Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Victoria Marie Calvert
Nominee to be United States District Judge, Northern District of Georgia

1. **During a presentation to the Emory University Law School Advanced Criminal Trial Advocacy Class earlier this year, you stated that you "like to see the government, you know, get their teeth kicked in and stuff like that." In the same speech, you also noted that "there's no way I could ever be a prosecutor."**
    a. **If you are confirmed, how can government attorneys or prosecutors feel confident that you will approach his or her case with impartiality, given your prior comments?**

    Response: At the outset, I would like to take the opportunity to make a few points about these comments. First, the off-the-cuff comments I made to a friend's trial advocacy class were not reflective of the relationships I have built with many colleagues who are federal prosecutors or how I have comported myself in the courtroom and I deeply regret my poor word choice. I am grateful to have the support of many federal prosecutors from the Northern District of Georgia with respect to my nomination. Second, I also understand that the role of a judge is very different from that of an advocate. If confirmed, I will be fair and impartial to all parties who appear before me, including prosecutors.

    I made those off-the-cuff remarks to a small group of students taking a seminar taught by a former and current federal public defender who have known me for years. The first quote was part of a longer discussion about the various styles of defense attorneys. I expressed that my focus is on my clients, whereas others focus on having an adversarial relationship with prosecutors. As I stated, I deeply regret my poor word choice. My intent was to express that as an advocate, I like winning, which is one aspect of being a zealous advocate in an adversarial system.

    The second quote omits the fact that I told the students that I initially applied to be a federal prosecutor and that I explained that I enjoy the freedom that comes with being a zealous advocate for each of my clients. I recognize that prosecutors have an extremely important role in the criminal justice system. I respect what they do and how their goals are necessarily very different from that of a defense attorney.

    b. **Do you stand by your comments made earlier this year?**

    Response: I would reiterate that the off-the-cuff remarks that I made to a friend's trial advocacy class were not reflective of the relationships that I have built with

many colleagues who are federal prosecutors or how I have comported myself and I deeply regret my poor word choice.

2. **In a different speech, you discussed illegal immigration. During that talk you stated that "the government doesn't care, the prosecutors don't care . . . They do not see our clients as people."**
    a. **During the course of your legal defense career, please provide specific examples of when a prosecutor showed that he or she "care[d]" and please explain why his or her actions differed from the standard you laid out above.**

    Response: These comments came from the same remarks referenced in Question 1, but I did not link the quoted language to illegal immigration. I deeply regret my poor word choice and should not have opined on the motives of prosecutors, especially given how many prosecutors I deeply respect.

    b. **What basis do you have to support your claim that the government and prosecutors "don't care" and "do not see [y]our clients as people" besides prosecutors enforcing laws set through our country's democratic process?**

    Response: I do not have a basis for that claim and I regret that I did not choose my words more carefully. I was referring to a few instances where I, as an advocate for my clients, disagreed with prosecutors regarding the reasonableness of their recommended sentences, not with a prosecutor's obligation to enforce criminal laws.

    c. **Why did you feel the need to attack prosecutors' motives for pursuing a career that upholds the rule of law and protects victims of crime?**

    Response: I would reiterate that the off-the-cuff remarks that I made to a friend's trial advocacy class were not reflective of the relationships that I have built with many colleagues who are federal prosecutors or how I have comported myself and I deeply regret my poor word choice. I recognize that prosecutors play an important role in the criminal justice system and I respect their obligations and viewpoints.

3. **Earlier this year, during the talk at the Emory University Law School, you stated that "people are a little disappointed by the choice of Merrick Garland and are not thinking it's going to be this great time for the defense like for defendants."**
    a. **What did you mean that the nomination of Merrick Garland, who is now serving as the Attorney General of the U.S., would not be a great time for defendants?**

Response: I cannot recall what specific issues other people were concerned about at that time.

b. Do you stand by your comments?

Response: I do not recall what concerns others may have had, but as a judicial nominee, it would not be appropriate for me to comment on the propriety of any actions taken by Attorney General Garland or the Department of Justice.

4. During the same talk referenced above, you were asked whether federal judges "care more." You noted that:

> **[t]here's so much procedure in Federal Courts and there's so many rules, and all this process that the judges go through before making a decision, and there are these factors they consider so it can give you the illusion of thinking that all of these judges are really, really listening. But those of us who have practiced in front of these judges know that some of them don't care.**

a. Do you believe that the procedure and rules in the federal courts help or hinder judges when making decisions?

Response: The federal rules and procedures provide guidance to judges and litigants, and in my role as an advocate, I have always sought to follow them. If confirmed, I will continue to follow all rules and procedures.

b. What basis did you have to claim that the rules and process available in federal courts give people "the illusion" that judges are listening rather than "really listening"? Please provide specific examples.

Response: I was responding to a student's perception that federal judges are better than state court judges. In my attempt to disabuse the student of this notion, I stated that he might have this perception because there are so many procedures in federal court as compared to state court. I regret any comment that I made indicating that judges do not listen and do not stand by that comment today.

c. Please provide specific examples of when a federal judge showed that he or she "care[d]" and please explain why his or her actions differed from the standard you set forth above.

Response: I do not have any specific examples to provide. I regret my comment regarding judges not caring and do not stand by that comment today.

d. If you are confirmed, how do you intend to demonstrate that you "care more"?

Response: In my role as a federal public defender, I have had clients who felt that judges did not hear their points of view and those experiences have stayed with me. I should note that the experiences I am referencing have nothing to do with the outcome of the case. On many occasions, judges have ruled against my clients but my clients have still felt heard and respected throughout the process. If confirmed, I will always strive to address the arguments of the parties so that every litigant feels heard regardless of which litigant prevails.

5. What factors should be considered when determining whether a prior conviction for statutory rape qualifies a defendant for inclusion on the sex offender registry under Georgia law and the law of the Eleventh Circuit?

Response: According to Section 42-1-12 of Georgia statutory code, statutory rape is considered an offense that would lead to inclusion on the sex offender registry, if the individual convicted is at least 21 years old at the time of the offense. This requirement applies to any criminal offense, or the attempt to commit any criminal offense under federal laws or the laws of another state with the same or similar elements to Georgia's statutory rape statute.

6. Under Eleventh Circuit precedent, is the fact that a defendant had been previously convicted of a crime of violence several years earlier a sufficient reason to justify not counting a conviction toward a defendant's career offender status, or to justify a downward departure from the guidelines?

Response: According to the commentary to Section 4B1.2(c) of the Federal Sentencing Guidelines Manuel, there are time limits to the convictions that can be considered for the career offender designation. However, the remoteness of a prior conviction is not a basis for a downward departure.

7. Under Eleventh Circuit precedent, is the fact that an armed bank robber who never used a loaded firearm during the course of a Hobbs Act robbery and who tried to act quickly to lessen the trauma to victims a salient point in considering whether the government has grounds to request the application of a consecutive sentence based on brandishing a firearm?

Response: If a defendant is convicted of brandishing a firearm, a seven-year consecutive sentence is mandatory. *See* 18 U.S.C. § 924(c)(1)(A)(ii). The specific circumstances of the use of the firearm and trauma to victims cannot serve as grounds to depart from the mandatory consecutive sentence.

8. **Under Eleventh Circuit precedent, should a defendant's claim that the defendant felt a "really sickening feeling" after committing an armed bank robbery be considered by the judge and prosecutors in determining the defendant's sentence?**

   Response: I am unaware of any Eleventh Circuit precedent on this specific issue. However, judges, prosecutors, and defense attorneys are guided by the factors set out in 18 U.S.C. § 3553(a), including the nature and circumstances of the offense and the history and characteristics of the defendant.

9. **Under what circumstances does firing a gun at law enforcement not qualify as a crime of violence? Please provide case citations to Georgia and Eleventh Circuit precedent in your response.**

   Response: In *United States v. Bates*, 960 F.3d 1278 (11th Cir. 2020), the Eleventh Circuit held that assault of a federal officer, in violation of 18 U.S.C. § 111(b), is a crime of violence. If confirmed, I will apply *Bates* and any other relevant precedent to any cases involving firing a gun at law enforcement.

10. **You frequently cite to public opinion in your arguments on behalf of your clients. Should public opinion influence judicial determinations?**

    Response: I do not recall citing to public opinion on behalf of my clients.

    a. **If public opinion should influence judicial determinations, what sources of "public opinion" are reliable source of information upon which a judicial officer should rely?**

       Response: I do not believe I have dealt with "public opinion" in any of my cases. However, in deciding on whether a right is fundamental under the Due Process Clause, the Supreme Court has considered whether states have enacted laws that either support or negate that right. *See e.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Roper v. Simmons*, 543 U.S. 551 (2005). Therefore, in certain circumstances, the Supreme Court has held that laws enacted by state legislatures can be a source of "public opinion."

    b. **If public opinion should not influence judicial determinations, why did you choose to make arguments based on a matter that is irrelevant to the decision?**

       Response: In my role as an advocate, I do not recall citing to public opinion. I recognize that the role of a judge is very different from that of an advocate. If confirmed, I will follow the precedent of the Supreme Court and the Eleventh

Circuit as to what are relevant considerations and only rely on those considerations when making decisions.

11. Several weeks ago, Attorney General Merrick Garland announced imminent action against parents protesting various policies being implemented at public schools across the country.

a. Do you think it is appropriate for the DOJ to weaponize federal law enforcement agencies against concerned parents discussing changes to their children's curriculum at local school board meetings?

Response: As a judicial nominee, I do not believe it is appropriate for me to give an opinion on an issue that may come before me. If confronted with this issue, I would apply Supreme Court and Eleventh Circuit precedent to the facts before me.

b. Which of the following groups of people have the right to protest government intrusion and/or overreach and why?

i. Concerned parents about the curricula in public schools?

Response: Yes. Under the First Amendment, all people have the right to freedom of speech. Any group may engage in peaceful protests subject to reasonable time, place, and manner restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

ii. Black Lives Matter protestors?

Response: Please see response to Question 11(b)(i).

iii. Climate change protestors?

Response: Please see response to Question 11(b)(i).

iv. Religious groups protesting abortion?

Response: Please see response to Question 11(b)(i).

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

Response: I am not sure what principles of social "equity" refers to. However, in the context of the judicial system, all litigants should be treated fairly and only the facts of each case, and the applicable law, should be considered. If confirmed, I will ensure that I act with fairness and impartiality to everyone who appears before me.

13. What is implicit bias?

Response: I believe implicit bias refers to an unconscious bias or prejudice.

14. Is the federal judiciary affected by implicit bias? Do you have any implicit bias?

Response: I believe this is an important question but I am unaware of any data on whether implicit bias affects the federal judiciary. I am not sure what specific implicit bias I may have, but in my role as a federal public defender, I have strived to give all of my clients the zealous advocacy that is required by the Constitution and ethics rules. If confirmed, I will treat all litigants with fairness and impartiality.

15. What is the legal standard for "threats" in the Eleventh Circuit?

Response: According to the Eleventh Circuit Pattern Jury Instructions (Criminal Cases), a "threat" is an expression of intent to do something made with the intent that others understand it as a serious threat. The government does not have to prove that the defendant intended to carry out the threat. A "true threat" is a serious threat made under circumstances that would place a reasonable person in fear. It is not idle talk, a careless remark or something said jokingly.

16. Please state the governing law for self-defense in Georgia and the Eleventh Circuit.

Response: Under Georgia law, "[a] person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to defend himself or herself or a third person against such other's imminent use of lawful force." Ga. Code. Stat. Ann. § 16-3-21. Absent circumstances involving defending the home, a person can only use "force which is intended or likely to cause death or great bodily harm only if he or she reasonably believes that such force is necessary to prevent death or great bodily injury to himself or herself or a third person or to prevent the commission of a forcible felony." *Id*.

In the Eleventh Circuit, a defendant can act in self-defense if he/she has a reasonable good-faith belief that self-defense was necessary. However, in the case of assault on a federal officer, there must also be a reasonable doubt that the defendant knew that the victim was a federal officer. *United States v. Danehy*, 680 F.2d 1311 (11th Cir. 1982). The absence of self-defense must be proven beyond a reasonable doubt by the government. *United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985).

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

Response: As a judicial nominee, it would not be appropriate for me to comment on policy matters. Legislative bodies are in the best position to address this issue.

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

Response: As a judicial nominee, it would not be appropriate for me to comment on policy matters. Legislative bodies are in the best position to address this issue.

19. Do you believe that the federal government should reallocate funds away from the Department of Justice, specifically, U.S. Attorney's Offices, to provide greater support to the Federal Public Defenders?

Response: As a judicial nominee, it would not be appropriate for me to comment on policy matters. Congress is in the best position to address this issue.

20. Do you believe that the federal government should decriminalize possession of any drugs? If so, which ones?

Response: As a judicial nominee, it would not be appropriate for me to comment on policy matters. Congress is in the best position to address this issue. However, if confirmed, I will faithfully apply all federal laws, including laws related to illegal drugs.

21. Do you believe the federal government should expand the use of the safety valve? What alterations do you believe should be adopted?

Response: As a judicial nominee, it would not be appropriate for me to comment on an issue that will likely come before me. Congress and the U.S. Sentencing Commission are in the best position to address the contours of any safety valve relief.

22. In what situation(s) does qualified immunity not apply to a law enforcement officer in Georgia?

Response: Under Georgia law, qualified immunity does not apply to discretionary actions outside the scope of an officer's official authority or actions done with willfulness, malice, or corruption. *Cameron v. Lang*, 549 S.E.2d 341 (Ga. 2001). Additionally, an officer may be personally liable for ministerial acts negligently performed or acts performed with malice or an intent to injure. *Id*.

Under federal law, qualified immunity only applies to acts that are discretionary rather than ministerial. *Bailey v. Swindell*, 940 F.3d 1295 (11th Cir. 2019). A defendant who violated a constitutional right that was clearly established at the time of his or her conduct is not entitled to qualified immunity. *Id*.

23. What is the legal basis for a nationwide injunction?

Response: The procedure for issuing injunctions is covered by Rule 65 of the Federal Rules of Civil Procedure. There is no federal statute explicitly authorizing or limiting the ability of a court to issue a nationwide injunction, but the Supreme Court and the Eleventh Circuit have considered matters regarding nationwide injunctions. If confirmed, I will carefully apply Supreme Court and Eleventh Circuit precedent, and the text of Rule 65 when a party seeks any injunction, including a nationwide injunction.

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

Response: Yes. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

25. In a False Claims Act case, what is the standard used by the Eleventh Circuit for determining whether a false claim is material?

Response: The Eleventh Circuit has held that "proximate causation is a useful and appropriate standard by which to determine whether there is a sufficient nexus between the defendant's conduct and the submission of a false claim." *Ruckh v. Salus Rehabilitation, LLC*, 963 F.3d 1089 (11th Cir. 2020). Under this standard, a defendant's conduct may be material if it "was: 1) a substantial factor in inducing providers to submit claims for reimbursement; and 2) if the submission of claims for reimbursement was reasonably foreseeable or anticipated as a natural consequence of defendant's conduct." *Id*.

26. What legal standard and circuit precedents would you apply in evaluating whether a regulation or statute infringes on Second Amendment rights?

Response: If confirmed, I will follow any relevant Supreme Court precedent, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In the Eleventh Circuit, the test is whether the restricted activity is protected by the Second Amendment and if so, whether the restriction passes the appropriate level of scrutiny. *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Engineers*, 788 F.3d 1318 (11th Cir. 2012). The Eleventh Circuit has not decided what level of scrutiny applies but at least one district court has applied intermediate scrutiny. *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Engineers*, 212 F.Supp.3d 1348 (N.D. Ga. 2016).

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

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

Response: Yes. Generally, judicial nominees and judges are not permitted to comment on precedent because such comments could be viewed as criticizing

higher courts or prejudging a particular matter. However, an exception to this general prohibition applies where a matter is so well-settled that the central holding is unlikely to be raised in future litigation. This case is one such example.

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

Response: Yes. Generally, judicial nominees and judges are not permitted to comment on precedent because such comments could be viewed as criticizing higher courts or prejudging a particular matter. However, an exception to this general prohibition applies where a matter is so well-settled that the central holding is unlikely to be raised in future litigation. This case is one such example.

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

Response: Generally, judicial nominees and judges are not permitted to comment on precedent because such comments could be viewed as criticizing higher courts or prejudging a particular matter. Therefore, I cannot offer an opinion on this case. However, if confirmed, I will faithfully apply this precedent.

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

Response: Please see response to Question 27(c).

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

Response: Please see response to Question 27(c).

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

Response: Please see response to Question 27(c).

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

Response: Please see response to Question 27(c).

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

Response: Please see response to Question 27(c).

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

Response: Please see response to Question 27(c).

28. 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, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

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, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

Response: No.

29. **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 Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

    Response: No.

30. **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? 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, or any other such Arabella dark-money fund.**

Response: No.

b. **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, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

c. **Have you ever been in contact with anyone associated with Arabella Advisors? 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, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

31. **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.

32. 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.

33. 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 March 17, 2021, I submitted my application to become a district court judge to the Federal Nomination Advisory Commission in my district. The Commission interviewed me on April 12, 2021. I met with Senator Jon Ossoff on April 23, 2021, and Senator Raphael Warnock on May 4, 2021. On June 1, 2021, I interviewed with members of the White House Counsel's Office. Since June 7, 2021, I have been in contact with members of the Department of Justice's Office of Legal Policy. On September 30, 2021, my nomination was submitted to the Senate.

34. 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.

35. 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.

36. 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, or any other such Arabella dark-money fund that is still shrouded.

Response: No.

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

Response: No.

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

Response: No.

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

Response: I have been in communication with members of the White House Counsel's Office and the Department of Justice's Office of Legal Policy since June 1, 2021.

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

Response: I received these questions on December 8, 2021. I reviewed each question, conducted any necessary legal research, reviewed my records, and answered each question to the best of my ability. I also received feedback from the Department of Justice's Office of Legal Policy before finalizing my answers.

Senator Marsha Blackburn
Questions for the Record to Victoria Calvert
Nominee for the Northern District of Georgia

1. **Do you acknowledge that unauthorized entry and re-entry into the United States are federal crimes?**

   Response: Yes. If confirmed, I will faithfully apply all federal laws, including laws related to illegal entry into the United States.

2. **During a discussion with Emory Law students in February 2021, you stated that the Biden administration shouldn't prosecute people just for illegal reentry. Is it your position that the executive branch should decline to enforce immigration laws duly enacted by Congress?**

   Response: In my role as an advocate, I mentioned that limited federal resources might be focused on those who have serious criminal records. I did not say that the Biden administration should not prosecute people "just for illegal reentry." However, I understand the difference between the role of an advocate and the role of a judge and if confirmed, I will faithfully apply all federal laws, including laws related to the prosecution of illegal reentry.

3. **Ms. Calvert, you have stated that prosecutors "do not see [y]our clients as people." You have also stated that you "like to see the government, you know get their teeth kicked in." If you are confirmed, you will have federal prosecutors appearing before you on a weekly, if not daily, basis. How can they trust that you will be an unbiased arbiter when you have leveled these kinds of attacks against them?**

   Response: At the outset, I would like to take the opportunity to make a few points about these comments. First, the off-the-cuff comments I made to a friend's trial advocacy class were not reflective of the relationships I have built with many colleagues who are federal prosecutors or how I have comported myself in the courtroom and I deeply regret my poor word choice. I am grateful to have the support of many federal prosecutors from the Northern District of Georgia with respect to my nomination. Second, I also understand that the role of a judge is very different from that of an advocate. If confirmed, I will be fair and impartial to all parties who appear before me, including prosecutors.

   With respect to the first quote, I should not have opined on the motives of prosecutors, especially given how many prosecutors I deeply respect. I was referring to a few instances where I, as an advocate for my clients, disagreed with prosecutors regarding the reasonableness of their recommended sentences. With respect to the second quote, my intent was to express that as an advocate, I like winning, which is one aspect of being a zealous advocate in an adversarial system. I would reiterate that the off-the-cuff remarks that I made to a friend's trial advocacy class were not reflective of the relationships that I have built with many colleagues who are federal prosecutors or how I have comported

myself and I deeply regret my poor word choice. I recognize that prosecutors have an extremely important role in the criminal justice system and I respect their obligations and viewpoints. If confirmed, I will be fair and impartial to all parties who appear before me, including prosecutors.

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

Questions for the Record for Victoria Marie Calvert, Nominee for the Northern District of Georgia

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. **In *United States v. Bates*, your client was found guilty of assaulting a federal officer and discharging a firearm in relation to a crime of violence. During sentencing, you argued that assaulting a federal officer does not qualify as a crime of violence. The district court rejected your arguments and followed the government's sentencing recommendation. I understand that as a federal public defender, you were taking the role of an advocate. But now you are being nominated to the federal bench, so I want to know your personal opinion.**

a. **Is assaulting a federal officer a crime of violence?**

Response: On appeal, in the case you mentioned, the Eleventh Circuit held, for the first time, that assault of a federal officer, in violation of 18 U.S.C. § 111(b), is a crime of violence. *See United States v. Bates*, 960 F.3d 1278 (11th Cir. 2020). This case is now binding precedent that I would faithfully follow if confirmed as a district judge in the Northern District of Georgia.

b. **During the same sentencing, you also argued that your client's prior drug convictions should not be predicates for being considered a career offender. In your opinion, how many drug convictions should be required before a defendant can be considered a career offender?**

Response: Under section 4B1.1 of the U.S. Sentencing Commission's Federal Sentencing Guidelines Manual, a defendant needs to have at least two prior felony convictions that qualify as either a crime of violence or a controlled substance offense to be a career offender.

2. If you are to join the federal bench, and supervise along with your colleagues the court's human resources programs, will 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: I do not know what role I would have in the topic of any trainings but I expect that any training provided by the court will be consistent with federal law, including federal anti-discrimination laws.

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

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

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

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

d. **Meritocracy or related values such as work ethic are racist or sexist.**

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

3. 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: Please see my response to Question 2(b).

4. Is the criminal justice system systemically racist?

Response: This is an important policy question, but I am unaware of any data on this issue. Furthermore, in my role as an advocate representing clients facing specific criminal charges or civil penalties, I have not had to address this issue. As a judicial nominee, it would not be appropriate for me to give an opinion. If presented with a case raising questions of racial bias or discrimination, I will listen to the arguments of the parties and apply the relevant precedent to the facts before me.

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

Response: The President has the power, with the advice and consent of the Senate, to make appointments. As a judicial nominee, it is not appropriate for me to comment on the President's and Senate's considerations.

6. In *Comcast v. National Association of African American-Owned Media*, the U.S. Supreme Court was asked to decide whether a racial discrimination claim under 42 U.S.C. § 1981 requires a plaintiff to show either "but-for" causation, or only that race is a motivating factor. Explain your understanding of the Court's holding and reasoning in its unanimous reversal of the Ninth Circuit.

Response: The Court held that a § 1981 plaintiff bears the burden of showing that the plaintiff's race was a but-for cause of his or her injury, and that burden remains constant over the life of the lawsuit. The Court reached this conclusion by considering the typical requirements for a tort plaintiff, the statute's text, and the larger structure and history of the Civil Rights Act of 1866.

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

Response: The Supreme Court has held 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." *Employment Div., Dep't of Human Res. Of Oregon v. Smith*, 494 U.S. 872 (1990). A challenged law that treats secular activities more favorably than religious activities is not neutral and generally applicable and must survive strict scrutiny. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

A facially neutral law can also violate the Free Exercise Clause if the manner in which it is enforced shows hostility towards religious or religious views. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

Additionally, the Religious Freedom Restoration Act of 1993 provides that the government "shall not burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that the application of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. "Person" includes natural persons, nonprofit corporations, and for-profit corporations, including those that are closely held. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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

Response: A challenged law that treats secular activities more favorably than religious activities is not neutral and generally applicable and must survive strict scrutiny. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). A facially neutral law can also violate the Free Exercise Clause if the manner in which it is enforced shows hostility towards religious or religious views. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

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

Response: The Court held that the religious entity-applicants were entitled to injunctive relief. As to likelihood of success on the merits, the restrictions at issue were not neutral to religion. Further, under strict scrutiny review, the restrictions were not narrowly tailored to the compelling state interest in stemming the spread of COVID-19. The loss of First Amendment freedoms, for even minimal periods, constitute irreparable injury and watching religious services remotely would not be the same as personal attendance. As to the final factor, the public interest, there was no showing that granting the applications for injunctive relief would harm the public. Finally, the request for injunctive relief was not mooted by changes to the restrictions because the applicants remained under constant threat that the areas would be reclassified again without prior notice.

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

Response: In *Tandon*, the Supreme Court granted injunctive relief for California's restrictions on at-home religious exercise. The Court held that a challenged law that treats secular activities more favorably than religious activities is not neutral and generally applicable and must survive strict scrutiny. Where the government permits secular activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those secular activities even when the same precautions are applied.

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

Response: Yes.

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

Response: The Supreme Court held that religious and philosophical objections to gay marriage are protected views and in some instances, protected forms of expression. Therefore, laws protecting gay persons must be applied in a manner that is neutral towards religion. The Colorado Civil Rights Commission's treatment of the baker violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. In reaching this conclusion, the Court considered several factors, including contemporaneous statements made by members of the Commission showing hostility to the baker and the Commission's treatment of other bakers with objections to anti-gay messages.

13. 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: The Supreme Court has repeatedly refused to analyze whether sincerely held religious beliefs are flawed. *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014). Rather, courts should consider whether the line drawn reflects "an honest conviction." *Id*.

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

Response: The Supreme Court has said, "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S 707 (1981).

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

Response: The Supreme Court has repeatedly refused to analyze whether sincerely held religious beliefs are flawed. *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014). Rather, courts should consider whether the line drawn reflects "an honest conviction." *Id*. Moreover, the Court has said that "intrafaith differences. . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses." *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S 707 (1981).

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

Response: I am unaware of the Catholic Church's official position on abortion. If confronted with a case raising this question, I will faithfully follow the precedent of the Supreme Court and the Eleventh Circuit regarding the protections of religious beliefs under the Constitution and federal law.

14. 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: The Supreme Court held that the First Amendment's Religion Clauses foreclosed the adjudication of the two employees' employment-discrimination claims because it protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well of those of faith and doctrine." Court should not interfere with employment disputes involving those who hold certain important positions within churches and other religious institutions. The Court rejected a rigid test and the suggestion that an employee can never come within the ministerial exception unless the employee is a "practicing" member of the religion. Instead a variety of factors should be considered, including the title, whether the position reflects religious training, tax benefits, and job duties. The teachers qualified for the ministerial exception because educating young people in their faith lies at the very core of a private religious school's mission.

15. 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: The Court held that Philadelphia burdened Catholic Social Services's (CSS) religious exercise by forcing it to curtail its mission or approve relationships inconsistent

with its beliefs. Since the non-discrimination requirement in the City's standard foster care contract was subject to entirely discretionary exceptions, it was not generally applicable and subject to strict scrutiny. The Court held that the City did not have a compelling interest in refusing to deny an exception to CSS. Maximizing the number of foster families and minimizing liability are important goals but the City failed to show that granting CSS an exception would put those goals at risk. Finally, the City's interest in the equal treatment of prospective foster parents and foster children was a weighty one but could not justify denying CSS an exception when it made exceptions available to others.

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

Response: The Religious Land Use and Institutionalized Persons Act requires strict scrutiny. Justice Gorsuch wrote that the County and the courts below treated the County's general interest in sanitation as "compelling" without reference to how the rules specifically applied to the Amish community challenging them. Therefore, the issue is whether the County has a specific interest in denying an exception from the septic system requirement to the specific Amish community. Furthermore, the County must offer a compelling explanation why the flexibility extended to others who are exempt from the septic system mandate could not be extended to the Amish. The County also had the burden to show that alternatives to the septic system would not work, not for the Amish to show that that they will.

17. In *Uzuegbunam v. Preczewski*, the Supreme Court was asked to decide whether a government's post-filing change of an unconstitutional policy moots nominal-damages claims that vindicate the government's past, completed violation of a plaintiff's constitutional right. Please explain your understanding of the Court's holding and reasoning in its 8-1 reversal of the Eleventh Circuit.

Response: The Court held that a request for nominal damages satisfies the redressability element needed for Article III standing where a plaintiff's claim is based on a completed violation of a legal right. At common law, a party could always recover nominal damages without providing evidence of actual damage; this avoided the oddity of privileging small economic rights over important, but not easily quantifiable nonpecuniary rights. The lead plaintiff experienced a completed violation of his constitutional rights and nominal damages could redress his injury.

18. In *Americans for Prosperity Foundation v. Bonta,* the Court's majority ruled that California's disclosure requirement was facially invalid because it burdens donors' First Amendment rights to freedom of association. However, the majority was evenly split as to which standard of scrutiny should apply to such cases. Explain your understanding of the two major arguments, and which of the two standards an appellate judge is bound to apply?

Response: Chief Justice Roberts, joined by Justices Kavanaugh and Barrett, stated that they would have applied "exacting scrutiny" to a First Amendment challenge to compelled disclosure. Under this standard, "there must be a 'substantial relation between the disclosure requirement and a sufficiently important government interest.'" Justice Thomas would have applied strict scrutiny. Justice Alito, joined by Justice Gorsuch, stated there was no need to decide which standard should be applied.

Because the majority was split on the standard of review, and the Eleventh Circuit has not opined on the standard it would apply, if this issue came before me, I would carefully listen to the arguments of the parties, and faithfully apply all of the relevant precedent to the facts before me.

19. Describe how you would 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: If confirmed, I will dutifully uphold the Constitution and the laws of the United States. I will carefully apply the law to the facts at hand and act with fairness, impartiality, and respect to the parties that appear before me. I have not studied the individual philosophies of Supreme Court Justices and I recognize that a district court judge has a very different role than a Supreme Court justice. If confirmed, my duty will be to faithfully apply the Supreme Court's precedent to the cases that come before me regardless of any personal viewpoints I may have.

20. Please briefly describe the interpretative method known as originalism.

Response: Black's Law Dictionary defines originalism as "[t]he theory that the U.S. Constitution should be interpreted according to the intent of those who drafted and adopted it.

21. Please briefly describe the interpretive method often referred to as living constitutionalism.

Response: My understanding is that it refers to the belief that the meaning of the U.S. Constitution can change over time in accordance with changing circumstances.

22. 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: I cannot imagine a situation where I would be faced with an issue of first impression regarding the meaning of the Constitution for which there is no precedent. If confirmed, I will faithfully apply Supreme Court and Eleventh Circuit precedent and

follow their methods of interpretation for specific constitutional provisions. However, if there truly is no precedent, I will consider the original public meaning of the text as well as the arguments of the parties in the specific case, and any analogous precedent from the Supreme Court and Eleventh Circuit.

23. 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 general, the text of the Constitution or statute should always be the starting point. The public's current understanding can also be relevant. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court recognized that "the public understanding of a legal text in the period after its enactment or ratification. . . . is a critical tool of constitutional interpretation."

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

Response: A constitutional amendment is the only way to change the Constitution. If confirmed, I will follow all binding Supreme Court and Eleventh Circuit precedent regarding the interpretation of the Constitution.

25. 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: Congress should make that decision. As a judicial nominee, it would not be appropriate for me to give my opinion on this policy issue.

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

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

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

Response: I am unaware of any precedent setting forth such a holding. The Supreme Court has held that the right to bear arms is an individual right protected by the Second Amendment. If confirmed, I will faithfully apply the Supreme Court and Eleventh Circuit precedent interpreting the Second Amendment.

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

Response: I am unaware of any precedent setting forth such a holding. If confirmed, I will faithfully apply binding Supreme Court and Eleventh Circuit precedent regarding all of the rights guaranteed by the Constitution.

29. In *Brnovich v. DNC*, the U.S. Supreme Court held that Arizona's out-of-precinct voting policy, early mail-in voting policy, and its ballot-collection law (H.B. 2023) do not violate Section 2 of the VRA, and that H.B. 2023 was not enacted with a racially discriminatory purpose. Shortly after this, the United States dropped its lawsuit challenging adjacent voting laws enacted by the State of Georgia. Explain your understanding of the analysis and reasoning employed in *Brnovich* for why Arizona's and Georgia's challenged voting laws do not violate the VRA.

Response: Section 2 of the VRA is only violated where "the political processes leading to nomination or election" are not "equally open to participation" by members of the relevant protected group "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." In *Brnovich*, the Court stated that any circumstance that has a logical bearing on whether voting is "equally open" and affords equal "opportunity" may be considered. The Court provided a non-exhaustive list of relevant factors that should be considered: the size of the burden imposed by a challenged voting rule; the degree to which a voting rule departs from what was standard practice when section 2 was amended in 1982; the size of any disparities on a rule's impact on members of different racial or ethnic groups; the opportunities provided by a state's entire system of voting; and the strength of the state's interest, such as the interest in preventing election fraud and ensuring that every vote is cast freely without intimidation or undue influence. The Court found that the Arizona measures at issue did not exceed the usual burdens of voting and that the bill was not enacted with a discriminatory purpose.

30. Are students accused of sexual misconduct entitled to due process?

Response: Where there is a substantive interest in a government benefit, such as entitlement to remain enrolled at a school, a student is entitled to due process. *Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012). "Due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Goss v. Lopez*, 419 U.S. 565 (1975).

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

Response: Generally speaking, the executive branch has a duty to faithfully execute the laws of our country. If a case came before me that presented a legal issue regarding an

executive branch official's refusal to enforce a specific law, I would carefully research and apply binding Supreme Court and Eleventh Circuit precedent.

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

Response: If a case was presented involving these issues, I would listen to the arguments of the parties, research the relevant law and precedent, and apply that precedent to the facts before me.

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

Response: Congress has the authority to amend or repeal the federal death penalty statute.

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

Response: The case involved a stay permitting the CDC's nationwide moratorium on evictions of tenants who live in a county that is experiencing substantial or high levels of COVID-19 transmission and who make declarations of financial need. The Court ruled in favor of the Association. First, it found that the Association had a substantial likelihood of success on the merits because the CDC likely did not have the authority to impose an eviction moratorium. The equities also did not justify depriving the Association and millions of landlords across the country of rent payments with no guarantee of eventual recovery. Further, harm to the applicants had increased while the government's interest had decreased with its ability to distribute rental-assistance funds and Congress's failure to enact new legislation for a moratorium. Finally, although the public has a strong interest in combating the spread of COVID-19, Congress, not the CDC, had the authority to decide whether the public interest merits further action. Therefore, the Court vacated the stay.

35. In *Carpenter v. United States*, what criteria did the U.S. Supreme Court use to distinguish between phenomena that are covered by the Fourth Amendment Third-Party Doctrine and those that are not?

Response: In *Carpenter*, the Court found that the cell-site data at issue implicated two lines of cases: 1) a person's expectation of privacy in his physical location and movements; and 2) a person's expectation of privacy in information voluntarily turned over to third parties. The Court explained that the third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another, but the act of sharing is one consideration. The nature of the particular documents sought and limitations on any legitimate expectation of privacy concerning their contents should also be considered. As to the cell site data, the Court found that cell phones are a pervasive and insistent part of daily life and that they log cell-

site records without any affirmative act on the user's part beyond turning the phone on. Therefore, cell phone location information is not truly "shared" as the term is normally understood for purposes of the Third-Party Doctrine. The Court held that the government needs a search warrant to obtain cell-site records.

36. Please explain your understanding of Justice Gorsuch's dissent in *Carpenter*.

Response: Justice Gorsuch disagreed with continued reliance on the third-party doctrine. Instead, he urged a return to a more traditional approach that considered property law or analogies to common law to fully vindicate the protections of the Fourth Amendment.

a. **What is the judicial value of tying positive law and common law property interests to the test of what constitutes a "search"?**

Response: Justice Gorsuch set forth a number of possible benefits, such as that a traditional approach would be based in the text and original understanding of the Fourth Amendment, would allow judges to decide cases on "democratically legitimate sources of law" rather than "their own biases or personal policy preferences, and allow for consultation with the people's representatives about their rights.

b. **Would Gorsuch's suggested supplementation of *Katz* offer more 4th Amendment protections or less? Why?**

Response: Justice Gorsuch suggested that "[n]eglecting more traditional approaches may mean failing to vindicate the full protections of the Fourth Amendment. Ultimately, he concluded that arguments that the parties do not make about the application of positive law "do not serve the development of a sound or fully protective Fourth Amendment jurisprudence."

37. Do Americans have a privacy interest in their financial affairs?

Response: There is no expectation of privacy in financial records held by a bank. *United States v. Miller*, 425 U.S. 435 (1976).

38. Are there any limitations on the Third Party Doctrine as applied to an individual's banking records? What are they?

Response: The Supreme Court held that the Fourth Amendment did not protect records subpoenaed from a bank. *United States v. Miller*, 425 U.S. 435 (1976). Therefore, any limitations, if they existed, would come from federal law, not the Constitution.

39. In *Stokeling v. United States*, the Supreme Court affirmed the Eleventh Circuit's decision and held that a state robbery offense that has as one of its elements the use

of force sufficient to overcome a victim's resistance, is categorically a "violent felony" under the Armed Career Criminal Act (ACCA). Explain your understanding of how the Court arrived at its decision in the case.

Response: The Court found that Florida's robbery statute required resistance by the victim that is overcome by the physical force of the offender. Therefore, it qualified as a predicate violent felony under the elements clause of the Armed Career Criminal Act, which defines "violent felony" as "any offense that has as an element the use, attempted use, or threatened use of physical force." In reaching this conclusion, the Court rejected the argument that the force should be "reasonably expected to cause pain or injury" because that definition is inconsistent with the degree of force necessary to commit robbery at common law.

40. In *Van Buren v. United States*, the Supreme Court was asked to decide whether a person authorized to access information on a computer for certain purposes violates Section 1030(a)(2) of the Computer Fraud and Abuse Act if he accesses that information for an improper purpose. Explain your understanding of the Court's holding and reasoning in the case.

Response: The Court held that those who have improper motives for obtaining information that is otherwise available to them are not covered by the CFAA. Instead, the CFAA covers a person who "exceeds authorized access" i.e. obtains information from particular areas of the computer to which their computer access does not extend. The Court reasoned that when a statute includes an explicit definition of a term, that definition must be followed even if it varies from a term's ordinary meaning. Further, the Court rejected an interpretation that could attach criminal liability to employers who use their work computer to send a personal email or read the news.

Senator Josh Hawley
Questions for the Record

Victoria Calvert
Nominee, U.S. District Court for the Northern District of Georgia

1. **In a speech before Emory University Law School's Advanced Criminal Trial Advocacy class, you allegedly stated that "yes, I like to see the government, you know get their teeth kicked in and stuff like that."**

    a. **Why do you like to see the government "get [its] teeth kicked in?"**

    Response: At the outset, I would like to take the opportunity to make a few points about these comments. First, the off-the-cuff comments I made to a friend's trial advocacy class were not reflective of the relationships I have built with many colleagues who are federal prosecutors or how I have comported myself in the courtroom and I deeply regret my poor word choice. I am grateful to have the support of many federal prosecutors from the Northern District of Georgia with respect to my nomination. Second, I also understand that the role of a judge is very different from that of an advocate. If confirmed, I will be fair and impartial to all parties who appear before me, including prosecutors.

    I made those off-the-cuff remarks to a small group of students taking a seminar taught by a former and current federal public defender who have known me for years. This quote was part of a longer discussion about the various styles of defense attorneys. I expressed that my focus is on my clients, whereas others focus on having an adversarial relationship with prosecutors. As I stated, I deeply regret my poor word choice. My intent was to express that as an advocate, I like winning, which is one aspect of being a zealous advocate in an adversarial system.

    b. **Do you stand by this statement today?**

    Response: I would reiterate that the off-the-cuff remarks that I made to a friend's trial advocacy class were not reflective of the relationships that I have built with many colleagues who are federal prosecutors or how I have comported myself and I deeply regret my poor word choice.

c. If you are confirmed, how do you intend to ensure that government litigators, including Assistant U.S. Attorneys, will have confidence that their arguments will receive a fair hearing in your courtroom?

First, I would like to reiterate that the off-the-cuff remarks that I made to a friend's trial advocacy class were not reflective of the relationships that I have built with many colleagues who are federal prosecutors or how I have comported myself and I deeply regret my poor word choice. Second, I recognize that prosecutors have an extremely important role in the criminal justice system and I respect their obligations and viewpoints. If confirmed, I will be fair and impartial to all parties who appear before me, including prosecutors.

2. Justice Thurgood 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: I am not familiar with this quote or the context in which it was made. Judges are obligated to decide cases based on the applicable law and the relevant facts without regard to personal beliefs or public opinion.

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

Response: It would not be appropriate for me, as a judicial nominee to a district court, to opine on whether a Supreme Court Justice violated his judicial oath. If confirmed, I will apply the law, including binding precedent, faithfully and fairly, and without regard to any personal viewpoints.

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

Response: The *Rooker-Feldman* doctrine bars federal courts, other than the United States Supreme Court, from reviewing final judgments of state courts. Accordingly, the Eleventh Circuit has held "that federal district courts cannot review or reject state court judgments rendered before the district court litigation began." *Behr v. Campbell*, 8 F.4th 1206 (11th Cir. 2021).

Younger abstention applies to judicial proceedings when important state interests are involved. A federal court should abstain unless state law clearly bars the interposition of the constitutional claims. The Eleventh Circuit test asks: "1) do the proceedings constitute an ongoing state judicial proceeding; 2) do the proceedings implicate important state interests; and 3) is there an adequate opportunity in the state proceedings to raise constitutional challenges." *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003).

Pullman abstention allows the state court to resolve unsettled issues of law, potentially obviating the need for federal courts to consider federal constitutional claims. Under this doctrine, two elements must be met: "1) the case must present an unsettled question of state law; and 2) the question of state law must be dispositive of the case or would materially alter the constitutional question presented." *Pittman v. Cole*, 267 F.3d 1269 (11th Cir. 2001).

Burford abstention applies to "proceedings or orders of state administrative agencies: 1) when there are difficult questions of state law bearing on policy problems of substantial public import or whose importance transcends the result in the case then at bar; or 2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989). However, it is rarely applicable when federal law preempts state law. *Boyes v. Shell Oil Products Co.*, 199 F.3d 1260 (11th Cir. 2000).

Thibodaux abstention applies in cases where adjudication might impair unsettled questions of state law in cases raising issues within the State's sovereign prerogative. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

Wilton/Brillhart is a doctrine of abstention to prevent a federal court from proceeding in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942).

Colorado River abstention allows a federal court to dismiss an action because of parallel state court litigation in exceptional circumstances, based on six factors: 1) whether one of the courts has assumed jurisdiction over property; 2) the inconvenience of the federal forum; 3) the potential for piecemeal litigation; 4) the order in which the forums obtained jurisdiction; 5) whether state or federal law will be applied; and 6) the adequacy of the state court to protect the parties' rights. *American Bankers Ins. Co. of Florida v. First State Ins. Co.*, 891 F.2d 882 (11th Cir. 1990).

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

   Response: No, I have not.

   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: Not applicable.

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

Response: It depends on the provision at issue. For example, in *District of Columbia v. Heller*, 544 U.S. 570 (2008), the Supreme Court interpreted the Second Amendment based on its original meaning. If confirmed, I will faithfully apply all relevant binding Supreme Court and Eleventh Circuit precedent interpreting the specific Constitutional provision at issue.

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

   Response: If a statute is clear, then there is no need to consult legislative history. However, if the text of a statute is ambiguous, and there is no binding precedent on point, then legislative history may be relevant.

   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: The Supreme Court has cautioned that comments of individual legislators or failed legislative proposals are less probative than other types of legislative history.

   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 laws of foreign nations are generally not relevant when interpreting the provisions of the United States Constitution, which is a domestic document.

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: In order to succeed on an Eighth Amendment method-of-execution claim, a plaintiff must establish that the method presents a risk that is sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers. To prevail, there must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading they were subjectively blameless, and the plaintiff must identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain. *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019); *Gissendaner v. Commissioner, Georgia Dept. of Corrections*, 803 F.3d 564 (11th Cir. 2015).

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: Yes.

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 Supreme Court held that there is no due process right to DNA testing for a habeas petitioner post-conviction. *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009). The Eleventh Circuit has followed the analysis in *Osborne*. *Cunningham v. District Attorney's Office for Escambia County*, 592 F.3d 1237 (11th Cir. 2010).

10. **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: No, I do not have any doubt.

11. **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: The Supreme Court has held 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." *Employment Div., Dep't of Human Res. Of Oregon v. Smith*, 494 U.S. 872 (1990). A challenged law that treats secular activities more favorably than religious activities is not neutral and generally applicable and must survive strict scrutiny. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). A facially neutral law can also violate the Free Exercise Clause if the manner in which it is enforced shows hostility towards religious or religious views. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

    The Religious Land Use and Institutionalized Persons Act could also set limits on state actions that impose a substantial burden on the religious exercise of a person unless the government survives strict scrutiny. A "substantial burden" must place more than an inconvenience on religious exercise. A "substantial burden" is akin to significant pressure, which directly coerces the religious adherent to conform his or her behavior and can result from pressure that forces adherents to forego religious precepts or mandates religious conduct. *Thai Meditation Association of Alabama, Inc. v. City of Mobile, Alabama*, 980 F.3d 821 (11th Cir. 2020).

12. **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: Please see my response to Question 11.

13. 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: The procedure for issuing injunctions is covered by Rule 65 of the Federal Rules of Civil Procedure. There is no federal statute explicitly authorizing or limiting the ability of a court to issue a nationwide injunction, but the Supreme Court and the Eleventh Circuit have considered matters regarding nationwide injunctions. If confirmed, I will carefully apply Supreme Court and Eleventh Circuit precedent, and the text of Rule 65 when a party seeks any injunction, including a nationwide injunction.

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 Supreme Court has repeatedly refused to analyze whether sincerely held religious beliefs are flawed. *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014). Rather, courts should consider whether the line drawn reflects "an honest conviction." *Id.*; *see also Cambridge Christian School, Inc. v. Florida High School Athletic Association, Inc.*, 942 F3d 1215 (11th Cir. 2019).

15. 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 believe Justice Holmes was stating that the Constitution does not support any particular economic theory.

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

Response: *Lochner* was abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). As it is no longer binding precedent, I would not follow it.

16. 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: I am not familiar with this quote or the context in which it was made. However, I believe Justice Scalia was referring to the obligation judges have to apply the law and binding precedent regardless of their personal beliefs or viewpoints on how a case should be resolved.

17. 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: I believe the Supreme Court was referring to the fact that *Korematsu* was wrongly decided and had not been followed in the decades since it was issued even thought it had not been expressly overruled.

18. 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: I am not aware of any Supreme Court opinions that have not been formally overruled but are no longer good law.

a. If so, what are they?

Response: None that I am aware of.

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

Response: Yes, I do.

19. 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: In my fifteen years of practicing as a criminal defense attorney, I have not had occasion to consider what constitutes a monopoly and cannot offer an opinion on Judge Hand's statement.

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

Response: Please see my response to Question 19(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 19(a).

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

Response: My understanding is that "federal common law" refers to a limited body of law developed by federal case law rather than by statute or the Constitution.

21. 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: If confronted with a case involving a provision in a state constitution, I would look to decisions from the highest court of that state interpreting that provision.

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

Response: There are instances where identical text has the same meaning. However, state courts may interpret their own constitutional texts differently from the way that federal courts have interpreted the United States Constitution.

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

Response: The United States Constitution, particularly through the Bill of Rights, does set a floor for every citizen. However, whether a state provision provides greater protection is a matter of state law.

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

Response: Yes, I do. Generally, judicial nominees and judges are not permitted to comment on precedent because such comments could be viewed as criticizing higher courts or prejudging a particular matter. However, an exception to this general prohibition applies where a matter is so well-settled that the central holding is unlikely to be raised in future litigation. *Brown* is one such example.

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

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

Response: The procedure for issuing injunctions is covered by Rule 65 of the Federal Rules of Civil Procedure. There is no federal statute explicitly authorizing or limiting the ability of a court to issue a nationwide injunction, but the Supreme Court and the Eleventh Circuit have considered matters regarding nationwide injunctions.

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

Response: If confronted with this issue, I would carefully apply Supreme Court and Eleventh Circuit controlling precedent, and the text of Rule 65 when a party seeks any injunction, including a nationwide injunction.

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

Response: Federalism allocates power between a federal (national) government and state governments. The United States Constitution gives certain powers to the federal government and certain powers to the state governments. The Tenth Amendment reserves powers to the states unless specifically delegated to the federal government.

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

Response: There is no single case that I can name. I am most proud of my almost ten-year career as a federal public defender where I have represented hundreds of people charged with violating a variety of federal criminal laws. Our Constitution requires that indigent defendants be represented by competent counsel and I believe that as an advocate, I have upheld that critically important responsibility. I also value the experiences I have had and the relationships I have formed with colleagues, opposing counsel, and the judges in my district.

26. 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 3.

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

Response: The issue of whether to award damages versus injunctive relief is one that should be made on a case-by-case basis after careful consideration of the applicable law and the facts at hand.

28. 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 First Amendment's right to free exercise of religion is a fundamental right. If confirmed, I will faithfully apply all controlling Supreme Court and Eleventh Circuit precedent regarding the scope of that right.

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

Response: The Free Exercise Clause protects more aspects of religious life than the freedom to worship. If confirmed, I will faithfully apply all controlling Supreme Court and Eleventh Circuit precedent.

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: If confirmed, I will faithfully apply all controlling Supreme Court and Eleventh Circuit precedent, including *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014), *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), and *Thai Meditation Association of Alabama, Inc. v. City of Mobile, Alabama*, 980 F.3d 821 (11th Cir. 2020).

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 Supreme Court has repeatedly refused to analyze whether sincerely held religious beliefs are flawed. *Burwell v. Hobby Lobby*, 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 provides that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1. If the government substantially burdens a person's exercise of religion, that person is entitled to an exemption from the rule unless the government shows that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. *Id*.

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.

29. 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: In my fifteen-year career as a defense attorney, I have never considered a numerical threshold for proof beyond a reasonable doubt. Usually, the jury decides whether the government has proven guilt beyond a reasonable doubt is for the jury to decide.

30. 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: In *Richter*, the Supreme Court explained that federal courts should give deference to a state court decision adjudicating claims that are presented in a later federal habeas petition. Rather than conducting a *de novo* review, a habeas court should determine what arguments or theories supported, or could have supported, the state court's decision and then ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with a prior decision of the Supreme Court. As a judicial nominee, it would not be appropriate for me to comment on a question that could come before me. However, if confronted with this issue, I would carefully review the arguments of the parties and faithfully apply *Richter* and any other relevant precedent to the facts at hand.

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 30(a).

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

Response: Please see my response to Question 30(a).

31. In your legal career:

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

Response: I have tried nine cases as first chair and one case as sole counsel.

b. How many have you tried as second chair?

Response: I have tried seven cases as second chair.

c. How many depositions have you taken?

Response: None.

d. How many depositions have you defended?

Response: None.

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

Response: Three.

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: None.

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

Response: As an assistant federal defender for over nine years, I have argued many motions in district court related to pretrial detention, the admissibility of evidence, judgments for acquittal, and motions related to sentencing. Although the majority of these motions were not "dispositive," they were critical to the outcome of the case.

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

Response: As an assistant federal defender for over nine years, I have argued many motions in district court related to the admissibility of evidence.

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

Response: Yes.

a. If yes, please provide appropriate citations.

Response: I can only recall one instance where I have argued that a federal statute, 18 U.S.C. § 922(g), is unconstitutional: *United States v. Morelock*, 2019 WL 7841853, 1:19-cr-211-AT-CMS (N.D. Ga. 2019).

33. 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? If so, please produce copies of the originals.

Response: No.

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

Response: With respect to the rights protected by the Fifth and Fourteenth Amendments, the Supreme Court has recognized "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and are "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702 (1997). These rights include the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to refuse unwanted lifesaving medical treatment. *Id*.

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

Response: I am aware that there is a lot of debate about this issue, however, as a judicial nominee, it would not be appropriate for me to give an opinion. If presented with a case raising questions of racial bias or discrimination, I will listen to the arguments of the parties and apply the relevant precedent to the facts before me.

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

Response: Yes.

a. How did you handle the situation?

Response: Regardless of my personal view, I have always sought to provide my clients with zealous advocacy in accordance with my Constitutional and ethical obligations.

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

Response: I commit to applying the law, including binding precedent, to any case that comes before me regardless of my personal beliefs.

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

Response: No specific Federalist Paper has shaped my view of the law.

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

Response: As a judicial nominee, it would not be appropriate for me to opine on an issue that is likely to come before me. However, if confirmed, I will faithfully apply all binding precedent to any case that questions the status of an unborn child.

39. 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 *Heller*, the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms.

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.

40. 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. Two former clients alleged that I provided ineffective assistance of counsel and I testified about my work on their cases and communications with them. Both transcripts are available on the PACER site for the Northern District of Georgia:

United States v. Otoupal, 3:16-cr-10-TCB-RGV, Doc. 64 at 5-41 (March 26, 2019).

United States v. Berry, 1:16-cr-00412-AT-JFK, Doc. 77-1 at 48-72 (May 28, 2019).

41. 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?

Response: No.

42. 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.

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

Response: As an associate at a law firm, it is likely that my name was not on the briefs filed in Georgia state courts on behalf of Robert Butts, a former Georgia death row inmate. As an assistant federal defender, I have routinely reviewed briefs that my colleagues have written for submission to the Eleventh Circuit Court of Appeals. However, any edits I suggested would have been minor and not necessarily adopted by the colleague writing the brief.

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

Response: Due to the passage of time, I cannot locate the citation for the cases that I wrote briefs for on behalf of Mr. Butts. Later opinions in his case can be found at these citations: *Butts v. Georgia*, 138 S. Ct. 1975 (2018); *Butts v. GDCP Warden*, 850 F.3d 1201 (11th Cir. 2017); *Butts v. Warden*, 5:13-cv-194-MTT, 2015 WL 61263802 (M.D. Ga. Oct. 16, 2015). Given the minimal editing I would have contributed to my colleagues' briefs as an assistant federal defender, I cannot recall the citations.

44. Have you ever confessed error to a court?

Response: Not that I can recall.

a. If so, please describe the circumstances.

Response: None that I can recall.

45. 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: Nominees testify under oath before the Senate Judiciary Committee and have a duty to answer all questions truthfully, subject to their obligations to remain removed from policy matters and to abstain from comments that could be interpreted as prejudging a matter that might come before them.

Senator Mike Lee
Questions for the Record
Victoria Calvert, Nominee to the District Court for the Northern District of Georgia

1. How would you describe your judicial philosophy?

Response: If confirmed, I will uphold the Constitution and the laws of the United States. I will carefully apply the law to the facts at hand and act with fairness, impartiality, and respect for the parties that appear before me.

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

Response: First, I would look at the text of the statute itself. If the text is clear, then I would not consult any other sources and decide the case based on the statute's text. If the text is ambiguous, then I would look to Supreme Court and Eleventh Circuit precedent to determine how analogous terms or statutes were interpreted. If there were none, then I would look to what other courts have done as persuasive authority. If none of these aforementioned sources were available, I would look to the legislative history of the statute.

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

Response: I would first consider the text of the provision and then consult binding precedent to determine how the text has been interpreted. If no binding precedent exists, then I would consider the text while consulting persuasive authority from other circuit and district courts.

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

Response: The text of a constitutional provision, as well as how the Supreme Court interprets that text, is extremely important. Original meaning can also play an important role. For example, in *District of Columbia v. Heller*, 544 U.S. 570 (2008), the Supreme Court interpreted the Second Amendment based on its original meaning.

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

Response: Please see my response to Question 2.

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

Response: The plain meaning refers to the ordinary meaning of the text of the statute at the time of enactment.

6. What are the constitutional requirements for standing?

Response: To establish standing a plaintiff must establish three elements: 1) the plaintiff must have suffered an injury in fact; 2) that is fairly traceable to the challenged conduct of the defendant; and 3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

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

Response: Under the Necessary and Proper Clause, Congress has implied powers to carry out the powers enumerated in the Constitution. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

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

Response: I would consult binding precedent related to that law. If there was no binding precedent, I would consider the arguments of the parties and follow the analysis used by the Supreme Court and the Eleventh Circuit in cases involving analogous laws.

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

Response: The Supreme Court has recognized several rights that are not expressly enumerated in the Constitution. For example, the Court has held that the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to refuse unwanted lifesaving medical treatment are protected by the Fifth and Fourteenth Amendments. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

10. What rights are protected under substantive due process?

Response: With respect to the rights protected by the Fifth and Fourteenth Amendments, the Supreme Court has recognized "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and are "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702 (1997).

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

Response: My response is not based upon my personal belief but upon Supreme Court precedent. The Supreme Court has not given the same protection to economic

rights as it has to personal rights. *See e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

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

Response: Congress may regulate the use of the channels of interstate commerce, the instrumentalities of interstate commerce, and activity that substantially affects interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995).

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

Response: Classifications based on race, alienage, national origin, and religion are suspect classes requiring strict scrutiny. *Graham v. Richardson*, 403 U.S. 365 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

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

Response: The Constitution gives each branch of government limited roles and responsibilities. Each branch serves as a check and balance on the others to ensure that no branch has absolute power.

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

Response: I would look to the text of the Constitution to determine what authority was granted to the particular branch, Supreme Court and Eleventh Circuit precedent, and the arguments of the parties.

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

Response: The law and the facts of the case are the only considerations when a judge is deciding a case. However, a judge can employ empathy, which is the ability to understand the feelings of another, to explain his or her decisions so that all parties feel as if the court heard their arguments.

17. What's worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: Both situations are equally bad.

18. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the

downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: I do not know the reasons for this change. One possible downside to the aggressive exercise of judicial review is infringement upon the democratic process. One possible downside to judicial passivity is that constitutional protections could be undermined.

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

Response: Judicial review refers to a court's power to review the actions of other branches of government. Judicial supremacy refers to the Supreme Court having the final say in how the Constitution is interpreted.

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

Response: I do not have an opinion on this issue. If confirmed, and I am faced with a case involving the duties of elected officials, I will fairly and impartially apply Supreme Court and Eleventh Circuit precedent.

21. In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.

Response: Judges are obligated to fairly and impartially interpret and apply the law. A judge should not be swayed by partisan interests, public clamor, or fear of criticism.

22. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: A district court judge must faithfully apply binding precedent even if that precedent does not align with his or her personal views. If the binding precedent is

not directly on point, a lower court should listen to the arguments of the parties and decide and study any relevant precedents to make a fair and just determination.

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

Response: A federal judge is obligated to apply the factors set forth in 18 U.S.C. § 3553(a). Group identity is not listed as a factor. Instead, a judge must consider the history and characteristics of the defendant as well as the need to avoid unwarranted sentencing disparities among similarly situated defendants.

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

Response: I am not familiar with this quote, and as a judicial nominee, it would not be appropriate for me to comment on any position of the Biden Administration. Moreover, I do not have my own definition of equity. However, if confirmed, I will treat all litigants who appear before me fairly and impartially.

25. Is there a difference between "equity" and "equality?" If so, what is it?

Response: The definitions of "equity" and "equality" are a current topic of debate and I do not have my own definitions. However, if confirmed, I will treat all litigants who appear before me fairly and impartially.

26. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?

Response: I am not familiar with this quote and as a judicial nominee, it would not be appropriate for me to comment on any positions taken by the Biden Administration. The equal protection clause is intended to guarantee equal protection under the law. If confirmed, I will faithfully apply binding precedent interpreting the equal protection clause and treat all litigants who appear before me with fairness and impartiality.

27. How do you define "systemic racism?"

Response: I do not have my own definition but I am aware that there is a lot of ongoing debate about what systemic racism is and how it may or may not affect various aspects of society. If confirmed, I will treat all litigants who appear before me with fairness and impartiality. If presented with a case raising questions of racial bias or discrimination, I will listen to the arguments of the parties and apply the relevant precedent to the facts before me.

28. How do you define "critical race theory?"

Response: I do not have my own definition but I am aware that there is a lot of ongoing debate about what critical race theory is. If confirmed, I will treat all litigants fairly and impartially.

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

Response: Please see my responses to Question 27 and 28.

Questions from Senator Thom Tillis
for Victoria Marie Calvert
Nominee to be United States District Judge for the Northern District of Georgia

1. **Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

   Response: Yes.

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

   Response: Black's Law Dictionary defines judicial activism as "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent." If confirmed, I will follow binding precedent without regard to my personal viewpoints.

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

   Response: Impartiality is an expectation for all judges.

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

   Response: No.

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

   Response: In an adversarial system, it is normal for at least one party to be unhappy with the outcome of a case. The role of a judge is to faithfully apply the law and precedent and to treat each litigant fairly and impartially. That is what our justice system requires.

6. **Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

   Response: No.

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

   Response: I will faithfully apply the binding precedent regarding the Second Amendment, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone's constitutional rights? In other words, does a pandemic limit someone's constitutional rights?

Response: As a judicial nominee, I believe it would be inappropriate for me to comment on a hypothetical question involving an issue that is likely to come before me. If confirmed, I will apply all relevant and binding precedent from the Supreme Court and the Eleventh Circuit to any issue, including those involving constitutional claims.

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

Response: Under federal law, qualified immunity only applies to acts that are discretionary rather than ministerial. *Bailey v. Swindell*, 940 F.3d 1295 (11th Cir. 2019). A defendant who violated a constitutional right that was clearly established at the time of his or her conduct is not entitled to qualified immunity. *Id*.

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

Response: If confirmed, I will faithfully apply the binding precedent of the Supreme Court and the Eleventh Circuit regarding the applicability of qualified immunity. The question of whether qualified immunity jurisprudence offers sufficient protection to law enforcement officers is a question for policymakers rather than judges.

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

Response: If confirmed, I will faithfully apply the binding precedent of the Supreme Court and the Eleventh Circuit regarding the applicability of qualified immunity. Questions about the proper scope of qualified immunity protections are better considered by policymakers rather than judges.

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

Response: In my fifteen-year career as a defense attorney, I have not litigated patent eligibility cases. If confirmed, I recognize that this is an area where I would need to dedicate substantial time to reviewing binding precedent from the Supreme Court and the Federal Circuit. If confirmed and a patent case comes before me, I will faithfully apply

Supreme Court and Federal Circuit precedent on patent eligibility. In the meantime, it would not be appropriate for me to comment on or criticize precedent that I would be bound to apply if confirmed.

13. How would you apply current patent eligibility jurisprudence to the following hypotheticals. Please avoid giving non-answers and actually analyze these hypotheticals.

a. *ABC Pharmaceutical Company* develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?

Response: In my fifteen-year career as a defense attorney, I have not litigated patent eligibility cases. If confirmed, I recognize that this is an area where I would need to dedicate substantial time to reviewing binding precedent from the Supreme Court and the Federal Circuit. If confirmed and a patent case comes before me, I will faithfully apply Supreme Court and Federal Circuit precedent on patent eligibility.

b. *FinServCo* develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should *FinServCo's* business method standing alone be eligible? What about the business method as practically applied on a computer?

Response: Please see my response to Question 13(a).

c. *HumanGenetics* Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics* Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?

Response: Please see my response to Question 13(a).

d. *BetterThanTesla ElectricCo* develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla's* billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?

Response: Please see my response to Question 13(a).

e. *Natural Laws and Substances, Inc.* specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?

Response: Please see my response to Question 13(a).

f. A business methods company, *FinancialServices Troll,* specializes in taking conventional legal transaction methods or systems and implementing them through a computer process or artificial intelligence. Should such implementations be patent eligible? What if the implemented method actually improves the expected result by, for example, making the methods faster, but doesn't improve the functioning of the computer itself? If the computer or artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?

Response: Please see my response to Question No. 13(a).

g. *BioTechCo* discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTech Co* invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?

Response: Please see my response to Question 13(a).

h. Assuming *BioTechCo's* diagnostic test is patent eligible, should there exist provisions in law that prohibit an assertion of infringement against patients receiving the diagnostic test? In other words, should there be a testing exemption for the patient health and benefit? If there is such an exemption, what are its limits?

Response: Please see my response to Question 13(a).

i. *Hantson Pharmaceuticals* develops a new chemical entity as a composition of matter that proves effective in treating TrulyTerribleDisease. Should this new chemical entity be patent eligible?

Response: Please see my response to Question 13(a).

j. *Stoll Laboratories* discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should *Stoll Labs* be able to patent the natural law that superconductive materials in space have higher superconductive temperatures? What about the space applications of superconductivity that benefit from this effect?

Response: Please see my response to Question 13(a).

14. Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: As a judicial nominee, it would not be appropriate for me to opine on the Supreme Court's precedent. Furthermore, in my fifteen-year career as a defense attorney, I have not litigated patent eligibility cases. If confirmed, I would faithfully apply the relevant Supreme Court and Eleventh Circuit precedent.

15. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

Response: In my fifteen-year career as a defense attorney, I have not litigated a case involving copyright law. However, if confirmed, I will faithfully apply the relevant Supreme Court and Eleventh Circuit precedent.

b. Please describe any particular experiences you have had involving the Digital Millennium Copyright Act.

Response: None.

c. What experience do you have addressing intermediary liability for online service providers that host unlawful content posted by users?

Response: None.

d. What experience do you have with First Amendment and free speech issues? Do you have experience addressing free speech and intellectual property issues, including copyright?

Response: I do not have experience in either area.

16. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office recently reported courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

a. In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?

Response: If the text of the statute is clear, then I would decide the case based on the text and not consult any other sources. If the text is ambiguous, I would look to Supreme Court and Eleventh Circuit precedent to determine how analogous terms or statutes were interpreted. If there were none, then I would look to what other courts have done as persuasive authority. If none of these aforementioned sources were available, I would look to the legislative history of the statute.

b. Likewise, what role does or should the advice and analysis of the expert federal agency with jurisdiction over an issue (in this case, the U.S. Copyright Office) have when deciding how to apply the law to the facts in a particular case?

Response: Interpretations in the form of opinion letters from an agency would not be entitled to *Chevron* deference; instead, they would be entitled to respect to the extent that the interpretation had the "power to persuade." *Christensen v. Harris County*, 529 U.S. 576 (2000).

c. Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

Response: As a judicial nominee, it would be inappropriate for me to comment on a hypothetical question involving an issue that may come before me. If confirmed, I will faithfully apply the relevant Supreme Court and Eleventh Circuit precedent.

17. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

Response: As a judicial nominee with no prior experience in this area, I can only provide the approach that I would take. I will listen to the arguments of the parties equally and with impartiality, research the existing law and precedent, and faithfully apply it to the facts before me.

b. How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?

Response: As a judicial nominee with no prior experience in this area, I can only provide the approach that I would take. I will listen to the arguments of the parties equally and with impartiality, research the existing law and precedent, and faithfully apply it to the facts before me.

18. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.

a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

Response: In my career as a defense attorney, this has not been an issue. Criminal cases in the Northern District of Georgia are assigned to the division in which the alleged conduct occurred. In the Atlanta division, which is the busiest, cases are assigned in a manner that would not permit judge shopping.

b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

Response: I do not believe this is an issue in the Northern District of Georgia and as a judicial nominee, it would not be appropriate for me to comment on the practices of district court judges.

c. Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

Response: I do not believe this is an issue in the Northern District of Georgia and as a judicial nominee, I should not comment on the appropriateness of actions taken by district court judges.

d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

Response: If confirmed, I commit to treating every litigant that comes before me with fairness and impartiality and to apply binding precedent faithfully.

19. In just three years, the Court of Appeals for the Federal Circuit has granted no fewer than 19 mandamus petitions ordering a particular sitting district court judge to transfer cases to a different judicial district. The need for the Federal Circuit to intervene using this extraordinary remedy so many times in such a short period of time gives me grave concerns.

a. What should be done if a judge continues to flaunt binding case law despite numerous mandamus orders?

Response: I believe the Chief District Judge, the Circuit Judicial Council, or Congress would have to make that determination.

b. Do you believe that some corrective measure beyond intervention by an appellate court is appropriate in such a circumstance?

Response: I believe the Chief District Judge, the Circuit Judicial Council, or Congress would have to make that determination.

20. When a particular type of litigation is overwhelmingly concentrated in just one or two of the nation's 94 judicial districts, does this undermine the perception of fairness and of the judiciary's evenhanded administration of justice?

Response: As a judicial nominee, it is not appropriate for me to comment on this issue and I do not have enough knowledge to offer an opinion. However, if confirmed, I will treat every litigant who appears before me fairly.

a. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

Response: As a judicial nominee, it is not appropriate for me to comment on this issue and I do not have enough knowledge to offer an opinion.

b. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: As a judicial nominee, it is not appropriate for me to comment on this issue. Furthermore, I do not have enough knowledge to offer an opinion.

21. Mandamus is an extraordinary remedy that the court of appeals invokes against a district court only when the petitioner has a clear and indisputable right to relief and the district judge has clearly abused his or her discretion. Nearly every issuance of mandamus may be viewed as a rebuke to the district judge, and repeated issuances of mandamus relief against the same judge on the same issue suggest that the judge is ignoring the law and flouting the court's orders.

a. If a single judge is repeatedly reversed on mandamus by a court of appeals on the same issue within a few years' time, how many such reversals do you believe must occur before an inference arises that the judge is behaving in a lawless manner?

Response: As a judicial nominee, it is not appropriate for me to comment on this issue. Furthermore, I do not have enough knowledge to offer an opinion.

b. Would five mandamus reversals be sufficient? Ten? Twenty?

Response: As a judicial nominee, it is not appropriate for me to comment on this issue. Furthermore, I do not have enough knowledge to offer an opinion.