by Pretrial Services and likely would have involved employment that he could engage in at home. Additionally, the remaining restrictions, which included GPS monitoring, no contact with victims and minors, and no internet usage, would have remained in place, so the Defendant would not have been able to resume his prior employment that put him in contact with minors.

Moreover, at the time D'Haiti appeared before me, the government's complaint included a single allegation of possession of child pornography and did not include any allegations related to sexual activity. By the time the government appeared before the district judge, they had obtained an indictment charging the defendant with one count of possession of child pornography and two counts of enticement of a minor to engage in sexually explicit conduct, the latter of which triggered the statutory presumption of detention. This was the first time that the government presented an indictment charging conduct related to sexual activity, and the first time that the government presented an indictment with charges related to a second victim. At the second hearing, the government emphasized that the charges had "gotten more serious since the first detention hearing. We now have two minor victims that are charged by a grand jury in an indictment." (Tr. (Doc. 64) at 50:12–15.)

If this additional information had been provided to me, I would have detained the Defendant. In the second detention hearing, the district judge also specifically noted that this information had not been presented to me.

c. **What about the school environment made the Defendant so much more dangerous there than any other employment environment?**

Response: The allegations in this case related to two very specific places: the Defendant's gym and a school where he was the cheerleading coach. I asked the government whether there were allegations of victim contact outside of these locations to assess the appropriateness of placing the defendant on house arrest, and the government confirmed that there were no allegations of victim contact beyond those two locations. For instance, if the government had presented evidence that a victim lived in the Defendant's neighborhood, I would not have considered house arrest to be appropriate.

Moreover, at the time D'Haiti appeared before me, the government's complaint included a single allegation of possession of child pornography and did not include any allegations related to sexual activity. By the time the government appeared before the district judge, they had obtained an indictment charging the defendant with one count of possession of child pornography and two counts of enticement of

a minor to engage in sexually explicit conduct, the latter of which triggered the statutory presumption of detention. This was the first time that the government presented an indictment charging conduct related to sexual activity, and the first time that the government presented an indictment with charges related to a second victim. At the second hearing, the government emphasized that the charges had "gotten more serious since the first detention hearing. We now have two minor victims that are charged by a grand jury in an indictment." (Tr. (Doc. 64) at 50:12–15.)

If this additional information had been provided to me, I would have detained the Defendant. In the second detention hearing, the district judge also specifically noted that this information had not been presented to me.

d. **If the high presence of children made the school environment more dangerous than any employment environment, what gave you assurance that the Defendant would not violate the non-contact of minors order in a different employment environment?**

Response: There was no evidence presented to me that the Defendant had inappropriate contact with minors outside of the specific locations of his gym and the school. Additionally, U.S. Pretrial Services would have had to approve any employment, and as part of that process, they would have verified with the potential employer that the Defendant would not be able to interact with minors.

Moreover, at the time D'Haiti appeared before me, the government's complaint included a single allegation of possession of child pornography and did not include any allegations related to sexual activity. By the time the government appeared before the district judge, they had obtained an indictment charging the defendant with one count of possession of child pornography and two counts of enticement of a minor to engage in sexually explicit conduct, the latter of which triggered the statutory presumption of detention. This was the first time that the government presented an indictment charging conduct related to sexual activity, and the first time that the government presented an indictment with charges related to a second victim. At the second hearing, the government emphasized that the charges had "gotten more serious since the first detention hearing. We now have two minor victims that are charged by a grand jury in an indictment." (Tr. (Doc. 64) at 50:12–15.)

If this additional information had been provided to me, I would have detained the Defendant. In the second detention hearing, the district judge also specifically noted that this information had not been presented to me.

46. **The government described Mr. D'Haiti as grooming a minor victim to attain child pornography by integrating himself into their family and developing an emotional relationship with the victim. Why did that factor not increase his dangerousness in your analysis?**

Response: Pursuant to the Bail Reform Act, 18 U.S.C. § 3142, I had to consider whether there were conditions that I could set that would mitigate any potential danger to an individual or to the community. In this case, in addition to house arrest and GPS monitoring, I ordered the Defendant not to have any direct or indirect contact with the minor victim. Additionally, most of the Defendant's communications occurred through social media, and I restricted him from accessing any electronic devices or the internet.

47. **Did you consider the pending state charges of lewd and lascivious communications with minors when deciding not to detain the Defendant?**

Response: The government stated at the Defendant's detention hearing that he had been arrested on state charges four months prior, but the Defendant had not been indicted for that conduct at the time of the hearing. At the time of the Defendant's detention hearing, the government's complaint charged only one count of possession of child pornography, which did not carry a statutory presumption. By the time the government appeared before the district judge, they had obtained an indictment charging the defendant with one count of possession of child pornography and two counts of enticement of a minor to engage in sexually explicit conduct, the latter of which triggered the statutory presumption of detention. This was the first time that the government presented an indictment charging conduct related to sexual activity, and the first time that the government presented an indictment with charges related to a second victim. At the second hearing, the government emphasized that the charges had "gotten more serious since the first detention hearing. We now have two minor victims that are charged by a grand jury in an indictment." (Tr. (Doc. 64) at 50:12–15.)

If this additional information had been provided to me, I would have detained the Defendant. In the second detention hearing, the district judge also specifically noted that this information had not been presented to me.

48. **Why were the facts of predatory grooming, multiple child victims, and possessing child pornography of current students insufficient to deem the defendant dangerous and worthy of detention?**

Response: When I first saw this Defendant, the only pending charge was one count of possession of child pornography, which did not carry a statutory presumption. Nevertheless, I placed him on home detention with a GPS monitor, which restricted the Defendant to his residence at all times unless he received prior court authorization to leave the residence. Additionally, he was placed under the supervision of U.S. Pretrial Services, prohibited from any direct or indirect contact with the victims, prohibited from any contact with minors generally, restricted from possessing firearms, not allowed to leave the Middle District of Florida, ordered to undergo psychiatric treatment, and restricted from any use or possession of any electronic device capable of connecting to the Internet.

By the time the government appeared before the district judge, they had obtained an

indictment charging the defendant with one count of possession of child pornography and two counts of enticement of a minor to engage in sexually explicit conduct, the latter of which triggered the statutory presumption of detention. This was the first time that the government presented an indictment charging conduct related to sexual activity, and the first time that the government presented an indictment with charges related to a second victim. At the second hearing, the government emphasized that the charges had "gotten more serious since the first detention hearing. We now have two minor victims that are charged by a grand jury in an indictment." (Tr. (Doc. 64) at 50:12–15.)

If this additional information had been provided to me, I would have detained the Defendant. In the second detention hearing, the district judge also specifically noted that this information had not been presented to me.

49. **In *United States v. King*, you granted pre-trial release to Defendant King, who was charged with receipt of child sexual abuse materials, and who had previously been convicted of child sexual abuse. You were reversed by the district judge who found that the Defendant did, in fact, pose a danger to the community. Did you consider Defendant's previous convictions for "various hands-on sex offenses" including sodomy with a child under the age of 12 by force and without consent when you held that there was no danger in pre-trial release?**

Response: Yes, I considered the Defendant's criminal history, including those convictions from 15 years prior. However, when I first saw this defendant, the only concern that the government articulated as to why the defendant would pose a danger to any individual or to the community was that he could possibly distribute more images, thereby revictimizing the victims of his charged crime. To address that concern, I placed the defendant on home detention with a GPS monitor, which restricted the defendant to his residence at all times unless he received prior court authorization to leave the residence. Additionally, he was placed under the supervision of U.S. Pretrial Services, prohibited from any direct or indirect contact with the victims, prohibited from any contact with minors generally, restricted from possessing firearms, not allowed to leave the Middle District of Florida, ordered to undergo psychiatric treatment, and restricted from any use or possession of any electronic device capable of connecting to the internet.

Subsequently, the district judge was presented with the defendant's statements regarding a compulsion that he could not control, which led her to decide that he should be detained. Those statements were not presented to me. If they had been, I also would have ordered the defendant to be detained.

50. **Did the Defendant's past convictions and history with minors factor into your decision to release him to house arrest?**

Response: Yes, I considered the Defendant's criminal history, including those convictions from 15 years prior. However, when I first saw this defendant, the only concern that the government articulated as to why the defendant would pose a danger to

any individual or to the community was that he could possibly distribute more images, thereby revictimizing the victims of his charged crime. To address that concern, I placed the defendant on home detention with a GPS monitor, which restricted the defendant to his residence at all times unless he received prior court authorization to leave the residence. Additionally, he was placed under the supervision of U.S. Pretrial Services, prohibited from any direct or indirect contact with the victims, prohibited from any contact with minors generally, restricted from possessing firearms, not allowed to leave the Middle District of Florida, ordered to undergo psychiatric treatment, and restricted from any use or possession of any electronic device capable of connecting to the internet.

Subsequently, the district judge was presented with the defendant's statements regarding a compulsion that he could not control, which led her to decide that he should be detained. Those statements were not presented to me. If they had been, I also would have ordered the defendant to be detained.

51. **Both Defendants in the above cases were ultimately found to have uncontrollable compulsions. Yet you released both without considering factors present before you at the time of the detention hearing that might have led to that inference.**

a. **Why in both cases did you ignore facts that showed a pattern of dangerous behavior towards children from the Defendants?**

Response: I considered all of the facts that were presented to me in accordance with the Bail Reform Act. As the district judge noted in *United States v. King*, the evidence of a compulsion was not presented to me. In *United States v. D'Haiti*, there was not specific evidence of a compulsion that was presented to me, but once again, the district judge noted that her decision was based on information that was not presented to me. In each case, if the government had presented the same evidence to me that it presented to the district judge, I would have detained each defendant.

b. **How much more evidence of a defendant's danger toward children is necessary for you to place a defendant in confinement?**

Response: Based on the evidence presented to me, to address the danger articulated by the government, I placed both Defendants on house arrest with a GPS monitor, which restricted the defendants to their residences at all times unless they received prior court authorization to leave the residences. Additionally, they were placed under the supervision of U.S. Pretrial Services, prohibited from any direct or indirect contact with the victims, prohibited from any contact with minors generally, restricted from possessing firearms, not allowed to leave the Middle District of Florida, ordered to undergo psychiatric treatment, and restricted from any use or possession of any electronic device capable of connecting to the internet.

In each case, if the government had presented the same evidence to me as it

presented to the district judge, I would have detained each Defendant.

52. **Did you have any conversations about the article, "*Grassroots Death Sentences?: The Social Movement for Capital Child Rape Laws*" with any member or staffer of either the executive or legislative branch?**

a. **If so, who was the member/staffer and what was the nature of the conversation?**

Response: I was asked by the Department of Justice's Office of Legal Policy whether I contributed to the article. My answer was no.

53. **During the hearing, you said that you needed to review the article "*Grassroots Death Sentences?: The Social Movement for Capital Child Rape Laws*" that your conversations helped inform.**

a. **Is it your sworn statement that you did not review the article prior to your confirmation hearing?**

Response: Yes. I read the abstract of the article when it was brought to my attention, but I did not read the full article. Prof. Bell and I were in law school at the time. I do not recall, and do not have records of, any conversations with her about the subject of the article. I did not author or contribute to any statements that Prof. Bell made in the article, and I do not share Prof. Bell's views as stated in the article.

b. **Now that you have had the time to review the article – what parts do you agree with?**

Response: I did not contribute to Prof. Bell's article and do not adopt any of her statements. Upon review, I agree that *Coker v. Georgia*, 433 U.S. 584 (1977), left open the question of whether the death penalty could be imposed for the rape of a child. Subsequent to the article, the Supreme Court decided the case of *Kennedy v. Louisiana*, 554 U.S. 407 (2008), which presented the question of "whether the Constitution bars [the state] from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim." *Id.* at 412. The Court held that "capital punishment for the rape of a child in which death did not occur is unconstitutional." *Id.* If confirmed, I would follow Supreme Court and Eleventh Circuit precedent when evaluating any child rape statutes.

c. **What parts do you disagree with?**

Response: As a former Assistant U.S. Attorney who prosecuted individuals for crimes against children and witnessed the devastating impact that those crimes had on the children involved, I believe that individuals who commit such crimes should

be held accountable to the full extent of the law. To the extent that Prof. Bell suggests otherwise in her article, I disagree. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent when evaluating any child rape statutes.

d. **Will you renounce the article?**

Response: I renounce any implication that I authored or share the views expressed in Prof. Bell's article. I did not author or contribute to the article, and I do not share Prof. Bell's views as stated in the article. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent when evaluating any child rape statutes.

54. **Have you had any conversations or communication with Professor Monica C. Bell?**

a. **If so, what were the nature of those conversations?**

Response: Prof. Bell and I were in law school at the time this article was published. As a law student, I would often have conversations and debates about cases and course material with my law school classmates, including Prof. Bell. I do not recall, and do not have records of, any conversations with her about this subject. I did not author or contribute to any statements that Prof. Bell made in the article, and I do not share Prof. Bell's views as stated in the article.

55. **The article provides "Child rape statutes, though not laden with the exact same racial baggage as more general rape statutes, are still racialized."**

a. **What does this sentence mean?**

Response: I do not know what this sentence means. I did not write or contribute to any statements that Prof. Bell made in the article, including this one, and I do not share Prof. Bell's views as stated in the article. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent when evaluating any child rape statutes.

56. **Imagine that a statute read as follows: "Federal judicial nominees shall provide a brief summary of and citations for all of their opinions where their decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings." How would you interpret the meaning of the statute?**

a. **Are there any basis for exceptions?**

Response: I recognize that this is the wording of Question 13(f) of the Senate Judiciary Committee's Questionnaire. To prepare my responses to the Committee's Questionnaire, I reviewed each question and then sought guidance from the Department of Justice's Office of Legal Policy regarding what material might be

responsive to the Committee's Questionnaire. I then thoroughly searched my own records, Court databases, legal databases, and other sources to supply this Committee with each and every responsive record that I had identified, consistent with the advice that I received.

In *United States v. King* and *United States v. D'Haiti*, I did not issue an opinion. Instead, I made findings of fact on the record and entered an order setting conditions of release. While completing the Questionnaire, I reviewed Questionnaires previously submitted by other magistrate judges and did not see any release or detention orders listed. Additionally, I considered that, even if the release orders could be construed as opinions, since the district judge's review of a release decision is *de novo*, the district judge need not review the initial detention hearing, or any reasoning that I articulated, in deciding whether to release a defendant. *See United States v. Gaviria*, 828 F.2d 667, 670 (11th Cir. 1987) ("[*D*]*e novo* review requires the [district] court to exercise independent consideration of all facts properly before it . . . .").

In each of these cases, the district judge held a new detention hearing and received new evidence. In each case, the district judge noted that her decision was based on information that had not been presented to me, and she did not criticize my findings. Therefore, I did not consider the district judge's independent decisions to detain these defendants to be reversals of my decisions. In each case, if the government had presented the same evidence to me that it presented to the district judge, I would have detained each defendant.

Further, based on guidance from the Department of Justice's Office of Legal Policy, I was under the impression that because the district judge's decision in each case was based on new evidence not presented to me, it was not responsive to the Questionnaire. Upon learning that these decisions were viewed as potentially responsive, I promptly updated my Committee Questionnaire. Had I known at the time of filing that these decisions were potentially responsive, I would have supplied them in my initial filing.

57. **Why did you choose not to disclose *United States v. D'Haiti* under SJQ Question 13(f) that asks nominees to "Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings?"**

a. **If you were advised not to turn over the case by a member or staffer for either the executive or legislative branch, please list the person(s), and the capacity in which they are employed. Should you not list anyone, the Judiciary Committee will interpret that to mean that you unilaterally made such a decision**.

Response: To prepare my responses to the Committee's Questionnaire, I reviewed each question and then sought guidance from the Department of Justice's Office of Legal Policy regarding what material might be responsive to the Committee's Questionnaire. I then thoroughly searched my own records, Court databases, legal databases, and other sources to supply this Committee with each and every responsive record that I had identified, consistent with the advice that I received.

I take seriously my duty of candor to the Senate and to the American public. In *United States v. D'Haiti*, I did not issue an opinion. Instead, I made findings of fact on the record and entered an order setting conditions of release. While completing the Questionnaire, I reviewed Questionnaires previously submitted by other magistrate judges and did not see any release or detention orders listed. Additionally, I considered that, even if the release orders could be construed as opinions, since the district judge's review of a release decision is *de novo*, the district judge need not review the initial detention hearing, or any reasoning that I articulated, in deciding whether to release a defendant. *See United States v. Gaviria*, 828 F.2d 667, 670 (11th Cir. 1987) ("[*D*]*e novo* review requires the [district] court to exercise independent consideration of all facts properly before it . . . .").

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58. **Why did you choose not to disclose *United States v. King* under SJQ Question 13(f) that asks nominees to "Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings?"**

a. **If you were advised not to turn over the case by a member or staffer for either the executive or legislative branch, please list the person(s), and the capacity in which they are employed. Should you not list anyone, the Judiciary Committee will interpret that to mean that you unilaterally made such a decision.**

Response: To prepare my responses to the Committee's Questionnaire, I reviewed each question and then sought guidance from the Department of Justice's Office of Legal Policy regarding what material might be responsive to the Committee's Questionnaire. I then thoroughly searched my own records, Court databases, legal databases, and other sources to supply this Committee with each and every responsive record that I had identified, consistent with the advice that I received.

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In this case, the district judge held a new detention hearing and received new evidence. The district judge noted that her decision was based on information that had not been presented to me, and she did not criticize my findings. Therefore, I did not consider the district judge's independent decisions to detain these defendants to be reversals of my decisions. In each case, if the government had presented the same evidence to me that it presented to the district judge, I would have detained each defendant.

Further, based on guidance from the Department of Justice's Office of Legal Policy, I was under the impression that because the district judge's decision in each case was based on new evidence not presented to me, it was not responsive to the Questionnaire. Upon learning that these decisions were viewed as potentially responsive, I promptly updated my Committee Questionnaire. Had I known at the time of filing that these decisions were potentially responsive, I would have supplied them in my initial filing.

59. **Why did you choose not to disclose overturned cases before your nomination hearing, despite the precedent of at least eleven nominees throughout the Obama, Trump, and Biden Administrations providing these cases during their nominations?**

Response: To prepare my responses to the Committee's Questionnaire, I reviewed each question and then sought guidance from the Department of Justice's Office of Legal Policy regarding what material might be responsive to the Committee's Questionnaire. I then thoroughly searched my own records, Court databases, legal databases, and other sources to supply this Committee with each and every responsive record that I had identified, consistent with the advice that I received.

I take seriously my duty of candor to the Senate and to the American people. In *United States v. King* and *United States v. D'Haiti*, I did not issue an opinion. Instead, I made findings of fact on the record and entered an order setting conditions of release. While completing the Questionnaire, I reviewed Questionnaires previously submitted by other magistrate judges and did not see any release or detention orders listed. Additionally, I considered that, even if the release orders could be construed as opinions, since the district judge's review of a release decision is *de novo*, the district judge need not review the initial detention hearing, or any reasoning that I articulated, in deciding whether to release a defendant. *See United States v. Gaviria*, 828 F.2d 667, 670 (11th Cir. 1987) ("[*D*]*e novo* review requires the [district] court to exercise independent consideration of all facts properly before it . . . .").

In each of these cases, the district judge held a new detention hearing and received new evidence. In each case, the district judge noted that her decision was based on information that had not been presented to me, and she did not criticize my findings. Therefore, I did not consider the district judge's independent decisions to detain these defendants to be reversals of my decisions. In each case, if the government had presented the same evidence to me that it presented to the district judge, I would have detained each defendant.

Further, based on guidance from the Department of Justice's Office of Legal Policy, I was under the impression that because the district judge's decision in each case was based on new evidence not presented to me, it was not responsive to the Questionnaire. Upon learning that these decisions were viewed as potentially responsive, I promptly updated my Committee Questionnaire. Had I known at the time of filing that these decisions were potentially responsive, I would have supplied them in my initial filing.

60. **Since the time of your application to the Eleventh Circuit, who did you speak with regarding the cases *United v. King* and *United States v. D'Haiti*?**

a. **Who in the executive branch did you consult?**

Response: I discussed these cases and whether they were responsive to the Questionnaire with the Department of Justice's Office of Legal Policy. I also discussed the substance of the cases with staff from the White House Counsel's Office.

b. **Who in the legislative branch did you consult?**

Response: No one.

c. **Who in the judicial branch did you consult?**

Response: No one.

d. **Who outside of the government did you consult?**

Response: No one.

Questions from Senator Thom Tillis
For Embry J. Kidd, nominated to serve as U.S. Circuit Judge for the 11th Circuit

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: No. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent when interpreting and applying the law.

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

   Response: Impartiality is a requirement of Canon 3 of the Code of Conduct for United States Judges, which I must follow as a current U.S. Magistrate Judge, and which I would follow if confirmed to the Eleventh Circuit.

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

   Black's Law Dictionary (11th ed. 2019) defines "judicial activism" as "a philosophy of judicial decisionmaking whereby judges allow their personal views about public policy, among other factors, to guide their decisions." I do not consider judicial activism to be appropriate.

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

   Response: No.

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

   Response: If confirmed, I would follow Supreme Court and Eleventh Circuit precedent when interpreting and applying the law regardless of the desirability of the outcome.

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

   Response: The Supreme Court has held that the Second Amendment protects an individual's right to keep and bear arms for self-defense both within and outside the home. *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I would follow Supreme Court and Eleventh Circuit precedent when interpreting the Second Amendment.

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

Response: The Eleventh Circuit has set forth the following requirements for qualified immunity:

> For qualified immunity to apply, a government official must first establish that he was acting within his discretionary authority when the alleged wrongful acts occurred. Once it has been determined that an official was acting within the scope of his discretionary authority, the burden shifts to the plaintiff to establish that qualified immunity is inappropriate. First, the plaintiff must show that the official's alleged conduct violated a constitutionally protected right. Second, the plaintiff must demonstrate that the right was clearly established at the time of the misconduct. "Clearly established" means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful.
>
> A plaintiff can demonstrate that a right was clearly established in three ways. First, "materially similar" case law may give an officer fair notice that his conduct would violate a constitutional right. Second, the plaintiff can show the existence of a broader, clearly established principle that should control the novel facts of his situation. In other words, even if there is no case law directly on point, general statements of the law contained within the Constitution, statute, or caselaw may sometimes provide fair warning of unlawful conduct. Finally, in rare instances, an official may still have notice when his conduct so obviously violates a constitutional right. Absent one of these standards being met, an officer is entitled to qualified immunity.

Garcia v. Casey, 75 F.4th 1176, 1185 (11th Cir. 2023) (internal citations and quotation marks omitted, alterations adopted). If confirmed, I would follow Supreme Court and Eleventh Circuit precedent when evaluating a claim 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: As a former prosecutor who worked closely with law enforcement officers, I understand the dangers that they must face daily. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent when evaluating a claim of qualified immunity.

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

   Response: As a former prosecutor who worked closely with law enforcement officers, I understand the dangers that they must face daily. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent when evaluating a claim of qualified immunity, including its scope.

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

    Response: As a current U.S. Magistrate Judge, and as a nominee to the Eleventh Circuit, my role is not to enforce the laws, but rather to apply binding Supreme Court and Eleventh Circuit precedent to all cases that come before me. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent when reviewing constitutional and statutory intellectual property issues.

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: The Middle District of Florida, where I currently sit as a U.S. Magistrate Judge, does not have a division with a single district judge. Therefore, I am not sufficiently familiar with the practice to be able to provide an opinion on its propriety.

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 current U.S. Magistrate Judge and nominee for the Eleventh Circuit, the Code of Conduct for United States Judges generally precludes me from commenting on the coherence of the Supreme Court's jurisprudence, including patent eligibility jurisprudence, or on issues that may come before me if I am confirmed. If confirmed, I would follow Eleventh Circuit and Supreme Court precedent.

Senate Judiciary Committee Hearing
"Nominations"
Questions for the Record for Embry Kidd
to be United States Circuit Judge for the Eleventh Circuit

QUESTIONS FROM SENATOR BLACKBURN

1. **As was discussed at your confirmation hearing, you are listed as having had "conversations that shaped" an article by Monica C. Bell titled "Grassroots Death Sentences: The Social Movement for Capital Child Rape Laws." In the introduction, the author contends that "capital child rape statutes are formed at the nexus of three movements: the popular movement to shame, fear, and isolate sex offenders; the feminist movement for harsher punishment of sexual and intrafamilial violence; and the legal and political movement to punish attacks against vulnerable victims with death." Monica C. Bell, *Grassroots Death Sentences: The Social Movement for Capital Child Rape Laws*, 98 J. CRIM. L. & CRIMINOLOGY 1 (2007-2008).**

    a. **Do you agree with Ms. Bell's contention in the article that there is a "popular movement to shame, fear, and isolate sex offenders"?**

    Response: As a former Assistant U.S. Attorney who prosecuted individuals for crimes against children and witnessed the devastating impact that those crimes had on the children involved, I believe that individuals who commit such crimes should be held accountable to the full extent of the law. To the extent that Prof. Bell suggests otherwise, I disagree.

    b. **How many conversations did you have with the author that "shaped" the article's contents?**

    Response: To the best of my knowledge, none. I did not contribute to Prof. Bell's article and do not adopt any of her statements. Prof. Bell and I were in law school at the time this article was published. As a law student, I would often have conversations and debates about cases and course material with my law school classmates, including Prof. Bell. I do not recall, and do not have records of, any conversations with her about this subject.

2. **Please explain the legal basis and your overall rationale in *United States v. Misael Rodriguez-Sanchez*, a case in which you issued an order releasing the defendant—an illegal immigrant from Mexico—pretrial.**

Response: As a former prosecutor who charged violations of 8 U.S.C. § 1326 (illegal reentry of removed aliens) and typically sought the defendants' detention based on risk of flight, and as a current U.S. Magistrate Judge who frequently sees defendants charged with this crime, I can attest that release is rare. In this instance, nearly the entirety of the defendant's family was in the Middle District of Florida, and his daughter agreed to serve as a third-party

custodian to ensure that the defendant appeared in court and complied with my release conditions. Additionally, he was listed on the deed of a residence that he owned outright with his wife—a circumstance that I have not seen repeated since this case. Because of that asset, I ordered the defendant to execute a $25,000 bond to secure his appearance in court. While the defendant had a misdemeanor battery conviction from nearly 10 years prior, there was no evidence that the victim resided in central Florida, and there were no other convictions involving violence, so I did not believe that his release would pose a danger to any individual or to the community. After considering all of the factors set forth in 18 U.S.C. § 3142(g), I believed that the conditions I set would mitigate the defendant's risk of flight and any danger that he might pose to the community.

The United States requested a new detention hearing before the district judge. The district judge reached the same conclusion that I reached, but also added electronic location monitoring. I note that the Defendant subsequently reported to court as required, went to trial on the charge, and was convicted of the charge without any release violations.