Senator Chuck Grassley, Ranking Member
Questions for the Record
Armando O. Bonilla
Judicial Nominee to the U.S. Court of Federal Claims

1. **In the context of federal case law, what is super precedent? Which cases, if any, count as super precedent?**

   Response: To my knowledge, neither the Supreme Court nor the Federal Circuit has used or defined the term "super precedent." Moreover, it is not a term I have ever used during my nearly 30-year career practicing law. If confirmed, I will faithfully adhere to all Supreme Court and Federal Circuit precedent and will not elevate certain decisions over others.

2. **Should law firms undertake the pro bono prosecution of crimes?**

   Response: The U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit are courts of limited jurisdiction and do not have criminal dockets. Nevertheless, I am mindful that questions about how best to allocate public safety resources is the subject of ongoing political and policy debates between and among federal, state, and local governments. For those reasons, as a judicial nominee, it would be inappropriate for me to offer my personal opinion or otherwise weigh into the debate.

3. **Do you agree with Judge Ketanji Brown Jackson when she said in 2013 that she did not believe in a "living constitution"?**

   Response: I am not familiar with Judge Ketanji Brown Jackson's 2013 statement regarding her opinion of the term "living constitution." I do not use the term "living" to describe the Constitution as that term has varying interpretations. Instead, I agree with judges and judicial nominees who have described the Constitution as an "enduring" document as that term more accurately captures our foundational document's preservation of our democracy and the protections of our fundamental rights throughout our history. Indeed, many provisions of the Constitution were, by design, broadly drafted to memorialize our foundational principles of democracy and freedom while allowing their application to circumstances and technologies not envisioned by the framers.

4. **Should a judge yield to social pressure when deciding the outcome of cases?**

   Response: No.

5. **Is it possible for private parties—like law firms, retired prosecutors, or retired judges—to prosecute federal criminals in the absence of charges being actively pursued by federal authorities?**

   Response: Please see my response to Question No. 2

6. **The Federalist Society is an organization of conservatives and libertarians dedicated to the rule of law and legal reform. Would you hire a member of the Federalist Society to serve in your chambers as a law clerk?**

   Response: Yes.

7. **Absent a traditional conflict of interest, should paying clients of a law firm be able to prevent other paying clients from engaging the firm?**

   Response: Save my 12-week summer employment at a law firm between my second and third year of law school, I have not been employed by a law firm or otherwise studied this issue. For those reasons, and as a judicial nominee, it would be inappropriate for me to offer my personal opinion or otherwise weigh in on this issue.

8. **Should paying clients be able to influence which pro bono clients engage a law firm?**

   Response: Please see my response to Question No. 7.

9. **As a matter of legal ethics do you agree with the proposition that some civil clients don't deserve representation on account of their identity?**

   Response: No. Everyone who desires legal representation deserves legal representation provided they have a non-frivolous claim and a good faith basis upon which to initiate or proceed in a civil action.

10. **Should judicial decisions take into consideration principles of social "equity"?**

    Response: The term "social equity" may mean different things and outcomes to different people. In interpreting or applying statutes or constitutional provisions that specifically call upon courts to take such considerations into account, courts should do so. In contrast, in adopting standards or tests to guide the application of specific statutes or rules silent upon this issue, courts should be mindful not to inadvertently foster inequity. Judges should not disregard clear law in order to promote or otherwise infuse their ideas of social equity.

11. **Is it ever appropriate for a judge to publicly profess political positions on campaigns and/or candidates?**

    Response: Cannon 4 of the American Bar Association's Model Code of Judicial Conduct states: "A Judge Or Candidate For Judicial Office Shall Not Engage In Political Or Campaign Activity That Is Inconsistent With The Independence, Integrity, Or Impartiality Of The Judiciary." Although I have not studied the issue, I understand state laws vary regarding campaigns for elected state court judges and their ability to make campaign contributions.

12. **Is threatening Supreme Court Justices right or wrong?**

Response: Threats of violence are never appropriate.

13. How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?

Response: True criticism involves an objective evaluation of the merits of a decision or the reasoning employed in reaching a particular result. An attack, in contrast, seeks to undermine the value of the work by devaluing the author.

14. Do you think the Supreme Court should be expanded?

Response: As a judicial nominee, it would be inappropriate to offer my opinion on potential Supreme Court reforms, including the number of justices in active service. If confirmed, I would be bound to follow – and faithfully would follow – all Supreme Court and Federal Circuit precedent without regard to any personal views I might hold. In accordance with Article III of the Constitution, and consistent with the Judiciary Acts passed by Congress throughout our history, I believe Congress is best suited to determine the appropriate number of justices on the Supreme Court. *See* U.S. Const. art III § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

15. If the Justice Department determines that the prosecution of an individual is meritless and dismisses the case, is it appropriate for a District Judge to question the Department's motivations and appoint an amicus to continue the prosecution? Please explain why or why not.

Response: The U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit are courts of limited jurisdiction and do not have criminal dockets; accordingly, it is exceedingly rare that such an issue would come before me if confirmed. Additionally, in the Court of Federal Claims, the United States is always the defendant. Finally, having personally litigated the issue, binding Federal Circuit precedent would preclude my review of decisions made by an Article III court. *See Vereda, Ltda. v. United States*, 271 F.3d 1367, 1375 (Fed. Cir. 2001) ("The Court of Federal Claims 'does not have jurisdiction to review the decisions of district courts.'" *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994)). As a judicial nominee, it would be inappropriate for me to offer an opinion I would be barred from sharing if confirmed.

16. What is the legal basis for a nationwide injunction? What considerations would you consider as a district judge when deciding whether to grant one?

Response: The authority for district courts to enter nationwide (or universal) injunctions has been scrutinized by the Supreme Court. *E.g.*, *Department of Homeland Sec. v. New York*, __ U.S. __, 140 S. Ct. 599, 599-600 (2020) (Gorsuch, J., concurring) (citing *Trump v. Hawaii*, 585 U.S. __, 138 S. Ct. 2392, 2428-29 (2018) (Thomas, J., concurring)). In granting this drastic relief, courts generally look to two factors: (1) whether the defendant violated the Administrative Procedure Act (APA), 5 U.S.C. § 701(a)(2); and (2) the need to

afford complete relief to the prevailing party. The U.S. Court of Federal Claims is a court of limited jurisdiction and, notably, lacks jurisdiction to entertain APA claims or grant pure equitable relief. *See Murphy v. United States*, 993 F.2d 871, 874 (Fed. Cir. 1993). If confirmed, consistent with my practice before the Court of Federal Claims for the better part of a decade, I would focus on the named plaintiffs in the case unless and until the issue of class certification was properly litigated.

17. What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court did not articulate a legal standard for courts to evaluate Second Amendment claims. Given the limited jurisdiction of the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit, the Federal Circuit has not addressed the issue. If confirmed and faced with a Second Amendment challenge, absent further guidance from the Supreme Court, I would look to other circuit courts for persuasive authority. *E.g.*, *New York State Rifle & Pistol Ass'n, Inc. v. Beach*, 818 Fed. Appx. 99 (2d Cir. 2020), *cert. granted sub nom. New York State Rifle & Pistol Ass'n, Inc. v., Corlett*, 141 S. Ct. 2566 (U.S. Apr. 26, 2021) (No. 20-843) (whether states' denial of concealed-carry license applications violates the Second Amendment)*; Schrader v. Holder*, 704 F.3d 980, 988 (D.C. Cir. 2013).

18. Do you believe that we should defund police departments? Please explain.

Response: The U.S. Court of Federal Claims is a court of limited jurisdiction, does not have a criminal docket, and only hears claims against the *federal* government. Nevertheless, I am mindful that questions about how best to allocate public safety resources is the subject of ongoing political and policy debates between and among federal, state, and local governments. For those reasons, as a judicial nominee, it would be inappropriate for me to offer my personal opinion or otherwise weigh into the debate.

19. Do you believe that local governments should reallocate funds away from police departments to other support services? Please explain.

Response: Please see my response to Question No. 18.

20. Is climate change real?

Response: While I am aware of the significant scientific evidence and scholarship addressing climate change, as a judicial nominee, it would be inappropriate to offer my personal views.

21. Which country is a bigger threat to our national security—Russia or China?

Response: As a judicial nominee, it would be inappropriate for me to offer my personal views on national security issues.

22. Is the Cuban Communist Party a threat to national security?

Response: Please see my response to Question No. 21.

23. Do Blaine Amendments violate the Constitution?

Response: I understand the reference to "Blaine Amendments" relates to laws prohibiting state support for religious schools. The U.S. Court of Federal Claims is a court of limited jurisdiction that only hears claims against the *federal* government. Nonetheless, the Supreme Court addressed this issue in *Espinoza v. Montana Dept. of Revenue*, __ U.S. __, 140 S. Ct. 2246 (2020). If confirmed and ever presented with this issue, I would be bound by – and faithfully would adhere to – Supreme Court and Federal Circuit precedent.

24. Do parents have a constitutional right to direct the education of their children?

Response: In *Washington v. Glucksberg*, the Supreme Court explained: "we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights . . . to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); [and] to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923) . . . ." 521 U.S. 702, 719-20 (1997) (alterations to citations).

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

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

Response: No.

b. Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, and/or Jen Dansereau?

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, Katie O'Connor, and/or Jen Dansereau?

Response: I had several conversations with Christopher Kang in connection with my 2014 nomination to serve as a judge on the U.S. Court of Federal Claims when he served in the White House Counsel's Office during the Obama Administration. I have not spoken to or had any contact with Mr. Kang during his tenure with Demand Justice or otherwise in connection with my pending 2021 re-nomination.

I know Brian Fallon from when we overlapped at the U.S. Department of Justice in the early 2010s, prior to his tenure with Demand Justice. I have had no conversations with Mr. Fallon in connection with any judicial nomination save, perhaps, his congratulating me following my 2014 nomination. I have not spoken to or had any contact with Mr. Fallon during his tenure with Demand Justice or otherwise in connection with my pending 2021 re-nomination.

26. The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."

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

Response: No.

b. Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?

Response: No.

c. Have you ever been in contact with anyone associated with Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

28. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**

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

Response: No.

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

Response: No.

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

Response: No.

29. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**

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

Response: No.

b. Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?

Response: No.

c. Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?

Response: No.

30. Please describe the selection process that led to your nomination to be a Judge on the U.S. Court of Federal Claims, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).

Response: On February 5, 2013, I submitted a letter to the White House Counsel's Office expressing my interest in serving as a judge on the U.S. Court of Federal Claims. In late August 2013, an official from the White House Counsel's Office contacted me to discuss my interest. Beginning on September 4, 2013, and continuing through late 2016, I was in contact with officials from the Office of Legal Policy at the U.S. Department of Justice. On May 21, 2014, President Obama nominated me to serve as a judge on the Court of Federal Claims. On September 18, 2014, following my July 24, 2014 Confirmation Hearing, the U.S. Senate Committee on the Judiciary reported my nomination. On December 17, 2014, my nomination was returned to the President. I was re-nominated on January 7, 2015, and the Senate Judiciary Committee again reported my nomination on February 26, 2015. My nomination expired on January 3, 2017.

On May 21, 2021, an official from the White House Counsel's Office contacted me to discuss my interest in a re-nomination to serve as a judge on the Court of Federal Claims. On May 22, 2021, I interviewed with attorneys from the White House Counsel's Office. Since May 23, 2021, I have been in contact with officials from the Office of Legal Policy at the Department of Justice and the White House Counsel's Office. On June 30, 2021, President Biden announced his intent to nominate me, and my nomination was formally submitted to the Senate for consideration on July 13, 2021.

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

Response: No.

a. Did anyone do so on your behalf?

Response: No.

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

Response: No.

a. Did anyone do so on your behalf?

Response: No.

33. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors? 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.

a. Did anyone do so on your behalf?

Response: No.

34. During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundation. If so, what was the nature of those discussions?

Response: No.

a. Did anyone do so on your behalf?

Response: No.

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

Response: Please see my response to Question No. 30.

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

Response: I reviewed the questions and drafted my answers, conducting legal research where necessary. I submitted my draft responses to the Office of Legal Policy at the U.S. Department of Justice for review and feedback. I revised and finalized my responses for submission to the Senate Judiciary Committee after receiving feedback from the Office of Legal Policy.

Senator Marsha Blackburn
Questions for the Record to Armando O. Bonilla

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

   Response: During my nearly 30-year legal career – including 24 years at the U.S. Department of Justice serving as a civil litigator, criminal prosecutor, appellate advocate, and senior legal and policy advisor – I approached every case and issue the same: take a hard look at all relevant and material facts, research the governing law, and strictly apply the law to the facts or administrative record presented. As documented in the hundreds of legal briefs and memoranda I filed in various federal trial and appellate courts throughout the United States, in each case, my approach to the required legal analysis was dictated by binding Supreme Court and applicable Circuit Court precedent. If confirmed, I would continue this approach in rendering impartial and prompt decisions.

2. **What approach do you take when interpreting a statute?**

   Response: If confirmed as a judge on the U.S. Court of Federal Claims, I would be bound to follow – and faithfully would follow – the interpretive approach dictated by Supreme Court and Federal Circuit precedent. Accordingly, I would first look to Supreme Court and Federal Circuit precedent to ascertain whether the issues of ambiguity and interpretation had been decided and, if so, faithfully follow the relevant binding precedent. If no applicable Supreme Court or Federal Circuit precedent exists, I would analyze the plain meaning of the text within the context of the relevant statutory scheme at the time it was drafted, and any subsequent amendments thereto, and employ traditional canons of statutory interpretation. If, after analyzing the text, I determine the statutory language can only be read one way, the text would not be ambiguous, and my inquiry would end.

   If, however, the statutory text remains unclear or lends itself to more than one plausible interpretation following my exhaustion of the steps outlined above, I would research Supreme Court and Federal Circuit precedent analyzing the same or similar language used in other statutes. If no such analogous authority exists, I would research other jurisdictions for persuasive authority. I might also consider certain legislative history and stated purpose (*e.g.*, committee reports) as permitted by Supreme Court and Federal Circuit precedent, mindful that it might not reliably reflect the views or intent of the entire deliberative body in enacting the legislation. For genuinely ambiguous statutory language, I would look to Supreme Court and Federal Circuit precedent to determine whether it would be appropriate to consider an agency's interpretation of the statute it was charged with administering. *E.g., Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).

3. **Do you think it is best to start with the original meaning of the text when interpreting the Constitution?**

Response: The text and original meaning of a constitutional provision play an important role in interpreting the Constitution. In certain cases, the Supreme Court focuses on the original meaning of the text in interpreting the constitutional provision at issue. *E.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment). If confirmed, my interpretive approach to constitutional law would be model adherence to Supreme Court and Federal Circuit precedent.

Nomination of Armando O. Bonilla
to be a United States Judge for the Court of Federal Claims
Questions for the Record
Submitted October 13, 2021

QUESTIONS FROM SENATOR COTTON

1. **Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?**

   Response: No.

2. **Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?**

   Response: No.

3. **Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.**

   Response: On October 13, 2021, I reviewed the questions and drafted my answers, conducting legal research where necessary. I submitted my draft responses to the Office of Legal Policy at the U.S. Department of Justice for review and feedback. I revised and finalized my responses for submission to the Senate Judiciary Committee after receiving feedback from the Office of Legal Policy.

4. **Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please also identify the department or agency with which those officials are employed.**

   Response: No.

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

Questions for the Record for Armando O. Bonilla, Nominee for the Court of Federal Claims

1. **Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice's philosophy from Warren, Burger, Rehnquist, or Robert's Courts is most analogous with yours.**

   Response: During my nearly 30-year legal career – including 24 years at the U.S. Department of Justice serving as a civil litigator, criminal prosecutor, appellate advocate, and senior legal and policy advisor – I approached every case and issue the same: take a hard look at all relevant and material facts, research the governing law, and strictly apply the law to the facts or administrative record presented. As documented in the hundreds of legal briefs and memoranda I filed in various federal trial and appellate courts throughout the United States, in each case, my approach to the required legal analysis was dictated by binding Supreme Court and applicable Circuit Court precedent. If confirmed, I would continue this approach in rendering impartial and prompt decisions.

   I have not studied the judicial philosophies of individual Supreme Court Justices and, if confirmed as a judge on the U.S. Court of Federal Claims, my role as a trial court judge would be significantly different. Accordingly, I cannot compare the approach I would take to the philosophy of any Supreme Court Justice.

2. **Please briefly describe in your own words your understanding of the interpretative method known as originalism.**

   Response: Although subject to varying views, I understand "originalism" as the belief that the text of the Constitution should be interpreted consistent with the plain meaning of the words as they were understood at the time our founding document was adopted.

3. **Please briefly describe in your own words your understanding of the interpretive method often referred to as living constitutionalism.**

   Response: Although subject to varying views, I understand "living constitutionalism" as the belief that the meaning of the Constitution can change and evolve over time to reflect societal changes and changing circumstances.

4. **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: Although possible that, if confirmed, I could be presented with a constitutional issue of first impression, I struggle to imagine a scenario in which there would be no

precedent – binding, analogous, or persuasive – to assist or guide my decision-making; this is particularly so given the limited jurisdiction of the U.S. Court of Federal Claims. If confirmed, my interpretive approach to constitutional law would be model adherence to Supreme Court and Federal Circuit precedent. In certain cases, the Supreme Court focuses on the original meaning of the text in interpreting the constitutional provision at issue. *E.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment). If ever presented with a true constitutional issue of first impression, and there was no precedent upon which to rely, I would look to the original public meaning of the text of the Constitution and consider inviting the litigants to brief the issue. In this unique circumstance, I also would consider inviting the parties to file a Motion for Certification and Interlocutory Appeal and to Stay Proceeding pursuant to 28 U.S.C. § 1292(d)(3), to ensure the controlling legal issue is timely and conclusively resolved. *E.g.*, *Vereda, Ltda. v. United States*, 271 F.3d 1367 (Fed. Cir. 2001).

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

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

Response: Article V of the Constitution describes the formal processes for amending (changing) our founding document. I agree with judges and judicial nominees who have described the Constitution as an enduring document that preserves our democracy and the protections of our fundamental rights throughout our evolutionary history. Indeed, many provisions of the Constitution were, by design, broadly drafted to memorialize our foundational principles of democracy and freedom while allowing for their application to circumstances and technologies not envisioned or imagined by the framers.

7. **President Biden has created a commission to advise him on reforming the Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.**

Response: As a judicial nominee, it would be inappropriate to offer my opinion on the merits of a Presidential commission or potential Supreme Court reforms, including the number of justices in active service. If confirmed, I would be bound to follow – and faithfully would follow – all Supreme Court and Federal Circuit precedent without regard to any personal views I might hold. In accordance with Article III of the Constitution, and consistent with the Judiciary Acts passed by Congress throughout our history, I believe Congress is best suited to determine the appropriate number of justices on the Supreme Court. *See* U.S. Const. art III § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

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

Response: The Second Amendment right to keep and bear arms is an individual right. *See McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 579-80 (2008).

9. **Is the criminal justice system systemically racist?**

Response: I do not have a personal definition of "systemic racism," but understand it to refer to discriminatory and racial disparities in policies and practices designed to, or having the effect of, creating and maintaining racial inequalities for people of color; it is distinguishable from discrete instances of discrimination by individual actors. Although the U.S. Court of Federal Claims does not have a criminal docket, if confirmed, racism and discrimination will have no place in my courtroom or the courthouse in which I would serve.

10. **Explain the *Feres* doctrine stemming from the Supreme Court's decision in *Feres v. United States*.**

Response: In *Feres v. United States*, the Supreme Court held that the United States "is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. 135, 146 (1950). In *United States v. Johnson*, the Supreme Court extended the *Feres* doctrine to cases where the servicemember is injured in the performance of their military duties due to the alleged negligence of a *civilian* government employee. 481 U.S. 681 (1987). A year later, in *Boyle v. United Techs. Corp.*, the Supreme Court further extended the immunity doctrine to government contractors where "the Federal Government's interest in the procurement of equipment is implicated by suits . . . even though the dispute is one between private parties." 487 U.S. 500, 506 (1988).

a. Are there any limitations on the *Feres* doctrine that allow an Armed Service member to sue the United States under the Federal Tort Claims Act?

Response: Yes.

b. If so, what are those limitations?

Response: The death or injury must be related to military service; active-duty status alone is not sufficient. *E.g.*, *Schoenfield v. Quamme,* 492 F.3d 1016 (9th Cir. 2007). The *Feres* doctrine also does not extend to the family members of servicemembers killed or injured or otherwise deprive servicemembers from filing a claim on behalf of their deceased family member or minor child. Additionally, although not under the Federal Tort Claims Act, the National Defense Authorization Act (NDAA) for Fiscal Year 2020 established an administrative process within the Department of Defense

(DoD) to assess servicemembers' claims of medical malpractice against a DoD healthcare provider.

11. **Explain the U.S. Supreme Court's holding in *Maine Community Health Options v. United States*.**

Response: In *Maine Comty. Health Options v. United States*, 590 U.S. __, 140 S. Ct. 1308 (2020) – a consolidated appeal from the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit – the Supreme Court considered alleged breach of contract claims filed against the United States by health insurers for unprofitable health insurance exchanges under the Patient Protection and Affordable Care Act (ACA); specifically, the health insurers sought to recover their alleged losses under the program in accordance with the statutory reimbursement formula (Risk Corridors program) after Congress passed annual appropriation bill riders preventing the payments. The Supreme Court held: (1) Congress created a contractual (money-mandating) obligation through statutory language; (2) the contractual obligation was not contingent upon or otherwise limited by the availability of federal appropriations or other government funds; and (3) the subsequent congressional riders did not impliedly repeal or otherwise cancel the government's contractual obligation. Accordingly, the Court of Federal Claims has Tucker Act jurisdiction to entertain the breach of contract actions.

Senator Josh Hawley
Questions for the Record

Armando Bonilla
Nominee, Judge for the U.S. Court of Federal Claims

1. **Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."**

    a. **Do you agree with that philosophy?**

    Response: During my nearly 30-year legal career – including 24 years at the U.S. Department of Justice serving as a civil litigator, criminal prosecutor, appellate advocate, and senior legal and policy advisor – I approached every case and issue the same: take a hard look at all relevant and material facts, research the governing law, and strictly apply the law to the facts or administrative record presented. As documented in the hundreds of legal briefs and memoranda I filed in various federal trial and appellate courts throughout the United States, in each case, my approach to the required legal analysis was dictated by binding Supreme Court and applicable Circuit Court precedent. If confirmed, I would continue this approach in rendering impartial and prompt decisions.

    b. **If not, do you think it is a violation of the judicial oath to hold that philosophy?**

    Response: Please see my response to Question No. 1(a).

2. **What role should the original public meaning of the Constitution's text play in the courts' interpretation of its provisions?**

    Response: If confirmed as a judge on the U.S. Court of Federal Claims, I would be bound to follow – and faithfully would follow – the interpretive approach dictated by Supreme Court and Federal Circuit precedent. In certain cases, the Supreme Court focuses on the original meaning of the text in interpreting the constitutional provision at issue. *E.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment). If confirmed, my interpretive approach to constitutional law would be model adherence to Supreme Court and Federal Circuit precedent.

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

    Response: If confirmed as a judge on the U.S. Court of Federal Claims, I would be bound to follow – and faithfully would follow – the interpretive approach dictated by Supreme Court and Federal Circuit precedent. Accordingly, I would first look to Supreme Court and Federal Circuit precedent to ascertain whether the issues of ambiguity and interpretation had been decided and, if so, faithfully follow that binding precedent. If no applicable Supreme Court or Federal Circuit precedent

exists, I would analyze the plain meaning of the text within the context of the relevant statutory scheme at the time it was drafted, and any subsequent amendments thereto, and employ traditional canons of statutory interpretation. If, after analyzing the text, I determine the statutory language can only be read one way, the text would not be ambiguous, and my inquiry would end.

If, however, the statutory text remains unclear or lends itself to more than one plausible interpretation following my exhaustion of the steps outlined above, I would research Supreme Court and Federal Circuit precedent analyzing the same or similar language used in other statutes. If no such analogous authority exists, I would research other jurisdictions for persuasive authority. At that point, I might also consider certain legislative history as permitted by Supreme Court and Federal Circuit precedent.

a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?

Response: I would not treat all legislative history the same as some legislative history is more probative of legislative intent than others. For example, a committee report highlighting the intended purpose of new legislation or amendments to an existing statute (*e.g.*, response to a court decision) may be more probative than the statement of an individual legislator.

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

Response: The U.S. Constitution and the laws of the United States are our own. We are not bound by the laws or judicial decisions of other nations.

4. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

Response: As a judicial nominee, it is generally not appropriate to offer my opinion on the merits or propriety of court decisions. If confirmed, I would be bound to follow – and faithfully would follow – all Supreme Court and Federal Circuit precedent. Moreover, the U.S. Court of Federal Claims is a court of limited jurisdiction and does not have jurisdiction to entertain claims arising under, for example, the Sherman Act.

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

Response: Please see my response to Question No. 4(a).

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

Response: Please see my response to Question No. 4(a).

5. Do you believe America is a systemically racist country?

Response: I do not have a personal definition of "systemic racism," but understand it to refer to discriminatory and racial disparities in policies and practices designed to, or having the effect of, creating and maintaining racial inequalities for people of color; it is distinguishable from discrete instances of discrimination by individual actors. Although the U.S. Court of Federal Claims does not have a criminal docket, if confirmed, racism and discrimination will have no place in my courtroom or the courthouse in which I would serve.

6. Please describe your understanding of the "federal common law."

Response: In *City of Milwaukee v. Illinois & Michigan*, the Supreme Court explained:

> Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision. The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress. . . .
>
> When Congress has not spoken to a particular issue, however, and when there exists a "significant conflict between some federal policy or interest and the use of state law," the Court has found it necessary, in a "few and restricted" instances, to develop federal common law. Nothing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable. We have always recognized that federal common law is "subject to the paramount authority of Congress." . . . Federal common law is a "necessary expedient," and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.

451 U.S. 304, 312-14 (1981) (internal citations omitted).

7. Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that

applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

Response: The U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit are courts of limited jurisdiction and do not have criminal dockets. Consequently, the Federal Circuit has not developed a legal standard for capital punishment. Nonetheless, in *Bucklew v. Precythe*, the Supreme Court "(re)confirmed that anyone bringing a method of execution claim alleging the infliction of unconstitutionally cruel pain must meet the *Baze-Glossip* test"; specifically, whether the claimant "identified a feasible and readily implemented alternative method of execution the State refused to adopt without a legitimate reason, even though it would significantly reduce a substantial risk of severe pain?" 587 U.S. __, 139 S. Ct. 1112, 1129 (2019).

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

   Response: Please see my response to Question No. 7. In addressing the Eighth Amendment execution protocol issue presented in *Glossip v. Gross*, the Supreme Court held: "prisoners must identify an alternative that is feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." 576 U.S. 863, 877 (2015).

9. **Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?**

   Response: The U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit are courts of limited jurisdiction and do not have criminal dockets; accordingly, both courts lack jurisdiction to entertain petitions for writs of habeas corpus and have not addressed this issue. *See Ledford v. United States*, 297 F.3d 1378, 1381 (Fed. Cir. 2002). Nonetheless, in *District Attorney's Office for the Third Judicial Dist. v. Osborne*, the Supreme Court declined to extend pretrial due process evidentiary protections to post-conviction entitlement to DNA evidence. 557 U.S. 52, 72-74 (2009).

10. **Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."**

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

       Response: If confirmed as a judge on the U.S. Court of Federal Claims, I would be required to apply binding Supreme Court and Federal Circuit precedent regardless of whether I personally agree with it or the outcome. During my 24-year tenure with the U.S. Department of Justice – including

two decades serving as a civil litigator, criminal prosecutor, and appellate advocate – I learned and embraced that the only desirable outcome in any case is a full and fair assessment of the material facts presented and an application of the governing law. A judge who strictly and faithfully applies the law will inevitably have to render decisions that conflict with their personal beliefs, but our system of justice – and predictability in the law -- depends on it.

11. U.S. Courts of Appeals sometimes issue "unpublished" decisions and suggest that these decisions are not precedential. *Cf.* Rule 32.1 for the U.S. Court of Appeals for the Tenth Circuit.

a. Do you believe it is appropriate for courts to issue "unpublished" decisions?

Response: As a nominee to serve as a judge on an inferior court to the U.S. Court of Appeals for the Federal Circuit, it would be inappropriate to offer my opinion on the appropriateness of the Federal Circuit's procedural rules and practices.

b. If yes, please explain if and how you believe this practice is consistent with the rule of law.

Response: Please see my response to Question No. 11(a).

12. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

Response: The U.S. Court of Federal Claims is a court of limited jurisdiction and does not have a criminal docket; nor does the court have jurisdiction to entertain petitions for writs of habeas corpus. *See Ledford v. United States*, 297 F.3d 1378, 1381 (Fed. Cir. 2002).

13. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: The U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit are courts of limited jurisdiction. The Court of Federal Claims, moreover, only hears claims against the *federal* government. Nonetheless, the Supreme Court has long held that the Free Exercise Clause is a foundational and fundamental constitutional right. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940). In addressing the applicable legal standard, the Supreme Court has explained:

> In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is

> neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993) (internal citation omitted).

Moreover, in *Tandon v. Newsom*, 593 U.S. __, 141 S. Ct. 1294 (2021), the Supreme Court reversed the denial of an injunction pending appeal that would have prohibited the State of California from enforcing its COVID-19 restrictions against the applicants' private, in-home religious gatherings. In doing so, the Supreme Court made clear:

> [G]overnment 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. It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."

593 U.S. at __, 141 S. Ct. at 1296 (emphasis in original; citations omitted). The Supreme Court further explained that in determining whether "two activities are comparable for purposes of the Free Exercise Clause," courts must consider "the risks various activities pose, not the reasons why people gather." *Id.* In addressing the standard of judicial review applicable to the state action impacting the Free Exercise Clause, the Supreme Court emphasized that the government bears the burden of satisfying strict scrutiny. *Id.* at 1296-97. Finally, the Supreme Court addressed the issue of mootness, noting that the government's authority to rescind or modify the challenged state action at any time does not necessarily end the need for injunctive relief. Id. at 1297.

14. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

Response: The U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit are courts of limited jurisdiction. In confirmed, and in the exceedingly rare instance that a matter involving a person's sincere religious belief under the First Amendment, I would model my constitutional analysis based on binding Supreme Court precedent. *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

15. The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

a. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?

Response: In *District of Columbia v. Heller*, the Supreme Court stated: "there seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." 554 U.S. 570, 595 (2008).

b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

16. In *Trump v. Hawaii*, the Supreme Court overruled *Korematsu v. United States*, 323 U.S. 214 (1944), saying that the decision—which had not been followed in over 50 years—had "been overruled in the court of history." 138 S. Ct. 2392, 2423 (2018). What is your understanding of that phrase?

Response: The Supreme Court in *Trump v. Hawaii*, 585 U.S. __, 138 S. Ct. 2392, 2423 (2018), reversed the Court's prior decision in *Korematsu v. United States*, 323 U.S. 214 (1944).

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

Response: As a judicial nominee, it is generally not appropriate to offer my opinion on the merits or propriety of Supreme Court decisions. If confirmed, I will be bound to follow – and faithfully will follow – all Supreme Court and Federal Circuit precedent unless and until a court of competent jurisdiction formally overturns them or Congress supersedes them.

a. If so, what are they?

Response: Please see my response to Question No. 17.

b. With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?

Response: Yes.

18. What is the standard for exercising each kind of abstention in the court to which you have been nominated?

Response: The U.S. Court of Federal Claims is a court of limited jurisdiction and only hears claims against the *federal* government. It would be exceedingly rare for a matter to be properly filed in the Court of Federal Claims with overlapping issues falling within the concurrent jurisdictional province of a state court. If confirmed and presented with an abstention motion, I would look to Supreme Court and Federal Circuit precedent for guidance. *E.g.*, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-17 (1976); *Warsaw Orthopedic, Inc. v. Sasso*, 977 F.2d 1224, 1229-30 (Fed. Cir. 2020).

19. Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?

Response: No.

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

Response: Please see my response to Question No. 19.

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

Response: The U.S. Court of Federal Claims is a court of limited jurisdiction and only hears claims for monetary damages against the *federal* government.

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

Response: Please see my response to Question No 20(a).

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

Response: Please see my response to Question No. 20(a).

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

Response: As a general matter, it is not appropriate for a judicial nominee to comment on the merits of Supreme Court precedent which, if confirmed, I would be bound to follow – and faithfully would follow – regardless of whether I believe it was correctly decided. As a judge, my personal opinions and beliefs would be irrelevant and would play no role in my decision-making. Nevertheless, there are a limited number of settled precedents unlikely to be relitigated – particularly before the U.S. Court of Federal Claims – that prior judicial nominees have confirmed were correctly decided. *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954), is one of those limited cases. I agree.

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

Response: The authority for district courts to enter nationwide (or universal) injunctions has been scrutinized by the Supreme Court. *E.g.*, *Department of Homeland Sec. v. New York*, __ U.S. __, 140 S. Ct. 599, 599-600 (2020) (Gorsuch, J., concurring) (citing *Trump v. Hawaii*, 585 U.S. __, 138 S. Ct. 2392, 2428-29 (2018) (Thomas, J., concurring)). In granting this drastic relief, courts generally look to two factors: (1) whether the defendant violated the Administrative Procedure Act (APA), 5 U.S.C. § 701(a)(2); and (2) the need to afford complete relief to the prevailing party. The U.S. Court of Federal Claims is a court of limited jurisdiction and, notably, lacks jurisdiction to entertain APA claims or grant pure equitable relief. *See Murphy v. United States*, 993 F.2d 871, 874 (Fed. Cir. 1993). If confirmed, consistent with my practice before the Court of Federal Claims for the better part of a decade, I would focus on the named plaintiffs in the case unless and until the issue of class certification was properly litigated.

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

Response: Please see my response to Question No. 22.

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

Response: Please see my response to Question No. 22.

23. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

Response: Please see my response to Question No. 22.

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

Response: Federalism is a system of government where power is divided and shared between the national (federal) government and the local (state) governments. The principal features of our constitutional government include: two or more levels of government (*i.e.*, federal, state, local); the different tiers of government govern the same citizens in a layered effect, with each tier empowered to enact laws, tax, and govern; the jurisdictional limits of each tier of government are specified in the Constitution; tiers of courts have the power to interpret the Constitution and subordinate laws depending on their jurisdictional reach; and the fundamental provisions of the Constitution cannot be unilaterally changed by one tier of government. In contrast, in a unitary government, a central authority holds the power; and, in a confederation, the decentralized states are dominant.

25. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

Response: Please see my response to Question No. 18.

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

Response: In *Washington v. Glucksberg*, the Supreme Court explained:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992). We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 278-79 (1990).

521 U.S. 702, 719-20 (1997) (alterations to citations); *see also Saenz v. Roe*, 526 U.S. 489 (1999) (right to travel). Since *Glucksberg*, the Supreme Court has recognized the right of same-sex couples to engage in sexual relations and to marry. *See Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

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

Response: The Supreme Court has long held that the Free Exercise Clause is a foundational and fundamental constitutional right. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940). Although that right is not absolute, *e.g.*, *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding law criminalizing polygamy), government actions restricting the free exercise of religion are subjected to strict scrutiny. *See Sherbert v. Verner*, 374 U.S. 398 (1963).

b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

Response: Please see my response to Question No. 27(a).

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

Response: Please see my response to Question No. 27(a).

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

Response: The U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit are courts of limited jurisdiction. In confirmed, and in the exceedingly rare instance that a matter involving a person's sincere religious belief under the First Amendment, I would model my constitutional analysis based on binding Supreme Court precedent. *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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

Response: The Religious Freedom Restoration Act (RFRA) of 1993 "ensures that interests in religious freedom are protected." 42 U.S.C. § 2000bb et seq. In *Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court limited its applicability to the federal government. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 & n.1 (2006). Specifically, RFRA provides that the federal government may not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb1.

Further, in *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. __, 140 S. Ct. 2049 (2020), the Supreme Court held that the "ministerial exception" set forth in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), was not limited to employees of religious institutions with ministerial titles or religious training, but necessarily extended to employees whose functions were religious in nature. The plaintiffs in *Our Lady of Guadalupe* were two elementary school teachers employed by private religious schools. In barring them from bringing discrimination cases against their employer, the Supreme Court held: "[j]udicial review of the way in which religious schools discharge [education] responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate." 591 U.S. at __, 140 S. Ct. at 2055.

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the

Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

28. Under American law, a criminal defendant cannot be convicted unless found to be guilty "beyond a reasonable doubt." On a scale of 0% to 100%, what is your understanding of the confidence threshold necessary for you to say that you believe something "beyond a reasonable doubt." Please provide a numerical answer.

Response: The U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit are courts of limited jurisdiction and do not have criminal dockets. As a judicial nominee, it would be inappropriate to offer my personal opinion or otherwise weigh in on this issue.

29. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

Response: I am not familiar with this quote. Moreover, as a judicial nominee, it is generally not appropriate to offer my opinion on the merits or propriety of court decisions. If confirmed, I would be bound to follow – and faithfully would follow – all Supreme Court and Federal Circuit precedent.

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

Response: Please see my response to Question No. 29(a).

30. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.

Response: Please see my response to Question No. 13.

31. The Supreme Court has held that a state prisoner may only show that a state decision applied federal law erroneously for the purposes of obtaining a writ of habeas corpus under 28 U.S.C. § 2254(d) if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

a. Do you agree that if there is a circuit split on the underlying issue of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents"?

Response: The U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit are courts of limited jurisdiction and do not have criminal dockets; accordingly, both courts lack jurisdiction to entertain petitions for writs of habeas corpus and have not addressed this issue. *See Ledford v. United States*, 297 F.3d 1378, 1381 (Fed. Cir. 2002).

b. In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?

Response: Please see my response to Question No. 31(a).

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

Response: Please see my response to Question No. 31(a).

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

Response: In accordance with Federal Rule of Appellate Procedure 32.1(a), if confirmed, I would treat unpublished decisions issued by the Federal Circuit as persuasive (rather than binding) authority and look to such opinions for guidance on how the Federal Circuit likely would expect a subordinate court to consider a particular issue.

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

Response: Please see my response to Question No. 31(c) above.

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

Response: Yes, and I would be transparent with the parties about the relative weight unpublished decisions would be afforded consistent with my response to Question No. 31(c) above.

f. Would you take steps to discourage any litigants from citing unpublished opinions? *Cf.* Rule 32.1A for the U.S. Court of Appeals for the Eighth Circuit.

Response: No, but I would be transparent with the parties about the relative weight unpublished decisions would be afforded consistent with my response to Question No. 31(c) above**.**

g. Would you prohibit litigants from citing unpublished opinions? *Cf.* Rule 32.1 for the U.S. Court of Appeals for the District of Columbia.

Response: No, but I would be transparent with the parties about the relative weight unpublished decisions would be afforded consistent with my response to Question No. 31(c) above.

32. In your legal career:

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

Response: 12 (8 civil; 4 criminal).

b. How many have you tried as second chair?

Response: 1 (criminal).

c. How many depositions have you taken?

Response: Dozens (civil & criminal).

d. How many depositions have you defended?

Response: Dozens (civil).

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

Response: 50+ (briefed & argued: First, Third & Federal Circuits; briefed only: Second, Fifth & Eleventh Circuits)

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

Response: None.

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

Response: Between 1994 and 2018, I served in the U.S. Department of Justice as a civil litigator, federal prosecutor, appellate advocate, and senior legal and policy advisor. During that time, and in my varying roles, I worked with and presented to a number of federal agencies. I also appeared before and briefed members of Congress and their staffs and briefed White House and Administrative officials and their staffs. In my current role at Capital One, I have quarterly meetings with federal financial industry regulators.

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

Response: Dozens (civil & criminal).

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

Response: Dozens (civil & criminal).

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

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

a. What is the maximum number of hours that you billed in a single year?

Response: Please see my response to Question No. 33.

b. What portion of these were dedicated to pro bono work?

Response: Please see my response to Question No. 33.

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that judges are charged with interpreting the law as written and consistent with binding precedent and applying the law to the factual record presented; judges do not have the authority to make the laws.

b. Do you agree or disagree with this statement?

Response: I generally agree with this statement insofar as the Chief Justice was referring to federal judges; state court judges also bear the responsibility of developing common law.

35. When encouraged to "do justice," Justice Holmes is said to have replied, "That is not my job. It is my job to apply the law."

a. What do you think Justice Holmes meant by this?

Response: I understand this statement to mean that judges must not inject their personal views into a decision or case to decide what the law *should be*; rather, judges should base all of their decisions on what the law *is*.

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

Response: I agree.

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

Response: The U.S. Court of Federal Claims is a court of limited jurisdiction and, notably, lacks jurisdiction to grant pure equitable relief. *See Murphy v. United States*, 993 F.2d 871, 874 (Fed. Cir. 1993). Moreover, as a judicial nominee, it is generally not appropriate to offer an opinion or otherwise suggest to future litigants how a particular judge, if confirmed, would be predisposed to rule without the benefit of a full factual record or the arguments advanced by the parties.

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

Response: No.

a. If yes, please provide appropriate citations.

Response: Please see my response to Question No. 37.

38. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media?

Response: No.

a. If so, please produce copies of the originals.

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

39. What were the last three books you read?

Response: *American Moonshot: JFK and the Great Space Race* by Douglas Brinkley; *The Boys in the Boat: Nine Americans and Their Epic Quest for Gold at the 1936 Berlin Olympics*, by Daniel James Brown; and *Into Thin Air* by Jon Krakauer.

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

Response: For nearly 24 years, I served in the U.S. Department of Justice as a civil litigator, criminal prosecutor, appellate advocate, and senior legal and policy advisor. During that time, each time I stood up in a federal courtroom across this nation, I proudly represented the American people.

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

Response: No.

a. How did you handle the situation?

Response: Please see my response to Question No. 41.

b. If confirmed, do you commit to applying the law as written, regardless of your personal beliefs concerning the policies embodied in legislation?

Response: Yes.

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

Response: There are no particular law professors' works I read with any regularity.

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

Response: My views of the law have not been shaped by a particular Federalist Paper.

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

Response: The opinions that have most often made me change my mind are the judicial opinions in which the arguments I advanced were not adopted by the court.

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

Response: The U.S. Court of Federal Claims is a court of limited jurisdiction. Although it is unlikely that, if confirmed, a case before me would involve issues involving when life begins, as judicial nominee, it would be inappropriate to offer my personal opinion. If confirmed and this issue was presented in a matter before me, my personal views would be irrelevant. I would be bound to follow – and would faithfully follow – binding Supreme Court and Federal Circuit precedent. Currently, in addressing this issue, the Supreme Court is focused on viability. *E.g.*, *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992).

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

Response: Yes. On July 24, 2014, I testified before the U.S. Senate Committee on the Judiciary in connection with my May 21, 2014 (initial) nomination to serve as a judge on the U.S. Court of Federal Claims. *See* https://www.judiciary.senate.gov/meetings/judicial-nominations_2014-07-24

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

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

Response: No.

b. The Supreme Court's substantive due process precedents?

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

e. Response: No.

48. Do you currently hold any shares in the following companies:

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: No.

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

Response: Please see my previous response.

50. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

Response: Please see my previous response.

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

Response: Having served in the U.S. Department of Justice for nearly 24 years – including two decades as a civil litigator and a criminal prosecutor – I take testimonial oaths as well as oaths of office quite seriously. I also appreciate and respect the Senate Judiciary Committee's constitutional obligation to perform its advise and consent role in assessing judicial nominees. In fact, during my tenure with the Department of Justice, I prosecuted a federal government official for obstructing a Senate investigation. The Senate Judiciary Committee is owed the respect and candor the Constitution demands.

Questions for the Record for Armando Bonilla
From Senator Mazie K. Hirono

1. **As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:**

   a. **Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

      Response: No.

   b. **Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

      Response: No.

Senator Mike Lee

Questions for the Record

Armando Omar Bonilla, Nominee for the United States Court of Federal Claims

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

   Response: During my nearly 30-year legal career – including 24 years at the U.S. Department of Justice serving as a civil litigator, criminal prosecutor, appellate advocate, and senior legal and policy advisor – I approached every case and issue the same: take a hard look at all relevant and material facts, research the governing law, and strictly apply the law to the facts or administrative record presented. As documented in the hundreds of legal briefs and memoranda I filed in various federal trial and appellate courts throughout the United States, in each case, my approach to the required legal analysis was dictated by binding Supreme Court and applicable Circuit Court precedent. If confirmed, I would continue this approach in rendering impartial and prompt decisions.

2. **What sources do you turn to when deciding a case involving constitutional provisions?**

   Response: If confirmed as a judge on the U.S. Court of Federal Claims, I would be bound to follow – and faithfully would follow – the interpretive approach dictated by Supreme Court and Federal Circuit precedent. Having practiced before the U.S. Court of Federal Claims and the Federal Circuit for the better part of a decade, I believe it would be exceedingly rare for a true constitutional issue of first impression to be presented before the Court of Federal Claims. If, however, I were ever presented with such an issue, I would read the text of the constitutional provision in context, assess the plain meaning of the language, and model my interpretive approach in strict adherence to Supreme Court and Federal Circuit precedent.

3. **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 confirmed as a judge on the U.S. Court of Federal Claims, I would be bound to follow – and faithfully would follow – the interpretive approach dictated by Supreme Court and Federal Circuit precedent. Accordingly, I would first look to Supreme Court and Federal Circuit precedent to ascertain whether the issues of ambiguity and interpretation had been decided and, if so, faithfully follow the relevant binding precedent. If no applicable Supreme Court or Federal Circuit precedent exists, I would analyze the plain meaning of the text within the context of the relevant statutory scheme at the time it was drafted, and any subsequent amendments thereto, and employ traditional canons of statutory interpretation. If, after analyzing the text, I determine the statutory language can only be read one way, the text would not be ambiguous, and my inquiry would end.

If, however, the statutory text remains unclear or lends itself to more than one plausible interpretation following my exhaustion of the steps outlined above, I would research Supreme Court and Federal Circuit precedent analyzing the same or similar language used in other statutes. If no such analogous authority exists, I would research other jurisdictions for persuasive authority. I might also consider certain legislative history and stated purpose (*e.g.*, committee reports) as permitted by Supreme Court and Federal Circuit precedent, mindful that it might not reliably reflect the views or intent of the entire deliberative body in enacting the legislation. For genuinely ambiguous statutory language, I would look to Supreme Court and Federal Circuit precedent to determine whether it would be appropriate to consider an agency's interpretation of the statute it was charged with administering. *E.g., Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).

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

Response: It is my understanding that the "plain meaning" of a statute or constitutional provision refers to the generally understood meaning of the language employed at the time of enactment.

4. What are the requirements for standing in the Court of Federal Claims?

Response: "The Court of Federal Claims, though an Article I court, 28 U.S.C. § 171 (2000), applies the same standing requirements enforced by other federal courts created under Article III." *See Anderson v. United States*, 344 F.3d 1343, 1349-50 n.1 (Fed. Cir. 2003). In *Lujan v. Defenders of Wildlife*, the Supreme Court articulated the three critical elements of stating:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

504 U.S. 555, 560-61 (1992) (internal citations omitted).

5. What role does precedent play in the opinions of a Court of Federal Claims judge?

Response: If confirmed as a judge on the U.S. Court of Federal Claims, I would be bound to follow – and faithfully would follow – Supreme Court and Federal Circuit precedent in every case.

6. **What legal experience do you think is necessary for a person to make a good Court of Federal Claims judge, and what have you done to gain this experience?**

   Response: As a nominee to serve as a judge on the U.S. Court of Federal Claims, I believe the question of what legal experience is necessary to serve on the court is more properly within the province of the President in appointing judges to serve on the court, and the Senate's role in providing advice and consent on those nominations.

   While a wide variety of professional experiences might make for good Court of Federal Claims judges, I believe my legal experience is one of them, and I hope that you will agree. With regard to my qualifications, I spent the better part of a decade practicing law before the Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit. During that time, I litigated over 100 cases before the Court of Federal Claims and briefed and argued over 50 appeals before the Federal Circuit. I also co-authored a chapter on "Military Pay" in *The United States Court of Federal Claims: A Deskbook for Practitioners* (4th ed. Apr. 1998). During my 2-year clerkship in the U.S. District Court for the District of New Jersey, and throughout my nearly 24-year tenure serving in the U.S. Department of Justice as a civil litigator, federal prosecutor, appellate advocate, and senior legal and policy advisor, I handled nearly every case typology I would see on the Court of Federal Claims if confirmed.

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

   Response: None.

8. **The Court of Federal Claims has been called "the keeper of the Nation's conscience" and the "People's court." How do you see the court fulfilling such a role? How do you see yourself fulfilling this role if you are confirmed?**

   Response: As I testified before the Senate Judiciary Committee during my confirmation hearing, "Having spent the better part of a decade practicing before [the U.S. Court of Federal Claims], I understand the importance to the American citizens that the government hold itself accountable for its actions." Tr. at 141 (Oct. 6, 2021). The Court of Federal Claims gives effect to the fundamental principle of our Constitution that the sovereign answers to its citizens. If confirmed, I will work every day to earn a reputation of a jurist with absolute integrity, impartiality, and an unwavering commitment to the rule of law, who is ably prepared, rules promptly, and treats everyone in his courtroom and the courthouse with dignity and respect.