

**Senator Lindsey Graham, Ranking Member**  
**Questions for the Record**  
**Mary Kay Costello**

**Nominee to be United States District Judge for the Eastern District of Pennsylvania**

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

Response: Yes.

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

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.**

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

Response: No.

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

Response: No.

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

Response: It is not generally appropriate to consider foreign law in constitutional interpretation. However, the Supreme Court considered English common law while exploring the historical tradition of firearm regulation in *District of Columbia v. Heller*, 554 U.S. 570, 598-600 (2008) and *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 39-44 (2022). If confirmed, I would not consider foreign law in constitutional interpretation unless the Supreme Court or Third Circuit has instructed courts to do so.

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

Response: I do not agree with this statement. If confirmed, I would faithfully apply Supreme Court and Third Circuit precedent to the cases that come before me. My personal views and value judgments would play no role in my decisions.

- 7. 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.

- 8. Please define the term “prosecutorial discretion.”**

Response: *Black’s Law Dictionary* (12<sup>th</sup> ed. 2024) defines the term “prosecutorial discretion” as 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.”

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

Response: No. District court judges must follow Supreme Court and relevant Circuit Court precedent when deciding cases.

- 10. 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. Support for a “Foreign Terrorist Organization” would be disqualifying for a potential clerkship in my chambers if I am confirmed.

- 11. 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.

**12. 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 federally sentenced prisoner in federal custody may seek relief by direct appeal to the Court of Appeals or through a motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255, a petition for a writ of habeas corpus under 28 U.S.C. § 2241, or a motion for compassionate release under 18 U.S.C. § 3582(c).

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

Response: In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) a nonprofit organization challenged raced-based admissions programs at Harvard University and the University of North Carolina, arguing that the universities' admissions programs were unconstitutional. The Supreme Court held that the admissions programs violated equal protection because the programs lacked sufficiently focused and measurable objectives warranting the use of race, employed race in a negative manner, involved racial stereotyping, and lacked meaningful endpoints.

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

Response: Yes.

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

Response: I have been a member of the hiring committee for the U.S. Attorney's Office in the Eastern District of Pennsylvania since approximately September 2021.

**15. 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.

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

Response: No.

**17. 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: 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.**

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

Response: Yes. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023).

**19. 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 plaintiff, a wedding website designer, filed a lawsuit seeking an injunction to prevent Colorado from forcing her to create websites celebrating marriages that defied her belief that marriage should be reserved to unions between one man and one woman. The Supreme Court held that the First Amendment prohibits the state from compelling the plaintiff to create expressive designs or speech she did not wish to provide.

**20. 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 (2023).

**21. 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: “As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.” *Turner Brod Sys, Inc. v. FCC*, 512 U.S. 622, 642–643 (1994). By contrast, a regulation is content-neutral if it focuses on the time, place, and manner of the speech as opposed to

the idea or substance of the expressions. *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61, 72 (2022). However, “[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.

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

Response: In *Counterman v. Colorado*, 600 U.S. 66 (2023), the Supreme Court held that in order to convict a person of making true threats, the government must prove that the speaker had a subjective understanding that the person to whom his words were directed would perceive them as threatening.

**23. Under Supreme Court and Third Circuit precedent, what is a “fact” and what sources do courts consider in determining whether something is a question of fact or a question of law?**

Response: A question of fact generally involves “who did what, when or where, how or why.” *U.S. Bank National Association v. Village at Lakeridge*, 583 U.S. 387, 394 (2018). A question of law is one in which courts “expound on the law, particularly by amplifying or elaborating on a broad legal standard.” *Id.* at 396. The distinction between a question of fact or a question of law “at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.” *Miller v. Fenton*, 474 U.S. 104, 113-114 (1985). For example, the Third Circuit has stated that deference to the district court may be appropriate “when the matter under review was decided by someone who is thought to have a better vantage point than we on the Court of Appeals to assess the matter.” *United States v. Mitchell*, 365 F.3d 215, 234 (3d Cir. 2004).

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

Response: All of the sentencing factors listed in 18 U.S.C. § 3553(a) should be considered and none should be given more weight than any other.

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

Response: As a judicial nominee, I am precluded from commenting on the quality of the reasoning of any particular Supreme Court decision. If confirmed, I will fairly and impartially apply all binding precedent.

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

Response: As a judicial nominee, I am precluded from commenting on the quality of the reasoning of any particular Third Circuit decision. If confirmed, I will fairly and impartially apply all binding precedent.

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

Response: Title 18, United States Code, Section 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.

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

Response: I am not aware of any Supreme Court or Third Circuit precedent that has addressed the constitutionality of 18 U.S.C. § 1507. However, the Supreme Court upheld a similar state statute in *Cox v. Louisiana*, 379 U.S. 559 (1965).

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

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

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). However, consistent with the practice of prior judicial nominees, because *Brown v. Board of Education* falls within a small class of foundational cases unlikely to ever be relitigated, I believe I may state my opinion that it was correctly decided.

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

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). However, consistent with the practice of prior judicial nominees, because *Loving v. Virginia* falls within a small class of foundational cases unlikely to ever be relitigated, I believe I may state my opinion that it was correctly decided.

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

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, including *Griswold v. Connecticut*.

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

Response: The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022) overruled *Roe v. Wade*. If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, including *Dobbs v. Jackson Women's Health Organization*.

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

Response: The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022) overruled *Planned Parenthood v. Casey*. If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, *Dobbs v. Jackson Women's Health Organization*.

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

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, including *Gonzales v. Carhart*.

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

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, including *District of Columbia v. Heller*.

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

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, including *McDonald v. City of Chicago*.

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

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, including *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.

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

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, including *New York State Rifle & Pistol Association v. Bruen*.

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

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, including *Dobbs v. Jackson Women's Health*.

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

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, including *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*.

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

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, including *303 Creative LLC v. Elenis*.



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

Response: In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), the Supreme Court held that means-end scrutiny does not apply in the Second Amendment context and that, instead, the government must demonstrate that the regulation is consistent with the Nation’s historical tradition of firearm regulation.

**31. 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.

**32. 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.

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

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

Response: No.

- 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.**

- 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?**

Response: No.

- 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 that is still shrouded.**

- 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?**

Response: No.

- i. **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.**

**34. 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.

**35. 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.

**36. 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.

**37. 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.

**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.

**38. 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.”**

**a. 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.

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

Response: No.

**c. 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: No.

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

Response: On November 14, 2023, I submitted an application to the District Commission for Senators Bob Casey and John Fetterman. On January 24, 2024, I interviewed with the District Commission. On April 16, 2024, I interviewed with Senator Casey and members of his staff. On April 19, 2024, I interviewed with Senator Fetterman and members of his staff. On that same date, I also interviewed with attorneys from the White House Counsel’s Office. Since then, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On June 12, 2024, the President announced his intent to nominate me.

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

Response: No.

**41. 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.

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

Response: No.

**43. 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.

**44. 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.

**45. 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.

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

Response: No.

**47. 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: No.

- 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?

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

Response: On April 19, 2024, I interviewed with attorneys from the White House Counsel's Office. Since then, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On June 12, 2024, the President announced his intent to nominate me.

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

Response: I received written questions for the record on July 17, 2024. I reviewed the questions and prepared my responses. I submitted a draft of my answers to attorneys with the Office of Legal Policy at the Department of Justice who provided limited feedback for my consideration. I then finalized and submitted my answers for submission to the Committee.

**SENATOR TED CRUZ**

**U.S. Senate Committee on the Judiciary**

**Questions for the Record for Mary Kathleen “Mary Kay” Costello, nominated to serve as United States District Judge for the Eastern District of Pennsylvania**

**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: If I am confirmed, I would follow relevant Supreme Court and Third Circuit precedent regarding the identification of unenumerated rights. In particular, I would consult *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), which set forth the test recognized by the Supreme Court for determining whether an unenumerated right should be constitutionally protected. Such a right must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” *Id.*

### **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: I have not served as a judge, but if I am confirmed, my philosophy would be a practical one, grounded in my experience as a federal prosecutor and civil litigator and guided by the principle of equal justice under law. I would focus on giving every litigant a full and fair opportunity to be heard, being prepared and ready to meaningfully engage with the parties on the issues, and then rendering a fair decision based on the applicable legal precedents and the facts of the case. Because I have not served as a judge and I have not studied the judicial philosophies of all the justices, I cannot say whose judicial philosophies are most analogous to mine.

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

Response: In a number of cases, the Supreme Court has considered the original meaning to interpret constitutional provisions. *See, e.g., N.Y. State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022); *Crawford v. Washington*, 541 U.S. 36 (2004). In such cases, constitutional interpretation is grounded in the text, the meaning of which is “fixed according to the understandings of those who ratified it.” *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 28 (2022). When deciding a case that turned on the interpretation of a constitutional provision, I would follow applicable Supreme Court and Third Circuit precedent and apply the appropriate analytic framework as described in those precedents, including originalism.

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

Response: According to *Black’s Law Dictionary* (12<sup>th</sup> ed. 2024), living constitutionalism is the “doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values.” If I am confirmed, when deciding a case that turned on the interpretation of a constitutional provision, I would follow applicable Supreme Court and Third Circuit precedent and apply the appropriate analytic framework as described in those precedents. I am not aware of any Supreme Court or Third Circuit precedent that applies a living constitutionalist 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: Yes. When deciding a case that turned on the interpretation of a constitutional provision where there are no applicable precedents from either the Supreme Court or the Third Circuit, I would consider the plain meaning of the text and apply it to the case before me.

**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: The plain meaning of a statute should be interpreted according to the ordinary public meaning at the time of its enactment. *See Bostock v. Clayton County*, 590 U.S. 644 (2020). Constitutional provisions are interpreted according to the ordinary public meaning at the time of ratification. *See New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1, 20 (2022).

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

Response: Constitutional interpretation is grounded in the text, the meaning of which is “fixed according to the understandings of those who ratified it.” *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 28 (2022). Changes to the Constitution may only be made through the amendment process described in Article V.

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

Response: Yes.

**a. Was it correctly decided?**

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, including *Dobbs v. Jackson Women’s Health Organization*.

**10. Is the Supreme Court’s ruling in *Cooper v. Aaron* settled law?**

Response: Yes.

**a. Was it correctly decided?**

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, including *Cooper v. Aaron*.

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

Response: Yes.

**a. Was it correctly decided?**

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, including *New York Rifle & Pistol Association v. Bruen*.

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

Response: Yes.

**a. Was it correctly decided?**

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). However, consistent with the practice of prior judicial nominees, because *Brown v. Board of Education* falls within a small class of foundational cases unlikely to ever be relitigated, I believe I may state my opinion that it was correctly decided.

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

Response: Yes.

**a. Was it correctly decided?**

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, including *Students for Fair Admissions v. Harvard*.

**14. Is the Supreme Court’s ruling in *Gibbons v. Ogden* settled law?**

Response: Yes.

**a. Was it correctly decided?**

Response: As a judicial nominee, it is improper for me to give my opinion on whether a Supreme Court case was correctly decided. See Code of Conduct for United States Judges, Canon 3(A)(6). However, consistent with the practice of prior judicial nominees, because *Gibbons v. Ogden* falls within a small class of foundational cases unlikely to ever be relitigated, I believe I may state my opinion that it was correctly decided.

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

Response: The Bail Reform Act of 1984 creates a rebuttable presumption of pretrial detention in cases involving controlled substance offenses for which the maximum term of imprisonment is ten years or more, crimes of violence with a statutory maximum of ten years or more, and certain crimes involving minor victims. 18 U.S.C. § 3142(e). A defendant may also face a rebuttable presumption of pretrial detention if he committed an offense while already on pretrial release. 18 U.S.C. § 3142(e)(2)(3).

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

Response: Pursuant to 18 U.S.C. § 3142(e)(1), pretrial detention is appropriate to assure the appearance of the defendant as required and to protect the public.

**16. 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: Yes. The Supreme Court has held that the Religious Freedom Restoration Act (“RFRA”) protects the free exercise rights of 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). In addition, the Supreme Court has held that the First Amendment prohibits the state from compelling a website designer to create expressive designs or speech that the designer did not wish to provide. *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). The Supreme Court has also held that a cake shop owner could not be compelled by a state anti-discrimination law to sell a wedding cake to a same-sex couple in violation of the owner’s sincerely held religious beliefs. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018).

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

Response: Laws burdening religion that are not neutral and generally applicable are subject to strict scrutiny review. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). “A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

**18. 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 held that religious organizations seeking to block enforcement of an executive order restricting capacity at worship services within certain zones, met all the requirements for a preliminary injunction. Because secular businesses were subject to lesser restrictions, the restrictions on the religious organizations were not neutral. In addition, the Court determined that the burden on religious freedom caused irreparable injury. Finally, the Court found that there was no showing that granting the preliminary injunction would harm the public.

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

Response: In *Tandon v. Newsom*, 593 U.S. 61 (2021), petitioners, who wished to gather for at-home religious exercise, sought to enjoin the state’s restrictions on private gatherings during the COVID-19 pandemic. The Supreme Court held that the

petitioners were entitled to emergency injunctive relief because they were likely to succeed on the merits of their free exercise claim as the state had failed to show that public health would be imperiled by employing less restrictive measures.

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

Response: Yes. In *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), the petitioner sued the school district for violation of his free exercise and free speech rights after he lost his coaching job for engaging in a quiet personal prayer at midfield after games. The Supreme Court held that the free speech and free exercise clauses protect an individual engaged in personal religious observance from government reprisal and no “historically sound understanding of the Establishment Clause” begins to make it necessary for government to be hostile to religion.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018), a cake shop owner sought review of cease-and-desist order arising from the shop’s refusal to sell a wedding cake to a same-sex couple in violation of Colorado’s anti-discrimination act. The Supreme Court held that the state commission did not comply with the Free Exercise Clause’s requirement of religious neutrality as evidenced by the commission’s expressions of hostility toward the owner’s sincerely held religious beliefs.

**22. 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. It is not for the courts to judge whether religious beliefs are mistaken. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 725 (2014).

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

Response: In cases involving religious liberty, the question for courts is whether a particular religious belief is sincerely held. *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 834 (1989).

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

Response: In cases involving religious liberty, it is not for the courts to judge whether religious beliefs are mistaken. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 725 (2014). Rather, the question for courts is whether a particular religious belief is sincerely held. *Frazee v. Illinois Department of Employment Security*, 489

U.S. 829, 834 (1989).

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

Response: I do not believe that to be the official position of the Catholic Church.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732 (2020), Catholic elementary school teachers brought actions against former employers for employment discrimination. The Supreme Court held that the ministerial exception, grounded in the First Amendment’s Religion Clauses, barred the teachers’ employment discrimination claims because courts are bound to stay out of matters of church government, including employment disputes involving those holding certain important positions with churches and other religious institutions.

**24. 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 Philadelphia’s refusal to contract with Catholic Social Services to provide foster care unless it agreed to certify same-sex couples as foster parents, violated the Free Exercise Clause. The City’s policy unduly burdened the free exercise of religion and could not withstand strict scrutiny because it was not narrowly tailored to achieve the government’s asserted interest.

**25. 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), parents of secondary school students filed a § 1983 action alleging that the “nonsectarian” requirement of Maine’s tuition assistance program for private secondary schools violated the Constitution. The Supreme Court held that the program’s nonsectarian requirement disqualified some schools solely because they are religious and therefore must be subject to strict scrutiny review. The nonsectarian requirement did not withstand strict scrutiny.

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

Response: In *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), the petitioner sued the school district for violation of his free exercise and free speech rights after he lost his coaching job for engaging in a quiet personal prayer at midfield after games. The Supreme Court held that the free speech and free exercise clauses protect an individual engaged in personal religious observance from government reprisal and no “historically sound understanding of the Establishment Clause” begins to make it necessary for government to be hostile to religion in such a way.

**27. 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 septic systems to members of an Amish community. In his concurrence, Justice Gorsuch stated the Religious Land Use and Institutionalized Persons Act required strict scrutiny of application of the ordinance. Strict scrutiny review requires the government to prove both that the regulation serves a compelling government interest and that it is narrowly tailored to achieve that interest. Justice Gorsuch explained that the government must establish its interest with specificity. It was not sufficient to point to the government’s general interest in sanitation. Rather, the question was whether government has an interest in denying an exception from the septic system requirement to the Amish specifically.

**28. 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: Title 18, United States Code, Section 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.

If I am confirmed, and a case involving Section 1507 comes before me, I would consider the text of the statute and the relevant Supreme Court and Third Circuit precedent interpreting that text. I would follow any such precedent. Beyond that, as a



federal judicial nominee, I am precluded from commenting on the merits of any matter that may come before me. See Code of Conduct for United States Judges, Canon 3(A)(6).

**29. 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.

**30. 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.

**31. 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.

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

Response: The power to make political appointments is vested in the political branches of government. If I am confirmed, and a case implicating the constitutionality of race- or gender-based political appointments comes before me, I would follow binding Supreme Court and Third Circuit precedent in resolving that case. Beyond that, as a judicial nominee, I am precluded from commenting on the merits of any matter that may come before me. See Code of Conduct for United States Judges, Canon 3(A)(6).

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

Response: The racially disparate outcome of a program or policy is insufficient, standing alone, to prove purposeful racial discrimination. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977).

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

Response: The number of justices on the Supreme Court is a matter for the legislative branch to decide.

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

Response: No.

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

Response: The Second Amendment guarantees the right of an individual to keep and bear arms for self-defense both in the home and outside the home. *New York Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

**37. 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: In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), the Supreme Court held that the Second Amendment prohibits firearm restrictions that are not consistent with the Nation's historical tradition of firearm regulation.

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

Response: Yes. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

**39. 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 stated 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).

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

Response: No.

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

Response: Pursuant to Article II, the executive power of the government is vested in the President who is sworn to faithfully execute the duties of the presidency and to protect and defend the Constitution. The Supreme Court has recognized that executive discretion is broad, but not unlimited, and that the exercise of such discretion is subject to constitutional constraints. *Wayte v. United States*, 470 U.S. 598, 608 (1985); *United States v. Batchelder*, 442 U.S. 114, 125 (1979). If I am confirmed, and a case implicating the propriety of the exercise of executive discretion comes before me, I would follow binding Supreme Court and Third Circuit precedent in resolving that case. Beyond that, as a judicial nominee, I am precluded from commenting on the merits of any matter that may come before me. See Code of Conduct for United States Judges, Canon 3(A)(6).

**42. Explain your understanding of what distinguishes an act of mere ‘prosecutorial discretion’ from that of a substantive administrative rule change.**

Response: *Black’s Law Dictionary* (12<sup>th</sup> ed. 2024) defines the term “prosecutorial discretion” as 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* (12<sup>th</sup> ed. 2024) defines an “administrative rule” as “[a]n officially promulgated agency regulation that has the force of law.” I believe that agencies must follow the Administrative Procedure Act when changing such regulations.

**43. Does the President have the authority to abolish the death penalty?**

Response: No.

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

Response: In *Alabama Association of Realtors v. HHS*, 594 U.S. 758 (2021), the Supreme Court vacated a nationwide moratorium on evictions imposed by the Centers for Disease Control and Prevention (CDC) during the COVID-19 pandemic. The Court reasoned that the CDC likely exceeded its statutory authority under the Public Health Services Act.

**45. 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: Generally, no.