

**Responses to Questions for the Record to Judge Merrick Garland,
Nominee to be United States Attorney General**

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Chairman Durbin

Responses to Questions from Chairman Durbin to Judge Merrick Garland, Nominee to be United States Attorney General

1. At your hearing, you made clear you will work tirelessly to restore integrity and independence to the Justice Department. In your opening remarks and in responding to several questions, you addressed the importance and role of career Justice Department employees. I have a few additional questions on that topic.

Early in his tenure as Attorney General, Eric Holder told career DOJ professionals that the Justice Department “has aptly been described as the ‘crown jewel’ of the federal government...not because of any laws or regulations, cases or controversies, buildings or equipment, but rather because of the quality, integrity, and dedication of the people who work tirelessly to carry out the Department’s vital mission.” He went on to say that these career employees are “the backbone, the heart, and the soul” of the Department.

Unfortunately, over the last four years, many of these career employees have been publicly undermined and denigrated by Department leadership. President Trump amplified baseless lies that he was the “victim of a seditious conspiracy” at DOJ and said that Attorney General Barr should “clean house.” Barr overruled prosecutors to seek a lower sentence for Trump ally Roger Stone and to dismiss a case against Trump ally Michael Flynn, leading to a wave of resignations and a statement of protest from over 2,000 former DOJ officials.

Barr even dismissed the idea that senior officials could trust line prosecutors’ judgment. He stated: “Letting the most junior members set the agenda might be a good philosophy for a Montessori preschool, but it’s no way to run a federal agency.”

- a. If confirmed, to what degree would you rely on the expertise of career Justice Department employees?

RESPONSE: The more than 115,000 career public servants at the Justice Department and its law enforcement agencies are committed to serving the cause of justice and protecting the safety of our communities. If confirmed, I would extensively rely on their expertise.

- b. How does your previous experience as a Special Assistant to the Attorney General, as an Assistant U.S. Attorney, as a Deputy Assistant Attorney General, and as Principal Associate Deputy Attorney General inform that view?

RESPONSE: Before I became a judge, a significant portion of my professional life was spent at the Justice Department as a Special Assistant to Ben Civiletti, the last of the trio of post-Watergate Attorneys General; as a line Assistant U.S. Attorney; as a supervisor in the Criminal Division; and finally, as a senior official in the Department. Many of the policies that the Justice Department developed during those years are the foundation for reaffirming the norms that were adopted to help ensure that the Department adheres to the rule of law. Among these are policies that protect the independence of the Department

from partisan influence in law enforcement, that strictly regulate communications with the White House, that establish guidelines for FBI domestic operations and foreign intelligence collection, that direct the respectful treatment of the press, that read the Freedom of Information Act generously, that respect the professionalism of Justice Department employees, and that set out the principles of federal prosecution to guide the exercise of prosecutorial discretion.

- c. Do you believe that respecting the input and experience of career professionals is an important component of ensuring the Justice Department's independence?

RESPONSE: As a former career prosecutor myself, I believe that respecting the input and experience of career professionals is an important component of ensuring the independence of the Department of Justice. If confirmed, a critical part of my job will be to protect career employees—prosecutors, lawyers, agents, and all others—from partisan motives or other improper influences.

2. In the 2013 case *Shelby County v. Holder*, the Supreme Court gutted Section 5 of the Voting Rights Act (VRA) by striking down its “preclearance” formula, which required states or localities with a history of voter discrimination to receive signoff from the Justice Department before making changes to their voting laws.

Nearly eight years later, Democrats in Congress are still working to restore the VRA to ensure ballot access for all. In the meantime, Republican state legislatures have enacted a slew of measures to undermine the franchise. We're seeing discriminatory voter ID laws, purges of voter rolls, curbs on early voting, attempts to undermine absentee voting, and polling location closures in minority precincts.

And yet, throughout the entirety of the Trump Administration, the Justice Department's enforcement of the VRA was nearly nonexistent. Until May 2020, the Administration had not filed a single new case under Section 2 of the VRA, which remains in force and prohibits any “standard, practice or procedures... which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.”

After the 2020 election, where we saw record-breaking turnout in the midst of an unprecedented pandemic, these voter suppression efforts have been dialed up. According to the Brennan Center, in 2021 alone, at least 165 bills that would restrict ballot access have already been introduced or considered in 33 states.

- a. What are your views on the state of ballot access today?

RESPONSE: I was encouraged to learn that the country had a historically high voter turnout in the last election. But at least a third of Americans still did not vote, and I think it is important that every eligible American has the opportunity to vote.

b. What do you view as the Justice Department's role in ensuring the right to vote?

RESPONSE: I believe the Department of Justice has a central role in protecting the right to vote for all eligible Americans. Voting is foundational to our democracy, and protecting the fundamental right to vote will be a top priority of the Department should I be confirmed.

3. At your hearing, I shared with you a story about a visit I made to an immigration court hearing in downtown Chicago. I mentioned four-year-old Marta and six-year-old Hamilton, two victims of the Trump Administration's shameful Zero Tolerance Policy. Marta and Hamilton were represented by top-notch pro bono lawyers from a Chicago nonprofit and were thankfully reunited with their parents.

But so many immigrants moving through the immigration court system are not represented by an attorney. Moreover, as noted at your hearing, the immigration court backlog has grown considerably — from 460,000 cases in 2015 to more than 1.2 million pending cases today.

In addition to this increased backlog, the immigration courts fell victim to harmful policies propagated by the Trump Justice Department that politicized the courts and stripped them of both their independence and effectiveness. Under Trump, the Justice Department:

- Restricted immigration judges' ability to manage their own dockets and to administratively close low-priority cases;
- Established a controversial annual quota system requiring judges to decide a minimum number of cases at the expense of due process;
- Politicized the hiring process for judges, according to multiple whistleblower accounts;
- Decertified the judges' longstanding union; and
- Tried to end the highly effective Legal Orientation Program, which provides basic legal information for detained migrants.

In short, under Trump, Attorneys General Sessions and Barr treated immigration courts as yet another arm of the Trump Administration's anti-immigration machinery.

a. Do you agree that the nation's immigration courts should operate free of undue political influence?

RESPONSE. Yes. All courts must operate fairly, impartially, and free of improper influence of any kind. As a sitting judge for the last 24 years, these values are of particular importance to me.

b. Will you commit to work with this Committee to improve the administration of justice in immigration courts?

RESPONSE: Yes. As I testified in my confirmation hearing, the immigration court backlog is an extraordinarily serious problem. As a federal judge for the last 24 years, I have not

had occasion to study the particulars of this issue, but I look forward to learning more. If I am confirmed, I am committed to appropriately supervising this departmental function with the goal of effective and efficient processing of immigration cases, consistent with principles of fairness, due process, and other applicable law.

Senator Ossoff

Responses to Questions from Senator Ossoff to Judge Merrick Garland, Nominee to be United States Attorney General

Will you commit to working with my office and this committee to determine how the Department of Justice can support efforts to ensure there is accountability for war crimes, atrocities committed against civilians, and attacks on journalists?

RESPONSE: If I am confirmed as Attorney General, I look forward to building upon the important efforts the Department has undertaken to seek justice for the victims of human rights violations and war crimes worldwide. I will also be committed to pursuing accountability for attacks on journalists. I look forward to working with you and the Committee to effectively address these issues.

Ranking Member Grassley

Responses to Questions from Ranking Member Grassley to Judge Merrick Garland, Nominee to be United States Attorney General

1. Among the civil rights of Americans is the right to keep and bear arms. This has been repeatedly affirmed by the U.S. Supreme Court.

What role does the U.S. Department of Justice have in protecting this civil right, and what steps will you take to ensure it is protected?

RESPONSE: If confirmed, I will take an oath, as all Department employees do, to support and defend the Constitution of the United States, and that includes the Second Amendment.

2. As a candidate, President Biden pledged to direct his Attorney General to “deliver to him within his first 100 days a set of recommendations for restructuring the ATF and related Justice Department agencies to most effectively enforce our gun laws.”¹ What recommendations would you provide President Biden?

RESPONSE: Because I am not currently at the Department, I am not familiar with the current operations of the ATF. If I am confirmed, I will respond to requests from the Administration on this issue after consultation with Department personnel.

3. In the context of national security, there is often a tension between keeping Americans safe and protecting individual liberties.
 - a. As a judge, how do you weigh those competing interests against each other?
 - b. Will you change how you weigh those interests if you are confirmed as Attorney General?

RESPONSE: From my first job at the Justice Department as a special assistant, to my current job as a federal judge, I have sworn an oath that I would take again if I am confirmed as Attorney General—to support and defend the Constitution of the United States. I have and will continue to dedicate myself to ensuring the security of our Nation, to ensuring the fair and faithful enforcement of our laws, and to protecting the rights of all Americans.

4. In 2017, the Trump administration formally discontinued and repudiated Operation Choke Point. This program, which involved the Justice Department among other federal agencies, pressured banks against transacting with certain industries which, while legal and financially viable, were considered to pose a “reputation risk” to banks. The

¹ “The Biden plan to end our gun violence epidemic,” available at <https://joebiden.com/gunsafety/>.

Obama/Biden administration has been accused of using Operation Choke Point to target disfavored business sectors, including makers and sellers of firearms and ammunition. More recently, the Office of the Comptroller of the Currency issued a rule that would prohibit banks from discriminating against lawful, financially sound customers for ideological or political reasons.

Does the Justice Department have a valid role in telling banks which lawful and financially viable industries they should serve? If not, would you pledge as Attorney General not to repeat the tactics of Operation Choke Point?

RESPONSE: I am not familiar with Operation Choke Point. As I testified, I think the laws should be enforced without regard to politics or partisanship.

5. There are many gun control proposals being floated or introduced in Congress, including licensing and registration schemes, bans on popular types of firearms, and repeal of the Protection of Lawful Commerce in Arms Act.
 - a. Do you support the enactment of additional federal gun control laws? If so, which proposals do you support?
 - b. Do you believe any proposal goes too far in infringing Second Amendment rights?

RESPONSE: I have not yet carefully studied these particular measures or developed positions on them. But as I testified at my hearing, I believe as a general matter that we should be careful that people who are entitled to have guns get the background check that allows them to have them, and that for those who are not entitled and who we are concerned about because they are threats, because they are felons or for whatever reason barred by the law, that there is an opportunity to determine that they are not permitted to have a gun.

6. Federal firearm laws delegate a number of technical decisions highly relevant to the legality of firearms and their accessories to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). The agency has historically made case-by-case determinations that offer manufacturers and consumers very little guidance on how slight variations to existing designs might affect a product's legality. Law-abiding gun owners are rightly concerned that products they obtain lawfully and in good faith could, at the stroke of ATF's pen, later become contraband that would subject the items to forfeiture and their owners to criminal penalties.

What safeguards can ATF and DOJ provide so that these technical decisions are transparent, consistent, and fairly applied, without the political whipsawing gun owners have come to fear and expect with each change in administration?

RESPONSE: Because I am not currently at the Department, I am not familiar with ATF technical decisions regarding particular firearm features or accessories. I agree that rules should be transparent, consistent, and fairly applied.

7. During your hearing you were asked if you will support the issuance of executive orders that restrict firearm ownership.
 - a. Can executive orders restrict the constitutional right to bear arms?
 - b. What executive orders would you refuse to support on the basis they would violate the right to bear arms?
 - c. What executive orders restricting firearm ownership are constitutional in your view?

RESPONSE: Like laws enacted by Congress, executive orders issued by the President must comply with the Constitution, including the Second Amendment. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment confers “an individual right to keep and bear arms.” *Id.* at 595. The Court also stated that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *Id.* at 626. If I am confirmed, I would not support any executive order that is inconsistent with any provision of the Constitution, including the Second Amendment.

8. According to press reports, the Biden administration recently reactivated a “migrant child facility” that was open “for only a month in summer 2019” during the Trump administration.² The practice of keeping children in these facilities was routinely criticized as “kids in cages” by Democrats and members of the media.
 - a. What’s the difference between a “migrant child facility” and a “cage”?
 - b. According to this article, as of February 21, the Biden administration had “about 7,000 children in HHS custody.” How do you plan on dealing with the rise in unaccompanied minors arriving at the Southern Border?

RESPONSE: If I am confirmed, I will contribute to the whole-of-government effort to reform our immigration system in a way that’s consistent with our values, secures our borders, and protects our national interests.

9. The Senate Judiciary Committee received a letter supporting your nomination from the U.S. Chamber of Commerce. On March 13, 2019, Senators Schumer, Whitehouse, and 22 of their Democrat colleagues wrote a letter to the U.S. Chamber admonishing the organization as one that “has long used its considerable resources to fight legislative and

² Siliva Foster-Frau, “First migrant facility for children opens under Biden,” Washington Post, Feb. 22, 2021, available at https://www.washingtonpost.com/national/immigrant-children-camp-texas-biden/2021/02/22/05dfd58c-7533-11eb-8115-9ad5e9c02117_story.html.

administrative action on climate change.”³

- a. Why do you think an organization that “has long used its considerable resources to fight legislative and administrative action on climate change” supported your nomination?

RESPONSE: I must leave it to any organization to explain its reasons for supporting my nomination.

- b. Should you be confirmed, what effect will the Chamber of Commerce’s endorsement have on your tenure as Attorney General?

RESPONSE: None. During my almost 24 years as a judge, I have been immune to outside pressures and have made my decisions based solely on the facts and the law before me. If confirmed as Attorney General, I will continue to do the same.

10. The Department of Justice has changed its litigation position in a number of cases so far since President Biden’s inauguration.

- a. Were you consulted on any of these changes in position?

RESPONSE: As I testified at my hearing, I have kept out of litigation decisions made by the Department.

- b. Do you agree with all of the changed positions? If you don’t agree with a change in a particular case, please explain why.

RESPONSE: As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court, including cases in which the Department of Justice is participating.

- c. Do you anticipate weighing in on the litigation positions of any other Justice Department cases currently before the courts? If so, please list them and your rationale.

RESPONSE: I will not weigh in on any of the Department’s litigation decisions unless and until I am confirmed by the Senate. If I am confirmed, I will have ultimate responsibility for the Department’s litigation decisions and will weigh in on those decisions in accordance with the Department’s traditional policies and practices.

- d. As I asked you in our phone call, will you commit to having the Department of Justice inform the Judiciary Committee on all changes in litigation position?

RESPONSE: As I testified at my hearing, I have great respect for the Committee’s

³ Available at <https://www.whitehouse.senate.gov/news/release/schumer-whitehouse-lead-letter-challenging-us-chamber-of-commerce>.

oversight role. If I am confirmed, I will seek to ensure that the Department of Justice’s Office of Legislative Affairs works with you and your staff to determine the most appropriate way to keep the Committee apprised of significant changes in litigating positions.

11. As many members of the Committee mentioned, you will find yourself with a lot of issues to tackle right away if you are confirmed. As you and some of my Democrat colleagues mentioned, the Department of Justice has limited resources, and thus some issues will be prioritized over others, and “prosecutorial discretion” may be employed in the immigration context due to these resource strains.

- a. Do you plan on re-implementing the Department-wide implicit bias training instituted under former Attorney General Lynch?

RESPONSE: I am not familiar with the training programs currently offered by the Department of Justice, nor am I familiar with the training instituted by former Attorney General Lynch. President Biden issued an Executive Order directing federal agencies to conduct an internal review and devise plans to address unequal barriers to opportunity in agency policies and programs. If I am confirmed as Attorney General, I will promptly undertake efforts to comply with President Biden’s Executive Order.

- b. If so, do you feel that such training is a higher priority than enforcing immigration laws passed by Congress?

RESPONSE: If I am confirmed as Attorney General, I commit to enforcing the laws of the United States, including immigration laws.

12. During the second day of your hearing, Wade Henderson, Interim President and CEO of the Leadership Conference on Civil and Human Rights, said that he is “very confident in the Attorney General’s willingness to open his door to hear concerns of organizations, a vast array of whom will have access to him—the entirety of the country, truthfully—he’ll evaluate those requests and carry them out....”

- a. Which “organizations” will “have access” to you?
 - i. If so, how will they be able to make “requests” to you and how will you evaluate them?
 - ii. If not, why was Mr. Henderson under the impression that they would?
- b. In particular:
 - i. Will the NAACP “have access” to you?
 - ii. Will the ACLU “have access” to you?
 - iii. Will NARAL “have access” to you?
 - iv. Will Planned Parenthood “have access” to you?
 - v. Will the NRDC “have access” to you?
 - vi. Will the NRA “have access” to you?
 - vii. Will the National Shooting Sports Foundation “have access” to you?
 - viii. Will Everytown for Gun Safety “have access” to you?
 - ix. Will the Alliance Defending Freedom “have access” to you?

- x. Will the U.S. Chamber “have access” to you?
- xi. Will the Becket Fund for Religious Liberty “have access” to you?
- xii. Will the United States Conference of Catholic Bishops “have access” to you?

RESPONSE: If I am confirmed as Attorney General, I will serve the American people and the rule of law. I look forward to receiving information from a wide range of voices as we make decisions important to the Department’s mission.

13. You were asked if “the Chinese Communist Party is an enemy of the American people.” You responded that you were not well positioned to “compar[e], say, the threat from China and the threat from Russia” but that “that China is a threat with respect to hacking of our computers, hacking of our infrastructure, theft of our intellectual property.” During his confirmation hearing, Bill Barr was asked by Senator Sasse, “is Putin a friend or a foe?” Barr responded that Russia is “a potent rival of our country.”

In your personal view:

- a. Is Vladimir Putin an enemy of the United States?
- b. Are foreign terrorist organizations like ISIS and al Qaida enemies of the United States?
- c. Is the Chinese Communist Party an enemy of the United States?
- d. Is the Iranian Revolutionary Guard an enemy of the United States?
- e. Is the Communist Party of Cuba an enemy of the United States?

RESPONSE: If I am confirmed as Attorney General, I will take an oath to support and defend the Constitution of the United States against all enemies, foreign and domestic. As I testified before the Committee, that requires remaining vigilant to the persistent threat of attacks by terrorist organizations. That also requires countering threats from foreign actors who conduct espionage, attack our elections, imperil our cyber security, steal our intellectual property, target our service members and diplomats overseas, and violate the sovereignty and territorial integrity of our allies. If confirmed, I will assess the Department’s current structure and capacity to counter such threats and fully support the President’s national security team in protecting the American people’s security, prosperity, health, and way of life against all enemies.

14. When asked about Vanita Gupta, President Biden’s nominee to be Associate Attorney General, you said, “Well, Senator, I know Vanita Gupta now quite well. I didn't know her before, but since the nomination I have gotten the chance to talk with her and speak with her.”

- a. If you have only gotten to know Ms. Gupta since her nomination, does this mean you did not know her before her nomination?
- b. If you didn’t know her before her nomination, how was she selected?
- c. Did you have any input in her selection?

- d. If your input was limited, how are you confident in senior deputies you did not choose?

RESPONSE: I have had the privilege of getting to know Vanita Gupta well since we were nominated, and I have found her to be a person of great integrity and experience who is dedicated to the mission of the Department—particularly equal justice under law and ensuring independence and integrity in decision making. I have complete faith in Ms. Gupta, and she will be integral to the success of the Department’s leadership team. As you note, President Biden nominated Ms. Gupta for this post. That is within his Constitutional authority alone, and I think he made a terrific decision in selecting her.

15. During your hearing you were asked by Senator Cotton and me about the ongoing litigation defending the death sentences of Dzhokhar Tsarnaev and Dylann Roof. I understand that you are not willing to comment on pending litigation. But in the case of litigation defending death sentences on direct appeal *generally*—that is not with regard to Tsarnaev or Roof in particular—what factors *should* the Justice Department consider in deciding whether or not to continue to defend those sentences on direct appeal?

RESPONSE: As I testified at my hearing, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court. I cannot comment on factors that would apply to pending cases. I also testified that I have developed serious concerns about the death penalty due to the large number of exonerations in capital cases, the apparent arbitrariness or randomness in application, and the disparate impact of the death penalty on Black Americans and other people of color. As a broader policy matter, President Biden has publicly stated that he opposes the death penalty.

16. Do you think that the regulations (28 CFR §§ 26.22, 26.23) guiding opt-in assessment by the Attorney General of capital counsel certifications under Chapter 154 of Title 28 allow for the Attorney General to reconsider a final certification decision? If so, what provision in the regulations allows for this?

RESPONSE: I understand that this issue has been raised in a case that is currently pending before the D.C. Circuit. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court.

17. In December 2020, the Justice Department finalized a rule prohibiting the inclusion of provisions in settlement agreements directing or providing for a payment or loan to a non-governmental person or entity that is not a party to the dispute, except in defined circumstances. The rule follows a 2017 memo from then-Attorney General Jeff Sessions, which was codified in the Department’s “Justice Manual.” As AG Sessions stated, “[w]hen the federal government settles a case against a corporate wrongdoer, any settlement funds should go first to the victim and then to the American people—not to bankroll third-party special interest groups or the political friends of whoever is in

power.” Will the Department commit to abiding by and upholding this rule? Do you think it’s appropriate for the Justice Department to direct settlement funds toward third-party organizations that Congress has affirmatively defunded?

RESPONSE: As I testified at my hearing, I have not studied this specific issue. If I am confirmed, I will carefully consider the matter and the arguments on both sides, including both the reasons why this practice developed and the reasons why it was changed.

18. In 2018, the Justice Department announced that it had begun investigating potential waste, fraud, and abuse in the asbestos bankruptcy trust system. These trusts are designed to ensure that all victims of asbestos exposure—both current and future—have access to compensation for their injuries. If funds in these trusts are depleted unfairly through abuse or mismanagement, it’s the future victims who will feel the impact through reduced compensation. To protect future asbestos victims and the integrity of the asbestos trust system, it’s important that the Department continue its investigative and oversight work. If confirmed, will you ensure that the Department does so, and will you commit to keeping this Committee informed of its efforts?

RESPONSE: If I am confirmed, I look forward to learning more about these efforts as part of my duty to ensure the full and faithful enforcement of our laws, including laws concerning conduct related to the asbestos bankruptcy trust system. I will exercise my best efforts in good faith to keep this Committee informed about the Department’s efforts through the Office of Legislative Affairs, consistent with the Department’s policies and practices related to ongoing investigations and cases, as well as closed matters.

19. Since 2018, plaintiffs’ counsel have filed thousands of lawsuits and sent an untold number of settlement demand letters to business owners alleging their websites are not accessible to the blind or visually impaired, in violation of Title III of the Americans with Disabilities Act (ADA). The bulk of these claims allege that private websites qualify as places of public accommodation and that websites with access barriers—such as those without compatible screen-reading software—deny individuals the right of equal access. Will the Department provide clarity on the law by resolving the question of whether private websites fall under the ADA? And will the Department provide clear parameters and guidance on how to comply with the law?

RESPONSE: As a sitting judge I am not permitted to comment on pending lawsuits. As a general matter, transparency and clarity in the law are important principles that I will strive to uphold as Attorney General. If I am confirmed, I will look forward to studying this issue.

20. Do state school-choice programs make private schools state actors for the purposes of the Americans with Disabilities Act?

RESPONSE: I have not studied this question and therefore cannot offer an opinion on it.

21. Will you commit, if confirmed, to both seek and follow the advice of the Department's career ethics officials on recusal decisions?

RESPONSE: If I am confirmed, I will consult about recusal issues with the Department of Justice's career ethics officials, for whom I have enormous respect. Because I would be personally responsible for my recusal decisions, I would ultimately have to make my own judgment based on the facts, the law, and the applicable rules, policies, and practices.

22. Are state laws protecting the unborn under the purview of the Civil Rights Division? If so, how?

RESPONSE: I am not familiar with all of the laws that the Civil Rights Division enforces, but my understanding is that, in general, the Division is responsible for enforcing federal statutes prohibiting discrimination on specified statutory bases. I am not familiar with whether and to what extent the Civil Rights Division is engaged with the issue you reference.

23. Would the Department of Justice under your leadership defend *Roe v. Wade* in court if it were challenged?

RESPONSE: If I am confirmed as Attorney General, the Department of Justice's litigating positions will be guided by the facts and the law, including the important legal principle of *stare decisis*. *Roe v. Wade* is an established precedent of the Supreme Court that has been repeatedly reaffirmed.

24. Would the Department of Justice under your leadership defend *D.C. v. Heller* in court if it were challenged?

RESPONSE: If I am confirmed as Attorney General, the Department of Justice's litigating positions will be guided by the facts and the law, including the important legal principle of *stare decisis*. *Heller* is an established precedent of the Supreme Court that has been repeatedly reaffirmed.

25. During your hearing you commented on the "disparate results with respect to wealth accumulation, discrimination in employment, discrimination in housing, discrimination in health care availability" relating to racial minorities. This is why now-Justice Kavanaugh has for many years sought to hire minority law clerks first at the Court of Appeals and now at the Supreme Court.

- a. In your years on the bench, how many law clerks have you hired?
- b. Of them, how many were Black, Hispanic, or Native American?
- c. What affirmative steps have you taken to identify and recruit outstanding Black, Hispanic, or Native American law clerks?

RESPONSE: I have had the privilege of working with approximately 100 clerks over the course of my time as a federal judge, and have intentionally sought to bring a wide variety of lived experiences and perspectives to my chambers, including by building candidate pools of people with diverse backgrounds. I have not tracked these statistics over the course of my tenure, but I am proud to have had clerks from diverse backgrounds throughout my time on the bench.

26. Elite universities have had complex and often troubled relationships with racial and ethnic minorities over the years. You were asked at your hearing, for example, about the Justice Department litigation against Yale University for its alleged discrimination against Asian applicants. But these complex relationships go beyond Yale. Princeton's President, for example, has said that "Racist assumptions from the past also remain embedded in structures of [Princeton] University itself." According to the *New York Times*, one study showed that Harvard recruits African-American applicants who have little chance of attending "rais[ing] questions about whether such recruitment strategies amount to a cynical enterprise by college admissions offices, in which students are being sold false promises to serve the schools' interests."⁴ It is perhaps, then, unsurprising that studies have shown that diverse and low-income students at elite colleges can "find the experience isolating and foreign."⁵

While the causes of and proper responses to the difficulties faced by many racial and ethnic minorities at elite universities are beyond our purview here, there seems to be general agreement that they are real. With that in mind,

- a. How have you taken the challenges faced by racial and ethnic minorities in higher education into account in your clerk hiring?
- b. Recognizing that high-achieving students from diverse backgrounds come from a variety of educational settings, have you ever hired any law clerks from outside the Ivy League? If so, from which universities and how many? If not, why not?

RESPONSE: I have intentionally sought to bring a wide variety of lived experiences and perspectives to my chambers, including by building candidate pools with people from diverse backgrounds. I have hired clerks from non-Ivy League schools.

27. Under the Religious Freedom Restoration Act the federal government cannot "substantially burden a person's exercise of religion."

- a. Who decides whether a burden exists on the exercise of religion, the government or the religious adherent?

⁴ Anemona Hartocollis, "That Recruitment Letter From Harvard Probably Doesn't Mean Much," *New York Times*, Nov. 29, 2019, available at <https://www.nytimes.com/2019/11/29/us/harvard-admissions-recruit-letter.html>.

⁵ Elissa Nadworny, "As Elite Campuses Diversify, A 'Bias Towards Privilege' Persists," *NPR*, March 5, 2019, available at <https://www.npr.org/2019/03/05/699977122/as-elite-campuses-diversify-a-bias-towards-privilege-persists>.

RESPONSE: The Religious Freedom Restoration Act provides that the federal government may not “substantially burden a person’s exercise of religion” unless it “demonstrates that application of the burden to the person” is “in furtherance of a compelling government interest” and is “the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1. As the Supreme Court’s decisions illustrate, a reviewing court is ultimately responsible for determining whether a law substantially burdens a person’s exercise of religion. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719-726 (2014). But the Court has emphasized that a court making that determination must not second-guess the plausibility or reasonableness of the religious adherent’s beliefs. *Id.* at 723-726. Instead, the court’s “narrow function” is to determine whether the adherent’s asserted beliefs reflect an “honest conviction” and whether the challenged law “imposes a substantial burden” on the adherent’s ability to act in accordance with those beliefs. *Id.* at 723-724.

- b. How is a burden deemed to be “substantial[.]” under current caselaw? Do you agree with this?

RESPONSE: In *Hobby Lobby*, for example, the Court held that the contraceptive-coverage requirement promulgated under the Affordable Care Act imposed a substantial burden on the plaintiffs’ exercise of religion. By requiring the plaintiffs to arrange for such coverage, the Court reasoned, the requirement demanded “that they engage in conduct that seriously violates their religious beliefs,” and if they did not comply, they would have faced “substantial economic consequences” in the form of “substantial” penalty assessments. 573 U.S. at 720-721.

28. Last Congress, I co-authored the bipartisan Promoting Security and Justice for Victims of Terrorism Act. This bill passed Congress with support from the State Department and was signed into law by the President. It strengthens the jurisdictional provisions of my Anti-Terrorism Act of 1992 and ensures that American victims of terrorism have their day in court against the PLO and Palestinian Authority. The PLO—which has done everything possible to avoid responsibility in our justice system—challenged the constitutionality of this law in federal court. As you know, the Attorney General has the duty to defend the constitutionality of duly enacted laws when they’re challenged. If confirmed, will you commit to defending the constitutionality of the Anti-Terrorism Act and its most recent jurisdictional amendments in cases currently pending in federal court?

RESPONSE: The question refers to cases currently pending in federal court. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court. As a general matter, however, the Department of Justice’s longstanding practice is to defend the constitutionality of the laws passed by Congress, subject only to limited exceptions. If I am confirmed, I will uphold that traditional practice.

29. Under applicable law you would have the ability to appoint U.S. Attorneys, should you be confirmed. Will you commit to consulting with home-state Senators prior to any Attorney General appointments of U.S. Attorneys?

RESPONSE: If I am confirmed, I would welcome the opportunity to consult with home-state Senators in the limited circumstances under which the Attorney General has the authority to appoint U.S. Attorneys.

30. I've long supported the Freedom of Information Act (FOIA) and the public disclosure of government records. Transparency yields accountability, no matter who is in the White House. As Chairman of this Committee, I helped steer the FOIA Improvement Act—led by Senators Cornyn and Leahy—into law, which creates a “presumption of openness” standard. The Justice Department oversees the federal government’s compliance with FOIA.

- a. Do you agree that FOIA is a critically important tool for holding government accountable? If confirmed, will you commit to make FOIA—and the faithful and timely implementation of the 2016 amendments—a top priority at the Department?
- b. If confirmed, will you commit to helping advocate for more proactive disclosure of government records—not just by the Justice Department, but by the federal government overall?

RESPONSE: Yes. As I said in my testimony before the Committee, I strongly believe in transparency, and I recognize that FOIA is a critically important tool for government accountability.

31. As you know, enforcement of the antitrust laws is extremely important to ensure that markets are fair and participants don't engage in abusive activity that harms consumers. I've been particularly active in making sure that the Justice Department and Federal Trade Commission carefully scrutinize mergers and acquisitions, as well as look out for anti-competitive behavior and predatory practices. Over the years, I've focused on competition issues in a couple sectors of our economy—the agriculture industry which is important to my state of Iowa, and the health care industry. Do you agree that the Justice Department has a critical role to play in these areas? Will you commit to making antitrust enforcement a top priority for the Department under your leadership? Especially in the drug, health care and agriculture sectors?

RESPONSE: As I testified at my hearing, antitrust was my first love in law school and I firmly believe that the antitrust laws are the charter of American economic liberty. I am committed to vigorously enforcing the antitrust laws in all sectors of the economy.

32. How will your Justice Department work with our allies and trading partners on issues of international antitrust?

RESPONSE: I believe that effective enforcement of the U.S. antitrust laws in a global economy requires cooperation with our allies and trading partners. The Department of Justice's Antitrust Division works closely with its counterparts around the world through

both bilateral relationships and participation in international organizations. Indeed, I worked with Attorney General Civiletti on one of the Department's first bilateral cooperation agreements during my first tour of duty in the Department. If I am confirmed, I look forward to learning more about the current status of these important efforts and working with the Antitrust Division to reinforce and strengthen them.

33. When bringing any complicated case, resources are undoubtedly an issue. There will be future cases—both criminal and civil—where the in-house technology expertise of the Department of Justice will be vital. Do you think the Justice Department currently has enough technologists and other experts to deal with the current workload? And how can the Department ensure that a lack of expertise in these areas doesn't impact the administration of justice?

RESPONSE: Because I am not currently at the Department, I am not familiar with current state of technological expertise at the Department or whether any additional resources are required. As I testified at my confirmation hearing, if I am confirmed, I look forward to the opportunity to engage with Congress on resources allocated to the Department in our effort to ensure that the Department has the expertise it needs to carry out its mission.

34. Millions of Americans across the United States rely on social media platforms to run small businesses, advocate on political issues, and advertise to customers. Just as these big tech companies have increasingly begun to censor views that they don't agree with, they have also increasingly removed pages and advertisements from their platforms. Some of these decisions are being made through automated computer detection sometimes without a human being even evaluating the content before it is removed, and once a page or material has been deemed to be against the platform's policies the small business or user can be permanently banned and removed without any meaningful redress. There is usually no due process and many times very little explanation for what the violation was other than a statement that there was a violation of the terms of service.

With the large market dominance of these platforms and the importance of having a presence on social media, along with the lack of due process that is afforded in the removal process, is there a role that the Justice Department can play in ensuring fair and even treatment of users on social media platforms?

RESPONSE: While I have not had the occasion to study this issue specifically, if confirmed, I would welcome the opportunity to learn more about this issue from you.

35. In environmental rulemakings and records of decision (ROD) that have already been developed by non-political career civil servants and have completed the entire permitting process—from scoping, through public comment periods, draft environmental impact statements, all the way through records of decision—should those rulemakings and RODs be defended in court by the Department of Justice? If not, why not?

RESPONSE: I have not studied this specific issue. In general, all Department of Justice litigation decisions—including decisions about whether to defend rulemakings and other

agency actions—should be based on a careful review of the relevant facts and law and consultation with the relevant lawyers at the Department and any interested client agency.

36. As Attorney General, you would have broad authority to administer and enforce the Immigration and Nationality Act and issue decisions that would be binding on immigration courts, the Board of Immigration Appeals, and the Department of Homeland Security. I've long been concerned about the abuse of our asylum system.

According to Executive Office of Immigration Review statistics, from Fiscal Year 2008 through Fiscal Year 2019, for every 100 immigrants who claimed credible fear, only 14 were ultimately granted asylum.

Under the law, asylum can be granted if an individual has a well-founded fear of persecution in their home country based on race, religion, nationality, membership in a particular social group, or political opinion.

The notoriously vague “membership in a particular social group” category has created quite a few issues over the years.

- a. Do you agree with former Attorney General Sessions' statement in *Matter of A-B-* that, as a general matter, claims related to gang violence or domestic violence committed by non-governmental actors will not qualify for asylum?
- b. Do you agree with the statement made in *Matter of A-B-* that the mere fact that a country might have problems effectively policing certain crimes—such as gang violence—or the fact that certain populations are more likely to be victims of a crime, cannot in and of itself establish an asylum claim?
- c. Do you agree that, particularly in cases involving private criminal activity, asylum adjudicators and immigration judges must consider factors such as whether or not internal relocation within an individual's home country presents a reasonable alternative to asylum in the United States?
- d. If confirmed, do you anticipate asking for BIA cases to be referred to you in order to revisit *Matter of A-B-* or address any of its findings regarding whether being a victim of private criminal activity amounts to persecution on account of membership in a particular social group?

RESPONSE: As a judge on the D.C. Circuit, my docket has not provided the occasion to become familiar with the federal government's asylum policies. If I am confirmed as Attorney General, I will study this issue. As a general matter, asylum is part of American law and the Department of Justice and the State Department have an obligation to apply the federal asylum laws.

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

RESPONSE: President Biden has stated his intent to create a bipartisan commission to study the court system. If confirmed, I would review the issue as appropriate.

38. Another Justice Department nominee has said, “Yes, freedom of religion is a fundamental right, but it is not an absolute right. It cannot be used as shield to permit discrimination.”
- a. Is this a correct understanding of the First Amendment and the Religious Freedom Restoration Act?
 - b. Will this be the understanding of the Justice Department, should you be confirmed?

RESPONSE: The Religious Freedom Restoration Act provides that the federal government may not “substantially burden a person’s exercise of religion” unless it “demonstrates that application of the burden to the person” is “in furtherance of a compelling government interest” and “is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1. If I am confirmed, the Department of Justice’s understanding of the Act will be determined by the text of the statute, traditional tools of statutory interpretation, and applicable precedent.

39. Do you agree with the Supreme Court that the free exercise clause lies at the heart of a pluralistic society (*Bostock v. Clayton County*)? If so, does that mean that the Free Exercise Clause requires that religious organizations be free to act consistently with their beliefs in the public square?

RESPONSE: As I testified at my hearing, I am a strong believer in religious liberty, a principle that is enshrined in the Free Exercise Clause, the Establishment Clause, the Religious Freedom Restoration Act, and other federal statutes. Those constitutional provisions and statutes guarantee religious individuals and organizations substantial autonomy to act consistently with their religious beliefs.

40. Do you agree with the Supreme Court that the principle of church autonomy goes beyond a religious organization’s right to hire and fire ministers? What, in your view, are the limits on church autonomy consistent with what the Supreme Court has said?

RESPONSE: In our *Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court reaffirmed that the First Amendment protects the right of religious institutions “to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Id.* at 2055 (citation omitted). There, although the plaintiff schoolteachers “were not given the title of ‘minister,’” the Court held that their cases fell within the so-called “ministerial exception” to employment discrimination laws. *Id.* Under that exception, “courts are bound to stay out of employment disputes involving those holding certain important decisions with churches and other religious institutions.” *Id.* at 2060. The Court held that “[t]he religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom

the schools rely to do this work lie at the core of their mission.” *Id.* at 2055. In finding the facts sufficient to decide the case before it, the Court declined to adopt a “rigid formula” for determining whether an employee falls within the exception. *Id.* at 2069 (citation omitted).

41. Do you agree that the Religious Freedom Restoration Act requires assessing compelling government interests “to the person” substantially burdened by a government action?
 - a. If not, why not?
 - b. If so, can *general* interests restrict religious liberty, or must the interests be defined more precisely?
 - c. How would you implement this principle in Justice Department guidance?

RESPONSE: The Supreme Court has held that the Religious Freedom Restoration Act “requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-431 (2006) (citation omitted). The Court has thus “looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants.” *Id.* at 431. If I am confirmed, I will seek to ensure that all Department of Justice guidance, including any guidance on this subject, is consistent with any relevant constitutional or statutory provisions and with applicable precedent.

42. Judge Ken Starr, in supporting your nomination, said he was confident that your record shows you will defend religious liberty. Will you commit that the Department of Justice under your leadership will not seek to restrict the scope of or otherwise undermine the Religious Freedom Restoration Act through litigation, guidance, or legislative priorities?

RESPONSE: As I testified at my hearing, I strongly believe in religious liberty. If I am confirmed as Attorney General, I will seek to ensure that the Department of Justice scrupulously complies with the Constitution and all federal statutes, including the Religious Freedom Restoration Act. I have not considered any potential legislative amendments to the Act. If I were asked to consider such an amendment, my position would be informed by my strong belief in religious liberty and guided by a careful review of the relevant facts and law.

43. The First Step Act became law 2 years ago, and since its passage, I’ve focused on the implementation of this comprehensive criminal justice law. The COVID-19 pandemic has affected implementation efforts. During the pandemic, many First Step Act authorities were used more frequently yet judiciously, such as increased review of compassionate release and elderly home detention cases.

However, the virus impeded programming available to federal prisoners. Programming to reduce recidivism is an essential part of the law, and can help non-violent inmates earn time off their sentences.

As we continue to navigate COVID-19 in prisons, how would you use your role as Attorney General to ensure that programming is available for inmates and effective in reducing recidivism?

RESPONSE: If confirmed, I would welcome the opportunity to work with Congress and the Bureau of Prisons to advance implementation of the First Step Act. Because I am not in the Department, I am not familiar with the programming issue you raise. If confirmed, I would work diligently to ensure COVID-19 safety and programming in prisons that effectively reduces recidivism.

44. It is critical that the Justice Department and Bureau of Prisons fully and expeditiously implement the First Step Act. Chairman Durbin and I sent a letter to the Justice Department Inspector General last year on this issue, but particularly in light of COVID-19. Specifically, we asked that he review the implementation of legislative authorities and directives on home confinement, preventative measures to protect prison staff and inmates, COVID-19 testing, screening and isolation measures, and availability of access by inmates to electronic communication.

If confirmed, would you provide any directives and guidance on these issues? If so, what would that look like?

RESPONSE: I am not aware of the status of this review, but, if confirmed, I would press for implementation of the dictates of the First Step Act, including by issuing directives and guidance where necessary.

45. The First Step Act requires that nonviolent inmates be given more opportunities to earn time credits as a result of participating in recidivism reduction programming. This will undoubtedly lead to more inmates being put in prerelease custody, such as halfway houses. The First Step Act authorizes \$75 million each year through FY 2023. It'll be absolutely vital that some of this funding be used for the expansion and creation of new residential reentry centers.

As Attorney General, will you use the funding available to you to adequately fund these residential reentry centers to handle the increase of inmates being put in prerelease custody?

RESPONSE: If confirmed, I will strive to use available resources to adequately fund these residential reentry centers.

46. The Justice Department, as part of the federal government, must enforce federal laws. An area where this has led to confusion is the enforcement of federal law in states where

marijuana has been legalized. As you are aware, marijuana is a Schedule I drug under the Controlled Substances Act.

- a. Under your leadership, how will you navigate the Justice Department's enforcement of federal law in states where marijuana has been legalized?

RESPONSE: As I suggested at my hearing, I do not think it the best use of the Department's limited resources to pursue prosecutions of those who are complying with the laws in states that have legalized and are effectively regulating marijuana. I do think we need to be sure, for example, that there are no end runs around the state laws by criminal enterprises, and that access is prohibited to minors.

- b. What do you see the role of the Justice Department to be in the changing landscape of marijuana legalization, decriminalization, and recreational use?

RESPONSE: The Department of Justice has not historically devoted resources to prosecuting individuals for simple possession of marijuana. As I suggested at my hearing, I do not think it the best use of the Department's limited resources to pursue prosecutions of those who are complying with the laws in states that have legalized and are effectively regulating marijuana. I do think we need to be sure, for example, that there are no end runs around the state laws by criminal enterprises, and that access is prohibited to minors.

- c. Do you support efforts to decriminalize or legalize marijuana?

RESPONSE: As I said at my hearing, criminalizing the use of marijuana has contributed to mass incarceration and racial disparities in our criminal justice system, and has made it difficult for millions of Americans to find employment due to criminal records for non-violent offenses.

- d. Legalized marijuana use may contribute to increased driving deaths. How will you support efforts by local and state law enforcement to combat driving under the influence of marijuana?

RESPONSE: I have not had an opportunity to examine this public safety question. If I am confirmed, I look forward to learning about it, and determining if the Department has programs or resources that could be helpful.

- e. While Biden is opposed to legalization of marijuana, he supports decriminalization of possession and expungements of marijuana offenses. Do you see any contradictions in President Biden's vision of maintaining the drug's federally illegal status while decriminalizing minor possession and expunging prior conviction records?

RESPONSE: As I testified at my hearing, it is important to focus our attention on violent crimes and other crimes that greatly endanger our society, and prosecutions for simple marijuana possession are not an effective use of limited resources. As I testified, we have

seen disparate treatment in these prosecutions that has had a harmful impact on people and communities of color, including stymied employment opportunities and social and economic instability.

- f. Are you aware whether drug trafficking organizations continue to operate illicit marijuana markets in states with legalized marijuana? If so, what steps will you take to combat drug trafficking organizations that may use the cover of the legal marijuana market?

RESPONSE: As I testified at my hearing, I think we need to be sure that there are no end run around the state laws by criminal enterprises, and that kind of enforcement is important.

- 47. The last two Attorneys General showed an unwavering commitment to seeking justice for vulnerable populations such as the elderly, and they both encouraged the prosecution of financial fraud and scams that target seniors during the COVID-19 pandemic. They championed training, research, victim services, and public awareness initiatives to combat elder abuse, through the Justice Department’s “Elder Justice Initiative.”
 - a. Will you also commit to continue the previous administration’s Elder Justice Initiative and devote adequate resources to its implementation?

RESPONSE: I am not familiar with the Elder Justice Initiative, but I share your commitment to seeking justice for the elderly, and, if confirmed, I look forward to working with you in seeking to ensure that the Department has the resources necessary to achieve that goal.

- b. And will you ensure that that there continues to be a prosecutor dedicated to elder abuse cases in each federal judicial district (as required under the bipartisan Elder Abuse Prevention and Prosecution Act, which I championed in 2017 with Senator Blumenthal)?

RESPONSE: I am not familiar with the specific requirements of the statute, but, if confirmed, I will work to ensure the Department abides by statutory requirements and vigorously enforces all laws that protect the Nation’s elderly from fraud and abuse.

- 48. In August of last year, Sen. Wyden and I released a report on syndicated conservation-easement transactions. That report concluded that those transaction are abusive tax shelters and that the government should do more to stop them. The Department of Justice’s Tax Division is already litigating one case against a company called EcoVest, which was featured prominently in our report. I believe it is imperative that Americans believe the nation’s tax laws are enforced fairly. If you are confirmed, can you commit that the Tax Division will do everything it can to help stop these abusive tax shelters, including seeking criminal charges where appropriate?

RESPONSE: Because I am a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court.

49. Do you believe we should be defunding, or otherwise withdrawing resources in any way, from police services, in order to redirect those resources to other government services? As Attorney General, will you take any steps to shift resources away from direct law enforcement services?

RESPONSE: As I stated at my hearing, I do not support defunding the police. I support giving police departments the resources they need to reform, build community trust, and ensure the safety of their communities. I understand that many police departments are forced to use their limited resources on public health issues over which they do not want sole responsibility, including confronting mental health crises. I believe other professionals in the community, such as mental health professionals, need resources to work in the community in a way that helps reduce unnecessary confrontations, alleviate the strains placed on police officers, and enhances public safety.

50. One area where bipartisan support could be found in combatting crime is increased Federal support to state and local law enforcement for technology. These include items like body armor, camera systems, automated fingerprint identification systems, weapons of less than lethal force. I am sure you are familiar with technology that detects gunshots, including technology that identifies gunshots and their location and transmits that information quickly to local law enforcement. Do you believe that local communities deserve increased Federal support to deploy this technology, along with other technologies?

RESPONSE: I am very supportive of law enforcement using technology appropriately and effectively. Because I am not in the Department, I am not currently aware of Department resources made available for these purposes, but, if confirmed, I look forward to learning more about ways the Department can provide appropriate support while protecting civil liberties.

51. As noted in media reports, the FBI waited months before pursuing sexual abuse allegations made by Olympic gymnasts against Larry Nassar. On July 9, 2018, I sent a letter requesting that the FBI provide my committee staff with a briefing on its handling of the USA Gymnastics abuse allegations. My letter also requested responses to 11 questions. Nearly three years have elapsed, and the FBI has yet to provide me with a briefing or responses to the questions I raised in this letter. To date, the FBI has indicated only that the matter had been turned over to the Office of Inspector General.
- a. Can you commit to a date certain when I will receive a response from the Department to my letter and briefing request?

- b. Can you commit to a date certain by which the Department will make available to my committee staff its internal report on the FBI's handling of the investigation into the Nassar allegations?

RESPONSE: Because I am not in the Department, I don't have information about the Department's response to your request. If confirmed, I will look into the matter.

52. Prosecutors within the Human Trafficking Prosecution Unit in DOJ's Civil Rights Division work closely with federal prosecutors and law enforcement personnel to streamline human trafficking investigations, ensure consistent enforcement of trafficking statutes, and identify multijurisdictional trafficking networks. The FBI's Crimes Against Children and Human Trafficking program also focuses on detection and investigation of human trafficking crimes.

- a. If confirmed, will you ensure that the investigation and prosecution of human trafficking offenses remains a top priority for the Department?

RESPONSE: Yes.

- b. How will you do so?

RESPONSE: Domestic and international human trafficking, the commodification of humans for forced labor, prostitution, and other illicit purposes, is a scourge on our society. If I am confirmed, I will seek to expand and further the efforts of the Civil Rights Division to combat these terrible offenses.

53. In 2018, the Department of Justice launched the China Initiative, focusing on the wide number of national security threats posed by the government of the People's Republic of China (PRC). As FBI Director Wray noted, the FBI opens a new China-related counterintelligence case about every 10 hours.

- a. Will you continue this important initiative?
- b. In what ways do you think our response to the threat of the government of the PRC can be made more comprehensive or robust?

RESPONSE: Because I am not currently at the Department, I am not familiar with the details of this initiative. But if confirmed, I look forward to reviewing this and any related initiatives that are underway. As I testified at my confirmation hearing, there is no doubt that China poses threats that the United States must defend against with a whole of government response.

54. In 2020, the Department of Justice launched Operation Legend, a sustained and systematic law enforcement initiative to fight the sudden surge in violent crime that

began in America's cities last summer. By the end of 2020, over 6,000 arrests had been made through Operation Legend, including 450 for homicide.

- a. Do you intend to retain or disband Operation Legend?
- b. If you intend to disband it, how do you intend to support state and local partners to fight the recent surge in violent crime?

RESPONSE: Because I am not currently at the Department, I am not familiar with the details of Operation Legend. As I testified at my hearing, it is important to focus the Department's attention on violent crimes and other crimes that greatly endanger our society, and I support targeting our limited resources that way.

55. The FBI and DOJ have repeatedly indicated to this committee that a solution for lawful access to encrypted technology is needed. Do you support such a solution? What is your plan?

RESPONSE: I agree that it is important to address law enforcement's legitimate need to protect public safety, while at the same time recognizing civil liberties, economic, and cybersecurity concerns. If confirmed, I look forward to learning more about this important issue.

56. Section 3204 of the SUPPORT for Patients and Communities Act provided that specialty pharmacies may distribute Medication Assisted Treatments (MAT) directly to providers.

- a. Section 3204 of the Act requires the practitioner to administer treatment to the patient named on the prescription or dispose of the medication within 14 days of receipt of the controlled substance, a period of time which can be modified by DOJ. Comments to the DEA Interim Final Rule for the SUPPORT Act have suggested that the 14 day limit needs to be increased in order to eliminate barriers to patient access. Can you commit to considering these comments and issuing a Final Rule expeditiously?
- b. Can you commit that the DEA will expeditiously completed rule-making under your leadership? Please describe how you will ensure this.

RESPONSE: Because I am not currently at the Department, I am not familiar with the DEA Interim Final Rule for the SUPPORT Act. If confirmed, I look forward to learning about the DEA's rule-making process and working with Department personnel to ensure it is efficient and effective.

57. In your hearing, you indicated a willingness to work with me on classwide scheduling of fentanyl analogues. Please be as explicit as possible: do you support a permanent extension of the current Schedule I designation of fentanyl related substances that is

currently set to expire in May 2021? If not, please explain why not. If so, how do you plan to support this extension?

RESPONSE: As we discussed, fentanyl analogues are sold illicitly and have caused senseless fatalities. Criminals constantly alter their chemical composition to evade scheduling. If confirmed, I look forward to examining and addressing this problem.

58. During your hearing you were asked repeatedly about the death penalty. I understand your answers to mean that you do not personally support the death penalty any longer, despite righteously seeking the death penalty against terrorist Timothy McVeigh. I also understand that you have committed to following the law as enacted by the Congress, and not selectively enforcing the provisions with which you personally disagree.

Will you enforce the death penalty so long as it is the law of the land? If not, why not?

RESPONSE: As I testified at my hearing, I do not regret seeking the death penalty against Timothy McVeigh. Over the past two decades, however, I have developed serious concerns about the death penalty due to the large number of exonerations in capital cases, the apparent arbitrariness or randomness in application, and the disparate impact of the death penalty on Black Americans and other people of color. As a broader policy matter, President Biden opposes the death penalty, and could choose to order an across-the-board moratorium on federal executions.

59. Do you intend to continue Operation Lady Justice? What plans do you have to alter, restrict, rebrand, or otherwise change this important initiative?

RESPONSE: Because I am not currently at the Department, I am not familiar with this program. If confirmed, I look forward to reviewing this and any related efforts.

60. One thing on which there is bipartisan agreement is our mutual disdain in both parties for white supremacy and white supremacy extremism. Yet, as I stated in a recent letter to Senator Durbin, the term appears to be used out of context at times to slam conservatives, including supporters of former President Trump, who are not in fact white supremacists.

In your written statement and in your hearing, I noticed that you characterized the attack on the Capitol as having been committed by white supremacists. However you also stated that you had not been briefed yet on law enforcement's information on the Capitol attack.

What is your understanding of the involvement of white supremacists in the 1/6 attack? What is the source of your information? If someone suggested you characterize the attack as conducted by white supremacists, who suggested that to you?

RESPONSE: Because I am not at the Department, I do not have access to internal law enforcement information relating to the attack on the Capitol. My statement was that the

attack was by “white supremacists and others” and my understanding of the events is based on videos, audio tapes, and reports that I saw and heard in the public media.

61. The year 2020 was marked by a great deal of left-wing violence. Riots broke out in numerous cities. Over 900 officers were injured in the line of duty. At least 25 people died. Estimates of the damage run over 2 billion dollars. The FBI opened over 300 domestic terrorism cases in response to this violence. Nationally over 14,000 people were arrested. Notwithstanding this violence, Democratic politicians have been dismissive and the media has lumped in the riots with the peaceful protests, using the dubious terminology that there were no riots, only “mostly peaceful protests.” This is contrasted with the bipartisan condemnation of the attack on the Capitol by right-leaning supporters of former President Trump.

In response to my direct question, you committed to continuing to work the over 300 domestic terrorism cases opened by the FBI in response to riots last year. I thank you for making that commitment. Senator Hirono then asked you if you would prioritize rightwing cases. Senator Hirono cited a *New York Times* article in which a small number of DOJ and FBI employees claimed that working the leftwing summer riots somehow “distracted” them from rightwing extremism. However the article notes that the FBI carries about 1,000 domestic terrorism cases in an ordinary year, and 400 were opened last summer because of the riots. It is difficult to see how a 40% increase in case load is a “distraction.” If anything, leftwing terrorism and anarchist extremism seem like growth areas especially deserving of your attention.

It is my expectation that you will receive constant pressure from left-leaning media such as the New York Times and Congressional Democrats to “prioritize” rightwing terrorism over leftwing terrorism, or to ensure that “scarce resources” are devoted to right-leaning terrorism and not left-leaning terrorism. This is totally unacceptable, and I suspect it has more to do with attempting to deemphasize the very real threat of leftwing terrorism than it does with anything else.

- a. Can you reaffirm your commitment to me that you will continue to pursue the 2020 riots cases and future cases of leftwing terrorism?

RESPONSE: If confirmed, confronting domestic terrorism will be a top priority. As I testified at my hearing, I believe the role of the Department is to investigate and prosecute acts of violence and other crimes regardless of associated ideology.

- b. Can you commit to me that if you are ever contemplating prioritizing or de-prioritizing or under-resourcing any terrorism investigations, you will first come to Congress and ask for more resources?

RESPONSE: If confirmed, I would seek to ensure that investigations into terrorist threats are adequately resourced, and I would welcome the opportunity to work with Congress to guarantee that the Department always has the resources it needs to combat evolving domestic and international terrorist threats.

- c. Do you agree that protecting Americans from all forms of domestic terrorism is a critical priority?

RESPONSE: Yes.

62. During your hearing I noted that former Attorney General Barr has observed that the FBI, while it had robust programs for white supremacism and militia extremism, lacked a similar infrastructure for anarchist extremism cases. Former Acting DHS Secretary Wolf stated this may have contributed to law enforcement being blindsided by the civil unrest that began in 2020. I asked if you will commit to reviewing your anarchist extremism program for weaknesses and fixing those weaknesses, and I understand that you will. Please explain exactly how you will conduct this review?

RESPONSE: Because I am not in the Department, I am not familiar with these specific programs. If confirmed, I look forward to learning more about them and any related efforts. As I testified at my hearing, confronting domestic terrorism will be a top priority.

63. Will you keep the antigovernment extremism task force which was founded at the Justice Department last summer, and which appears sorely needed at this point in time? If not, why not?

RESPONSE: Because I am not in the Department, I am not familiar with this specific program. If confirmed, I look forward to learning more about this and any related efforts. As I testified at my hearing, confronting domestic terrorism will be a top priority.

64. I want to better understand a point you were making in your hearing. I believe you stated that you would not consider an attack on a courthouse to be domestic terrorism if it occurred at night when judges were not there. You mentioned that this would comport with a statutory definition. Title 18 of the U.S. Code, section 2331 defines terrorism:

- (5) the term “domestic terrorism” means activities that—
 - (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
 - (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
 - (C) occur primarily within the territorial jurisdiction of the United States[.]

How does burning or attacking a courthouse at night not comply with that definition? To be more specific, don't months of attacks on the federal courthouse in Portland, Oregon meet that definition? If not, why not?

RESPONSE: My point at the hearing was as follows: “[A]n attack on a courthouse, while in operation, trying to prevent judges from actually deciding cases ... plainly is domestic extremism, domestic terrorism. An attack simply on a government property at night or any other kind of circumstances is a clear crime and a serious one and should be punished.... I don’t know enough about the facts of the example you’re talking about, but that’s where I draw the line.... [B]oth are criminal, one is a core attack on our democratic institutions.”

65. Former Attorney General Barr launched investigations, under the Civil Rights of Institutionalized Persons Act, into how state actors may have fueled the spread of COVID-19 in public nursing homes. These investigations are even more important as we have learned that state actors may have concealed information and underreported nursing home deaths in the state of New York.

- a. If confirmed, will you set aside any partisan pressure and continue the Justice Department’s investigations, under the Civil Rights of Institutionalized Persons Act, into four Democratic governors’ poor handling of the COVID-19 pandemic in public nursing homes?
- b. Will you look into the question of whether New York State officials may have deliberately misled federal investigators and the public as to the number of COVID-19 deaths which occurred in nursing homes?
- c. Acting U.S. Attorney for the Northern District of New York, Toni Bacon, is a career prosecutor and the former Elder Justice Coordinator of the Department of Justice. Will you consider keeping her in her acting role to work on the investigation of this potential cover up in New York state until a replacement is confirmed by the Senate?

RESPONSE: If confirmed, I will make decisions concerning investigations based on the facts and the law, without regard to partisan considerations. I understand that, generally, in all investigations like those referenced above, the Justice Department considers evidence of fraud, false statements, and other violations of the law. Because I am not in the Department and am a sitting federal judge, it would not be appropriate for me to comment on any particular investigation.

66. Former Attorney General Barr circulated an April 27, 2020 memorandum directing the Civil Rights Division and U.S. Attorney’s Offices to participate, where appropriate, in civil litigation over excessive or unequal COVID-19 restrictions, including in defense of religious liberty. Will you continue the Justice Department policy, articulated in an April 27, 2020 memorandum, of participating, where appropriate, in civil litigation to defend Americans’ religious freedom against unnecessary interference during the COVID-19 pandemic? If not, why not?

RESPONSE: If confirmed I look forward to reviewing the policy. As I testified at my hearing, I am a strong believer in religious liberty.

67. The Department of Justice's Office of Legal Counsel, in a January 2020 opinion, declared that the Equal Rights Amendment (ERA) resolution expired in 1979. Its legal opinion also indicated that Congress has no power to revive this resolution, except by re-starting the Article V process with the support of two-thirds of Congress. For the current Congress to attempt to retroactively change the deadline on this long-expired proposal would be like this Congress trying to override a veto by President Carter. Yet the Virginia General Assembly has passed a resolution purporting to ratify the ERA and claimed to be the last state needed to enact the Amendment.

The late Justice Ruth Bader Ginsburg implied that she agreed with this OLC legal opinion when she stated, last February, of the ERA proposal, "I'd like it to start over." She added that Virginia's legislative action came "long after the deadline passed....Plus, a number of states have withdrawn their ratification."

Yet some now are pressing the new Biden Administration to declare the original 1972 ERA back from the dead, without first obtaining two-thirds of votes in Congress and the consent of three fourths of the states.

The Archivist for the United States issued a press release, dated January 8, 2020, indicating that he "defers to DOJ on this issue and will abide by the OLC opinion, unless otherwise directed by a final court order." No such court order has been issued. In light of the Archivist's statement, can you give this committee your assurance that you will not direct or permit the Archivist to certify that the ERA is part of the Constitution, without a final federal court order directing such an action?

RESPONSE: The issue to which you refer is the subject of pending litigation involving the Archivist of the United States. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court. If I am confirmed as Attorney General, any opinions or legal advice I might give on this subject would be based solely on the law, and not on any other consideration.

68. If any members of the Biden administration met and negotiated with Iranian leaders with the purpose of undermining the previous administration's policy, would that constitute a violation of the Logan Act? If so, do you intend to prosecute them?

RESPONSE: As I testified at my hearing, I have always been extremely careful, as a prosecutor and as a judge, not to comment about something without knowing the facts. Accordingly, I am not in a position to comment on this hypothetical scenario.

69. When the Department of Homeland Security described the Supreme Court's DACA opinion as having "no basis in law," Judge Garufis, in the Eastern District of New York, took exception to the executive branch criticizing a Supreme Court opinion. He asked a career Justice Department lawyer, "I'm just wondering how a decision by the Supreme Court could be deemed by a federal agency to have no basis in law. Can you explain that

to me[?]" The judge went on, "The attorney general should advise his client Mr. Wolf that it is not [a] benefit to anyone to have a federal agency take issue with a decision of the Supreme Court. I'm very troubled by anyone who would write such a thing on a document issued by a federal agency regarding a decision by the U.S. Supreme Court or any court, until it is overruled or reversed, any federal court."

- a. Under your leadership will the Justice Department agree not to "take issue with a decision of the Supreme Court"?
- b. Under your leadership will the Justice Department and its client agencies maintain publicly that all Supreme Court holdings have a sound basis in the law?

RESPONSE: As a sitting judge who has been serving for more than two decades, I have great respect for the nation's courts and the judges who sit on them. The Department of Justice and its client agencies may sometimes disagree with decisions issued by the Supreme Court or other courts, and may express that disagreement in legal briefs or public statements. But if I am confirmed, I will seek to ensure that all such statements are appropriately respectful of the courts and their role in our constitutional system.

70. Will the Justice Department under your leadership enforce the Partial Birth Abortion Ban Act of 2003?

RESPONSE: If I am confirmed as Attorney General, I commit to enforcing the laws of the United States.

71. Hunter Biden publicly confirmed that he is under criminal investigation regarding his taxes and financial matters. Has anyone provided you non-public information about Hunter Biden's criminal case? If so, who, when, and what was it?

RESPONSE: No.

72. Do you understand that if you're confirmed you'll have an obligation to ensure the Department and its components, including the FBI, respond to congressional inquiries in a timely manner?

RESPONSE: Yes.

73. Do you understand that this obligation applies regardless of whether a member of Congress is a committee chairman or ranking member?

RESPONSE: As I testified in my hearing, I take very seriously the obligation to respond to Congressional inquiries, and I believe it is important for the Department to be responsive to congressional inquiries.

74. I've conducted oversight of the Foreign Agents Registration Act (FARA) since April 2015. My oversight activities have been bipartisan and without regard to party or power.

As a result of my oversight, I introduced the bipartisan Foreign Agents Disclosure and Registration Enhancement Act to shore up the law (S. 1762). I encourage you to review the bill.

RESPONSE: I look forward to reviewing the bill if I am confirmed as Attorney General.

75. My most recent FARA oversight letter focused on the extensive contacts Hunter Biden and James Biden have with the communist Chinese government. In that letter I asked the Justice Department to review whether they should've registered as foreign agents under FARA. If confirmed, will you commit to fully and completely answering that letter?

RESPONSE: As I testified in my hearing, the oversight responsibility of this Committee is a vital duty imposed by the Constitution. This duty is one that I greatly respect and it is important for the Department to be responsive to Congress in a timely fashion as appropriate. I understand that the Department works to appropriately respond to all Members of the Committee, consistent with the Department's law enforcement, national security, and litigation responsibilities. If confirmed, I will continue this practice and will be pleased to work with Congress through the Department's Office of Legislative Affairs.

76. The Justice Department Inspector General found 17 errors and omissions in the Carter Page FISA applications. There were also 50 errors in the Woods Process for the FISA applications. Crossfire Hurricane should've collapsed under the weight of its faulty foundation and political infection. Comey, Yates, McCabe, and Rosenstein now say they wouldn't have signed the FISAs if they had known about those flaws. As I've told many nominees, you either run the Department or the Department runs you. If confirmed, what steps will you take to ensure that the government doesn't abuse its power and authorities with respect to surveilling American citizens and related FISA activity like it did under the Obama/Biden administration during Crossfire Hurricane?

RESPONSE: As I testified at the hearing, I understand that the Inspector General found serious problems with respect to FISA applications, and had a substantial number of recommendations for how they could be fixed. Those problems must be fixed. I understand that the Inspector General submitted his recommendations to the FBI Director, and I understand that the FBI Director is in the process of implementing them. If I am confirmed, I intend to speak directly with the Inspector General and the FBI Director about these issues and make sure that necessary steps are taken. I am concerned, and have always been concerned, that the Department be vigilant regarding appropriate application of FISA.

77. The Federalist Society is an organization of conservatives and libertarians dedicated to the rule of law and legal reform.

a. Have you ever hired a clerk who was in the Federalist Society?

RESPONSE: I do not know.

- b. Would you allow a member of the Federalist Society to serve on your staff as Attorney General?

RESPONSE: Yes.

- c. Would you allow a member of the Federalist Society to serve on front-office staff within the Justice Department?

RESPONSE: Yes.

- d. Would you allow a career employee who is a member of the Federalist Society to be promoted to chief, assistant chief, section head, or any other career supervisory position in the Justice Department?

RESPONSE: Yes.

78. What is your view on removing federal employees who joined the government during the last presidential administration—whether as appointees and career employees—and now hold career positions?

RESPONSE: If confirmed, it will be my direction that personnel decisions at the Justice Department be made consistent with civil service laws and Departmental policies and without regard to any prohibited considerations.

79. Do Blaine Amendments violate the Constitution?

RESPONSE: The “Blaine Amendment of the 1870s” was a failed proposal to amend the U.S. Constitution to prohibit states from aiding religious schools. *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2259 (2020). In *Espinoza*, the Supreme Court considered a provision of the Montana Constitution that prohibited any state aid to any school controlled by a “church, sect, or denomination.” *Id.* at 2251, 2259. The Court held that the Montana Supreme Court’s application of that no-aid provision to strike down a program to provide tuition assistance to parents who send their children to private schools violated the First Amendment.

80. Do you believe potential voter fraud or other elections abnormalities are concerns that the Justice Department should take seriously?

RESPONSE: I believe the Department of Justice plays a pivotal role in protecting the right to vote and ensuring that elections are not influenced by fraud. While I am aware that there have been documented instances of isolated voter fraud, I have no reason to question Attorney General Barr’s statement that the Department’s investigation did not discover “fraud on a scale that could have effected a different outcome in the [last] election.”

81. If the Justice Department determines that a prosecution of an individual is meritless and dismisses the case, is it appropriate for a District Judge to question the Department’s

motivations and appoint an amicus to continue the prosecution? Please explain why or why not.

RESPONSE: I believe this question refers to *In re Flynn*, 973 F.3d 74 (D.C. Cir. 2020) (en banc), in which I joined the per curiam opinion denying a petition for a writ of mandamus. Matters related to that case are addressed in that opinion.

82. On the night of May 29 two well-educated young attorneys in Brooklyn drove around, found a police cruiser, and threw a fire bomb at it. The incident was caught on video. When they were apprehended, the two attorneys were found to have precursor items for several more “Molotov cocktails” in their van. This was a serious crime and the lawyers have since been charged with seven felonies, including civil disorder, conspiracy to commit arson, and federal explosives charges. Many liberal media outlets have since taken up the case of the two attorneys, trying to paint them as sympathetic actors whose hearts were in the right place and merely got caught up in events. Just this week reports emerged that the Justice Department is offering them a plea deal. Will you commit that any disposition of that case following your confirmation will neither take into account the politics of the defendants nor the influence of liberal activists and journalists on their behalf?

RESPONSE: Because I am a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case that is in any court. As I testified during my confirmation hearing, however, if I am confirmed as Attorney General, the Department will make prosecutorial decisions based on the facts and the law only, without regard to politics or partisanship.

83. Another Justice Department nominee has said, “As a civil rights lawyer with matters that regularly go before the Supreme Court, I can’t underscore how dangerous it will be to have [Judge Brett] Kavanaugh on the Court, a man who harbors such bias, rage, fury and is so easily unhinged. We should expect a spike in recusal motions for sure.”

a. Do you agree that Justice Kavanaugh is “dangerous” and “easily unhinged”?

RESPONSE: I am not familiar with the statement quoted. Based on my experience serving with Justice Kavanaugh on the D.C. Circuit for many years, I would not describe him that way.

b. Are you confident that Justice Kavanaugh will be fair in hearing cases from the Justice Department under your leadership?

RESPONSE: Yes.

c. Do you intend to direct the Solicitor General to seek his recusal from civil rights cases?

RESPONSE: No.

84. Please describe the selection process that led to your nomination to be Attorney General, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).

RESPONSE: I was called by the President-elect's transition and asked whether I was willing to be considered for nomination as Attorney General. Between that time and the day of the President-elect's public announcement of his intent to nominate me, I had further contact with transition representatives, including for the vetting process. I was also interviewed by the President-elect and by the Vice President-elect. The President-elect publicly announced his intent to nominate me on January 7, 2021, and formally sent that nomination to Congress on January 20, 2021.

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

RESPONSE: No.

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

RESPONSE: No.

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

RESPONSE: The Department of Justice received these questions on February 24, 2021. I worked with Department attorneys, conducted research, and answered the questions. I finalized answers to the questions and authorized their transmission to the Committee on February 28, 2021.

Senator Graham

Responses to Questions from Senator Graham to Judge Merrick Garland, Nominee to be United States Attorney General

1. If confirmed, will you commit that the Drug Enforcement Administration (DEA) will collaboratively engage with industry stakeholders to evaluate new technologies intended to render controlled substances “non-retrievable” and, further, work with interested parties to understand DEA’s role as it relates to the Environmental Protection Agency (EPA) Resource Conservation and Recovery Act (RCRA) exemption identified in 40 CFR 266.506?

RESPONSE: I am not familiar with this issue. I look forward to examining it should I be confirmed and I would welcome the opportunity to speak with you about these matters.

2. Vladimir Kara-Murza, a prominent opposition activist in Russia, was poisoned in Russia in 2015 and again in 2017, and nearly died on both occasions. Following both poisonings, samples of his blood were accepted for testing by the FBI, and tests were performed, but the results of those tests and the FBI’s assessment of the cause of Mr. Kara-Murza’s poisonings have not been released to either interested Members of Congress or Mr. Kara-Murza. On July 5, 2018, Mr. Kara-Murza submitted a request pursuant to the Freedom of Information Act and Privacy Act (FOIPA) to the FBI (FBI FOIPA Request No. 1410820-000) for documents relating to his poisonings, including the results of tests performed by U.S. government agencies. Mr. Kara-Murza has been informed that 277 pages of documents responsive to that request have been referred by the FBI for review to other, undisclosed agencies of the federal government. Of those 277 pages, 251 have yet to be released to Mr. Kara-Murza pending consultation with other government agencies. Additionally, 15 pages of responsive documents have been withheld from disclosure by the FBI on varying grounds, including that they contain classified information. A further 562 pages that were released by the FBI have been redacted.
 - a. Do you commit that the United States Government, the Department of Justice, and the FBI will work with Mr. Kara-Murza and interested Members of Congress to share information in their possession about the circumstances surrounding the poisonings of Mr. Kara-Murza, including the nature of the agent with which he was poisoned?
 - b. Will you commit to reviewing the information that the FBI has withheld from disclosure? Do you commit to expediting the release of as many responsive documents as possible to Mr. Kara-Murza, as soon as possible? After your review, will you consider directing that the 562 pages of documents that were redacted by the FBI be re-reviewed with an eye to releasing as much information as practicable to Mr. Kara-Murza about the circumstances surrounding his poisonings and the nature of the agent with which he was poisoned?

- c. Beyond documents encompassed by Mr. Kara-Murza's FOIPA request, will you look into whether the Department of Justice, including any element of the Department, has additional documents, records, evidence, or other materials relating to the poisonings of Mr. Kara-Murza? If the Department of Justice has such materials, do you commit to briefing the committee on their contents and releasing them to the greatest extent possible?

RESPONSE: Because I am not currently at the Department, I am not familiar with the circumstances of this case. As a general matter, I will seek to ensure that the Freedom of Information Act and Privacy Act is properly followed and that the Department is as responsive as possible to inquiries from the Committee.

Senator Cornyn

Responses to Questions from Senator Cornyn to Judge Merrick Garland, Nominee to be United States Attorney General

1. Vanita Gupta, President Biden’s nominee for Associate Attorney General, has advocated to “decrease police budgets . . .”
 - a. Do you agree with the statement of Ms. Gupta to “decrease police budgets”? Please be specific as to your agreement or disagreement with the aforementioned statement.

RESPONSE: I am not familiar with the context of the statement referred to above. As I stated at my hearing, I do not support defunding the police, and Ms. Gupta has not only stated the same, but has received widespread support from police leaders and organizations. I support giving police departments the resources they need to reform, build community trust, and secure the safety of their communities.

- b. What effect, if any, do you see this type of rhetoric having on state and local police if she were to become the Associate Attorney General?

RESPONSE: I have had the opportunity to discuss the Department’s mission with Ms. Gupta and am confident that she is a person of great ability and integrity, who shares my goals and priorities. I am also confident that, if confirmed, she would help the Department attend to and advance critical partnerships, such as those with state and local law enforcement agencies, many of which have endorsed her nomination.

- c. Do you support measures to shift resources away from state and local police?

RESPONSE: As stated above, I support giving police departments the resources they need to reform and build community trust. I understand that many police departments are forced to use their limited resources on public health issues over which they do not want sole responsibility, such as confronting mental health crises. I believe that also supporting other professionals in the community, such as mental health professionals, will help alleviate the unnecessary strains that are placed on police officers and will enhance public safety.

- d. If you do not, then what guardrails do you intend to put into place to prevent efforts to “defund the police” or shift resources away from state and local police?

RESPONSE: If confirmed, I will continue the Department’s longstanding practice of supporting state and local law enforcement, including helping police departments secure the resources they need to reform, build community trust, and ensure the safety of their communities.

2. The Obama Administration had instituted a policy where legal settlements between the

DOJ and companies were used to fund third-party, special interest groups that were not parties to the litigation. This practice, often referred to as “slush fund settlements,” presents a myriad legal, ethical, and constitutional concerns. In 2017, the Trump Administration forbade this practice; and last year, the DOJ incorporated this ban into the Justice Manual (85 FR 81409). President Biden recently announced that it is reviewing the bar on this practice.

- a. What problems, if any, do you foresee if this practice is reinstated?
- b. Do you see any constitutional issues at play if the DOJ is diverting money from a general fund to a specific party or charitable cause that is not a party to the litigation?
- c. If so, what are those constitutional issues at play?
- d. Do you think the “slush fund settlement” practice usurps any congressional authority? If so, how so?
- e. If not, why not?

RESPONSE: As I testified at my hearing, I have not studied this specific issue. If I am confirmed, I will carefully consider the matter and the arguments on both sides, including both the reasons why this practice developed and the reasons why it was changed.

3. Over the past four years, the DOJ has updated and reformed the enforcement of the Foreign Corrupt Practices Act (“FCPA”), a process that began under the Obama Administration. Specifically, in 2016, under Attorney General Loretta Lynch, the DOJ announced an FCPA “pilot project,” which was designed to promote voluntary self-disclosure, cooperation with the government, and remediation of violations in exchange for mitigated penalties. In 2017, the DOJ enhanced this pilot project and incorporated it into the U.S. Attorneys’ Manual as the FCPA Corporate Enforcement Policy (“CEP”); the Department has since stated that it will apply the principles of the CEP to contexts other than the FCPA. It appears that these reforms are having a positive effect on compliance. For example, the Organisation for Economic Cooperation and Development (“OECD”) recently released its Phase IV report on the effort by the United States to combat foreign corruption. Its lead examiners “commend[ed] the United States for its unparalleled efforts to encourage voluntary disclosure of FCPA violations... and recognize[d] the United States’ continuous dedication to refine enforcement policies in order to achieve the right mix of incentives to voluntary self-disclose.” In addition, the OECD found that, according to the career staff at the DOJ, these reforms were resulting in a higher quality of self-disclosure. The OECD report also noted a significant improvement in the quality of compliance programs as a result of the CEP. If you are confirmed, will you continue to support and improve the CEP in a way that appropriately incentivizes the private sector to invest voluntarily in compliance programs and cooperate with the DOJ?

- a. What ways do you intend to support the CEP?

RESPONSE: I am committed to the vigorous enforcement of the Foreign Corrupt Practices Act and other federal anti-corruption laws, including efforts to foster voluntary compliance and cooperation with the Department of Justice. I have not studied the Corporate Enforcement Policy. If I am confirmed, however, I will look forward to consulting with the relevant Department officials to learn more about that initiative and to identifying ways in which it might be further supported or improved.

4. On October 19, 2020, Attorney General Barr appointed United States Attorney John Durham as a special counsel to investigate matters related to intelligence activities and investigations arising out of the 2016 Presidential Campaign. Mr. Durham has all the powers of a special counsel under federal law.
 - a. Today, do you see any reason why you would end Mr. Durham’s investigation into the intelligence activities and investigations arising out of the 2016 Presidential Campaign (“Durham Probe”)?
 - b. Will you commit to me that you will not end the Durham Probe unless you find that there is “good cause” to do so?

RESPONSE: As I said at the hearing, I do not know anything about this investigation except what I have read in the press. If confirmed, one of the first things I am going to do is speak with Mr. Durham and learn the status of his investigation. I understand that he has been permitted to remain in his position, and today, I see no reason why that was not the correct decision.

5. I’ve been a big proponent of improving the National Instant Criminal Background Check System (“NICS”). In 2018, we were able to pass the FIX NICS Act, which incentivizes state and federal agencies to submit all disqualifying records into NICS to ensure that firearms are lawfully purchased. Under the FIX NICS Act, each department or agency is required to submit to the Attorney General a written certification to the Attorney General as to whether the department or agency is in compliance with the record submitting requirements under the law. Additionally, the FIX NICS Act requires the Attorney General to ensure each agency is in compliance with the FIX NICS Act requirements, and to take certain remedial measures if an agency or department is not in compliance. Finally, the Attorney General must publish and submit to Congress a semiannual report on federal agency compliance with the law.
 - a. If confirmed, will you ensure that departments and agencies are complying with the FIX NICS Act certification requirement?
 - b. If confirmed, will you ensure that each department or agency is complying with its own implementation plan and making good faith efforts to continue to improve with the uploading of disqualification records into NICS?

- c. If confirmed, will you take remedial measures, where appropriate, to ensure that each department or agency is complying with the FIX NICS Act?
- d. If confirmed, will you commit to submitting to Congress a semiannual report on federal agency compliance with the FIX NICS Act?

RESPONSE (a – d): Because I am not currently at the Department, I am not familiar with the current efforts to comply with the FIX NICS Act. If I am confirmed, I will examine the state of compliance and take remedial steps where appropriate.

- e. Sometimes, NICS is unable to make an immediate determination about whether a person can lawfully purchase a firearm. If that is the case, NICS provides a Missing Disposition Information Date, also known as the Brady Transfer Date, at which point the licensed dealer is allowed, but not required, to transfer a firearm after three business days if the licensed dealer has no reasonable cause to believe that an individual is prohibited from possessing a firearm. Do you believe that ATF has the regulatory authority to require licensed dealers to wait beyond the three-business day waiting period before legally transferring a firearm to an individual in “delayed” status or that it would have to take an Act of Congress?

RESPONSE: I am not familiar with the impact of the Missing Disposition Information Date. I have not examined ATF’s regulatory authority with regard to the three-business day period and cannot offer an opinion on that question.

- 6. Modern Sporting Rifles (“MSRs”) are among the most popular firearms sold. In your opinion, should these semi-automatic firearms be classified and regulated under the National Firearms Act?
 - a. Does the DOJ have the administrative authority to establish and enforce a mandatory buyback program for MSRs?
 - b. If so, what is that authority?

RESPONSE: I am not familiar with the relevant statutory and regulatory provisions and accordingly cannot offer an opinion on this issue.

- 7. In your opinion, does the administration have the power to create a national gun registry or would it take an Act of Congress? Please provide legal authority in support of your position.

RESPONSE: I am aware that Brady Act Section 103(i)(2) bars the use NICS to establish a firearm registry, “except with respect to persons prohibited by ... law from receiving a firearm.” Beyond that I am not familiar with any other relevant statutory or regulatory provisions.

8. In your opinion, does the administration have the power to require background checks for all firearm transfers absent a licensed dealer or would it take an Act of Congress? Please provide legal authority in support of your position.

RESPONSE: I am not familiar with the relevant statutory and regulatory provisions and accordingly cannot offer an opinion on this issue.

9. Guidance documents, also known as sub-regulatory guidance, are a way for agencies to announce policy changes, establish new procedures, and sometimes set forth new obligations on the private sector. This guidance often takes a variety of forms, including Frequently Asked Questions and compliance memos. This process is fundamentally different than legislation and rule-making. One can envision a number of problems when the DOJ uses and relies on these guidance documents to bring enforcement actions.
 - a. Do you see any problems with using guidance documents to bring enforcement actions?
 - b. If so, what are some of the problems presented to a potential defendant or litigant when the DOJ uses guidance documents to bring enforcement actions?
 - c. Will you commit to me that you will avoid using guidance documents as a way to bring enforcement actions?

RESPONSE: In general, enforcement actions must be based on a violation of a statute or a “legislative rule” that has “the force and effect of law.” *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 95 (2015) (citation omitted). By definition, the guidance documents referenced in the question lack that force and effect. A violation of a guidance document thus cannot, by itself, be the basis for an enforcement action. Guidance documents may, however, serve valuable functions. For example, they can “‘advise the public’ of how the agency understands, and is likely to apply, its binding statutes and legislative rules.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (plurality opinion). If I am confirmed, any action I take in this area will be consistent with these principles.

10. Increasingly, third-party litigation funding (“TLPF”) is being used to fund lawsuits, including False Claims Act (“FCA”) cases brought by relators. As you know, the government—through the DOJ—may choose to intervene in these actions not knowing that the TLPF funders are backing the relator’s action and stand to obtain a cut of the proceeds of any settlement. Recently, DOJ has encouraged its attorneys to ask questions of relators as to whether there is an agreement with a third-party funder and/or whether the third-party funder exercises decision-making authority over the litigation.
 - a. Do you think the DOJ would be better able to assess a case if it understood the extent to which third party litigation founder is backing, and may have some influence or even control over, the relator’s cause of action? If so, why?

RESPONSE: The False Claims Act, and its qui tam provisions, play a critical role in

the federal government's effort to ensure that those who do business with the government do so honestly. However, I have not had occasion to become familiar with the particulars of this issue.

- b. Do you support transparency measures in Congress to highlight TLPF in FCA cases?

RESPONSE: I have not studied this issue. As a general matter, I firmly believe in transparency wherever possible, and I would look forward to reviewing any proposals from Congress to increase transparency.

- c. As Attorney General, will you support DOJ attorneys asking relators questions regarding TLPF funding and involvement?

RESPONSE: As a federal judge for the last 24 years, I have not had occasion to become familiar with this issue.

- 11. Human traffickers target the most vulnerable members of our society, especially children. They violently exploit them through force, fraud, threats, debt bondage, drug addiction, or intimidation. Do you believe that mandatory minimum sentences are an appropriate tool in crimes involving the sexual exploitation and slavery of children?

RESPONSE: Sexual exploitation and enslavement of children are horrific acts. Congress has recognized the seriousness of these crimes by enacting statutes that impose significant criminal penalties, including mandatory minimums in some instances. If confirmed, I commit that the Department will vigorously enforce these laws so that those that prey on the vulnerable face appropriate punishment.

- 12. A primary purpose of the Justice for Victims of Trafficking Act (P.L. 114-22), which I sponsored, was to provide resources for survivors of human trafficking. JVTVA mandated that DOJ create the Domestic Trafficking Victims' Fund, which uses fines levied on offenders to provide funding for vital services and protections for domestic trafficking victims. Do you agree that victim compensation and financial contribution from criminals should be a core element of human trafficking prosecutions?

RESPONSE: Yes. I am not currently in the Department, but I understand there have been challenges to securing funds from criminals who are responsible for these horrific offenses. If confirmed, I will seek to expand and further efforts to obtain funding for victims, who often lack resources to obtain needed services.

- 13. The rape kit backlog has unbearable consequences for victims. Laws like the Debbie Smith Act, which we most recently reauthorized in 2019, provide important resources so rape kits can be tested and criminals can be brought to justice. For several years now, I have worked to make sure the laws that address this backlog are properly complied with, so that sexual assault survivors can have the justice they deserve. Will you commit to working with me to make sure legislation that works to end the backlog, like the Debbie

Smith Act, the SAFER Act, and the Justice Served Act, are fully implemented?

RESPONSE: I share your commitment to ending the rape kit backlog, and, if confirmed, look forward to working with you to achieve that goal.

Senator Lee

Responses to Questions from Senator Lee to Judge Merrick Garland, Nominee to be United States Attorney General

1. In *Priests for Life v. HHS*, you voted in support of an opinion requiring a religious nonprofit to comply with the Obama Administration’s contraceptive mandate. Could you explain why you voted against rehearing that case?

RESPONSE: I understand that litigation concerning the contraceptive-coverage requirement remains pending in the federal courts. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court. But, as I testified at my hearing, for me a vote on a petition for rehearing en banc is simply a vote on whether or not the case warrants rehearing by the full court.

2. Do you intend to prosecute religious organizations who seek exemptions from federal laws governing healthcare, employment, and education?

RESPONSE: No. I am not aware of any law making it a crime to request a religious exemption.

3. Do you believe religious organizations and institutions should be exempted from government mandates requiring them to violate their sincerely held religious beliefs?

RESPONSE: The Religious Freedom Restoration Act provides that the federal government may not “substantially burden a person’s exercise of religion” unless it “demonstrates that application of the burden to the person” is “in furtherance of a compelling government interest” and “is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1.

4. The Religious Freedom Restoration Act is the leading federal civil rights law that protects all Americans’ religious freedom. It was championed by Senator Ted Kennedy and Senator Orrin Hatch to pass the Senate by a vote of 97-3 and to pass the House by a unanimous voice vote. President Bill Clinton proudly signed it into law in 1993. For nearly three decades, it has protected the religious freedom of all Americans of all faiths. If confirmed, will you commit that the Department of Justice will not support any legislative or executive action that would alter in any way the Religious Freedom Restoration Act’s protection for Americans of all faiths?

RESPONSE: As I testified at my hearing, I am a strong believer in religious liberty. If I am confirmed as Attorney General, I will seek to ensure that the Department of Justice scrupulously complies with the Constitution and all federal statutes, including the Religious Freedom Restoration Act. I have not considered any potential legislative amendments to the Act. If I were asked to consider such an amendment, my position would be informed by my strong belief in religious liberty and guided by a careful review

of the relevant facts and law.

5. In a 2007 opinion, the Office of Legal Counsel affirmed that a religious organization which administers a federal grant retains its right, under the Civil Rights Act of 1964 and the Religious Freedom Restoration Act, to hire staff who agree with its religious mission. Despite pressure from outside groups, the Obama Administration refused to rescind that opinion. If confirmed, will you continue the Obama Administration's policy of leaving that opinion in place? (The opinion is "Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act," 31 Op. O.L.C. 162 (2007)).

RESPONSE: I have not studied this Office of Legal Counsel opinion or the legal issues it addresses. If I were confirmed and called upon to consider those issues, I would follow the same approach I would use in any other context where I was asked to provide legal advice: I would carefully review the relevant facts and law; consult with lawyers in the Department of Justice and other relevant agencies; consider any relevant Department practices and procedures; and ultimately reach a conclusion based on my best view of the law.

6. On October 6, 2017, the Department of Justice issued guidance for all executive departments and agencies through a Memorandum entitled Federal Law Protections for Religious Liberty (82 Fed. Reg. 49668). This memorandum explained the many ways in which the First Amendment and federal law protect all Americans' right to live according to their religious beliefs. If confirmed, will you ensure that the memorandum will not be rescinded or otherwise ignored?

RESPONSE: As I testified at my hearing, I am a strong believer in religious liberty. I have not studied the October 2017 memorandum. But if I am confirmed, I will seek to ensure that the Department of Justice faithfully follows the First Amendment and federal laws protecting religious liberty. I will also adhere to those laws in issuing, revising, or rescinding any guidance in this area.

7. In an executive order, President Biden has committed to extend *Bostock's* narrow holding to other areas of federal nondiscrimination law, including those touching on school sports and locker rooms. If confirmed as Attorney General, will the Justice Department force schools and other organizations to allow biological males who identify as female to:
 - a. Compete in girls' and women's sports?
 - b. Use girls' and women's locker rooms?
 - c. Enter women's shelters?
 - d. Enjoy financial benefits, such as scholarship grants, reserved for women and girls?

RESPONSE: As I testified at my hearing, I believe that every human being should be treated with dignity and respect. I have not had the opportunity to consider these issues or to examine the effects of the Supreme Court’s decision in *Bostock*, and because some of these issues are pending in current court cases I am barred from commenting on them.

8. As Attorney General, in seeking to “fully enforce” federal antidiscrimination laws, will you also commit to protect the freedoms of all Americans to exercise their rights of conscience and religious liberty?

RESPONSE: If I am confirmed, I will endeavor to fully enforce all federal laws within the authority of the Department of Justice, including both the federal antidiscrimination laws and laws protecting religious liberty.

9. Will you commit to not target religious organizations and individuals who seek exemptions from Title VII based on their sincere religious beliefs?

RESPONSE: As I testified at my hearing, I firmly believe that improper considerations such as an individual’s political or religious beliefs should not play any role in the Department of Justice’s investigations, prosecutions, or other enforcement actions. Instead, those actions must be guided by a careful review of the facts and an evenhanded application of the law. If I am confirmed, I will likewise follow the facts and applicable law if called upon to consider any question related to religious exemptions from Title VII.

10. Do you believe the President can disregard the majority’s express clarification that *Bostock*’s reasoning only applies to the employment discrimination context and not to other federal antidiscrimination laws?

RESPONSE: If I am confirmed, I will seek to ensure that the Department of Justice’s approach to all statutes, including antidiscrimination laws, is guided by the traditional tools of statutory interpretation. Those traditional tools include the text, structure, and context of the statute, as well as any relevant precedent.

11. Earlier this year, the Department of Justice’s Inspector General released a report reviewing the U.S. Marshall Services’ response to the COVID-19 pandemic, which found that contractor-operated facilities were safer, more accountable, and more responsive in mitigating risk from COVID-19 than government-run facilities. While these plans have all been reviewed and approved, the Inspector General was not able to confirm whether any of the 873 government-run facilities it worked with had implemented a COVID-19 response plan. What implications does this have for the Biden Administration’s executive order canceling private prison contracts?

RESPONSE: I am not familiar with this report but, if I am confirmed, addressing the impact of COVID-19 across the Department will be an important priority.

12. Do you believe Civil Asset Forfeiture is a legitimate use of government authority?

Civil forfeiture is authorized under federal law, including 18 U.S.C. § 981 and other laws enforced by the Department of Justice. I understand that aspects of civil forfeiture have been a source of controversy. If I am confirmed, I would look forward to examining these issues.

13. Do you think there have been abuses of Civil Asset Forfeiture programs? Will you commit to helping correct those abuses?

RESPONSE: I have not studied these issues closely enough to have a view on whether there have been abuses of the Department's forfeiture programs. If confirmed, I would work diligently to correct any abuses in any Department processes, and I would welcome input from you and other Members of Congress.

14. Recently, President Biden signed an executive order prohibiting the Justice Department from renewing contracts with Private Prisons. As far as I'm aware, about 14,000 federal inmates— around 9% of the total prison population—are in private prisons.

a. Do you have any concerns about prison capacity? A 2017 study (the most recent study I've seen) showed that many BOP facilities were operating above capacity. What steps will the Justice Department take to ensure that it's not creating an overcrowding problem in existing federal facilities?

RESPONSE: As a nominee, I am not familiar with studies regarding the capacity at BOP facilities. But I agree that we should work to alleviate any overcrowding in federal facilities.

b. What precautions do you plan to take to avoid unnecessary risks while transferring inmates from private prisons to federal facilities given the ongoing pandemic?

RESPONSE: If I am confirmed, I will address the impact of COVID-19 across the Department, including the risks attendant to operations in and transfers to federal facilities.

15. Unlike the Federal Bureau of Prisons, the U.S. Marshalls Service does not have its own facilities—how will you ensure that canceling private prison contracts will not negatively impact the U.S. Marshalls Service?

RESPONSE: Because I am not currently at the Department, I am not familiar with the nature of the contracts the U.S. Marshals Service has with privately owned facilities.

16. When bringing any complicated case, resources are undoubtedly an issue. For example, the pending case on Google could conceivably turn on issues around computer coding and algorithmic decision making. There will also undoubtedly be future cases- both criminal and civil- where the in-house technology expertise of the Department of Justice will be vital. Do you think the DOJ currently has enough technologists and other experts to deal with the current workload? And how can the Department ensure that a lack of expertise in these areas doesn't impact the administration of justice?

RESPONSE: As a Justice Department nominee, I do not yet know what additional resources would be required by the Department with regard to particular initiatives. If confirmed, I will take steps to ensure, consistent with Congress's appropriations, that sufficient resources are available to support the Department's essential work.

17. How will your Department of Justice work with our allies and trading partners on issues of international antitrust? The Europeans, Australians, South Koreans, and Japanese are all pursuing cases against some large US based technology firms, and without some coordination there could be unintended consequences that could hurt consumers.

RESPONSE: I believe that effective enforcement of the U.S. antitrust laws in a global economy requires cooperation with our allies and trading partners. I understand that the Department of Justice's Antitrust Division works closely with its counterparts around the world through both bilateral relationships and participation in international organizations. If I am confirmed, I look forward to learning the current status of these important efforts and working with the Antitrust Division to reinforce and strengthen them.

18. We've seen disturbing reports recently of websites posting obscene content involving minors. Will you commit to prioritize enforcement of our anti- trafficking and child pornography laws against these heinous online actors?

RESPONSE: Yes. Sexual exploitation of children is a heinous crime. If I am confirmed, the Department will vigorously enforce all statutes that criminalize the trafficking and exploitation of children.

19. When General Flynn's case came before you on the D.C. Circuit, you voted with the majority of the court to deny his request for a writ of mandamus, effectively ruling that Judge Sullivan's actions did not show bias towards General Flynn. Could you explain your reasoning in that case?

RESPONSE: I joined the per curiam opinion in *In re Flynn*, 973 F.3d 74 (D.C. Cir. 2020) (en banc), which explains the reasons for denying the writ of mandamus in that case.

20. Relatedly, can you name an example (other than Judge Flynn's case) where, when the U.S. Attorney has asked the court to dismiss the government's case against a defendant, the court has appointed an outside lawyer to continue arguing for conviction?

RESPONSE: I joined the per curiam opinion in *In re Flynn*, 973 F.3d 74 (D.C. Cir. 2020) (en banc), and point to that opinion concerning any matters related to that case.

21. Did you see any problems with Judge Sullivan's decision to appoint an outside lawyer who had written an article criticizing General Flynn mere days before his appointment?

RESPONSE: I joined the per curiam opinion in *In re Flynn*, 973 F.3d 74 (D.C. Cir. 2020) (en banc), and point to that opinion concerning any matters related to that case.

22. Did you see any problems at all with Judge Sullivan’s actions including his threat to investigate the Department of Justice’s decision to dismiss and whether career prosecutors agreed with that decision?

RESPONSE: I joined the per curiam opinion in *In re Flynn*, 973 F.3d 74 (D.C. Cir. 2020) (en banc), and point to that opinion concerning any matters related to that case.

23. In her dissent in *In re: Michael T. Flynn*, Judge Rao stated “by allowing the district court to scrutinize ‘the reasoning and motives’ of the Department of Justice, the majority ducks our obligation to correct judicial usurpations of executive power and leaves Flynn to twist in the wind while the district court pursues a prosecution without a prosecutor.” Would you agree that Judge Sullivan’s attempts to keep the prosecution of General Flynn alive even though the Justice Department had dismissed charges constitutes an unconstitutional abuse of authority?

RESPONSE: I joined the per curiam opinion in *In re Flynn*, 973 F.3d 74 (D.C. Cir. 2020) (en banc), and point to that opinion concerning any matters related to that case.

24. Do you believe agencies should try to “aggressively” interpret statutes in order to accomplish White House priorities?

RESPONSE: If I am confirmed, my legal advice on matters of statutory interpretation, as on all other matters, will reflect my independent judgment.

25. Do you think it’s proper for agencies to try to “fix” a problem through regulations where Congress is deadlocked on an issue?

RESPONSE: As I testified at my hearing, the mere fact that the Executive Branch disagrees with congressional inaction cannot create regulatory authority that would not otherwise exist. But congressional action or inaction can be relevant to the scope of the Executive’s authorities, as Justice Jackson famously explained in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Id.* at 635. “When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” *Id.* at 637. And “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” *Id.*

26. Would you be in favor of agencies addressing problems like immigration, transgendered students in sports, and other controversial issues through regulation?

RESPONSE: My answer would depend on the context, including the agency’s relevant legal authorities and the specific nature of the regulation at issue. Congress has, for example, required or authorized the Attorney General and the Secretary of Homeland Security to issue regulations addressing many matters related to immigration. See, e.g., 8 U.S.C. § 1103(g)(2).

27. On the whole, do you believe that we need more government control and regulation of American’s lives, jobs, and healthcare, or less?

RESPONSE: It is hard to answer that question in the abstract. If I am confirmed, my decisions about whether to issue or rescind any regulation within the authority of the Department of Justice will be based on a careful review of the relevant facts and law.

28. As Attorney General, who would your client be? The President or the American people?

RESPONSE: The American people.

29. What happens when the President takes a position that is contrary to the law or not in the interests of the United States?

RESPONSE: As I testified at my hearing, I do not expect this to happen because the President has made clear his respect for the rule of law and the independence of the Department of Justice. But if I were asked to do something unlawful, the first thing I would do is say it was unlawful. If I were nonetheless asked to do something unlawful, I would resign.

30. As a nominee for a position in the Executive branch, do you think there are any limits on the President’s use of prosecutorial discretion?

RESPONSE: As I testified at my hearing, prosecutors and other government agencies have exercised discretion about how to allocate their limited enforcement resources throughout our Nation’s history. But the Executive Branch cannot simply decide, based on a policy disagreement, that it will not enforce a law at all.

31. Is there a point where “prosecutorial discretion” simply becomes “executive fiat?”

RESPONSE: As I testified at my hearing, prosecutors and other government agencies have exercised discretion about how to allocate their limited enforcement resources throughout our Nation’s history. But the Executive Branch cannot simply decide, based on a policy disagreement, that it will not enforce a law at all.

32. Do you agree that prosecutorial discretion should be the exception rather than the rule—i.e., that in the typical case covered by a law, it is the Executive’s duty to enforce that law?

RESPONSE: The Department of Justice has a duty to vigorously enforce the law. The

Supreme Court has recognized, however, that an agency “generally cannot act against each technical violation of the statute it is charged with enforcing.” *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). In determining whether to bring an enforcement action, the Court explained, “the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.” *Id.*

33. Do you commit to support and continue the Department’s antitrust lawsuit against Google?

RESPONSE: As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court. As I testified at my hearing, I do not know anything about the Google case beyond what I’ve read in press reports about public filings. But based on what I have read, I do not see any reason why the decision to institute the investigation would be changed.

34. Do you commit to not hiring for a leadership, supervisory, or policy-making role any person who previously worked for or represented Google, Amazon, Facebook, Apple, or any other Big Tech firm?

RESPONSE: As I said during my hearing, many of the best lawyers in the country have had some involvement, in one way or another, with Big Tech companies, and I cannot commit to excluding all those talented lawyers from the Department or its leadership. I can promise that I will insist that Department personnel adhere scrupulously to applicable ethics rules, including those that require recusals.

35. Will you support the Antitrust Division continuing to investigate other potential antitrust violations by Google or other tech companies?

RESPONSE: I support the vigorous enforcement of the antitrust laws in all contexts, including the technology sector.

36. Do you believe the antitrust laws require amendment or reform? If so, in what way(s)?

RESPONSE: I have not carefully studied potential reforms to the antitrust laws. If I am confirmed, I look forward to consulting with the Department’s antitrust lawyers and working with the Committee to identify and advance any necessary amendments.

37. Do you believe that U.S. antitrust enforcement would benefit from consolidation at one agency?

RESPONSE: I have not studied this issue enough to have a view.

38. Operation Fast and Furious was an ATF enforcement action that allowed operable firearms to be transferred to agents of drug trafficking organizations, ostensibly to help track how those organizations obtained and distributed weapons. Yet these same firearms were used by their eventual recipients to commit lethal crimes in Mexico and the U.S., including the murder of U.S. Border Patrol Agent Brian Terry. Is gun-walking of the sort used in Operation Fast and Furious a legitimate law enforcement tactic? If not, what steps would you take to ensure it doesn't happen by any DOJ component under your watch?

RESPONSE: I do not know the details of Operation Fast and Furious, but based on public reports, I have a general understanding of the concerns. If I am confirmed, I will work with the Department's law enforcement components to understand and address the very serious issues that have been raised.

39. A number of states have enacted so-called "red flag laws" that authorize judges to issue orders for the seizure of otherwise lawfully owned firearms when the owner is found to be a danger to self or others. Do you support the use of red flag orders to seize lawfully-owned firearms? If so, what due process protections should apply to the issuance of these orders? Should a judge be able to order firearm seizures in *ex parte* proceedings, before the respondent has had a chance to answer the allegations in the petition?

RESPONSE: I do not know the specifics of this issue, but I believe that if someone is determined by a judge to be a danger to themselves or another human being, then it is important to minimize those risks, including allowing for the temporary seizure of their firearms. It is also important to consider due process and other constitutional principles.

40. Kristen Clarke has been selected by President Biden to lead DOJ's Civil Rights Division. Yet in publicly accessible tweets issued on July 16, 2019, Ms. Clarke lauded the late Associate Justice John Paul Stevens for calling for the repeal of the Second Amendment. Does it concern you at all that the presumptive leader of DOJ's Civil Rights Divisions supports repealing a constitutional provision that protects an individual civil right? How can gun owners feel confident that DOJ will protect their rights with Ms. Clarke in charge of its Civil Rights Division?

RESPONSE: If I am confirmed as Attorney General, I will uphold all provisions of the Constitution, including the Second Amendment. With respect to Ms. Clarke, she is an experienced former hate-crime prosecutor, who we need to run the Civil Rights Division. She is a person of integrity, whose views about running the Civil Rights Division are in line with my own. If she is confirmed, I have no doubt that she will likewise faithfully uphold all provisions of the Constitution.

41. Late last year, ATF took steps to crack down on pistol braces, an accessory that was originally created to help disabled veterans safely and effectively handle large-framed handguns. Over a span of several years, BATFE deemed these items to be unregulated accessories, then appeared to backtrack on that decision, then reiterated its original position, then suddenly declared certain braced pistols to be regulated short-barreled

rifles. The agency also issued highly-controversial draft guidance on pistol braces which it quickly withdrew after condemnation from the firearm industry and gun-owning public. Do you intend to reprise BATFE's efforts to regulate brace-equipped handguns? If so, how do you intend to accommodate the millions of law-abiding Americans who originally obtained these devices lawfully and in good faith and who have never used them for illegal purposes?

RESPONSE: Because I am not currently at the Department, I am not familiar with current ATF proposals or pending technical decisions on particular firearm features or accessories. I agree that rules should be transparent, consistent, and fairly applied.

42. Do you support the following gun control measures?

- a. Banning specific types of firearms?
- b. Banning large magazines?
- c. Holding firearms manufacturers liable for damage caused by people using their firearms to commit a crime?

RESPONSE: I would have to study these issues further to offer an informed view. As I said at the hearing, the President is a strong supporter of gun safety measures. With respect to matters of policy, the role of the Department is to advance the policy program of the President and the administration as long as it is consistent with the law.

43. In your hearing testimony, you stated that you agreed with the Biden Administration's definition of "equity," which the administration has defined 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."

- a. What is the difference between "equity" and "equality?"

RESPONSE: As you note above, and as I stated in my hearing, the Biden Administration has provided a specific definition of equity, and I am not sure what else there is to be said in that regard.

- b. In order to achieve "equity," is it ever necessary to discriminate against members of some groups in favor of others?

RESPONSE: The Biden Administration's definition of equity aligns with bedrock legal principles and is thus consistent with federal laws, including laws that forbid

discriminatory conduct.

- c. If treating people equally before the law results in disparate outcomes, is it acceptable to discriminate against those with favorable outcomes before the law in order to correct that disparity?

RESPONSE: Disparate impact and discriminatory intent are distinct legal principles. There are statutory remedies for each. Determining what remedies are available for correcting a legal violation is a fact-specific inquiry. If confirmed, I will apply the facts and governing law to any case before me, including those addressing acts of unlawful discrimination.

44. In 2016 Vanita Gupta co-authored the “Dear Colleague” letter which threatened schools with defunding if they did not permit biological males from using girl’s facilities, including showers and locker rooms. Although the letter towards the beginning states that it does not “add requirements to applicable law,” it nonetheless uses language which implies that a school will be defunded if it does not comply with the contents of the letter. What would you do if a subordinate tried to send a similar letter that implied it had to be followed even though it admitted that it was not “add[ing] requirements to applicable law”?

RESPONSE: I understand that matters related to these issues are the subject of ongoing litigation, and as a sitting federal judge, Canon 3 of the Code of Conduct for Federal Judges bars me from commenting on any pending or impending case that is in any court. As a general matter, if confirmed, I would seek to ensure that the Justice Department adheres to all applicable legal requirements.

45. Under the Electronic Communications Privacy Act, providers of electronic communications services or remote computing services, such as phone companies or Internet service providers, are generally prohibited from voluntarily disclosing certain customer information to government agencies. But this law was written before the advent of digital data brokers. Today, ECPA’s prohibition is easily sidestepped; the company that collects the data can sell it to a data broker without any restrictions, and then the data broker can turn around and sell it to the government.
 - a. Will you commit to disclosing to this committee any purchases from data brokers made by the Department of Justice or its components that involve the acquisition of Americans’ data?
 - b. Would you support legislation to close this legal loophole by subjecting data brokers to the same restrictions as the companies they get the data from?

RESPONSE: Because I am not currently in the Department, I am not aware of the Department’s practices with respect to purchases of data or of legislative proposals regarding this issue. If confirmed, I would welcome the opportunity to learn more about your concerns.

46. Over the next four years, a number of foreign intelligence surveillance authorities will come before Congress for reauthorization. FISA authorities can be valuable tools for collecting intelligence on foreign threats. But a series of scandals over the past eight years have raised questions about whether the rights of Americans are sufficiently protected.

- a. Do you agree that the government should have to obtain a warrant or a FISA Title I order before seeking access to the private phone calls, emails, and text messages of Americans?

RESPONSE: As I stated during my confirmation hearing, when I worked at the Department of Justice, I strove to ensure that we used FISA only as appropriate under the law as it existed at the time. I did so not only because I was concerned about losing a valuable intelligence tool, but more importantly because of my commitment to respecting constitutional rights. If confirmed as the Attorney General, I look forward to reviewing legislative proposals and engaging with this Committee on this important issue.

47. In 2018, the Supreme Court ruled in *Carpenter v. United States* that historical cell site location information was protected by the Fourth Amendment despite the fact that this information is shared with cell phone service providers. The holding was limited to historical cell site information. Still, *Carpenter* made clear that the government can no longer argue, as it has in the past, that there is no Fourth Amendment protection for any information voluntarily disclosed to a third party. And the principles articulated in *Carpenter*, if not the holding, could certainly be applied in other contexts.

- a. Does the Department of Justice have an obligation to revisit its legal interpretations and practices with respect to collection of personal information from third parties in light of *Carpenter*?
- b. Will you commit to sharing with this committee any legal analysis that the Department has conducted or will conduct regarding the application of *Carpenter*?

RESPONSE: The Department of Justice is obligated to ensure that its interpretations and practices are consistent with the Constitution, including new Supreme Court precedents. If I am confirmed, I would be happy to direct the Department's Office of Legislative Affairs to work with the Committee to determine what information about the *Carpenter* decision the Department can provide, consistent with its longstanding policies and practices.

48. If confirmed, how would you direct your department to handle a mandatory gun confiscation-type program that would result from banning so-called "assault weapons" like some of my colleagues are calling for and that has the support of the President?

RESPONSE: As I testified at the hearing, if confirmed, the Department will take positions that are supported by the Constitution and the law.

49. In 2007, you voted to re-hear *Parker v. District of Columbia*, a case that challenged the Washington, D.C. ban on handgun possession—even a handgun in the home for personal defense. The court ultimately denied the en banc request in a 6-4 vote and the case was heard a year later before the Supreme Court when it was combined with *District of Columbia v Heller*. You also voted to deny en banc hearing in a similar case, *Seegars v Gonzales*, which involved five Washington, D.C., residents who sued the mayor and U.S. Attorney General over the District’s prohibition against the registration of pistols, its requirement to keep firearms disassembled or bound by a trigger lock and its prohibition against carrying a pistol without a license in one’s dwelling.
- a. Since there were no accompanying opinions from any of the judges as to their beliefs on why an en banc panel of the D.C. Circuit should or should not reconsider the *Parker* decision, can you share your rationale for voting to re-hear *Parker*?

RESPONSE: As I testified, a vote to rehear a case en banc is a vote for the full court to hear a case, not a vote on the merits of the case. I thought this was an extremely important issue. Other judges, including a judge appointed by a president of a different party, also voted to rehear the case, and for the same reason, so that the full court would have an opportunity to hear the case.

- b. And state for the record your thoughts on the Second Amendment?

RESPONSE: My view of the Second Amendment is controlled by the *Heller* and *McDonald* opinions. In *Heller*, Justice Scalia’s opinion for the Court held that the Second Amendment confers “an individual right to keep and bear arms.” *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). The Court also stated that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *Id.* at 626. In *McDonald*, the Court held that the right guaranteed by the Second Amendment is a fundamental right that applies to the states as well the federal government. If confirmed, I will take an oath, as all Department employees do, to support and defend the United States Constitution, and that includes the Second Amendment.

50. Under the Obama Administration, Operation Chokepoint formalized financial discrimination in the form of an effort by the Federal Deposit Insurance Corporation (FDIC) and Department of Justice (DOJ) to stop financial institutions from offering services to some regulated industries in an attempt to choke off banking services. This included federally licensed firearm retailers and other companies in the firearm and ammunition industry—some of the most heavily regulated businesses in the country. The Justice Department under President Trump committed to ending this controversial program.
- a. Will you commit that, if confirmed, this would also be the case under your

leadership?

RESPONSE: I am not familiar with the operation you reference. As I testified, I think the laws should be enforced without regard to partisan views.

51. As the Nation’s chief legal officer, the Attorney General is responsible for giving the President and other government agencies candid advice about the legality of proposed Executive action. With that in mind, please answer the following:

- a. If confirmed, you (or the Office of the Legal Counsel under your supervision) would be asked to definitively opine on the legality of a variety of proposed Executive actions. In your view, is it the duty of the Department of Justice to give a favorable opinion of the legality of proposed action so long as reasonable arguments can be made in its defense? Or must the Department decide, de novo, whether those arguments are in fact correct?

RESPONSE: My understanding is that the Office of Legal Counsel’s longstanding practice with respect to providing controlling legal advice is to “provide advice based on its best understanding of what the law requires—not simply an advocate’s defense of the contemplated action or position proposed by an agency or administration.” David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Memorandum for Attorneys of the Office re: Best Practices for OLC Legal Advice and Written Opinions at 1 (July 16, 2010)*. I agree with that traditional practice.

52. Are there any specific Office of the Legal Counsel (“OLC”) opinions that you would like to withdraw?

- a. What will be your approach to deciding which opinions to withdraw?

RESPONSE: I have not undertaken a review of Office of Legal Counsel opinions or formed views about opinions that might warrant reconsideration or withdrawal. If I am confirmed, I will approach all aspects of giving legal advice—including considering whether to withdraw an Office of Legal Counsel opinion—by giving careful attention to the facts and the law, consulting as appropriate with the lawyers in the Department with expertise on the relevant issues, and reaching a conclusion based on my best judgment.

53. Lawsuits have been filed over the ratification of the Equal Rights Amendment (“ERA”). The Biden-Harris Administration has stated that with Virginia ratifying the ERA, the required $\frac{3}{4}$ th of states have ratified the amendment. However, the OLC released a slip opinion stating that Congress must start over. Do you agree with the Administration’s position, or the conclusion reached by OLC that this is a matter that should be left to Congress to decide?

RESPONSE: The issue to which you refer is the subject of pending litigation involving the Archivist of the United States. As a sitting federal judge, Canon 3 of the Code of

Conduct for United States Judges bars me from commenting on any pending or impending case in any court. If I am confirmed as Attorney General, opinions or legal advice I might give on this subject would be based solely on the law, and not on any other consideration.

54. What are your thoughts on the Department of Justice’s (“DOJ”) policy concerning civil asset forfeiture?
- a. As we have seen in published reports, the Department of Justice collects large amounts of money for its Assets Forfeiture Fund, particularly from large deposits. Does this provide an incentive for the agencies you oversee to use civil asset forfeiture in a way that continues purely for budgetary gain?
 - i. Do you think this incentive by law enforcement agencies is a problem? If so, is it something you will work to address?
 - b. Your predecessor, Attorney General Barr, stated that incentives behind asset forfeiture require “constant vigilance,” do you share that view? How do you plan about ensuring that agencies have the right incentives in place?
 - c. Are you willing to work with the members of the U.S. Senate to reform civil asset forfeiture?

RESPONSE: Civil forfeiture is authorized under federal law, including 18 U.S.C. § 981 and other laws enforced by the Department of Justice. I understand that aspects of the practice have attracted criticism. If I am confirmed, I will review the Department’s practices in this area and determine whether changes may be warranted. And I would welcome the opportunity to work with Congress to address any issues within the purview of the Justice Department that might need reform.

55. In terms of antitrust, attention has been given to “big tech” companies such as Google, Amazon, and Apple, but what are your thoughts on the monopolistic practices of the National Collegiate Athletic Association (“NCAA”)?
- a. For years, the NCAA has profited off of the name, likeness, and image of college athletes, but also used its influence to undermine decisions made by schools in communities across the country. What are your thoughts on how it wields its influence?

RESPONSE: I have not studied the NCAA’s actions in these areas. In addition, I understand that some of the NCAA’s practices are the subject of active litigation, including a case pending before the Supreme Court. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court.

- b. In particular, what are your thoughts on the NCAA's recent track record of undermining women by pushing schools to allow individuals born biologically of one gender to participate in another gender's sports?

RESPONSE: I am not familiar with the NCAA activities referenced in the question.

56. The Supreme Court ruled in *Regents of the University of California v. Bakke* that racial quotas cannot be used in university admissions. In subsequent decisions, the Supreme Court has stated that universities may use a process that considers various qualities, such as race, to evaluate candidates. Numerous universities, including your alma mater, have been sued or are under investigation for their admissions processes and possible discrimination against various groups of people. With that in mind, please answer the following:

- a. Under your leadership, how would the DOJ handle these investigations and lawsuits?
- b. More broadly, how would DOJ approach future investigations into similar institutions?

RESPONSE: My understanding from publicly available information is that the Department recently voluntarily dismissed one such lawsuit, but that related matters remain pending. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case that is in any court. As a general matter, if I am confirmed, the Department will conduct its investigatory work guided by the facts and the law.

57. Given that when you were an AUSA, you assisted in the successful prosecution of D.C. Mayor Marion Barry for cocaine possession, you are aware of the prevalence of drugs in our society. With that in mind, please answer the following:

- a. Recently, there has been growing discussion in the United States concerning the establishment of "supervised consumption services" or "safe consumption sites" for individuals to come to a designated area for the purpose of using drugs. What are your views on these sites? How with DOJ handle any attempts to establish more of these sites throughout the country?
- b. In *United States v. Safehouse*, the DOJ sued a Philadelphia planned "safe consumption sites" on the grounds that it would violate the federal Controlled Substances Act's ("CSA") so-called "crack house provision." The 3rd Circuit found that this statute prohibits operation of safe injection facilities and as a result the site could not open. Do you agree with this decision? If so, would you commit to enforcing the CSA in its entirety, a law that President Biden was a proponent of while serving in the U.S. Senate? What if the policy of the Biden-Harris Administration, advocates or encourages the creation of these sites?

RESPONSE: I understand that the lawsuit referenced in the question remains pending. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court.

58. At the hearing, when I asked you whether you “believe[d] that efforts to purge voter rolls of people who have either died or have left the state in question are racially discriminatory,” you said “If there is enormously disparate impact of something that someone continues to propose it is not unreasonable for people to draw conclusions from that.”

- a. If someone “continued to propose” voter ID laws and it had a disparate impact, do you think someone would be justified in calling them a racist?

RESPONSE: Both in law and in life it can be difficult to ascertain a person’s subjective intent. Some instances of disparate impact are the result of purposeful discrimination. Some are not.

59. How do you define systemic racism?

RESPONSE: In my view, systemic racism refers to historic patterns or practices that have had a disparate impact of communities of color and other ethnic minorities, such as the fact that those communities have disproportionately lower rates of employment and wealth accumulation.

60. How do you define critical race theory?

RESPONSE: I am not a legal academic and do not have a definition.

61. Do you think America’s criminal justice system, including the federal courts, U.S. Attorney’s offices, and the Department of Justice are “systemically racist?”

RESPONSE: As I explained at the hearing, acknowledging the existence of systemic racism in society does not mean that any particular institution or individual is systemically racist.

62. Congresswoman Ayanna Presley has said, in relation to criminal justice policy: “[w]e must now be every bit as intentional in legislating justice and equity, and that starts with embracing anti-racism as a central tenet of the policymaking process.”

- a. Do you plan to institute “anti-racist” policies at the Justice Department? If so, which policies do you plan to institute?
- b. What current policies of the Justice Department are “racist?”

RESPONSE: “Equal justice under law” is a foundational principle of our legal system and the Department of Justice’s mission is to ensure fair and impartial administration of justice for all Americans. If confirmed, I will faithfully and impartially apply the law in an effort

to identify and address acts of unlawful racial discrimination. I am not familiar with all of the Department's current policies, but if confirmed I would seek to ensure that the Department's policies and practices are aligned with this vision.

63. Do you believe that members of historically oppressed minority groups should be treated more favorably than those of other races in prosecutions and sentencing decisions to correct for the effects of systemic racism?

RESPONSE: If confirmed, I would faithfully carry out the Department's responsibility to fairly and impartially administer justice for all Americans.

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

RESPONSE: As explained above, I am not a legal academic and do not have a definition of critical race theory.

65. Do you believe that as the AG you have a duty to act in line with your moral code? If so, would you agree that it is part of your duty to ensure that the department under your care does not violate that code?

- a. Along the same line, let's assume that someone acting as an agent of the Department of Justice takes actions which contradict your moral code. What responsibility do you feel you would owe for those actions?

RESPONSE: If confirmed, like any public servant in our government, I would take an oath to support and defend the Constitution of the United States and my decisions as Attorney General would be in keeping with this oath and in furtherance of the Department's mission. I would expect the same from every Department employee.

66. For purposes of federal law, when does life begin?

- a. Does the definition of when human life begins for purposes of federal law differ from the scientific definition of when human life begins?

RESPONSE: In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court stated that the court "need not resolve" the question of when life begins. *Id.* at 159.

67. At what point in human development does the United States have a compelling interest in protecting a human life?

RESPONSE: In *Casey*, the Supreme Court held that states may regulate abortion prior to viability based on the state's interest in maternal health and potential life, provided those regulations did not impose and do not have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

68. Do you support laws penalizing fetal homicide?

RESPONSE: In the course of my tenure as a federal judge I have not had occasion to become familiar with these laws.

69. Do you support the Unborn Victims of Violence Act of 2004, which provides that a person guilty of killing a child in utero may be punished to the same extent as if they had killed the child's mother, and that a person who intentionally kills a child in utero may be charged as a homicide (i.e., murder or manslaughter)?

RESPONSE: I have not had occasion to become familiar with this legislation.

- a. Given that "homicide" requires the killing of an innocent human being, do you agree that in order to punish someone for violating this statute, the child in utero would have to be a human being?

RESPONSE: I have not had occasion to become familiar with this legislation.

- b. Are there any circumstances which justify the killing of an innocent human being?

RESPONSE: Existing federal and state laws prohibit homicide. If I am confirmed as Attorney General, I will enforce the laws of the United States, including criminal homicide statutes.

70. Do you support the Born Alive Infants Protection Act?

- a. Relatedly, would you support any policy that would prohibit the killing of children who survive failed abortions outside the womb?

RESPONSE: I have not had occasion to become familiar with this legislation.

71. Will you commit that the Department of Justice will not rely upon data or information compiled by the Southern Poverty Law Center considering the serious allegations of systemic sexual harassment, racial discrimination and their ties to domestic terrorism cases?

RESPONSE: Because I am not at the Department, I am not familiar with whether and to what extent the Department relies upon data or information compiled by the Southern Poverty Law Center, and I do not know the facts of these allegations.

72. Based on evidence that Planned Parenthood profited from the purchase and sale of fetal tissue, the FBI opened its current investigation into the sale of fetal tissue. Will you ensure that this investigation will be allowed to proceed without interference under your leadership of the Department of Justice?

RESPONSE: As the nominee for Attorney General, I do not have information about this investigation. If I am confirmed, I commit to making prosecutorial decisions based on the facts and the law.

73. What is the Federalist Society?

- a. What does it do?
- b. What do you think about it?

RESPONSE: According to its website, the Federalist Society is “a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities.” As with many other legal organizations, I have participated in panels hosted by the Federalist Society and have friends and colleagues who are members.

74. On March 22, 1972, the 92nd Congress gave final approval, by the required two-thirds votes, to H.J. Res. 208, the Equal Rights Amendment. The final text of the resolution reflected a political compromise reached in the previous Congress (the 91st), in which proponents had accepted a 7-year ratification deadline. Congresswoman Griffiths explained, “I think it is perfectly proper to have the 7-year statute so that it should not be hanging over our head forever.” (117 Cong. Rec. 35814-15, 1971) As has been the case for every constitutional amendment proposed by Congress since 1960, this 7-year deadline appeared in the Proposing Clause. In your February 22, 2021 oral testimony before the Judiciary Committee, you indicated that under your leadership, the Justice Department will follow the President on “policy” matters, “as long as it is consistent with the law.” In advising the President on what the law is, on any given matter, you said, “we will do so objectively, based only on the reading of law.” I will proceed here on the assumption that this assurance would apply in full force to such a weighty matter as the requirements that Article V of the Constitution imposes for adopting amendments to the text of the Constitution. During the 2020 presidential campaign, the Biden-Harris campaign posted a short position statement on its website on the ERA, which remains there today. It states in part, “Now that Virginia has become the 38th state to ratify the ERA, Biden will proudly advocate for Congress to recognize that 3/4 of the states have ratified the amendment...” However, this campaign statement by the now-President cannot be effectuated unless the Department of Justice alters its positions on fundamental aspects of the constitutional amendment process.

- a. In analyzing the constitutional issues that surround that current status of the 1972 ERA, will you be influenced in any manner by this political position taken during the campaign? In other words, will you feel obligated, at least to some degree, to come up with legal rationales, however strained or novel, to justify the conclusion that the President stated when he was still a candidate?

- b. In 1977, with the 7-year deadline fast approaching, the ERA had not received the required 38 state ratifications, and several states had rescinded their initial ratifications. The Justice Department's Office of Legal Counsel issued an opinion dated Oct. 31, 1977, written by Assistant Attorney General John M. Harmon, which argued, with qualifications, that Congress could, by simple majority votes, extend the deadline prior to expiration. Subsequently, in 1978, did pass such a resolution purporting to extend the deadline to June 1982. (The only federal court to consider the matter ruled in *Idaho v. Freeman* that this was unconstitutional, but after the ostensibly extended deadline passed with no new ratifications, the Acting Solicitor General asserted that the ERA had failed ratification with or without the deadline extension, and the Supreme Court implicitly agreed by declaring the litigation moot.) In his 1977 OLC opinion, Mr. Harmon wrote, "Certainly if a time limit had expired before an intervening Congress had taken action to extend that limit, a strong argument could be made that the only constitutional means of reviving a proposed amendment would be to propose the amendment anew by a two-thirds vote of each House and thereby begin the ratification process anew." Do you agree that since the ERA deadline was reached with only 35 states having ratified (or only 30, if the 5 pre-deadline rescissions are permissible), "a strong argument could be made that the only constitutional means of reviving a proposed amendment would be to propose the amendment anew by a two-thirds vote of each House..."?
- c. In 1992, many people came to believe that the "Congressional Pay Amendment" had been ratified 203 years after Congress proposed it -- although it appears that to this day, no federal court has reviewed that claim or held that the amendment is actually part of the Constitution. In any event, the Congressional Pay Amendment contained no deadline, nor did any state rescind a ratification prior to the 38-state threshold being reached. Nevertheless, some ERA proponents then began to advance claims that ratification deadlines either were unconstitutional, or could be retroactively adjusted or removed by Congress, and this by simple majority votes. After decades of unsuccessful attempts, three state legislatures ultimately adopted purported ratifications based on such theories -- Nevada (2017), Illinois (2018), and Virginia (2020). However, the Virginia legislature's action came weeks after the Office of Legal Counsel on January 6, 2020, issued a 38-page legal opinion, arguing that Congress has the power to include a ratification deadline in a resolution submitted to the states proposing a constitutional amendment; that the 92nd Congress effectively exercised that power when it included a 7-year deadline in H.J. Res. 208; and that Congress lacks power to change an amendment proposal in any respect, once it is submitted to the states. OLC therefore concluded that the only constitutional route to adoption on an ERA was to restart the process. Based on that guidance, the Archivist of the United States issued a statement on January 8, 2020, that he would not certify the ERA as part of the Constitution, "unless otherwise directed by a final court order."
- i. Do you intend to withdraw the OLC opinion on which the Archivist

currently relies?

- ii. If so, will you simultaneously replace it with a new opinion, and if so, how soon might that occur?
- d. If after thorough review, you were to conclude that the President was mistaken in asserting that "3/4 of states have ratified the amendment," or that "Congress can recognize" that to be so, would your conclusions about "what the law is" be conveyed privately to the President, and perhaps, subject to modification at his instruction?
- iii. Or, would your legal conclusions be presented in a public document, such as a new OLC opinion?
- e. Candidate Biden's 2020 statement that "3/4 of states have ratified the amendment" the ERA disregarded not only the ratification deadline, but the fact that five state legislatures formally rescinded their ratifications, prior to the deadline of March 22, 1979. In 1977, the opinion by Assistant Attorney General Harmon argued that rescissions are not allowed under Article V, and no subsequent OLC opinion has found it necessary to re-examine that question. But when the late Justice Ruth Bader Ginsburg was asked about the ERA on Feb. 10, 2020, she said, "I would like to see a new beginning. I'd like it to start over. There's too much controversy about latecomers -- Virginia, long after the deadline passed. Plus, a number of states have withdrawn their ratification. So, if you count a latecomer on the plus side, how can you disregard states that said, 'We've changed our minds'?"
- iv. Do you intend to analyze the question of whether Article V permits states to rescind their ratifications, prior to the three-fourths threshold being reached, in order to determine whether the Administration can in fact, consistent with the Constitution, urge Congress to assert that "3/4 of states have ratified" the ERA?
- f. Do you foresee any eventually in which the Department of Justice would authorize or permit the Archivist of the United States to certify the ERA as part of the Constitution, if Congress has NOT passed a joint resolution purporting to remove the ERA's ratification deadline?
- g. There are currently two active federal lawsuits against the Archivist in the federal courts, which involve claims regarding the validity of the ratification deadline, the validity of rescissions, the authority (if any) of Congress to act retroactively on such matters, etc. In these lawsuits the Department of Justice has been defending the position that the 1979 deadline was permissible and effective. As long as such litigation is ongoing, are there any circumstances under which the Department of Justice would allow or order the Archivist of the United States to certify the ERA as part of the Constitution, under 1 U.S.C. Sec. 106b, in the absence of a final judgment or order by a federal court that such an action by the Archivist is

authorized or required by law?

RESPONSE: The issue to which you refer is the subject of pending litigation involving the Archivist of the United States. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court. If I am confirmed as Attorney General, any opinions or legal advice I might give on this subject would be based solely on the law, and not on any other consideration.

Senator Cruz

Responses to Questions from Senator Cruz to Judge Merrick Garland, Nominee to be United States Attorney General

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions.

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 disagrees 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.

Because you stated at your hearing that you are able to answer questions about policy, many of the questions below focus on policy and facts underlying policy decisions. To the extent you are unable to answer a question about your policy views, please state why you are unable to provide an answer at this time, what information you will need to provide an informed answer, and when you will be able to provide that answer.

II. Questions

1. Do you agree that it is appropriate to investigate whether and to what extent individuals engaged in criminal conduct related to the 2016 election?

RESPONSE: If confirmed, I will make decisions concerning investigations based on the facts and the law. Because I am not in the Department and accordingly lack access to relevant facts, among other things, it would not be appropriate for me to comment on any particular investigation or potential investigation.

2. When Bill Barr was asked at his confirmation whether he would terminate Robert Mueller, he answered that he would not terminate him without “good cause.” At your hearing, you refused to commit to any standard by which to determine whether to fire John Durham or stop his investigation and instead avoided answering the question by stating that you have yet to examine the facts.
 - a. What is the appropriate standard for an Attorney General to apply to determine whether to fire a U.S. Attorney who is overseeing a politically sensitive investigation?
 - b. What is the appropriate standard for an Attorney General to apply to determine whether to indefinitely halt a politically sensitive investigation?
 - c. Do you agree with Bill Barr that the appropriate standard is “good cause”?
 - d. If the appropriate standard for terminating John Durham or his investigation is anything other than “for cause” or “good cause” please explain why the standard for reviewing the Durham investigation should be different than the standard that Bill Barr applied when reviewing the Mueller investigation.
 - e. If the appropriate standard for terminating John Durham or his investigation is anything other than “for cause” or “good cause” please explain how that standard differs from the “for cause” or “good cause” standard.

RESPONSE: As I testified at my hearing, I do not know anything about the Durham investigation except what I have read in the press. My view about every investigation is that I have to know the facts before I can make these kinds of decisions or commitments. As I said at the hearing, however, I understand Mr. Durham has been permitted to remain in his position, and I presently have no reason to think that that was not the correct decision.

3. What does “for cause” removal mean in the context of reviewing whether to terminate a politically sensitive investigation?
 - a. What kind of conduct would qualify as removable “for cause”?
 - b. Who will make the determination that the “for cause” standard has been met?
 - c. Who will conduct the investigation into whether “for cause” behavior has occurred?
 - d. If you have decided to break with precedent and apply a different standard from the “good cause” standard applied by Bill Barr, please answer subparts (a)–(c) for the standard you intend to apply.

RESPONSE: As I testified at my hearing, I do not know anything about that investigation except what I have read in the press. My view about every investigation is that I have to

know the facts before I can make these kinds of decisions or commitments. As I said at the hearing, however, I understand Mr. Durham has been permitted to remain in his position and to continue his investigation, and I presently have no reason to think that that was not the correct decision.

4. What does “for cause” removal mean in the context of reviewing whether to terminate a U.S. Attorney overseeing a politically sensitive investigation?
 - a. What kind of conduct would qualify as removable “for cause”?
 - b. Who will make the determination that the “for cause” standard has been met?
 - c. Who will conduct the investigation into whether “for cause” behavior has occurred?
 - d. If you have decided to break with precedent and apply a different standard from the “good cause” standard applied by Bill Barr, please answer subparts (a)–(c) for the standard you intend to apply.

RESPONSE: As I testified at my hearing, I do not know anything about that investigation except what I have read in the press. My view about every investigation is that I have to know the facts before I can make these kinds of decisions or commitments. As I said at the hearing, however, I understand Mr. Durham has been permitted to remain in his position and to continue his investigation, and I presently have no reason to think that that was not the correct decision.

5. Assume for the sake of this question and this question only that after reviewing the facts of the Durham investigation, you were to determine that the Durham investigation was not properly predicated.
 - a. Would that hypothetical lack of proper predication be sufficient grounds to terminate the investigation? Please explain your answer.
 - b. Would that hypothetical lack of proper predication be sufficient grounds to terminate John Durham? Please explain your answer.
 - c. Does your answer to subpart (a) change if you assume that a reasonable, objective observer could disagree with your assessment that the investigation lacked a proper predicate? Please explain your answer.
 - d. Does your answer to subpart (b) change if you assume that a reasonable, objective observer could disagree with your assessment that the investigation lacked a proper predicate? Please explain your answer.

RESPONSE: As I testified at my hearing, I have always been extremely careful, as a prosecutor and as a judge, not to comment about something without knowing the facts. As a Justice Department nominee, I do not have information about Mr. Durham’s

investigation aside from what has been reported in the press. I therefore am not in a position to comment on these hypotheticals. If confirmed, I will make decisions concerning investigations based on the facts and the law. As I said at the hearing, I understand Mr. Durham has been permitted to remain in his position and I presently have no reason to think that that was not the correct decision.

6. You stated at the hearing that you knew nothing of the Steele “dossier” beyond what you had read in the papers. Have you taken the time to acquaint yourself with the issue since?
 - a. You had earlier claimed to have read the executive summary of the IG report, which referenced the “dossier” multiple times. Have you since read any of the remainder of the IG report?
 - b. Do you have any additional comments on the “dossier,” having learned more about it?
 - c. Do you believe the FBI’s handling of the “dossier” was appropriate?

RESPONSE: Since the confirmation hearing, I have not studied these issues further and thus am not in a position to comment further.

7. What standard of obstruction of justice did the Mueller investigation adopt?
 - a. What is the statutory definition of obstruction of justice?

RESPONSE: I have not reexamined the Mueller Report. There are several statutes that prohibit obstruction of justice, including those in Chapter 73 of Title 18 of the U.S. Code.

- b. Could the firing of an independent counsel, special counsel, or U.S. Attorney who is investigating the President, his political allies, or his family members constitute obstruction of justice?

RESPONSE: As I testified at my hearing, I have always been extremely careful, as a prosecutor and as a judge, not to comment about something without knowing the facts. As a Justice Department nominee, I am not in a position to comment on these hypotheticals. If confirmed, I will make decisions concerning investigations based on the facts and the law.

- c. Is it possible for a President to commit obstruction of justice?

RESPONSE: As I testified at my hearing, I have always been extremely careful, as a prosecutor and as a judge, not to comment about something without knowing the facts. As a Justice Department nominee, I am not in a position to comment on this hypothetical.

- d. Do you agree that terminating John Durham would create the appearance of impropriety?

RESPONSE: As I testified at my hearing, I have always been extremely careful, as a prosecutor and as a judge, not to comment about something without knowing the facts. As a Justice Department nominee, I am not in a position to comment on this hypothetical. If confirmed, I will make decisions concerning investigations based on the facts and the law.

8. Will you allow special counsel Durham to publish a public report, with only minimal redactions?
 - a. What categories of redactions would the Department consider?
 - b. Will you commit to personally review and approve of any and all redactions?

RESPONSE: As the nominee for Attorney General, I do not have information about Mr. Durham's investigation aside from what has been reported in the press. If I am confirmed, one of my first tasks will be to speak with Mr. Durham to learn about his investigation. Only when I know relevant facts would I be in a position to consider these questions.

9. Top officials, including Sally Yates, Rod Rosenstein, and Jim Comey, have testified that they were not responsible for the FISA abuses outlined in the Horowitz Report.
 - a. Do you agree that, as Attorney General, the buck stops with you—that you are responsible for the product and conduct of career attorneys speaking and working on behalf of the Department of Justice?

RESPONSE: As I stated at my confirmation hearing, if I am confirmed as Attorney General, I would be ultimately responsible for the Department's actions.

- b. What, if anything, would you have done differently from previous leadership to have prevented these abuses?

RESPONSE: As I stated at my confirmation hearing, as a nominee I should not comment about Justice Department officials' prior decisions, as I want you to judge me on my own record and what I do going forward. If I am confirmed, I will speak directly with Mr. Horowitz and FBI Director Wray to make sure that any necessary changes are made as a result of the recommendations by Inspector General Horowitz. I have long been concerned that the Department be careful in its use of FISA.

10. Will you commit to ensuring that no one who was found to have engaged in improper conduct related to Crossfire Hurricane is employed by Department of Justice or the FBI?
 - a. Will you commit to reporting to this Committee on the reasons for retaining any culpable individuals, in the event they remain at DOJ or the FBI?

RESPONSE: If confirmed, it will be my direction that personnel decisions at the Justice

Department comply with all applicable laws, and that any investigations into allegations of misconduct by Department employees should be searching and fair.

11. Kevin Clinesmith, the FBI lawyer who admitted to falsifying an email, was sentenced to one year of probation, and no prison time. Prosecutors had asked for several months prison time. Do you agree with the prosecutors that Mr. Clinesmith deserved at least some term of imprisonment?

RESPONSE: As I said at the hearing, as a nominee I should not comment on Justice Department officials' prior decisions, as I want you to judge me on my own record and what I do going forward.

12. On January 5, 2017, the day after the FBI drafted a closing memo in the General Flynn investigation determining Flynn was "no longer a viable candidate," there was an Oval Office meeting with President Obama and, among others, Vice President Biden, Susan Rice, James Comey, and Sally Yates. At that meeting, President Obama asked if they should withhold information from Flynn. Do you believe this was appropriate?
 - a. How would you respond in such a situation with President Biden?
 - b. If you had been the Attorney General during this January 5 meeting, would you have pushed back and made clear that sidelining the incoming National Security Advisor was dangerous and unprecedented?

RESPONSE: I do not know the facts of the situation you describe. As I stated at the hearing, as a nominee I should not comment about Justice Department officials' prior decisions or hypothetical situations, as I want you to judge me on my own record and what I do going forward.

13. Investigations have revealed that then-Deputy Director of the FBI, Andrew McCabe, who initially told inspector general investigators that he did not authorize a controversial leak, was lying. He later confessed.
 - a. We do not know, however, whether and to what extent then-FBI Director Comey was aware of and authorized this leak after the fact; will you commit to finding an answer to this question?

RESPONSE: I have not studied these matters, and it would not be appropriate for me to commit to an investigation without knowing the facts. If confirmed, I will make decisions concerning investigations based on the facts and the law.

- b. Do you agree this is the kind of conduct of senior government officials that requires oversight?

RESPONSE: As I said at the hearing, as a nominee I should not comment on Justice Department officials' prior decisions, as I want you to judge me on my own record and

what I do going forward. As a general matter, oversight is appropriate for all government officials.

- c. Mr. Comey and Mr. McCabe have now offered multiple statements, under oath, that are directly and irreconcilably contradictory. One of them must be lying. Would you agree that lying under oath is a serious matter?

RESPONSE: I have always been careful as a prosecutor and a judge not to comment about something without knowing the facts. Without commenting on any specific individual or prior event, I agree that lying under oath is a serious matter.

- d. Will you commit to fulfilling my request sent to Director Wray and Attorney General Barr on December 10, 2020, to provide “to the fullest extent possible any and all emails, records, communications, and any other documents relevant to determining whether Mr. Comey knew of and approved of the FBI's leak of information pertaining to the Clinton investigation to the Wall Street Journal”?

RESPONSE: If confirmed, it will be my direction that the Justice Department be responsive to congressional requests for information, consistent with applicable law and longstanding Department policies and procedures.

- e. If, and when, one of them is determined definitively to be lying, will you instruct DOJ staff to consider charges under federal law?

RESPONSE: As I testified at my hearing, I have always been extremely careful, as a prosecutor and as a judge, not to comment about something without knowing the facts. As a Justice Department nominee, I am not in a position to comment on these hypotheticals.

- f. Will you commit that lying under oath and to federal authorities will be treated the same for each and every individual, regardless of position or previous rank?

RESPONSE: If confirmed, I will make decisions concerning investigations and charging decisions based on the facts and the law, without respect to the power of the perpetrator (or lack thereof).

- 14. While COVID has no doubt posed a challenge for state and local governments around the country, we have seen a disturbing trend in the way that Americans have been treated by local authorities. The Department of Justice is entrusted with the authority to prevent state and local authorities from violating federal civil rights and civil liberties.
 - a. Are you willing to commit to filing suit against, or support suits against, states and localities that single out religious institutions and religious individuals for particularly onerous regulations?

RESPONSE: I am committed to vigorous and evenhanded enforcement of federal law, including federal laws protecting religious individuals and institutions.

- b. Would it satisfy the First Amendment for a state to impose an arbitrary system in which commercial establishments are allowed to open, or open partially, while religious institutions are shut down indefinitely?

RESPONSE: The Supreme Court has held that a law violates the Free Exercise Clause of the First Amendment if it “discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). The Court has likewise made clear that the government “cannot in a selective manner impose burdens only on conduct motivated by religious belief.” *Id.* at 543. In general, the application of those tests requires a careful assessment of the facts and circumstances of each case. But a law that draws “arbitrary” distinctions between institutions based on their religious character would violate that test.

15. Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be the Little Sisters of the Poor or small business owners, in pursuit of political goals?

RESPONSE: Yes. The government must respect the rights enshrined in the Constitution, including the rights to freedom of speech, the free exercise of religion, due process, and equal protection of the laws, as well as the rights provided by statute.

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

RESPONSE: Yes. The Supreme Court has made clear that rights secured by the Free Exercise Clause and the Religious Freedom Restoration Act are not limited to the home or houses of worship.

17. How will you accommodate Americans who hold strong religious convictions when there is growing pressure from the Biden administration to loosen, and perhaps even undo, religious exemption laws?

RESPONSE: As I testified at my hearing, I am a strong believer in religious liberty. If I am confirmed, I will seek to ensure that the Department of Justice scrupulously follows the Constitution and federal law, including the Free Exercise Clause and statutes protecting religious liberty.

18. The Biden administration is now on the record stating its opposition to the use of religious exemptions for those who hold traditional religious views on sexuality and gender.
 - a. What is the role of the Department of Justice in preventing the federal and state

governments from discriminating against religious Americans who hold traditional religious views on sexuality and gender?

- b. What will you do in office to ensure that religious exemption laws are not dismantled?

RESPONSE: The role of the Department of Justice is to vigorously and evenhandedly enforce the law, including laws protecting religious liberty. If I am confirmed, I will seek to ensure that the Department fulfills that responsibility.

19. Please describe your understanding of the holding of *Our Lady of Guadalupe School v. Morrissey-Berru* (2020).

RESPONSE: In our *Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court reaffirmed that the First Amendment protects the right of religious institutions “to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Id.* at 2055 (citation omitted). There, although the plaintiff schoolteachers “were not given the title of ‘minister,’” the Court held that their cases fell within the so-called “ministerial exception” to employment discrimination laws. *Id.* Under that exception, “courts are bound to stay out of employment disputes involving those holding certain important decisions with churches and other religious institutions.” *Id.* at 2060. The Court held that “[t]he religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission.” *Id.* at 2055. In finding the facts sufficient to decide the case before it, the Court declined to adopt a “rigid formula” for determining whether an employee falls within the exception. *Id.* at 2069 (citation omitted).

20. If confirmed, will you revive the lawsuits against the Little Sisters of the Poor seeking to require them, against their religious beliefs, to facilitate abortions?

RESPONSE: I understand that litigation on the contraceptive-coverage requirement promulgated under the Affordable Care Act, including a suit involving the Little Sisters of the Poor, remains pending. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court.

21. Is it religious discrimination if the government forces a religious baker or florist to provide customized services and products for a ceremony or event celebrating an LGBTQ wedding, even if providing that service or product conflicts with her religious beliefs?

RESPONSE: I understand that these issues are currently pending before the courts, including in a petition for a writ of certiorari before the Supreme Court. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from

commenting on any pending or impending case in any court.

22. Can the government force a church that objects to same-sex marriage to hire a pastor who is in a relationship with someone of the same sex?

RESPONSE: The “ministerial exception” recognized by the Supreme Court gives religious institutions “the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

23. If a student Christian campus organization asks a member who begins a same-sex relationship to step down, on grounds that the organization does not support same-sex marriage, does that violate the member’s civil rights?

RESPONSE: I understand that these issues are the subject of pending litigation. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court.

24. Please explain the holding of *Bostock v. Clayton County* and its relevance to the Department of Justice.

RESPONSE: In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court held that Title VII prohibits an employer from firing or otherwise discriminating against employees “simply for being homosexual or transgender.” *Id.* at 1737. Like other federal agencies, the Department of Justice must comply with Title VII in its own employment actions. 42 U.S.C. § 2000e-16(a). In addition, the Department’s Civil Rights Division is responsible for enforcing Title VII in cases involving state and local government employers. 42 U.S.C. § 2000e-5(f)(1).

25. Do you agree that free speech is an essential and irreplaceable American value?
- What are the present threats to free speech in America?
 - What role does the Department have in addressing threats to free speech?
 - Does the First Amendment protect speech that some may consider offensive? If so, what are the limits to that protection?
 - What is “hate speech”? Is “hate speech,” as you have defined it, protected by the First Amendment? If so, what are the limits to that protection?

RESPONSE: The protection of speech against government regulation is a fundamental value enshrined in the First Amendment. The Department of Justice is responsible for upholding all constitutional rights, including the right to freedom of speech. The protection of the First Amendment extends to speech that some may find offensive; indeed, the Supreme Court has “said time and again that ‘the public expression of ideas

may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017). So far as I am aware, the Supreme Court has not defined “hate speech” or treated it as a distinct legal category. In general, the Court has instructed that the First Amendment excludes only a few “well defined and narrowly limited classes of speech” such as “obscenity,” “defamation,” “fraud,” “incitement,” and “speech integral to criminal conduct.” *United States v. Stevens*, 559 U.S. 460, 468-469 (2010) (citation omitted).

26. Do public educational institutions have the legal obligation to protect the speech rights of students and employees?

RESPONSE: Public educational institutions are bound by the First Amendment, which is incorporated against the states by the Fourteenth Amendment. See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

27. Under the prior administration, the DOJ moved to protect free speech on college and university campuses. Will you continue to defend students on campuses across America against increasingly repressive speech codes?

RESPONSE: I am not familiar with the specific initiatives referenced in the question. If I am confirmed, I will uphold all constitutional rights, including the First Amendment right to freedom of speech.

28. Do private educational institutions have the legal obligation to protect the speech rights of students and employees?

RESPONSE: The Supreme Court has held that “the Free Speech Clause prohibits only governmental abridgement of speech”; it “does not prohibit private abridgement of speech.” *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). The Free Speech Clause thus does not govern the actions of private educational institutions. I have not studied other federal or state laws that might require some or all of those institutions to protect the free speech rights of their students or employees.

29. Are educational institutions that receive federal funding permitted to discriminate on the basis of speech?

RESPONSE: In general, educational institutions and other organizations that agree to accept federal funding are bound by the conditions attached to that funding. See, e.g., *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 638 (1999) (prohibition on sex discrimination). But I have not studied specific funding conditions that might address discrimination on the basis of speech.

30. What do you understand to be the scope of Section 230 protection?

RESPONSE: As I testified at my hearing, I have relatively limited information about Section 230 beyond the statutory text and the D.C. Circuit case I decided. I know that

you and other Members of the Committee have ideas about how the statute should be amended. If I am confirmed, I look forward to talking with you and others about those ideas.

- a. Does Section 230 immunize content publishers only?

RESPONSE: As I testified at my hearing, I have relatively limited information about Section 230 beyond the statutory text and the D.C. Circuit case I decided. If confirmed, I look forward to studying the issue more closely.

- b. If an internet platform curates content, and specifically selects what a user sees and does not see, is the platform engaged in publishing?

RESPONSE: As I testified at my hearing, I have relatively limited information about Section 230 beyond the statutory text and the D.C. Circuit case I decided. If confirmed, I look forward to studying the issue more closely.

- c. Do you believe that corporations like Facebook, Twitter, and Google should have a special immunity from liability when publishing material that is unavailable to traditional publishers like the New York Times? Please explain why.

RESPONSE: In my role as a federal judge, I have not thought about this policy question. If confirmed, I look forward to learning more about your concerns.

- d. Would it be appropriate for the Department of Justice to work in any way with Facebook, Twitter, and Google to limit the availability or reach of constitutionally protected speech or information?

RESPONSE: The Department is bound to enforce the First Amendment's protections.

31. Many big technology platforms are funded or financed in part by the Chinese Community Party.
 - a. Do you see the self-censorship of American media companies at the behest of a fundamentally anti-western, anti-American regime as a problem?
 - b. If not, why not?

RESPONSE: I have not studied this issue, but if confirmed, I would welcome the opportunity to learn more from you and others on this subject.

32. What are your thoughts on what is called "cancel culture"? Is "cancel culture," as you understand it, consistent with the values of free speech?

RESPONSE: I do not have an understanding of the meaning of the term sufficient to comment.

33. Do you plan on taking action against companies for “misinformation” or “disinformation”?
- a. How do you define those terms?
 - b. What is the basis in the law?
 - c. What is your opinion on social media and networking companies banning material or the accounts of content providers who promote what are termed “conspiracy theories”?

RESPONSE: I have not had occasion to study these issues. I understand that Director Wray has testified that misinformation and disinformation, especially from foreign adversaries, pose one of the key challenges for the FBI, and that the Bureau has partnered with social media companies to address this issue. As I indicated during my hearing, I would welcome the opportunity, if confirmed, to work with Congress on this issue and to learn more about the challenges it poses. Of course, any action the Department of Justice takes in this area must be consistent with the First Amendment.

34. At your hearing, you stated that you were not familiar with “Operation Choke Point.”
- a. Having now had time to review the details of it, please describe your understanding of the Operation Choke Point initiative.
 - b. Do you believe Operation Choke Point was an appropriate use of the Department of Justice’s investigatory power?

RESPONSE: Since the confirmation hearing, I have not studied these issues any further and have no additional comments.

35. Can institutional investors and stock brokerages lawfully suspend trading on their platform to protect themselves against loss?

RESPONSE: I am not sufficiently conversant in the securities laws to have a view on this question at this time.

36. My office has received a number of complaints from Texas manufacturers regarding the benchmarks used to set the price of aluminum. Specifically, there is concern that the Midwest Premium (MWP) set by S&P Global Platts—a provider of energy and commodities information and a source of benchmark price assessments in the physical commodity markets—is causing market distortions and artificially inflated prices to consumers. Will you commit to ensuring that you or the appropriate member of your senior staff becomes familiar with this issue and assesses whether any action by the Department of Justice is appropriate?

RESPONSE: I understand that the Midwest Premium is the subject of ongoing antitrust litigation. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court. As a general matter, however, I am committed to the vigorous enforcement of the antitrust laws.

37. In your testimony, you expressed some doubt that the Biden administration would seek to overturn *Heller v. District of Columbia* because the Supreme Court is unlikely to agree with their position.
- a. Would you instruct the Solicitor General to advocate to overturn *Heller* if you believed there was a reasonable chance that the Supreme Court would agree to do so?

RESPONSE: If confirmed, I will take an oath, as all Department employees do, to support and defend the U.S. Constitution. As I testified, I cannot take a position on a particular case before reviewing the facts and the applicable law.

- b. Please describe the holding of *Heller*.

RESPONSE: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court held that the Second Amendment protects “an individual right to keep and bear arms.” *Id.* at 595. The Court also stated that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *Id.* at 626.

38. Please state whether you would defend the constitutionality of any of the following hypothetical executive actions or pieces of legislation restricting access to firearms:
- a. A ban on “assault weapons,” as that term was used in the Public Safety and Recreational Firearms Use Protection Act.
- b. A ban on high-capacity magazines.
- c. A ban on carrying firearms outside the home.
- d. Universal background checks.
- e. A punitive tax on the purchase or ownership of a firearm.
- f. As a matter of policy, do you support one or more of the above in subparts (a)-(f)? If so, please state which policies.

RESPONSE: If I am confirmed, my decisions about the Department of Justice’s litigating positions would be guided by the Constitution and applicable Supreme Court precedent. I have not carefully studied the constitutional issues raised by these hypothetical measures. I also have not developed policy positions on those hypothetical measures. But as I testified at my hearing, I believe as a general matter that we should be careful that people who are

entitled to have guns get the background check that allows them to have them, and that for those who are not entitled and who we are concerned about because they are threats, because they are felons or for whatever reason are barred by the law, that there is an opportunity to determine that they are not permitted to have a gun.

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

RESPONSE: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects “an individual right to keep and bear arms.” *Id.* at 595.

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

RESPONSE: If confirmed, I will take an oath, as all Department employees do, to support and defend the United States Constitution, and that includes the Second Amendment.

b. Does it deserve less protection than the right to vote?

RESPONSE: If confirmed, I will take an oath, as all Department employees do, to support and defend the United States Constitution, and that includes the Second Amendment.

c. Does the Civil Rights division have a duty to ensure that states and localities do not infringe on the right to bear arms, just as it has a duty to ensure that states and localities do not infringe on other individual rights, such as the right to vote?

RESPONSE: If confirmed, the protection of individual rights will be one of my duties as Attorney General, a duty I will share with all Department attorneys.

d. Do you believe that an individual who believes *Heller* was incorrectly decided, and that there is thus no individual right to possess a firearm, can fully discharge the duties of Assistant Attorney General for the Civil Rights division?

RESPONSE: Respectfully, this question appears aimed at another Presidential nominee for an important position as a leader in Department of Justice. As I stated in my hearing, I have gotten to know Kristen Clarke and believe she is a person of great integrity who will faithfully and impartially apply and defend the laws and Constitution of the United States, including Supreme Court precedent. The Department of Justice will benefit from her leadership and experience.

e. Will you commit to ensuring that all political appointees understand that the Second Amendment protects a personal civil right and to providing training on the scope of that right to employees in the Civil Rights division?

RESPONSE: If confirmed, I will take an oath, as all Department employees do, to support and defend the Constitution, and that includes the Second Amendment. The protection of

individual rights and adherence to Supreme Court precedent is an integral part of that commitment.

40. Do you personally own any firearms? If so, please list them.

RESPONSE: No.

41. At your hearing, you refused to commit to prosecuting illegal border crossings. Do you stand by that testimony?
- You also stated that whether to prosecute illegal border crossings “is again a question of allocation of resources.” Can you please elaborate?
 - Under what circumstances would the Justice Department be unable to prosecute unlawful border entries for lack of resources?

RESPONSE: As a judge on a court that hears few immigration cases, I have not had the occasion to carefully study this issue. I am committed to fostering public safety through the enforcement of federal laws and to working with other agency partners in continuing efforts to secure our borders and protect our national security.

42. During the hearing for your nomination to be the Attorney General of the United States, Senator Hawley asked, “Do you believe that illegal entry at America’s borders should remain a crime?” You responded that you had not thought about that question.
- Having had time to think about the question, do you now believe that illegal entry at America’s borders should remain a crime? If so, why? If not, why not?
 - Do you believe that only some illegal entries should be criminalized, and others should be considered lawful? If so, what is the basis for the distinction?

RESPONSE: As I said to Senator Hawley, “I just haven’t thought about that question.... [T]he President has made clear that we are a country of ... borders and with a concern about national security. I don’t know of a proposal to decriminalize, but still make it unlawful to enter.” Since the hearing, I have not had time to think further about the question.

43. The Obama-Biden administration refused to withhold funding from cities that openly ignored immigration law and refused to cooperate with federal law enforcement. Was this consistent with the rule of law?

RESPONSE: It is my understanding that the statutory requirements referenced in the question are the subject of active litigation, including cases pending in the Supreme Court. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges prohibits me from commenting on pending or impending cases.

44. Do you believe that, if the Department's resources were not limited, the Department of Justice should enforce every immigration law in its jurisdiction?

RESPONSE: I am committed to fostering public safety through the enforcement of federal laws and to working with other agency partners in continuing efforts to secure our borders and protect our national security.

45. Is it appropriate for the executive to refuse to enforce a law, absent constitutional concerns?

RESPONSE: As I testified at my hearing, for the entire history of our Nation prosecutors and other government agencies have exercised discretion in deciding how to allocate their limited resources. The Supreme Court has explained that, in exercising that discretion, an agency may appropriately consider not only "whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

- a. Does the same principle apply in a different political context, such as if a Republican president ordered the IRS not to collect taxes?

RESPONSE: The Executive Branch's actions, including its exercises of enforcement discretion, are always governed by the Constitution and laws of the United States.

- b. Could a President concerned with the impact of immigration on domestic employment decide to enforce the laws more stringently than intended by Congress?

RESPONSE: In enforcing statutes enacted by Congress, the Executive Branch must act consistently with those statutes.

46. The Secretary of DHS, Alejandro Mayorkas, was the focus of a 2015 Inspector General report that concluded he overrode normal process in order to provide political favors under the EB-5 visa program to well-connected Democrat stakeholders.
- a. Was that consistent with the rule of law?
- b. If not, do you condemn his actions?
- c. If a Department of Justice employee engaged in behavior materially equivalent to Mayorkas's behavior that served as the basis for the Inspector General report, would you recommend discipline?
- d. If not, why not? If so, what discipline would be appropriate?

RESPONSE: I have not studied the 2015 Inspector General report referenced in the question and it would not be appropriate for me to comment without knowing the facts.

47. Should an illegal alien who is convicted of murder or sexual assault in the United States expect to be deported immediately?

RESPONSE: Murder and sexual assault are serious crimes and such crimes are, as general matter, grounds for removal. See 8 U.S.C. § 1227(a)(2). The process and timing of removal is governed by the immigration laws.

48. Every day, almost 30 people in the United States die in drunk-driving crashes—that's one person every 50 minutes. Should the United States prioritize the deportation of illegal aliens who are convicted of driving while intoxicated?

RESPONSE: Driving while intoxicated can lead to death and serious injury. If I am confirmed as Attorney General, I will enforce the laws of the United States.

49. The Biden administration is committed to opening our country's borders at a time when many businesses and shops remain closed due to COVID-19-related precautions. Do you find this policy to be consistent with the stated goal of "building back better"?

RESPONSE: My understanding is that the Administration is undertaking a comprehensive review of immigration policies in an effort to ensure that they are consistent with the law and the Nation's values.

50. The opening of borders has led to a surge in the number of illegal migrants at the southwestern border of the United States. Virtually none of these migrants, who are from countries like Guatemala, Nicaragua, and Mexico, are vaccinated against COVID-19. Health-related grounds is a reason of inadmissibility to the United States under the INA. How would will the Department of Justice address this?

RESPONSE: My understanding is that the Administration is undertaking a comprehensive review of immigration policies in an effort to ensure that they are consistent with the law and the Nation's values.

51. Are there any differences in the rights, under federal law, between a citizen and an illegal alien? Please describe any differences.
- a. What is the legal basis of those differences?

RESPONSE: As a general matter, there are differences between the rights afforded to citizens and non-citizens, and among non-citizens depending on their immigration status. The legal bases for those differences are the relevant constitutional and statutory provisions, some of which apply to all persons in the United States and some of which differentiate on the basis of citizenship or immigration status.

52. Can you commit to bringing the same vigor and completeness of enforcement to the immigration laws, duly passed by Congress, that you bring to other laws?
- a. If not, why not?

RESPONSE: If I am confirmed as Attorney General, I will commit to vigorously enforcing the laws of the United States.

53. In response to a request from my staff asking for an in-person meeting with you, I received a reply that you “cannot do an in-person meeting under any circumstances.” This was in contrast to other senior nominees of the Biden administration who have scheduled meetings in-person.
- a. Did the White House instruct you not to take in-person meetings?
- b. Since April 1, 2020, have you met with any members of the Senate in- person, other than on February 23, at your confirmation hearing?
- i. If so, who and on what dates?
- c. Since April 1, 2020, have you met with Joe Biden in person?
- d. Since April 1, 2020, have you met with any individuals employed by the White House in person?
- i. If so, who and on what dates?
- e. Since April 1, 2020, have you had any conversations or meals indoors lasting more than 15 minutes with an individual who is not a member of your household?
- f. Since April 1, 2020, have you attended any marches, rallies, or public protests?
- g. Is it your belief that taking a meeting with me in my office pursuant to all appropriate medical guidelines, including the guidelines set forth by the Capitol’s attending physician, would have posed an unacceptable risk of transmission?
- h. If so, on what basis do you base that conclusion?

RESPONSE: Because of the COVID-19 pandemic, I have been working from home and limiting activities outside of my house as much as possible since mid-March of 2020, including work related to my nomination to be the Attorney General. To date I have met virtually, or by telephone, with over 30 Senators, including 20 Senators on the Judiciary Committee. I regret that you and I were not able to arrange a way to meet virtually before the hearing, but I look forward to being able to do so in the future, or to meet in person when the dangers related to the pandemic abate.

54. In *Garza v. Hargan*, you joined the en banc order overturning the panel’s decision “substantially for the reasons set forth in the . . . dissenting statement of Circuit Judge Millett.”
- a. Please describe the reasoning set forth in Judge Millett’s dissenting opinion.
 - b. Do you agree that the court’s order stands for the proposition that the moment a person steps foot in the United States, whether lawfully or unlawfully, she has a constitutional right to abortion?

RESPONSE: The per curiam order I joined in *Garza* sets forth my views on that case as it came before me. The order and Judge Millett’s opinion speak for themselves.

55. Please describe your understanding of the undue burden standard in light of *Russo v. June Medical Services LLC* (2020). Did it alter the undue burden standard as set forward in *Whole Women’s Health v. Hellerstedt* (2016)?

RESPONSE: This is the subject of ongoing litigation. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges prohibits me from commenting on pending or impending cases.

56. American public opinion is increasingly coming to favor at least some restrictions on abortion, and that is reflected by new federal and state legislation.
- a. Will you faithfully enforce restrictions on abortions that appear in federal law?

RESPONSE: If I am confirmed as Attorney General, I will faithfully enforce the laws of the United States.

- b. Will you exercise prosecutorial discretion, as with immigration, to not enforce certain valid laws relating protecting the lives of unborn babies?

RESPONSE: If I am confirmed as Attorney General, I will faithfully enforce the laws of the United States.

- c. Will the Biden administration join litigation seeking to invalidate state- level laws protecting the lives of unborn babies?

RESPONSE: As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges prohibits me from commenting on pending or impending cases.

- d. Does the Biden administration plan to make abortion access a priority of enforcement at the Department of Justice?

RESPONSE: If confirmed as Attorney General, I will engage with Department personnel to consider enforcement priorities across the country and the Department.

- e. Should Americans be forced to pay for abortions against their conscience rights?

RESPONSE: As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges prohibits me from commenting on pending or impending cases.

- 57. The Department of Justice safeguards rights against discrimination on the basis of sex, race, and disability, among other characteristics.
 - a. Should a mother be permitted to terminate her pregnancy on the basis of the unborn child's gender?
 - b. Should a mother be permitted to terminate her pregnancy on the basis of the unborn child's suspected disability?
 - c. Should a mother be permitted to terminate her pregnancy on the basis of the unborn child's race?

RESPONSE: These questions are the subject of ongoing litigation. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges prohibits me from commenting on pending or impending cases.

- 58. Do you believe that the Equal Rights Amendment, if enacted, would protect a right to abortion?

Please see my answer to Question 59 below.

- 59. Some advocates claim that the Equal Rights Amendment remains alive and available for ratification, even though Congress imposed a ratification deadline of 1982. Do you agree that this option is open to states that failed to ratify?
 - a. Can it be ratified, moving forward, on the basis of the past approval of states?
 - b. Does that apply to all other proposed amendments which have received some state approval, but not enough to qualify for ratification?
 - c. Justice Ginsburg famously believed that the ERA can no longer be ratified, and that the process has to start over. Is she incorrect?
 - d. When determining whether a sufficient number of states have ratified the ERA, is it appropriate to include states that withdrew their ratification?
 - e. Do you believe there would be a states' rights concern in counting the nearly four-decade-old votes of states who no longer desire to ratify the ERA?
 - f. Will you commit to not revoking the Office of Legal Counsel opinion stating that

Congress many not revive a proposed amendment after a deadline for its ratification has expired?

RESPONSE: The issue to which you refer is the subject of pending litigation involving the Archivist of the United States. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court. If I am confirmed as Attorney General, any opinions or legal advice I might give on this subject would be based solely on the law, and not on any other consideration.

60. Will you commit that acts of violence and destruction will be prosecuted, to the fullest extent of the law, regardless of the politics of the perpetrators?

RESPONSE: Yes.

61. At your hearing, a Senator suggested that burning buildings as part of a riot is mere vandalism and a property crime. Do you believe that unlawfully setting a building on fire in a riot is a violent act?

RESPONSE: I do not recall the context of the first sentence, but unlawfully setting a building on fire is a violent act.

62. The Vice President very publicly encouraged citizens to contribute money for bail for rioters and looters last year, some of whom went on to commit further crimes. Do you support using federal tools to encourage local authorities to prohibit or limit cash bail requirements, so that those arrested for committing violence may be more expeditiously released into the community?

RESPONSE: I am not familiar with any individual cases within the scope of your question, and as a sitting judge, I would be unable to comment on any such cases regardless. And although I have not studied the issue, I do understand that many jurisdictions in the country are assessing the fairness of conditioning release on cash bail rather than other alternatives for those who are unable to afford it, particularly for nonviolent pretrial detainees. If confirmed, I would welcome the opportunity to study this issue and assist state and local law enforcement officials with such assessments.

63. What is your understanding of the policy underlying the slogan “defund the police”? Do you support that underlying policy?

RESPONSE: As I stated at my hearing, I do not support defunding the police. I support giving police departments the resources they need to help them reform and build community trust. I also support giving communities mental health and other resources so that police can do the job they are trained to do.

64. Is it appropriate for a witness to a crime to consider the race of the perpetrator when deciding whether to provide information to the police or federal authorities?

RESPONSE: It is important that individuals reporting to law enforcement about crimes or potential crimes make those calls on the basis of criminal conduct, not the race of the suspect.

65. Is it racist for a person to call police out of concern over the conduct of a person of color?

a. Can it ever be racist, provided that person has in fact committed the alleged crime?

RESPONSE: Please see response to Question 64.

66. Do you believe that an individual who attended the Trump rally on January 6, 2021 did not participate in any act of violence should be prohibited in holding a political position in the Department of Justice in a future administration, even if he or she did not personally engage in any unlawful conduct?

RESPONSE: Americans have a constitutional right to engage in lawful, peaceful protest. If confirmed, I would assess any candidate's fitness for a role in the Department on an individual basis and with the goal of hiring individuals who are capable of carrying out the Department's important mission with integrity.

67. Do you believe that an individual who attended a protest during the summer of 2020 and did not participate in any act of violence should be permitted to hold a political position in the Department of Justice, even if he or she did personally engage in any unlawful conduct?

RESPONSE: Please see response to Question 66.

68. Is participation in a riot grounds for termination from the Department of Justice?

RESPONSE: While I am not familiar with the administrative termination procedures in the Department, I would expect that unlawful conduct is a ground for termination.

69. At your hearing, you stated that your definition of "domestic terrorism" is "about the same" as the statutory definition.

a. What is the statutory definition of "domestic terrorism"?

RESPONSE: The term "domestic terrorism" is statutorily defined in 18 U.S.C. § 2331.

b. What is your definition of "domestic terrorism"?

c. What is the difference between your definition and the statutory definition?

d. What relevance will your personal definition of "domestic terrorism" have to your

duties, if confirmed, as Attorney General?

RESPONSE: At the hearing, I described domestic terrorism as using violence or threats of violence in an attempt to disrupt democratic processes, noting that this definition is close to the statutory definition of the term in the criminal code codified at 18 U.S.C. § 2331. If confirmed, all of my actions as Attorney General would be guided by the law as written.

70. At your hearing, you said that an attack on a courthouse while in operation, trying to prevent judges from actually trying cases, “plainly is domestic extremism.” You mentioned also that an attack “simply on government property at night or any other kind of circumstances” is a clear and serious crime, but seemed to make a distinction between the two regarding an “attack on our democratic institutions.”
- a. Is it your position that if rioters targeted and stormed the Capitol in the middle of the night, when Congress was not in the Capitol, it would not constitute “domestic terrorism” or an “attack on our democratic institutions”?

RESPONSE: My testimony was intended to explain why I regard the January 6 attack on the Capitol as a particularly heinous act.

- b. Is it your position that if Timothy McVeigh had bombed the Alfred P. Murrah Federal Building at 5 a.m., it would not constitute “domestic terrorism” or an “attack on our democratic institutions”?
- c. My understanding is that Timothy McVeigh did not bomb the Alfred P. Murrah Federal Building because he wished to disrupt the proceedings at that specific building, but did so to send a message against the federal government for its handling of incidents at Ruby Ridge and Waco. Under the definition you provided at the hearing, that would not qualify “domestic terrorism.” Please explain why that is correct or incorrect.

RESPONSE (b – c): Timothy McVeigh intentionally built and detonated a bomb that killed at least 168 people and injured more than 680 others. This act of mass destruction was intended to intimidate and coerce a civilian population and spark a revolution that would topple the federal government. It was an act of domestic terrorism.

- d. You stated that you were not familiar with the facts surrounding the over 50 days of rioting in which rioters assaulted a federal courthouse, federal officers, and local law enforcement personnel with hammers, lasers, baseball bats, fireworks, Molotov cocktails, chemicals, and other weapons resulting in over 270 injuries to federal law enforcement officers. Having now had an opportunity to familiarize yourself with the facts, do you believe this was “domestic terrorism?” Please explain why or why not.

RESPONSE: As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case that is in any court.

As I described throughout the hearing, if I am confirmed I will fairly and impartially apply the law and vigorously prosecute incidents of violence and domestic terrorism regardless of the ideology motivating such acts.

71. Is the criminal justice system systemically racist?
 - a. Are police unions systemically racist?
 - b. Is the Department of Justice systemically racist?

RESPONSE: As I explained in my hearing, acknowledging the existence of systemic racism in society does not mean that any particular institution or individual is systemically racist.

72. Do you agree that the vast majority of law enforcement personnel are good people who fairly enforce the law without regard to race?

RESPONSE: I have spent my entire career working with our Nation's law enforcement personnel, for whom I have great respect, and I have relied on their good judgment for decades.

73. Would it be appropriate for the Department of Justice to provide trainings that teach the following:
 - a. One race or sex is inherently superior to another race or sex;
 - b. An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;
 - c. An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or
 - d. Meritocracy or related values such as work ethic are racist or sexist.

RESPONSE: On his first day in office, President Biden issued an Executive Order stating that it is the policy of his administration "to advance racial equity for all," meaning "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." As part of that Executive Order, President Biden rescinded Executive Order 13950, which related to workplace trainings, and directed all agency heads to consider appropriate actions in response, as consistent with applicable law. If confirmed, I would look forward to supporting the President's efforts to advance racial equity.

74. Could training or teaching any of the propositions stated in question 73 result in a hostile work environment in violation of Title VII of the Civil Rights Act? Please explain.

RESPONSE: If confirmed, I would seek to ensure that all Department actions fully conform with federal law, including Title VII of the Civil Rights Act as applicable.

75. Will you commit to producing any and all training materials used by the Department of Justice upon request so that the public understands what is being taught to the people in charge of enforcing our laws?

RESPONSE: As I stated during my hearing, it would be my goal if confirmed to have the Department be responsive to congressional requests for information and, if the Department cannot answer a question, to explain why it cannot do so.

76. President Biden last month issued an Executive Order blocking the Department of Justice from renewing contracts for privately-operated detention centers. Unlike the Federal Bureau of Prisons, the U.S. Marshals Service does not have its own facilities; please explain why the U.S. Marshals Service should not be allowed to renew its contracts with private facility operators.

RESPONSE: I am not familiar with the nature of the contracts the U.S. Marshals Service has with privately owned facilities.

77. Where marijuana is “legalized,” does law enforcement currently have technology to accurately determine whether a driver has unsafe levels of THC in his or her system for the purposes of driving?
- a. If not, what is the solution for this problem?

RESPONSE: Because I am not currently at the Department, I am not familiar with the technology that is available to accurately assess whether a driver has unsafe levels of THC in his or her system.

78. By most indications, illicit and large-scale marijuana trafficking activity has increased; if you are confirmed, what actions will you undertake to counter the trend?

RESPONSE: As I testified at my hearing, it is important to focus our attention on violent crimes and other crimes that greatly endanger in our society. Large-scale illicit drug trafficking should be distinguished from simple marijuana possession and should be vigorously investigated and prosecuted.

79. Is there currently a crime problem in America’s urban centers?
- a. Is crime worse than it has been in years past?
- b. Do statistics suggest there has been a jump in violent crime?
- c. Does this problem require more police, or fewer police, on the streets?

- d. Given the assertion that police are systematically racist, does additional funding for, or deployment of, police in America's city constitute an act of racism?

RESPONSE: Combatting violent crime is an important duty of the Department of Justice. I spent much of my early career working on the issue of violent crime. During my time at the Justice Department, I was one of the developers of its Violent Crime Initiative. If confirmed as Attorney General, I look forward to using the Department's resources to find innovative and sustainable ways to decrease violence across our Nation.

80. Is it appropriate for the Department of Justice to use settlements as a means to provide funding to outside organizations?

RESPONSE: As I testified at my hearing, I have not studied this specific issue. If I am confirmed, I will carefully consider the matter and the arguments on both sides, including both the reasons why this practice developed and the reasons why it was changed.

81. At your hearing, you stressed the importance of transparency and congressional oversight. Will you commit to provide a yearly report to the Committee listing every suit settled by the Department of Justice whereby a settlement requires the defendant to pay any amount to a third-party (excluding customary attorneys' fees and costs)?
- a. If you are not willing to commit to providing a yearly list, will you commit to providing the information in a timely manner upon request?

RESPONSE: As I testified at my hearing, I have great respect for the oversight role of the Senate Judiciary Committee. And as I also testified at my hearing, I will seek to ensure that the Department responds to oversight requests in a timely manner, subject to the Department's longstanding policies and practices that may limit what can be disclosed in response to particular requests.

82. Does the President have the authority to abolish the death penalty?
- a. Does the implementation of a criminal punishment prescribed by law depend entirely on the President's discretion?
- b. Could a President lawfully declare, as a policy, that he disfavors physical imprisonment and order all federal prosecutors to refuse to seek it?

RESPONSE: The President could not abolish the death penalty, which is reflected in federal and state statutes. But the President has the authority to declare an across-the-board moratorium on executions. The President also has broad clemency powers, which includes the power to commute an individual's sentence of death to a lesser punishment or to commute an individual's sentence of imprisonment to a lesser punishment.

83. What is the difference between a commutation and refusal to carry out the death penalty?

- a. Are there differences in the effect on future cases?
- b. On the political accountability involved?

RESPONSE: The President has broad clemency powers, which include the power to commute an individual's sentence of death. I am not able to speculate on the hypothetical effect on future cases or on political accountability.

84. Will you commit to having the Bureau of Prisons continue with executions for murderers on death row who have exhausted their appeals, unless the President takes the politically accountable step of commuting their sentences?

RESPONSE: Because I am not in the Department, I cannot make such commitments without studying the issue further and learning the Administration's policy positions.

85. Will you commit to allowing line prosecutors to seek the death penalty in appropriate cases?

RESPONSE: I cannot speculate on hypothetical future cases. To the extent that your question implicates current cases, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case that is in any court.

86. You prosecuted Timothy McVeigh, a terrorist who bombed the Oklahoma federal building, murdering 168 people, including 19 children and infants in a day care center. McVeigh was sentenced to death and was executed in 2001.
- a. Should Attorney General Reno have refused to have prosecutors seek the death penalty?
 - b. Should Attorney General Ashcroft have stopped his execution?

RESPONSE: As I testified at my hearing, I do not regret seeking the death penalty against Timothy McVeigh. I supported the death penalty at that time in that case.

87. Last year, the United States carried out the death sentence against Daniel Lewis Lee. Lee was a virulent racist who murdered a husband and wife along with their 8-year-old daughter.
- a. If you were Attorney General at the time of Daniel Lee's execution, would you have prevented the Bureau of Prisons from carrying out his sentence?

RESPONSE: I am not familiar with the specifics of this case. As such, it would not be appropriate for me to comment further.

88. The Boston Marathon bomber, Dzhokhar Tsarnaev, murdered three people and injured

264 with two pressure cooker bombs. A court of appeals recently reversed his death sentence, and the Department of Justice appealed to the Supreme Court. At your hearing you refused to commit to maintaining the Justice Department's position, stating that you are unable to opine on a pending matter as a sitting judge. The question, however, was not about the merits of the case that could come before you, but rather about whether the Department of Justice would take the radical step of reversing its position.

- a. Will you commit to maintaining the Department's position in the Tsarnaev case?
- b. If you refuse to answer subpart (a), have you sought the advice of an ethics expert to determine whether you may provide an answer to this question? If not, why not. If so, what was the advice, and its basis?
- c. Even if the appeal is unsuccessful, prosecutors will have the opportunity to again seek the death penalty. Can you commit that the Department of Justice will seek the death penalty on remand?

RESPONSE: These questions implicate a pending case, so I am barred from commenting on this matter by Canon 3 of the Code of Conduct for United States Judges.

89. You stated at your hearing that your concerns with the death penalty have grown because of the increasing awareness of false convictions.
 - d. I assume that, like me, you have no doubt that Dylann Roof was correctly and lawfully convicted of murdering nine people in cold blood during a bible study at Emanuel African Methodist Episcopal Church. Given that there are no concerns about false conviction, will you commit to working with the Bureau of Prisons to carry-out his execution? If not, what is the basis for your refusal?
 - e. How many of the individuals who had their federal death sentences carried out since 2000 do you believe were wrongly convicted? If the answer is anything other than "none," state which individuals you believe were wrongly convicted.
 - f. How many individuals currently on federal death row do you believe were wrongly convicted? If the answer is anything other than "none," state which individuals you believe were wrongly convicted.

RESPONSE: I testified at my hearing that I have developed concerns about the death penalty due to the large number of exonerations, the apparent arbitrariness of application, and the disparate impact on Black Americans and other people of color. Exonerations of individuals sentenced to death are well documented. However, I am not familiar with the specifics of the cases involving individuals who are currently on federal death row, and I am banned from commenting on pending or impending cases by Canon 3.

90. Do civil rights laws apply to all Americans or only certain Americans?

RESPONSE: Civil rights laws apply to all Americans.

91. Do you approve of the Biden administration's recent decision to voluntarily dismiss a suit against Yale for discrimination against Asian Americans? If you lack sufficient knowledge about the suit, will you commit to reviewing the dismissal to determine whether it was in error?

RESPONSE: My understanding from publicly available information is that the Department recently voluntarily dismissed one such lawsuit, but that related matters remain pending. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case that is in any court. As a general matter, if I am confirmed, the Department will conduct its investigatory work guided by the facts and the law.

92. In 2011, the U.S. Department of Education issued a dear Deal Colleague Letter to colleges and universities that broadened the definition of sexual harassment and required covered institutions to adopt a lenient "more likely than not" burden of proof when adjudicating claims. Should this standard of proof govern?

RESPONSE: My understanding is that these matters are currently the subject of pending litigation. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case that is in any court.

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

RESPONSE: Title IX requires that schools provide all parties with a fair process, including both survivors and those accused of sexual misconduct.

94. As Chief Judge of the D.C. Circuit, you instituted reforms to prevent sexual harassment. Did any of these reforms include adopting a "more likely than not standard," or otherwise altering traditional rights to due process?

RESPONSE: I do not believe the D.C. Circuit reforms addressed a standard of proof.

95. Will you commit to hiring career attorneys for the civil rights division without regard to ideology?
- a. If the vast majority of attorneys in the civil rights division hold liberal political views, does this suggest discriminatory hiring?
 - b. Would your answer be the same if the vast majority of attorneys identified with the same racial group? Please explain.

RESPONSE: If confirmed, it will be my direction that personnel decisions at the Justice Department are made consistent with civil service laws and departmental policies, and without regard to any prohibited considerations, including ideology.

96. Is it appropriate for the Department of Justice to consider an individual's race, sex, or sexual orientation when making a hiring decision for career positions? For political appointments, including judicial nominations? If the answer is "yes," in what manner and to what extent may race, sex, or sexual orientation be considered?

RESPONSE: President Biden has been clear that he values a process that brings diverse perspectives and expertise to the table, as do I. Executive Order 11478, as amended, directs executive departments and agencies "to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, age, sexual orientation, gender identity, or status as a parent, and to promote the full realization of equal employment opportunity through a continuing affirmative program." If confirmed, it will be my direction that the Department shall conform fully with this Executive Order and all applicable law.

97. Should colleges receiving federal funds be permitted to consider the race, sex, or sexual orientation of prospective students in admissions decisions?
- c. Are racial quotas constitutionally permissible?
- d. What compelling justification, if any, can be offered for racial discrimination in college admissions?

RESPONSE: As I stated during my hearing, the Supreme Court has repeatedly affirmed that universities have a compelling interest in obtaining "the educational benefits that flow from student body diversity," and that it is permissible to consider race as part of a holistic approach to achieving these goals. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). The Court has also made clear that "a race-conscious admissions program cannot use a quota system." *Id* at 334. If confirmed, I would seek to ensure that the Department's federal funding programs comply fully with applicable law.

98. In 2019, the attorney general of Michigan announced her new "hate crimes unit" would use the Southern Poverty Law Center's "hate group" list in the enforcement of law, and two conservative organizations have filed lawsuits claiming this violates the First Amendment.
- a. Do you believe that the SPLC's "hate group" list is sufficiently credible that Department of Justice employees may rely on it?
- b. If your answer to subpart (a) is anything other than "yes," will you commit to ensuring that Department of Justice attorneys do not rely in whole or in objectionable part on the SPLC's "hate group" list?

- c. If your answer to subpart (a) is anything other than “no,” do you agree with SPLC that any of the following are “hate groups”:
 - i. The Ruth Institute;
 - ii. Alliance Defending Freedom;
 - iii. Family Research Council

RESPONSE: I am not familiar with how the Southern Poverty Law Center classifies groups, nor am I familiar with any deliberations regarding classifying the groups listed in (c).

99. Title IX of the Civil Rights Act prevents sex-based discrimination in any school or educational program that receives federal funds. Title IX has led to the proliferation and growth of women’s sports.
 - a. Do biological men possess a physiological advantage compared to biological women in collegiate sports?
 - b. If so, what implications, if any, does this have for Title IX?
 - c. Does it violate women’s rights to open female competitions to biological men?

RESPONSE: The issues you reference are the subject of ongoing litigation. As a sitting federal judge, Canon 3 prohibits me from commenting on such matters.

100. At your hearing, you stated about Kristen Clarke: she has “views about the civil rights division I have discussed with her and they are in line with my own.” Are any of her public views materially different than your views? If so, which views?

RESPONSE: Kristen Clarke is a person of great integrity with a proven track record of advocating for the most vulnerable among us and defending liberty. If we are both confirmed, I look forward to her valuable insights as part of our Department leadership team.

101. Does voter fraud exist?

RESPONSE: Yes, there have been documented, isolated instances of voter fraud. Fortunately, I have not seen evidence of widespread voter fraud.

102. Is voter fraud an issue that should be addressed?

RESPONSE: The Department investigates credible allegations of voter fraud.

103. Do you agree with the Baker-Carter Commission’s conclusion that “absentee ballots

remain the largest source of potential voter fraud”?

RESPONSE: I am not familiar with the conclusions of this commission. I understand that it concluded its work over 15 years ago.

104. Do you agree with the Baker-Carter Commission’s conclusion that fraud is particularly possible where “third-party organizations, candidates, and political party activists” are involved in “handling absentee ballots”?

RESPONSE: I am not familiar with the conclusions of this commission. I understand that it concluded its work over 15 years ago.

105. Can Voter ID laws help prevent voter fraud?

RESPONSE: I am unfamiliar with what specific laws or regulations could have prevented the documented, isolated incidents of voter fraud. If confirmed, I would prioritize working to ensure that all eligible Americans have the opportunity to cast their ballot in a free and fair election.

106. Can you commit to affirmatively investigating any credible allegations of fraud in any election?

RESPONSE: If confirmed, I will seek to ensure that the Department investigates credible allegations of voter fraud within its jurisdiction.

107. Are there any violations of the Voting Rights Act that should not result in the Department of Justice moving to place a jurisdiction under preclearance?

RESPONSE: The effect of the *Shelby County* decision is that the jurisdictions identified by the coverage formula in Section 4(b) of the Voting Rights Act no longer need to seek preclearance for new voting changes. Jurisdictions covered by a separate court order entered under Section 3(c) of the Act must still seek preclearance under that section, which provides the remaining standards for preclearance.

108. Former Attorney General Holder described himself as the President’s “wingman.” Is this an accurate description of the Attorney General’s role?
- a. If you are confirmed, will you act as President Biden’s “wingman”?

RESPONSE: If confirmed, I will be the lawyer for the people of the United States.

109. Who makes the laws—the President or Congress, or neither?

RESPONSE: “Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.” *INS v. Chadha*, 462 U.S. 919, 945 (1983). To become a law, a bill must be passed

by both the House of Representatives and the Senate, then presented to the President for his signature or veto. U.S. Const. art. I, § 7, Cl. 2. The bill becomes a law if the President signs it; if the House and Senate override his veto by a two-thirds vote; or the bill is not “returned by the President within ten days (Sundays excepted),” unless “the Congress by their adjournment prevent its return.” *Id.*

110. Is it consistent with the rule of law for the President or the Attorney General to refuse to enforce a law because he disagrees with it?

RESPONSE: As I testified at my hearing, prosecutors and other government agencies have exercised discretion about how to allocate their resources in terms of enforcement priorities, both criminal and civil, throughout our Nation’s history. But the Executive Branch cannot simply decide, based on a policy disagreement, that it will not enforce a law at all.

111. Is it consistent with the rule of law for federal prosecutors to refuse to prosecute individuals who violate federal drug laws because the President disagrees with those laws?

RESPONSE: As I testified at my hearing, it is important to prioritize the Department’s limited resources to prosecute violent crimes and other crimes that greatly endanger our society. Large-scale illicit drug trafficking should be distinguished from simple marijuana possession. But the Executive Branch cannot simply decide, based on a policy disagreement, that it will not enforce a law at all.

112. The Obama-Biden administration refused to enforce certain federal drug laws to avoid triggering mandatory minimum sentences enacted by Congress. Is this consistent with the rule of law?

RESPONSE: As I testified at my hearing, I support the policy I helped draft for Attorney General Reno, and that was furthered by Attorney General Holder, in which prosecutors are not required to seek in every case the most serious offense with the highest possible sentence. I believe that the Department should give discretion to its prosecutors to make the offense and the charge fit the crime and be proportional to the damage that it does to our society. In addition, as President Biden has suggested, we should consider the elimination of mandatory minimums so that we, once again, give authority to trial judges to make determinations based on all of the sentencing factors that judges normally apply granting them the ability to do justice in individual cases.

113. Democrats criticized former Attorney General Barr for overriding line prosecutors in recommending a sentence for Roger Stone, alleging this was political, even though the trial court, exercising its independent judgment, ended up agreeing with Barr’s recommendation.
- a. Do you agree with this criticism that it politicized the Department of Justice’s work to override the line prosecutors?

- b. If so, do you commit that political appointees will never override the decisions of career employees?

RESPONSE: As I stated at the hearing, as a nominee I should not comment on Justice Department officials' prior decisions. I want you to judge me on my own record and what I do going forward.

- 114. In 2012, the House voted to hold then-Attorney General Eric Holder in contempt of Congress for his failure to turn over documents related to the Fast and Furious scandal.
 - a. If you had been in Eric Holder's position, would you also have refused to turn over documents relevant to a legitimate investigation into a serious scandal?

RESPONSE: As I stated at the hearing, as a nominee I should not comment on Justice Department officials' prior decisions. I want you to judge me on my own record and what I do going forward.

- 115. Who are the relevant parties for the Department of Justice to consult before reaching a settlement and establishing a consent decree?
 - a. Should the public have a chance to review and comment on such arrangements?
 - b. Is there a concern over the integrity of a "settlement" when two parties are not actually adverse?

RESPONSE: Consent decrees are sometimes appropriate to enact a shared goal. These agreements are not one-sided. The Justice Department has been given these tools by Congress and I believe it is important that the Department consider all tools at its disposal when tailoring resolutions.

- 116. Will you abide by all court orders?
 - a. Including declaratory judgments?
 - b. Including injunctions?
 - c. Including injunctions imposed nationwide by the issuing court?

RESPONSE: If I am confirmed, I will seek to ensure that the Department of Justice complies with all court orders.

- 117. When is it appropriate for political appointees in the Department of Justice to override decisions made by career FBI agents?

RESPONSE: As I testified at my hearing, I have always been extremely careful, as a

prosecutor and as a judge, not to comment about something without knowing the facts. As a Justice Department nominee, I am not in a position to comment on this hypothetical.

118. When is it appropriate for political appointees in the Department of Justice to override decisions made by career Department of Justice attorneys?

RESPONSE: As I testified at my hearing, I have always been extremely careful, as a prosecutor and as a judge, not to comment about something without knowing the facts. As a Justice Department nominee, I am not in a position to comment on this hypothetical.

119. Do you accept the legitimacy of the Supreme Court as currently constituted?

RESPONSE: Yes.

120. 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?

RESPONSE: I understand that President Biden has stated his intent to create a bipartisan commission to study the court system. If confirmed, I would review the issue as appropriate.

121. Should there be a Code of Conduct for Supreme Court justices?

RESPONSE: During my time as a federal judge, I have rigorously adhered to the Code of Conduct for United States Judges. I have not had occasion to consider whether that or another ethical code should govern Supreme Court justices, but I understand from public reporting that the issue has been a subject of discussion.

122. Given the information in the public domain, do you believe that Brett Kavanaugh sexually assaulted Christine Blasey Ford?

RESPONSE: As a Justice Department nominee, it would not be appropriate for me to answer a question like this.

123. What is your understanding of the scope of the President's decision-making authority after *United States v Nixon* and *Seila Law v CFPB*?
- a. Should agencies, such as the FCC, receive any insulation from presidential control and administration?
 - b. To what extent, if any, is the Department of Justice independent from the political directives of the President?
 - c. What is the Unitary Executive theory? Do you agree with this theory? If not, why not?

RESPONSE: The Supreme Court’s decision in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), is the Court’s most recent statement on the President’s authority to supervise and remove officers in the Executive Branch. The Court explained that the executive power conferred on the President by Article II of the Constitution “generally includes the ability to remove executive officials.” *Id.* at 2197. The Court noted that its decisions have recognized “two exceptions to the President’s unrestricted removal power.” *Id.* at 2198. First, the Court has held that the heads of certain multimember commissions like the Federal Trade Commission can be protected from removal “except for ‘inefficiency, neglect of duty, or malfeasance in office.’” *Id.* (citation omitted). Second, the Court has upheld statutory restrictions on the removal of “*inferior* officers.” *Id.* at 2199. In *Seila Law*, the Court declined to “extend those precedents” to allow Congress to limit the President’s authority to remove the head of the Consumer Financial Protection Bureau, which the Court described as “an independent agency led by a single Director and vested with significant executive power.” *Id.* at 2201.

The Department of Justice is part of the Executive Branch. For that reason, the Department follows the President’s direction on policy matters. But since Watergate, the Department has developed powerful norms, policies, and traditions to protect the independence of its prosecutions and investigations. President Biden has committed that he will not interfere with the Department in those matters. Those decisions will be made by the Department, under my leadership, if I am confirmed. And those decisions will be made without respect to partisanship, the perpetrator’s power or lack of power, or any other improper consideration.

124. Reports indicate that Governor Cuomo, of New York, actively withheld information from the Department of Justice and intentionally misled federal officials to avoid political accountability in his handling of COVID-19.
 - a. Is withholding information requested by federal authorities a crime?
 - b. Is misleading federal investigators a crime?
 - c. Is encouraging or ordering others to withhold material information from the FBI a crime?

RESPONSE: As I testified at my hearing, I have always been extremely careful, as a prosecutor and as a judge, not to comment about something without knowing the facts. As a Justice Department nominee, I am not in a position to comment on these hypotheticals.

125. Will you commit the Department of Justice to fully investigating the allegations that Governor Cuomo and/or his staff violated the civil rights of New York senior citizens and later misled the Department of Justice regarding its actions?
 - a. Will you commit to determining whether any criminal laws were violated?

- b. Will you commit to prosecuting attempts to obstruct justice in this case?

RESPONSE: If confirmed, I will make decisions concerning investigations and charging decisions based on the facts and the law.

126. Do you agree that Toni Bacon—the acting U.S. Attorney for the Northern District of New York, a career Department of Justice employee and former Elder Justice coordinator—is well-suited to lead a politically sensitive investigation into the actions of Governor Cuomo’s administration?

RESPONSE: As I testified at my hearing, I have always been extremely careful, as a prosecutor and as a judge, not to comment about something without knowing the facts. As a Justice Department nominee, I am not familiar with the relevant facts here, and therefore am not in a position to comment.

127. At your hearing, you committed to ensuring that the individual who runs any investigation into the actions of Governor Cuomo’s administration will not have a conflict of interest.
- a. Do you agree that Audrey Strauss would have a conflict of interest?
- b. Would an individual with substantial ties to Governor Cuomo’s campaign have a conflict of interest?
- c. Would an individual with ties to the New York State Democratic Party have a conflict of interest?

RESPONSE: Government ethics rules serve vitally important purposes, and Justice Department ethics officials provide guidance on when conflicts of interest exist. As a Justice Department nominee, I do not know facts relevant to these questions and hypotheticals, but as a general matter, if I am confirmed, I will seek to ensure that all ethics rules are scrupulously followed.

Senator Sasse

Responses to Questions from Senator Sasse to Judge Merrick Garland, Nominee to be United States Attorney General

1. In your opening statement, you discussed the notion that the Attorney General's client is not the President, but rather the United States. Nevertheless, the Attorney General is obviously part of the President's team. We should surely expect that the Attorney General and the Department are going to be trying their best to support the administration as a whole and its agenda.
 - a. Can you explain exactly how that tension works in practice and how you plan to navigate these competing demands?
 - b. Given that both the Attorney General and federal judges take an oath to the Constitution and laws of the United States, do they both have a duty to abide by their best view of the law, or does the Attorney General have more flexibility to interpret the law in a way more favorable to the administration's agenda? Do the relationships between the coordinate branches affect how officers in each branch should approach legal interpretation?

RESPONSE: Decisions concerning investigations and prosecutions at the Justice Department must be based on the facts and the law. With respect to matters of policy, because the Justice Department is part of the Executive Branch, the Department follows the lead of the President so long as the President's policy is consistent with the law. In other words, where there is room under the law for the President's policies to be pursued, the President is entitled to pursue them. But the Department must advise the President on whether his or her policies are consistent with the law.

2. You have spoken admirably about the importance of shoring up the integrity of the Department. Unfortunately, the nature of our tribal partisanship means that it is very easy for each party to decry the abuses they see in the administration of the other party, but it is much harder to stand up for the rule of law when it involves standing up to an administration of the same party.
 - a. Do you agree that preserving the integrity of the Department depends not just on resisting politically driven interference in investigations, but also in resisting stretching statutory authorities past their limits to accomplish the parts of a President's agenda that cannot pass through Congress?
 - b. Is it healthy for the republic for a President to say that he will resort to his pen and phone to get his agenda through against the will of Congress? How should an administration pursue its agenda when Congress seriously disagrees on first principles?

- c. Please list some instances in which the demands of the law and the facts of a particular situation or case have forced you to reach an answer that did not serve the agenda of an administration in which you served.
- d. Please list some instances when you as a judge have ruled against some high-profile priorities of administrations of your same party.

RESPONSE: Investigations and prosecutions at the Justice Department must be based on the facts and the law. With respect to matters of policy, because the Justice Department is part of the Executive Branch, the Department follows the direction of the President. In other words, where there is room under the law for the President's policies to be pursued, the President is entitled to pursue them. But the Department must advise the President on whether his or her policies are consistent with the law. I have decided many cases both for and against each of the four administrations that have spanned my 24 years on the bench.

- 3. Turning to the matter of politically sensitive investigations, I hope you share the desire to figure out how we build robust and durable processes to handle these cases so that Americans and their elected representatives can have confidence that no matter who is in office the law will be enforced.
 - a. What are the biggest takeaways that you've garnered from the IG reports on the Clinton email investigation and the Trump-Russia investigation? What lessons should we have learned?

RESPONSE: As I stated at the hearing, as a nominee I should not comment on Justice Department officials' prior decisions, as I want you to judge me on my own record and what I do going forward.

- b. When you have a high-profile, politically sensitive investigation cross your desk, how do you plan to handle it?

RESPONSE: If confirmed, I will make decisions concerning investigations based on the facts and the law.

- c. Given your praise on the post-Watergate Department's groundbreaking policies to preserve the Department's integrity, do you plan use that period as a model for instituting any new policies for the Department?

RESPONSE: As I testified at my hearing, policies that the Justice Department developed in the wake of Watergate are the foundation for the norms that seek to ensure that the Department adheres to the rule of law.

4. In your hearing, I indicated that I intended to ask you questions for the record about China.
 - a. Do you agree that the Chinese Communist Party (CCP) is our greatest geostrategic and ideological adversary on the international stage?

RESPONSE: Secretary of State Blinken has repeatedly observed that China represents the most significant challenge to the United States of any country in the world. As I testified at my hearing, there is no doubt that China poses threats that the United States must defend against with a whole-of-government response. If confirmed, I will assess the Department's current structure and capacity to counter such threats and will fully support the President's national security team to protect the American people's security, prosperity, health, and way of life.

- b. How would you evaluate the Department's China Initiative? Was it needed, and if so, why? What has been its greatest successes? Has there been overreach? Was there underreach in light of the CCP's influence operations?

RESPONSE: Because I am not currently at the Department, I am not familiar with the details of this initiative. However, if confirmed, I look forward to learning more about this is reviewing this and any related initiatives that are underway and ensuring that all of the tools at the Department's disposal are being put to their best use to counter threats from China.

- c. What is going to be necessary to convince the venture capital and academic community to take this threat seriously?

RESPONSE: If confirmed, I look forward to learning more about this issue and the Department's efforts in this area.

5. As a sitting federal judge, I am confident that you share my perspective that the judicial selection process is critically important.

- a. Is it your understanding that you will have a significant role in the administration's judicial selection process?
- b. As Attorney General, will you use your platform to advocate for judicial nominees that are reasonable and can command public trust across the political spectrum?

RESPONSE: It is my understanding that the Department of Justice traditionally plays a role in advising the President on the selection of judicial nominees, including vetting of potential nominees by the Department's Office of Legal Policy. If I am confirmed, I would recommend the nomination of individuals of outstanding character and ability.

6. Public safety is obviously one of the basic responsibilities of the Department.
 - a. How do you plan to balance your obligations under the FIRST STEP Act with the need to protect public safety?

RESPONSE: Based on my understanding of the First Step Act, I do not believe that the law is in tension with ensuring public safety. Rather, I believe the two are complementary and reinforcing. For example, the First Step Act contains provisions aimed at reducing recidivism and reducing recidivism helps promote public safety and public welfare.

- b. Do you agree that the federal prison population contains very few offenders that are incarcerated because of low-level, non-violent drug offenses?

RESPONSE: Because I am not currently at the Department, I am not familiar with the precise classifications of incarcerated persons in Bureau of Prison facilities.

- c. Given the significant amount of violence associated with trade in narcotics, are drug traffickers properly considered non-violent?

RESPONSE: As I testified, I believe that it is important to devote Department resources to the most serious offenders, which can include drug traffickers. I have not studied the issue of how various offenders are classified, but whether a person has engaged in violence has been a factor in the exercise of prosecutorial discretion and in sentencing policy for decades.

- d. Does increasing judicial discretion in sentencing risk increasing racial disparities in sentences?

RESPONSE: Judges retain judicial discretion under our current advisory federal sentencing guidelines. I have not examined the data on this issue, but it is a question worthy of study.

7. The Department of Education has two rules that protect religious student groups, 34 CFR §§ 75.500(d) and 76.500(d). These rules prohibit public college administrators from discriminating against student groups because of their sincerely held religious beliefs, speech, and leadership standards. These rules ensure that students of all faiths feel welcome and respected at any public college that receives federal grants.
 - a. Will you assure me that the Department will defend these rules against any court challenges?

RESPONSE: As I testified at my hearing, I am a strong believer in religious liberty. I have not studied these specific rules or any legal issues they may raise. In general, the Department of Justice’s legal defense of regulations issued by another agency is guided by close consultation with the client agency and a careful review of the facts and the law. If I am confirmed and these rules are challenged in court, I would follow that same approach here.

8. In a January 6, 2020 opinion, the Department’s Office of Legal Counsel concluded “that Congress had the constitutional authority to impose a deadline on the ratification of the [Equal Rights Amendment] and, because that deadline has expired, the ERA Resolution is no longer pending before the States.” Accordingly, the opinion goes on to state that “the 1972 version of the ERA has failed of adoption.”
 - a. Do you see any cause for modifying or rescinding this opinion? Will you commit that the Department under your leadership will not modify or rescind the opinion?

RESPONSE: The issue to which you refer is the subject of pending litigation involving the Archivist of the United States. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court. If I am confirmed as Attorney General, any opinions or legal advice I might give on this subject would be based solely on the law, and not on any other consideration.

Senator Hawley

Responses to Questions from Senator Hawley to Judge Merrick Garland, Nominee to be United States Attorney General

1. If you are confirmed as Attorney General, when, if ever, would you independently recommend, advise, or direct that the Department of Justice decline to defend a Federal statute?

RESPONSE: I understand that, as a general matter, the Department of Justice will defend laws that Congress passed so long as there is a reasonable argument to be made that the law is constitutional, and so long as the statute does not violate the separation of powers by infringing on executive authority.

2. If you are confirmed as Attorney General, do you intend to faithfully enforce the laws prohibiting unlawful entry into the United States, whether through unauthorized border crossings or visa overstays?

RESPONSE: As I testified at my hearing, if I am confirmed the Department of Justice will work to prevent unlawful entry into the United States. I look forward to studying the issue and consulting with Department officials to review the Department's current efforts in this area and to determine the most effective way to accomplish that goal given the Department's available resources.

3. If you are confirmed as Attorney General, would you independently recommend, advise, or advocate that the domestic operations of U.S. Immigrations and Customs Enforcement be significantly curtailed or restructured?

RESPONSE: I would refer you to President Biden's Executive Orders on immigration policy and enforcement. As a federal judge for the last 24 years, I have not had occasion to become familiar with this issue.

4. If you are confirmed as Attorney General, do you intend to faithfully use Federal law enforcement resources to defend Federal property against violent rioters, without prejudice to whether those rioters hold radical left-wing or right-wing views?

RESPONSE: If confirmed, I will enforce federal law without regard to the ideology of those who violate it.

5. If you are confirmed as Attorney General, as you conduct your investigation of the rioting that took place at the Capitol grounds on January 6, 2021, what specific steps do you intend to take to ensure that Americans' First Amendment rights to criticize their government and pursue political change are not infringed?

RESPONSE: Americans have a fundamental right to engage in lawful, peaceful protest. If confirmed, I will vigorously defend this right. Acts of violence and other criminal acts are not protected under the Constitution.

6. In testimony to Sen. Cruz about Operation Choke Point, you stated that you “do not believe as a general matter that regulations should be used to stop people from doing what they are lawfully entitled to do, unless the regulation is pursuant to a statute, obviously, in which Congress is given authority to change the rules.” If you are confirmed as Attorney General, would you independently recommend, advise, or direct that the Department of Justice pursue legal actions against, or develop legal theories for the Federal prosecution of, websites, firearms manufacturers, internet platforms, banks, financial services providers, book distributors, or religious organizations that are engaged in activities traditionally understood to be protected by the First and Second Amendment?

RESPONSE: As I testified, I am not familiar with Operation Choke Point. But it is improper to target an individual or entity for prosecution or other enforcement action because of their constitutionally protected activity.

7. If you are confirmed as Attorney General, would you independently recommend, advise, or direct that the Department of Justice pursue efforts to criminalize, prosecute, undermine, or obtain technological backdoors into end-to-end encrypted messaging technologies?

RESPONSE: I agree that it is important to address law enforcement’s legitimate need to protect public safety, while at the same time recognizing civil liberties, economic, and cybersecurity concerns. If confirmed, I look forward to learning more about this important issue.

8. If you are confirmed as Attorney General, what specific steps do you intend to take to prevent pressure from large multinational technology firms from influencing the decisions taken by the Department of Justice?

RESPONSE: As I testified at my hearing, as a judge I have been immune to any kind of pressure or influence other than the pressure to do what I think is right given the facts and the law. I have spent my whole professional life looking up to Ed Levi and the other post-Watergate Attorneys General who stood up on behalf of the Department against impermissible pressure and influence. If I am confirmed as Attorney General, I intend to do the same.

9. In testimony to me, you observed that “unfortunately or fortunately, a lot of the best antitrust lawyers in the country have some involvement one way or another in some part of high tech, and we cannot exclude every single good lawyer from being able to be in the division.” If you are confirmed as Attorney General, what specific steps do you intend to take to prevent the conflicts of interest that naturally come from a “revolving door” between regulators and regulated technology entities?

RESPONSE: As I testified at my hearing, the Department of Justice has recusal rules that reflect applicable federal ethics statutes, regulations, and policies. In addition, President Biden’s Executive Order No. 13989 requires political appointees to sign a pledge imposing additional recusal obligations and other requirements aimed at “revolving door” concerns. If I am confirmed, I will seek to ensure that all Department employees scrupulously follow these and other ethics rules. More broadly, I will insist that the Department’s decisions in all enforcement matters—including antitrust matters—are based solely on an evenhanded application of the law to the facts.

10. If you are confirmed as Attorney General, would you independently recommend, advise, or direct that the Department of Justice drop its ongoing antitrust lawsuit against Google?

RESPONSE: As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court. As I testified about my hearing, I do not know anything about the Google case beyond what I’ve read in press reports about public filings. But based on what I have read, I do not see any reason why the decision to institute the investigation would be changed.

11. If you are confirmed as Attorney General, what steps do you intend to take, and what authorities do you intend to consult, in order to develop the Department’s interpretation of 47 U.S.C. § 230 (“Section 230”) under your leadership?

RESPONSE: As I testified at my hearing, I have relatively limited information about Section 230. I know that you and other members of the Committee have ideas about how the statute should be amended, and, if confirmed, I look forward to talking with you and others about those ideas.

12. In testimony to Sen. Lee, you stated that “I am a strong believer in religious liberty and there will not be any discrimination under my watch.” If you are confirmed as Attorney General, would you independently recommend, advise, or direct that the Department of Justice support legislative or executive actions that would alter in any way the Religious Freedom Restoration Act’s protection for Americans of all faiths?

RESPONSE: As I testified at my hearing, I am a strong believer in religious liberty. If I am confirmed as Attorney General, I will seek to ensure that the Department of Justice scrupulously complies with the Constitution and all federal statutes, including the Religious Freedom Restoration Act. I have not considered any potential legislative amendments to the Act. If I were asked to consider such an amendment, my position would be informed by my strong belief in religious liberty and guided by a careful review of the relevant facts and law.

13. If you are confirmed as Attorney General, would you independently recommend, advise, or direct that the Department of Justice continue to pursue legal action against the Little Sisters of the Poor?

RESPONSE: I understand that litigation on the contraceptive-coverage requirement promulgated under the Affordable Care Act, including a suit involving the Little Sisters of the Poor, remains pending. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court.

14. If you are confirmed as Attorney General, what do you envision as the principal strategic litigation priorities of the Department's Civil Rights Division under your leadership?

RESPONSE: If confirmed, I would expect the Civil Rights Division to play a role in a number of the Department's priorities such as battling the threat of domestic violent extremism through hate crime prosecutions, protecting the right to vote, addressing police departments that engage in unconstitutional patterns or practices and helping them to reform, and combating discrimination in housing, to name a few.

15. If you are confirmed as Attorney General, would you independently recommend, advise, or direct that the Department of Justice suspend Special Counsel John Durham's investigation into the Crossfire Hurricane operation?

RESPONSE: As I testified at my hearing, I do not know anything about the Durham investigation except what I have read in the press. My view about every investigation is that I have to know the facts before I can make these kinds of decisions or commitments. As I said at the hearing, however, I understand Mr. Durham has been permitted to remain in his position, and I presently have no reason to think that that was not the correct decision.

16. If you are confirmed as Attorney General, would you independently recommend, advise, or direct that the Department depart from the reasoned analysis set forth in OLC's January 6, 2020 opinion Ratification of the Equal Rights Amendment, which is in accord with both statements made by the late Justice Ginsburg and OLC's October 31, 1977 opinion Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment?

RESPONSE: The issue to which you refer is the subject of pending litigation involving the Archivist of the United States. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court. If I am confirmed as Attorney General, any opinions or legal advice I might give on this subject would be based solely on the law, and not on any other consideration.

Senator Cotton

Responses to Questions from Senator Cotton to Judge Merrick Garland, Nominee to be United States Attorney General

1. During your hearing, you refused to commit to ensuring that U.S. Attorney John Durham has the time, staff, and resources needed to complete his investigation into intelligence, counter-intelligence, and law-enforcement activities related to the 2016 presidential campaigns. You did, however, state that, “everything I know sitting here suggests that he should, of course, have those resources.” You also stated that you “have no reason to doubt that the decision to keep him in place and to continue in his investigation was in any way wrong.” Based on everything you know as you answer these questions, do you have any reason to believe that the Durham Investigation was not properly predicated?

RESPONSE: As I testified at my hearing, I do not know anything about the Durham investigation except what I have read in the press. My view about every investigation is that I have to know the facts before I can make these kinds of decisions or commitments. As I said at the hearing, however, I understand Mr. Durham has been permitted to remain in his position, and I presently have no reason to think that that was not the correct decision.

2. Based on everything you know as you answer these questions, do you have any reason to believe that the Durham Investigation has been conducted improperly?

RESPONSE: As I testified at my hearing, I do not know anything about the Durham investigation except what I have read in the press. My view about every investigation is that I have to know the facts before I can make these kinds of decisions or commitments. As I said at the hearing, however, I understand Mr. Durham has been permitted to remain in his position, and I presently have no reason to think that that was not the correct decision.

3. Based on everything you know as you answer these questions, do you have any reason to believe that the Durham Investigation is an inappropriate or excessive use of resources?

RESPONSE: As I testified at my hearing, I do not know anything about the Durham investigation except what I have read in the press. My view about every investigation is that I have to know the facts before I can make these kinds of decisions or commitments. As I said at the hearing, however, I understand Mr. Durham has been permitted to remain in his position, and I presently have no reason to think that that was not the correct decision.

4. Do you believe that a political appointee of President Biden ordering the closure of the Durham Investigation prior to its natural end could cause members of the public to believe that such a decision was based on improper political considerations, rather than the impartial administration of justice?

RESPONSE: As I testified at my hearing, I do not know anything about the Durham investigation except what I have read in the press. My view about every investigation is that I have to know the facts before I can make these kinds of decisions or commitments. As I said at the hearing, however, I understand Mr. Durham has been permitted to remain in his position, and I presently have no reason to think that that was not the correct decision.

5. Has anyone within the Biden administration, the Biden transition team, or the Department of Justice discussed the Durham Investigation with you?
 - a. If so, please list all such individuals with whom you have discussed the Durham Investigation.
 - b. If any such discussions have occurred, please identify any individuals involved in those discussions who have suggested that the Durham Investigation should not continue.

RESPONSE: No.

6. Do you believe, based on what you know today, that the decision of the Department of Justice to allow the Mueller Investigation to run its course increased confidence among Americans that impartial justice would be done?

RESPONSE: As I stated at the hearing, as a nominee it would not be appropriate for me to comment on Justice Department officials' prior decisions, as I want you to judge me on my own record and what I do going forward.

7. During your hearing, you stated that you “do not have any regret” for seeking the death penalty against Timothy McVeigh, but you also said that you supported the death penalty “at that time for Mr. McVeigh in that individual case.” If Timothy McVeigh were still on death row awaiting execution today, would you as Attorney General sign the order to carry out that sentence?

RESPONSE: If confirmed, I will seek to ensure that criminal sentences are carried out consistent with the law, the Department's policies and practices, and any relevant policies set by the President.

8. During your hearing, you repeatedly suggested it would be within President Biden's authority to issue a moratorium on seeking the death penalty in criminal cases, and that you would follow such a policy if President Biden were to issue one. But you also repeatedly stated that one of your roles as Attorney General would be to advise the president on policy. If you are confirmed as Attorney General, would you advise President to issue an across-the-board moratorium on seeking the death penalty?

RESPONSE: As I testified at my hearing, I have developed concerns about the death penalty over the last two decades due to the large number of exonerations, the apparent

arbitrariness of application, and the disparate impact on Black Americans and other people of color. I have not reached a conclusion on the question you ask, and if I am confirmed I would want to consult with Department of Justice attorneys before advising the President on policy matters.

9. When I asked you during your hearing whether you would recommend to President Biden that he issue an across-the-board commutation to all federal death row inmates, you said that you would have to think about that before you could answer. So I ask you again, now that you have had more time to think about it: If you are confirmed as Attorney General, would you advise President Biden to categorically commute the sentences of all federal death row inmates, as some have suggested you should?

RESPONSE: This is an important issue that warrants more careful study and consideration than I have been able to give it in the few days since my hearing. I have not reached a conclusion on the question you ask, and if I am confirmed I would want to consult with Department of Justice attorneys before advising the President on policy matters.

10. During your hearing, I asked you whether, if you were confirmed as Attorney General and there was another case like Timothy McVeigh's where a white supremacist bombed a federal courthouse, killing 168 Americans, including 19 children, and your U.S. Attorney sought your approval to seek the death penalty, you would approve that request. You answered that "it depends on what the development of the policy is—if the president asks or if we develop a policy of a moratorium, then it would apply across the board." That's one scenario. If, however, such a policy had not been developed, and the Department of Justice's policies were as you understand them to exist right now, would you approve that request from your U.S. Attorney?

RESPONSE: It would not be appropriate for me to comment on hypothetical charging decisions. If confirmed, my charging decisions would be based on careful consideration of the facts and the law.

11. During your hearing, you refused to answer whether, as Attorney General, you would continue supporting on appeal the death penalty sentence against Dylann Roof, the white supremacist who murdered nine African Americans as they worshipped in a church in South Carolina, stating that you wouldn't comment on a pending case. I won't ask you about the case itself or the appeal, but I will ask you purely about two executive branch matters:
 - a. Assuming that Dylann Roof's sentence is upheld on appeal and all further avenues for appeal are exhausted, would you advise President Biden to commute Roof's sentence?
 - b. Assuming that Dylann Roof's sentence is upheld on appeal and all further avenues for appeal are exhausted, under the Department of Justice's policies as you understand them to exist today, would you sign the order to carry out his

sentence?

RESPONSE: This question implicates a pending case, so I am barred from commenting on this matter by Canon 3 of the Code of Conduct for United States Judges.

12. During your hearing, you said that one of the sources of concern with the death penalty is what you described as its “disparate impact on black Americans and members of other communities of color.” I’d like to ask you specifically about the death penalty cases that are prosecuted by the Department of Justice. According to the non-profit Death Penalty Information Center, the current makeup of the federal death row is 43% White, 41% Black, 14% Latino, and 2% Asian.
- a. Do you believe that the federal death penalty was sought or applied improperly in the cases of any of the 49 individuals currently on federal death row?
 - b. If so, in which of the 49 cases do you believe the death penalty was improperly sought or applied, and why?
 - c. For any individuals on federal death row whose cases you identified in the previous question, what, if anything, do you plan to do as Attorney General to remedy those improprieties?

RESPONSE: I am not familiar with the specific circumstances of the individuals currently on federal death row. If I am confirmed, I expect to learn more about their cases.

13. If, after thorough review of any federal death row inmate’s case file, you have no reason to believe that the death penalty was improperly sought or applied in that particular case, would you nonetheless advise President Biden to commute that individual’s sentence based not on the facts of the case but on the fact of application of the death penalty alone?

RESPONSE: As I testified at my hearing, I have not formed a view about the possibility of an across-the-board commutation of capital sentences. In addition, if I am confirmed, I would want to consult with Department of Justice attorneys before reaching any definitive view or providing advice in this area.

14. During your hearing, you said that you “do not see any distinction” between “equality” and the definition of “equity” contained within President Biden’s Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the federal Government, signed on January 20, 2021.
- a. To confirm, then, do you believe that there is no difference between “equality” and “equity” as used in that Executive Order?
 - b. The Executive Order, as you noted during the hearing, defines “equity” to mean “the consistent and systemic fair, just, and impartial treatment of all

individuals[.]” Do you believe that the Executive Order allows for or directs the treatment of any Americans differently from other Americans based on the color of their skin?

RESPONSE: As I stated in my hearing, the Biden Administration has provided a specific definition of equity, and I am not sure what else there is to be said in that regard.

15. If you believe that “equity” and “equality” are interchangeable terms, do you believe they refer to providing people with the same opportunity, or the same outcomes?

RESPONSE: As I stated in my hearing, the Biden Administration has provided a specific definition of equity, and I am not sure what else there is to be said in that regard.

16. If you are confirmed as Attorney General, will you commit to opposing any Department of Justice action that would treat Americans differently based on the color of their skin?

RESPONSE: If I am confirmed, I will seek to ensure that Department actions abide by the laws and Constitution of the United States, including bans on unlawful discrimination on the basis of race.

17. If you are confirmed as Attorney General, will you commit to opposing any Department of Justice action that would treat Americans differently based on their sex?

RESPONSE: If I am confirmed, I will seek to ensure that Department actions abide by the laws and Constitution of the United States, including bans on unlawful discrimination on the basis of sex.

18. Is the First Amendment right to one’s own religious beliefs and expression of those beliefs a fundamental right?

RESPONSE: The Supreme Court has recognized that “the free exercise of religion” is “[u]nquestionably” a “fundamental constitutional right.” *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974).

19. If you are confirmed as Attorney General, will you commit to defending the religious freedoms of all Americans to the fullest extent of the law?

RESPONSE: If I am confirmed, I will uphold all rights guaranteed by the Constitution and other federal laws—including religious freedom—to the fullest extent of the law.

20. Should students at our public colleges and universities be discriminated against because of their sincerely held religious beliefs, regardless of whether they are Christian, Jewish, Muslim, Hindu, or something else?

RESPONSE: No.

21. The Department of Education has two rules (34 C.F.R. §§ 75.500(d) and 76.500(d)) that are designed to protect religious student groups from discrimination by any public college administrators due to the student groups' sincerely-held religious beliefs, speech, and leadership standards.

- a. Do you believe that it is important that students of all faiths feel that their religious freedoms are respected by any public college receiving federal grants?
- b. If you are confirmed as Attorney General, will the Department of Justice vigorously defend these rules against court challenges?

RESPONSE: As I testified at my hearing, I am a strong believer in religious liberty. I have not studied these specific rules or any legal issues they may raise. In general, the Department of Justice's legal defense of regulations issued by another agency is guided by close consultation with the client agency and a careful review of the facts and the law. If I am confirmed and these rules are challenged in court, I would follow that same approach here.

22. Do you agree that government officials should be held to clear standards of conduct because they have the power to use government authority against individuals?

RESPONSE: Yes, to the greatest extent possible.

23. Do you believe that it is important that government officials know and understand the rules they need to follow?

RESPONSE: Yes.

24. If government officials, such as a police officers, break the rules, isn't it true that they could be suspended, disciplined, or lose their jobs?

RESPONSE: Yes, although I am unfamiliar with the administrative processes for addressing police officer misconduct in every police department.

25. If a government official breaks the law, isn't it true that she could potentially be charged with a crime?

RESPONSE: Yes, depending on the law and the nature of the violation.

26. Under current law, if a government official in the course of his duties violates someone's clearly established rights, is true that he can face personal lawsuits for those actions?

RESPONSE: Yes. State and local officials who violate the rights secured by the Constitution and laws of the United States are subject to suits under 42 U.S.C. § 1983. Federal officials who violate certain constitutional rights may be subject to suit under

the implied cause of action recognized by the Supreme Court in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

27. If a government official doesn't violate someone's clearly established rights, is it true that, while she might face other workplace discipline for her actions, she is protected from personal lawsuit under the doctrine of qualified immunity?

RESPONSE: It is true that in certain federal law suits alleging official misconduct, a government official is protected by the judicially-created doctrine of qualified immunity if the official is alleged to have violated someone's rights that were not clearly established at the time of the alleged misconduct.

28. If qualified immunity did not exist, would it be easier or more difficult for a criminal to sue an arresting officer personally for his actions during the arrest?

RESPONSE: As a federal judge, I am aware of the ways that the doctrine of qualified immunity impacts federal causes of actions, such as lawsuits brought under 42 U.S.C. § 1983. I am not familiar with the availability of various state law causes of action regarding official misconduct. Based on what I know, I would assume that the elimination of qualified immunity would make it easier for persons whose constitutional rights were violated to advance federal civil suits alleging incidents of official misconduct.

29. If a police officer was sued in her personal capacity without the protection of qualified immunity, is it possible she could face some very expensive legal fees even if she won the case?

RESPONSE: I am unfamiliar with the various indemnification policies and arrangements for police officers throughout the nation and how those provisions are or would be impacted by the existence or non-existence of qualified immunity.

30. If police officers faced potential lawsuit from every criminal they arrested, even if they didn't violate the criminal's clearly established rights, would that make police officers more likely or less likely to arrest criminals?

RESPONSE: I have not studied the literature on the practical effects of the qualified immunity doctrine or the likely effects of eliminating it.

31. Aluminum purchasers, including the beer industry that relies on rice from Arkansas, are concerned that price spikes in the "Midwest Premium" index are being driven by anticompetitive behavior, as opposed to market demands. The "Midwest Premium" index is set by a single entity which may increase the chance that anticompetitive actions result in price swings. These price spikes are passed on to consumers and ultimately result in job losses. If you are confirmed as Attorney General, will you commit to examining credible allegations of anticompetitive conduct in the "Midwest Premium" index, as well as anticompetitive conduct for all price indexes, that may

result in job losses?

RESPONSE: I understand that the Midwest Premium is the subject of ongoing antitrust litigation. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court. As a general matter, however, I am committed to the vigorous enforcement of the antitrust laws.

32. During the course of the 2016 Trump campaign and shortly after President Trump won the 2016 election, certain members of FBI leadership egregiously abused their investigatory powers, which led to the unjust prosecution of General Mike Flynn. Not only did the FBI engage in malfeasance in this case, Judge Emmet Sullivan (who oversaw the criminal case in the D.C. District Court) also displayed an extraordinary level of personal, political animus toward General Flynn. If you are confirmed as Attorney General, you must continue the work of your predecessor in combatting such politically-motivated bad acts.
- a. If you are confirmed as Attorney General, what steps will you take to ensure that FBI agents do not conduct interviews without a legitimate investigatory basis?
 - b. Do you believe it's appropriate for law enforcement officers to interview someone to see if they will lie about non-criminal conduct, with the intent of then prosecuting them for making a false statement?
 - c. Do you believe that it is ever appropriate for an FBI Director to have agents interview White House officials without notifying the Attorney General or the White House?
 - d. Do you believe that it is ever appropriate to charge someone with making a false statement to an FBI agent where the agents themselves don't believe there was an intent to lie?
 - e. If the Department of Justice moves to dismiss a prosecution, and the defendant consents, is it appropriate for the judge to refuse to dismiss the case?
 - f. If you are confirmed as Attorney General, will you commit to working with me to change the Federal Rule of Criminal Procedure 48 to clarify that federal judges do not have discretion to continue a prosecution by refusing to dismiss cases where the government's motion to dismiss is unopposed? In other words, will you commit to working with me to clarify the Rule 48 to ensure that the rules accurately reflect the constitutional principle that the power to prosecute belongs to the Executive, not the Judiciary?

RESPONSE: As I testified at my hearing, I have always been extremely careful, as a prosecutor and as a judge, not to comment about something without knowing the facts. As a Justice Department nominee, I do not know all of the facts and circumstances

surrounding these events and therefore am not in a position to comment on them, or on hypotheticals drawn from them. If confirmed, I will make decisions concerning investigations based on the facts and the law. With respect to the change to Federal Rule of Criminal Procedure 48, I have not studied the specific issue you raise.

33. In December 2020, the European Union implemented an e-Privacy Directive that interfered with technology companies' ability to use hashing, PhotoDNA, and anti-grooming technologies to scan user e-mails and messages for child sexual abuse material (CSAM). Since that time, the National Center for Missing and Exploited Children (NCMEC) has stated that, as of February 15, EU reports to its CyberTipline have dropped by 51% compared to the same period in 2020. The European Commission previously noted that the EU has become the largest host of digital child sexual abuse material globally. The images depicting the abuse of child victims from all over the world can now be freely exchanged, undetected, within the European Union. If you are confirmed as Attorney General, will you commit to working with me—and our Five Eyes allies—to encourage the European Union to pass legislation that would clearly permit companies to use hashing, PhotoDNA, and anti-grooming technologies?

RESPONSE: During my time as a federal judge, I have not had occasion to study this particular issue, but the sexual exploitation of children is a horrific crime. If confirmed, I would look forward to studying this important issue in greater depth.

34. U.S.-based technology companies are continually moving toward encrypted platforms, which would prevent the use of hashing, PhotoDNA, and anti-grooming technologies to scan for child sexual abuse material (CSAM). Thus, the United States could soon become like the EU, seeing CyberTipline reports decrease significantly as tech companies become willfully blind to CSAM that is exchanged on their platforms. Further, these tech companies are using warrant-proof encryption, which means that, even if law enforcement had probable cause to believe there was CSAM on an encrypted platform, and obtained a warrant stating based on this probable cause, law enforcement could not obtain access to it to the material. Your predecessors understood the dangers of warrant-proof encryption and publicly called for technology companies to ensure lawful access to encrypted platforms. If you are confirmed as Attorney General, will you commit to working with me and my colleagues on this issue and publicly support the Lawful Access to Encrypted Data Act that I introduced with Senators Graham and Blackburn last Congress?

RESPONSE: While I am not familiar with that particular bill, I agree that it is important to address law enforcement's legitimate need to protect public safety, while at the same time recognizing civil liberties, economic, and cybersecurity concerns. If confirmed, I look forward to learning more about this important issue.

35. Contraband cell phones are a pervasive and widespread problem inside U.S. prisons. Prison officials confiscate hundreds of thousands of cell phones from prisons and jails each year. Contraband cellphones are used to perpetuate all types of crime from within prison walls and victimize both other inmates and people in our communities. The most

recent example of the dangers posed by the use of contraband cell phones is a 147-count indictment from the United States Attorney in South Carolina. It details a large RICO conspiracy involving numerous individuals who are incarcerated in the South Carolina Department of Corrections, and involved violent offenses such as murder and kidnapping. To reduce the proliferation of contraband cellphones in prisons, the Federal Bureau of Prisons has two active micro-jamming pilots underway. However, the Communications Act of 1934 precludes state correctional institutions from similarly jamming signals in their own facilities. Would you support legislation that would allow states to test and use micro-jamming technology in order to disable contraband cell phones, like the technology being tested and used by the Federal Bureau of Prisons?

RESPONSE: I have not studied this issue, so I cannot offer an opinion at this time. If confirmed, I look forward to learning more, consulting with Department personnel, and working with Congress to address this issue.

36. During your hearing, we discussed how, according to FBI statistics, only 45 percent of violent crimes in the United States result in an arrest. You agreed with me that it would be better if 100 percent of violent crimes in the United States resulted in arrest and prosecution. You also noted that task forces and collaborative work with state and local law enforcement partners can be a “force multiplier.” In the summer of 2020, to stem the tide of violent crime in U.S. cities throughout the country, Attorney General Barr began Operation Legend. Operation Legend was named after four-year-old LeGenD Taliferro, who was shot and killed while he slept early in the morning of June 29, 2020 in Kansas City, Missouri. Operation Legend was a “a sustained, systematic and coordinated law enforcement initiative in which federal law enforcement agencies work in conjunction with state and local law enforcement officials to fight violent crime,” the very type of “force multiplier” we discussed at your hearing. Unsurprisingly, Operation Legend was a major success. In a matter of weeks, law enforcement made more than 2000 arrests—including 147 homicide arrests; seized more than 544 firearms; and seized more than seven kilograms of fentanyl, 14 kilograms of heroin, 12 kilograms of cocaine, and 50 kilograms of methamphetamine. 476 of the individuals arrested were charged with federal offenses. Given the massive increase in murders we continue to see in U.S. cities, if you are confirmed as Attorney General, will you commit to continuing Operation Legend and similar operations?

RESPONSE: I am not familiar with the details of Operation Legend. As I testified at my hearing, it is important to focus our attention on violent crimes and other crimes that greatly endanger in our society, and I support targeting our limited resources that way. If confirmed, I will evaluate our joint task forces and operations for lessons learned and ways to build on their success.

37. Do you believe that federal law enforcement and state and local law enforcement partners should work together in a collaborative fashion?

RESPONSE: Yes.

38. Over the last few years, we've seen a marked increase in politically-motivated riots, including some high-profile examples. Do you think that police departments should have access to protective gear like helmets and riot shields when they're facing down a mob of rioters?

RESPONSE: Yes. It is important to ensure the safety and security of police officers. Police departments should also be encouraged officers to use safety resources in a way that builds community trust and prioritizes de-escalation.

39. Do you believe the government should be responsible with taxpayer funds and reduce waste when it is possible to do so?

RESPONSE: Yes.

40. Should rioters be given a free pass to work out their anger by attacking government buildings?

RESPONSE: No. There is a difference between peacefully exercising fundamental free speech rights and criminal acts of violence and vandalism. If confirmed, I will protect the former and prosecute the latter.

41. Should rioters be given a free pass to work out their anger by attacking non-governmental targets, such as by attacking innocent people or businesses?

RESPONSE: No. There is a difference between peacefully exercising fundamental free speech rights and criminal acts of violence and vandalism. If confirmed, I will protect the former and prosecute the latter.

42. Should rioters who engage in violence be prosecuted to the fullest extent of the law?

RESPONSE: All individuals who engage in violence should be held accountable for their actions.

43. During your hearing, you said that, under your own definition, “an attack on a courthouse while in operation, trying to prevent judges from actually deciding cases, that plainly is domestic extremism, domestic terrorism, [but] an attack simply on government property at night or any other kind of circumstances is a clear crime . . . both are criminal, but one is a core attack on our democratic institutions.”

- a. Under that same definition, would the riots at the U.S. Capitol on January 6 qualify as “domestic terrorism” if they had occurred on January 7, after Congress had finished counting the election results?
- b. Under that same definition, would you say that the riots at the U.S. Capitol on January 6 were not a “core attack on our democratic institutions” if they had taken place on January 7, after Congress had already finished counting the

election results?

- c. Does intent matter in the determination of whether something is “an attack on our democratic institutions?” In other words, if rioters attacking the U.S. Capitol mistakenly believed that Congress was conducting business inside and the rioters intended to disrupt such business but the buildings were actually empty at the time, would such a riot still be an attack on our democratic institutions?

RESPONSE: At the hearing, I described domestic terrorism as using violence or threats of violence in an attempt to disrupt democratic processes, noting that this definition is close to the statutory definition of the term in the criminal code codified at 18 U.S.C. § 2331. If confirmed, all of my actions as Attorney General would be guided by the law as written. My testimony was intended to explain why I regard the January 6 attack on the Capitol as a particularly heinous act.

44. Do you believe, based on what you know as you answer these questions, that the violent riots instigated and carried out by Antifa and similar groups over the last few years in an attempt to dismantle or destroy police departments, courthouses, and other symbols and institutions of our justice system qualify as domestic terrorism and core attacks on our democratic institutions?

RESPONSE: I am not familiar with the specific circumstances of the events you reference. To the extent that your question implicates pending cases, I am barred from commenting on any pending or impending case in any court by Canon 3 of the Code of Conduct for United States Judges. As a general matter, I understand domestic terrorism to be the conduct specified in 18 U.S.C. § 2331.

45. During your hearing, you were asked whether you believe that illegal entry at America’s borders should remain a crime. You responded that you had “not thought about that question.” Now that you have had time to think about the question, do you believe that illegal entry at our borders should remain a crime?

RESPONSE: As I said at the hearing, I haven’t thought about that question. The President has made clear that we are a country of borders and with a concern about national security. I don’t know of a proposal to decriminalize, but still make it unlawful to enter. Since the hearing, I have not had time to think further about the question.

46. Is it important to enforce our nation’s immigration laws?

RESPONSE: Yes.

47. You are currently a federal judge. If a case is decided by the D.C. District Court, the parties exhaust all of their appeal rights, and the court’s order is upheld, would it be appropriate for the parties to simply ignore the court’s order?

RESPONSE: No.

48. If you are confirmed as Attorney General, the nation's immigration courts will be your employees and will report to you. If one of your immigration courts rules that an alien has violated immigration law and must be deported, and all appeals are exhausted, should that alien be deported?

RESPONSE: The process of removal after proceedings in immigration court is governed by the immigration laws. I have not studied those laws, or the practical issues involved in the removal process, in detail.

49. If you are confirmed as Attorney General and one of your immigration courts rules that an illegal alien who assaulted a U.S. citizen must be deported, and all appeals are exhausted, should that alien be deported?

RESPONSE: The process of removal after proceedings in immigration court is governed by the immigration laws. I have not studied those laws, or the practical issues involved in the removal process, in detail.

50. If you are confirmed as Attorney General and one of your immigration courts rules that an illegal alien who is a gang member must be deported, and all appeals are exhausted, should that alien be deported?

RESPONSE: The process of removal after proceedings in immigration court is governed by the immigration laws. I have not studied those laws, or the practical issues involved in the removal process, in detail.

51. Can unmonitored communications between inmates in Bureau of Prisons custody and the outside world be a security threat to our prisons?

RESPONSE: Because I am not in the Department, I am not familiar with the current procedures governing incarcerated persons' communications with parties outside BOP facilities. It is important to evaluate security threats, while recognizing that some communications are privileged, such as communications with counsel. If confirmed, I would evaluate these issues in consultation with Department personnel.

52. Can unmonitored communications between inmates in Bureau of Prisons custody and the outside world threaten the safety and security of federal judges, their staffs, and their families?

RESPONSE: Because I am not in the Department, I am not familiar with the current procedures governing incarcerated persons' communications with parties outside BOP facilities. It is important to evaluate security threats, while recognizing that some communications are privileged, such as communications with counsel. If confirmed, I would evaluate these issues in consultation with Department personnel.

53. Can unmonitored communications between inmates in Bureau of Prisons custody and

the outside world threaten the safety of innocent people, crime victims, and other inmates?

RESPONSE: Because I am not in the Department, I am not familiar with the current procedures governing incarcerated persons' communications with parties outside BOP facilities. It is important to evaluate security threats, while recognizing that some communications are privileged, such as communications with counsel. If confirmed, I would evaluate these issues in consultation with Department personnel.

54. Can unmonitored communications between inmates in Bureau of Prisons custody and the outside world threaten the safety of corrections officers and staff?

RESPONSE: Because I am not in the Department, I am not familiar with the current procedures governing incarcerated persons' communications with parties outside BOP facilities. It is important to evaluate security threats, while recognizing that some communications are privileged, such as communications with counsel. If confirmed, I would evaluate these issues in consultation with Department personnel.

55. Drug cartels and other drug trafficking organizations push deadly drugs like fentanyl on our streets. According to the DEA, “[f]entanyl and other highly-potent synthetic opioids—primarily sourced from China and Mexico—continue to be the most lethal category of illicit substances misused in the United States.” It is estimated that more than 80,000 Americans died of opioid overdoses last year. Do you agree that stopping fentanyl and other synthetic opioid trafficking must be among the Department of Justice’s highest drug enforcement priorities?

RESPONSE: Yes. As I testified at my hearing, I agree that stopping fentanyl and synthetic opioids from flooding our communities should be a high priority for the Department.

56. Should the people who are responsible for bringing illicit fentanyl into the United States be prosecuted?

RESPONSE: Yes.

57. Should gangs and drug trafficking rings that distribute illicit fentanyl on the streets be prosecuted?

RESPONSE: As I have testified, fentanyl analogues are sold illicitly and have caused senseless fatalities. I think we should devote resources to the most dangerous criminal enterprises.

58. Should individuals who knowingly sell illicit fentanyl to unsuspecting customers while misrepresenting it as some less-lethal substance be prosecuted?

RESPONSE: As I have testified, fentanyl analogues are sold illicitly and have caused senseless fatalities. I think we should devote resources to the most dangerous criminal enterprises.

59. Should cartels, gangs, and drug trafficking rings that traffic drugs like heroin and cocaine be prosecuted?

RESPONSE: Yes. As I have testified, I think we should devote resources to the most dangerous criminal enterprises.

60. The Chinese drug labs that have been flooding our streets with illegal fentanyl have recently turned to a new weapon: A drug called isotonitazene, or referred to on the street as “iso.” It’s harder to pronounce than fentanyl, but equally deadly, and has already been encountered in dozens of confirmed incidents across the country, according to the DEA. Last summer, the DEA used its emergency scheduling authority to make isotonitazene illegal, but that authority is only temporary. Will you commit to continuing the work of stopping this deadly drug?

RESPONSE: I am not familiar with isotonitazene, but it is clear that criminal enterprises remain eager to develop and sell illicit dangerous substances. If confirmed, I look forward to working on this issue in consultation with Department personnel.

61. During your hearing, you said that we should seek to eliminate mandatory minimum sentences in the context of drug cases. The mandatory minimum is a crucial tool in dismantling drug trafficking organizations, not only because it serves as a deterrent, but also because it promotes cooperation with law enforcement. As you know, many drug trafficking defendants can have mandatory minimum sentences significantly reduced merely by providing substantial assistance to the government. In passing legislation such as the Controlled Substances Act, Congress knew that the mandatory minimum would be an important tool in combatting an intractable problem like drug trafficking. Do you think it’s appropriate for the Executive branch to disregard Congress’s intent that individuals trafficking certain amounts of drugs be subject to specific mandatory minimum sentences by having a policy of charging lesser-included offenses as opposed to the most serious, readily provable offense?

RESPONSE: As I testified at my hearing, I support the policy I helped draft for Attorney General Reno, and that was furthered by Attorney General Holder, in which prosecutors are not required to seek in every case the most serious offense with the highest possible sentence. I believe that we should give discretion to our prosecutors to make the charge fit the crime and be proportional to the damage that it does to our society. In addition, as President Biden has suggested, we should consider the elimination of mandatory minimums so that we, once again, give authority to trial judges to make determinations based on all of the sentencing factors that judges normally apply. This would give judges the ability to do justice in individual cases.

62. If you are confirmed as Attorney General and Congress chooses not to heed your call to

eliminate mandatory minimum sentences, do you believe that you have the authority to unilaterally override Congress by categorically declining to bring charges that would trigger those sentences?

RESPONSE: As I testified at my hearing, I support the policy I helped draft for Attorney General Reno, and that was furthered by Attorney General Holder in which prosecutors are not required to seek in every case the most serious offense with the highest possible sentence. I believe that we should give discretion to our prosecutors to make the charge fit the crime and be proportional to the damage that it does to our society. In addition, as President Biden has suggested, we should consider the elimination of mandatory minimums so that we, once again, give authority to trial judges to make determinations based on all of the sentencing factors that judges normally apply. This would give judges the ability to do justice in individual cases.

63. If you are confirmed as Attorney General, will you be responsible for enforcing the laws of the United States?

RESPONSE: Yes.

64. If you are confirmed as Attorney General, will your responsibility be to enforce all laws of the United States, or merely the laws with which you agree?

RESPONSE: If I am confirmed, I will be responsible for enforcing the Constitution and all laws of the United States within the authority of the Department of Justice. I will exercise those responsibilities free from improper influences.

65. Are laws passed by Congress and signed by the president merely policy suggestions for the Executive Branch?

RESPONSE: No.

66. Do you believe that it is appropriate for the Department of Justice to categorically decline to bring certain types of cases or charge certain crimes, regardless of the evidence, merely because you dislike the law?

RESPONSE: If confirmed, I will expect charging decisions to be made based on the facts and the law, consistent with departmental policies, and free from improper influences.

67. Do you believe that it is appropriate for the Department of Justice to categorically decline to bring certain types of cases or charge certain crimes, regardless of the evidence, merely because you disagree with Congress about whether the law is good policy?

RESPONSE: If confirmed, I will expect charging decisions to be made based on the facts and the law, consistent with departmental policies, and free from improper influences.

68. During your hearing, you said that you “find it hard to believe that the Department [of Justice] could think that there was any possibility of overturning the Heller [v. District of Columbia] case.” Please describe what you view as the core holding of the Heller case, and any limits you believe the Heller case imposes on the Department’s ability to regulate firearms.

RESPONSE: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment confers “an individual right to keep and bear arms.” *Id.* at 595. The Court also stated that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *Id.* at 626.

69. As noted during your hearing, you voted to re-hear en banc the case of *Parker v. District of Columbia*, which challenged Washington, D.C.’s former ban on handgun possession even in the home for personal defense. Why did you vote to re-hear that case?

RESPONSE: As I testified, for judges a vote to rehear en banc is a vote to hear a case, not a vote on the merits of the case. I thought this was an extremely important issue that I had not previously studied, and I was not the only judge who thought so. Other judges, including a judge appointed by a president of a different party, also voted to rehear the case, and for the same reason, so that the full court would have an opportunity to hear the case.

70. Prior to the Supreme Court’s opinion in *Heller v. District of Columbia*, did you think that Washington, D.C.’s former ban on handgun possession in the home for personal defense was allowable under the Second Amendment? Why or why not?

RESPONSE: I did not form a view on that question because I did not hear the case on the merits. After a three-judge panel of my court decided the case that became *Heller*, I voted in favor of rehearing en banc so the full court would have an opportunity to hear the case. But rehearing en banc was denied, so I did not consider the matter further before the Supreme Court issued its decision.

71. Firearms sales in the United States are occurring at a record pace, with more than 21 million background checks for gun purchases reported last year. In 2019, the Department of Justice released the first implementation report regarding the Fix NICS Act, in which the Department detailed improved compliance by state and federal agencies, resulting in faster and more accurate background checks for gun purchasers. Nonetheless, some have suggested that the government should use delays in background check results to prevent individuals from purchasing guns for undefined periods of time even if they have not been found to be ineligible. Do you believe that the Bureau of Alcohol, Tobacco, Firearms, and Explosives has regulatory authority under current law to require that certain individuals without a NICS denial have their firearm sale delayed indefinitely?

RESPONSE: I am not familiar with the current implementation of the FIX NICS Act. I have not examined ATF's statutory or regulatory authority with regard to the waiting period and cannot offer an opinion on that question.

72. Modern Sporting Rifles (MSRs) are one of the most popular types of firearms sold today. MSRs are semi-automatic firearms, which only fire a single round with each pull of the trigger. Do you believe that President Biden has the authority under existing law to ban the sale or possession of MSRs without Congress?

RESPONSE: I am unfamiliar with this issue and cannot offer an opinion on that question.

Senator Kennedy

Responses to Questions from Senator Kennedy to Judge Merrick Garland, Nominee to be United States Attorney General

1. The core copyright industries employ [5.7 million](#) Americans. The copyright workforce earns on average more than \$100,000 per year -- a 43 percent premium over the average American wage. These 5.7 million Americans add \$1.5 trillion to the U.S. economy and rely on the property rights created by the Constitution and the Copyright Act to make a living from their art. Because copyright is purely a body of federal law, what mechanisms will you put in place to ensure that the Department prioritizes the protection of American creators?

RESPONSE: I share your commitment to the important, and often challenging, task of protecting intellectual property rights of American creators and businesses. Because I am not currently in the Department, I am not familiar with the mechanisms the Department currently has in place to protect copyright owners. If confirmed, I look forward to reviewing the existing measures, as well as working with your office to understand how the Department can better enforce intellectual property laws, including those laws protecting copyright holders.

2. The Obama administration was selective over which federal laws it would defend in court, based on its own interpretation of the law's constitutionality.

Is it the Department of Justice's duty to defend in court all laws duly passed by Congress where there is at least a reasonable argument to be made for the law being constitutional?

RESPONSE: In general, the Department of Justice should vigorously defend the constitutionality of the laws passed by Congress. That is a longstanding tradition of the Department and one I will uphold if I am confirmed as Attorney General. There are, however, limited exceptions to the Department's duty to defend the constitutionality of federal laws. As you note, one such exception applies when the Department concludes that there are no reasonable arguments to be made in defense of the law. Another applies when the law infringes on the constitutional authorities of the Executive Branch.

3. You and I are too familiar with backed-up court dockets. One of the places this is most evident is with our nation's immigration courts, which fall under the Department of Justice's jurisdiction. Over the last forty years, the backlogged caseload has only gotten worse.

Why don't immigration judges have similar authorities as other judges to dismiss claims or to grant summary judgment so they can more efficiently manage their dockets when it comes to disposing of meritless claims? Do you think these would be useful, and if so, will you commit to giving immigration judges similar authorities?

RESPONSE: As I testified in my confirmation hearing, the immigration court backlog is

an extraordinarily serious problem. As a federal judge for 24 years, I have not had occasion to study the particulars of this issue and I look forward to learning more. If I am confirmed, I am committed to ensuring that immigration judges are supervised appropriately to ensure effective and efficient processing of immigration cases consistent with principles of fairness and due process and other applicable law.

4. A few years ago, the Federal Bureau of Investigation special agent in charge in New Orleans called political corruption in that city “robust.” He said corruption in New Orleans was “profound.” In fact, we have two Federal Bureau of Investigation units in New Orleans to handle the workload.

How will you prioritize the issue of political corruption during your tenure as Attorney General, if confirmed?

RESPONSE: One of the primary functions of the Justice Department is to protect Americans from fraud and corruption, including public corruption. The Department’s Public Integrity Section oversees the investigation and prosecution of all federal crimes affecting government integrity, including bribery of public officials. If confirmed as Attorney General, I will make the Section’s important mission a priority and work to ensure that our Nation’s anticorruption laws are vigorously enforced.

Senator Tillis

Responses to Questions from Senator Tillis to Judge Merrick Garland, Nominee to be United States Attorney General

Intellectual Property Enforcement

1. The Department of Justice's attention to intellectual property enforcement has been somewhat inconsistent over the years. During the times that IP enforcement has properly been regarded as a high priority, the Department generally had put into place a structure that emphasizes its importance and takes a coordinated approach involving all the stakeholder components. What type of organizational structure do you plan to put in place at DOJ, as well as other steps you will take, to ensure that protecting American intellectual property will be regarded as a high priority under your leadership?

RESPONSE: I consider intellectual property enforcement a priority area, as intellectual property crime threatens both our economic wellbeing and, in some instances, public safety. If confirmed, I would look forward to examining this issue in greater depth, including studying how the Department can better coordinate its approach among various stakeholder components.

2. How do you plan to work proactively with the IP Enforcement Coordinator alongside DOJ's sister agencies, especially DHS, to coordinate IP enforcement across the government? In addition, please provide specific information about your plan to combat counterfeit products, online piracy and copyright crime, and the theft of trade secrets.

RESPONSE: I share your commitment to ensuring strong and coordinated approach to intellectual property enforcement. If confirmed, I would look forward to working with the Department's stakeholder components, including its IP Task Force, in seeking to ensure that the Department closely collaborates with the Office of the Intellectual Property Enforcement Coordinator, as well as other agencies, to address these serious issues.

3. Last Congress, Senator Leahy and I partnered together to enact the Protecting Lawful Streaming Act. This bill finally closed the so-called "streaming loophole" by giving the Department the authority to pursue felony charges against large scale, commercial piracy organizations. Importantly, this law doesn't allow the Department to target individual streamers, companies pursuing licensing deals in good faith, or internet service providers. This law is what we call a win-win for everyone. As Attorney General, will you use this new authority and make the prosecution of commercial piracy sites a tier one priority?

RESPONSE: As noted above, I consider intellectual property enforcement a priority area, and if confirmed, I will seek to ensure the Department vigorously enforces this important law.

- a. How soon can you update the US Attorneys manual to provide guidance on

prosecutions under this law?

RESPONSE: Because I am not currently in the Department, I am not familiar with the guidance that currently exists to implement this law. If confirmed, I will seek to ensure that any appropriate revisions to the relevant guidance are made in a timely fashion.

- b. Will you ensure that such guidance makes clear that— per the plain, clear, and unambiguous words of the statute—that prosecutions should only be pursued against commercial piracy services?

RESPONSE: Because I am not currently in the Department, I am not familiar with what guidance currently exists to implement this law. If confirmed, I would work to ensure all Department guidance is consistent with federal law.

Patent Eligibility Reform

4. As you likely know, reforming our nation’s patent eligibility standards is one of my top priorities. The current state of patent eligibility law is in shambles. The standards are so unworkable that you have judges ruling that things like a garage door opener is an abstract idea. That’s bizarre and well-beyond the scope of what any reasonable person would conclude. These unworkable standards are having an adverse impact on a number of sectors, from life-sciences and precision medicine to quantum computing, 5G, and artificial intelligence. If the United States is going to remain the world’s leader in innovation, we have to fix this.

That’s why I’m doing everything I can, from hearings, letters, and draft legislation, to filing an amicus brief **this week** in the *American Axle* case. But I can’t do it alone. As Attorney General, will you direct the Solicitor General to find appropriate cases on patent eligibility and to urge the Supreme Court to take them up and finally provide clarity in this area of the law?

RESPONSE: As a sitting federal judge, Canon 3 of the Code of Conduct precludes me from commenting on pending or impending litigation, including the *American Axle* case. I share your commitment, however, to protecting the intellectual property of American creators and business, as well as ensuring that there is clarity in this important area of law.

Antitrust

5. Judge, as you know, competition policy and antitrust enforcement can have important implications for intellectual property policy. Both have the shared goal of encouraging innovation and competition. And a big area right now where more antitrust scrutiny is likely needed is the technology industry—particularly big internet companies. How do you think the Department of Justice should approach antitrust enforcement against what we think of as “big tech”?

RESPONSE: As I said during my hearing, I take the enforcement of antitrust laws very seriously and have throughout my career. If confirmed, the Department will vigorously enforce antitrust laws in every sector of the economy, including the technology sector.

6. Google and Facebook are two of the most powerful and most influential companies in the world. Both completely dominate their corners of the online service provider market. And more Americans now get their news from Facebook or Google than news publishers. At the same time, Facebook and Google have repeatedly refused to negotiate in good faith with news publishers for their carrying their content on Facebook and Google. Just last week this took a very ugly turn in Australia when Google agreed to some licensing terms but Facebook refused and then prohibited its Australian customers from sharing URLs from those news publishers. What do you plan to do to address monopoly powers generally and particularly those big tech companies that control access to information?

RESPONSE: While I am not familiar with the specific issues you mention, I take very seriously the Department's role in enforcing antitrust laws. If confirmed, the Department will vigorously enforce antitrust laws in every sector of the economy, including the technology sector.

7. In the copyright space, the Department of Justice has overseen the music consent decrees that have governed the public performance of music for 80 years. Songwriters and publishers have long argued—and I fully agree—that the consent decrees are outdated—especially for the digital age. Following a lengthy review of the consent decrees, the past administration left the consent decrees untouched.

What are your thoughts on the music consent decrees, and do you plan to reopen their review? Do you support transitioning to a fully functioning free market for musical licensing?

RESPONSE: I have not studied the market for musical licensing, or the Department's music consent decrees. If confirmed, I would look forward to learning more about this issue and discussing it with the Antitrust Division and the U.S. Copyright Office.

8. In the patent space, standard essential patents are those patents necessary to meet certain requirements set by standard setting organizations. One area where this comes up a lot is for cell phone makers. In 2019, Senator Coons and I sent a letter to the Department of Justice urging greater clarity on how DOJ enforces antitrust policy with regard to standard essential patents. In particular, we wanted to ensure that DOJ doesn't unduly prejudice rights holders in this area. What do you think should be DOJ's competition policy and enforcement practices related to standard essential patents?

RESPONSE: Because I am not currently in the Department, I am not familiar with the Department's current competition policy and enforcement practices related to standard essential patents, and I have not had occasion to study the issue during my time as a

federal judge. If confirmed, I would welcome the opportunity to learn more about the issue from you and other members.

9. What are your thoughts on the ongoing issues surrounding the Qualcomm litigation? How will you approach the types of antitrust issues raised by the Qualcomm case?

RESPONSE: My understanding is that the *Qualcomm* case remains pending. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case in any court. I have not studied the *Qualcomm* case and therefore have not formed a view about how I would approach similar issues if they arose in the future. As a general matter, however, I am committed to vigorous enforcement of the antitrust laws.

Section 230 and Telecommunications

10. Judge, last Congress this Committee dedicated a lot of attention to the Communications Decency Act, and particularly how some internet providers hide behind section 230's bar on liability to not address illicit user activity while also actively curating content. DOJ weighed in last year after completing a lengthy review of section 230 and sent Congress 230 reform legislation. As I'm sure you know, section 230 can pose real challenges for law enforcement because it does not encourage online services to address illicit activity—including sex trafficking—on their sites. DOJ's proposal focused on increasing transparency from online services when they remove lawful speech and motivating internet platforms to better address illicit activity. What are your thoughts on how section 230 should be reformed?

RESPONSE: As I testified at my hearing, I have relatively limited information about Section 230. I know that you and other members of the committee have ideas about how the statute should be amendment, and if confirmed, I look forward to talking with you and others about those ideas.

Counterfeit Goods

11. Judge Garland, counterfeit goods are not only a threat to American innovation, they are a significant threat to public safety. This is especially true as counterfeit PPE such as N95 masks flood into the United States putting Americans at risk. Earlier this month there was another report of more counterfeit N95 masks that had been sold to hospitals and, just last week, federal agents seized one million counterfeit N95 masks. What steps will you take as Attorney General to stop the flow of counterfeit goods into the United States and protect public safety?
- a. How will you coordinate with the Department of Homeland Security to combat the importation of counterfeit goods?
 - b. Will you commit to establishing a specific task force dedicated to this issue?

RESPONSE: I share your concern regarding counterfeit goods. Because I am not at the

Department, I am not familiar with the Department’s current efforts to stop the flow of counterfeit goods into the United States. If confirmed, I will coordinate with all appropriate government partners, including the Department of Homeland Security, to address this important issue.

Cybersecurity and Privacy

12. Judge, we are still working to understand the extent of the reported Solar Winds cyber-attack. While the extent of this particular attack is shocking, cyber-attacks are not a new threat to American infrastructure and technology. As Attorney General, what will you do to prevent another attack like the Solar Winds attack, and more broadly, cyber-attacks on American infrastructure and innovation in the future?

RESPONSE: I share your concerns about cybersecurity and the need to be nimble in our efforts to prevent, detect, and disrupt cyberattacks. I know President Biden has repeatedly warned that there are vulnerabilities in U.S. cyber infrastructure. If confirmed, I would look forward to fully supporting the President’s and his national security team’s efforts on that front. That approach would include using the full extent of the Department’s authorities to identify and disrupt—whether through prosecutions or other means—those who would threaten our country by seeking to attack these systems.

13. To combat future cyberattacks we need a coordinated, whole-of-government approach to this issue. From proactive security measures to the quick reporting and prosecution of cyberattacks, every relevant agency in the federal government needs to be engaged on this issue. How will you increase cooperation between private actors and companies—particularly companies engaged in cutting edge research and development of emerging technologies—and the federal government on these issues?

RESPONSE: As I said during my hearing, I fully agree that this threat demands a forward-looking and whole-of-government response. If confirmed, I am committed to developing a coordinated approach to combatting cyberattacks and would look forward to reviewing the Department’s existing efforts at cooperation and finding ways to enhance those efforts.

Law Enforcement

14. In 2020, 47 law enforcement officers were murdered by criminals. In 2021, there have already been 11 law enforcement officers killed by criminals. The shocking calls to “defund the police” continue to devalue and dehumanize our brave men and women in blue. This is dangerous and it is unacceptable. As our nation’s top law enforcement official, what will you do as Attorney General to stop violence against law enforcement officers?

RESPONSE: If I am confirmed, ensuring the safety and security of all public servants, including police officers, will be a top priority. As part of this focus, I will vigorously prosecute federal offenses involving attacks on law enforcement officers,

such as the heinous January 6th attack on the Capitol and its police officers.

15. Do you agree or disagree that we need to make it a federal crime to assault law enforcement officers? If not, please explain why.

RESPONSE: 18 U.S.C. § 111 makes it a federal crime to assault, resist, oppose, impede, intimidate, or interfere with a federal officer while the officer is engaged in the performance of his or her official duties. I have not had an opportunity to assess all the available federal, state, and local protections for state and local law enforcement officers. If confirmed, I would welcome the opportunity to study the issue and work with Congress to ensure that federal law adequately and appropriately protects law enforcement officers from violence.

16. What are your thoughts on “defunding the police?” If you don’t support defunding the police, how do you and the Administration intend to manage the vocal stakeholders calling for this policy?

RESPONSE: I do not support defunding the police. I support giving police departments the resources they need to reform and build community trust. If confirmed, I would seek to ensure that the Department operates in a manner consistent with this view.

17. What are your thoughts on qualified immunity for law enforcement officers? I view qualified immunity as a critical legal protection for law enforcement agencies across the country? Do you believe it is appropriate to eliminate or limit qualified immunity?

RESPONSE: As a federal judge, I am familiar with the judicially-created doctrine of qualified immunity and the way it affects certain federal civil causes of action, such as suits brought under 42 U.S.C. § 1983. Because I am a sitting judge bound by precedent and a specific code of conduct, it would be inappropriate for me to express my view on the propriety of that doctrine. If confirmed as Attorney General, I would welcome the opportunity to work with various partners and stakeholders, including Congress, to pursue appropriate and effective methods of police accountability.

Criminal Justice Reform

18. The First Step Act was a landmark law that had broad bipartisan support. I am proud of the work we in the Judiciary Committee did to enact this commonsense and historic legislation. But proper implementation of the First Step Act is just as important as passing the law. Do I have your commitment that you will work in good faith with Congress to see that the First Step Act is fully implemented?

RESPONSE: Yes. As I testified at my hearing, if I am confirmed I plan to make the First Step Act a priority. I would welcome the opportunity to work with Congress to see that the Act is fully implemented.

19. Earned time credits were included in this legislation as an incentive to encourage inmates to participate in programming that is likely to reduce their likelihood of recidivism. At this time, however, inmates have not yet been assigned earned time credits.
- a. When are inmates scheduled to begin receiving earned time credits?
 - b. Which date has the Department and the Bureau of Prisons identified as the date when earned time credits begin to accrue?
 - c. How significant are the waitlists for inmates to access programming, and how will you reduce these waitlists?
 - d. What steps will you take to ensure that inmates have access to programming which will decrease their likelihood of recidivism?

RESPONSE: Because I am not currently at the Department, I do not have access to information about the operations and internal plans of the Bureau of Prisons. If I am confirmed, I expect to study the Bureau's operations to determine what is necessary to fully implement the First Step Act and take other steps to advance these important goals.

20. Which criminal justice policy do you believe is the most important issue that needs to be addressed?

RESPONSE: As I testified, I believe that guaranteeing the promise of fair and impartial enforcement of the law, and addressing the disparate results for communities of color in our justice system, are among the most important issues we face. If I am confirmed, I look forward to the opportunity to address these issues.

21. President Biden issued an executive order directing the Attorney General not to extend any contracts for private prisons. Can you explain the Administration's thinking surrounding this issue?

RESPONSE: Because I am not currently at the Department, I am not familiar with the nature of the contracts the Bureau of Prisons or the U.S. Marshals Service has with privately owned facilities. As I have testified, the Department is a part of the Executive Branch, and for that reason on policy matters we follow the lead of the President and the administration as long as it is consistent with the law. The President's Executive Order is the best explanation of the Administration's thinking on this issue.

Victims Issues

22. In 2017, the Crime Victim's Fund collected \$6.5 billion—the most ever, and three times what was collected the year before. Collections in 2018 and 2019 plummeted to approximately \$500 million. As a result, organizations that serve victims have been deeply impacted by cuts in federal funding. My colleagues and I sent a letter on this

issue last year that has yet to receive a response. In the letter, we identified the use of non-prosecution agreements as a major factor in this decrease in collections. Do you agree with that assessment?

- a. Other than the use of non-prosecution agreements, what other factors have contributed to this significant decline in collections for the Crime Victims Fund?
- b. Do you commit to working with the President and Congress to address this growing crisis for organizations who serve victims?
- c. What recommendation would you make as Attorney General to solve this challenge?

RESPONSE: As a nominee for Attorney General, I am not familiar with the letter you are referencing. If confirmed as Attorney General, I will look into these matters and work with requisite parties to help ensure that Department of Justice's victim services remain robust and effective.

Private Immigration Detention

23. President Biden has prohibited the Department of Justice from renewing or entering into any new contracts for private prison facilities. According to media reports, President Biden may extend that prohibition to immigration detention. Do you support this policy? How will you advise President Biden on this issue if you are confirmed?
- a. How would you expect to absorb the detainee population from private facilities into public facilities?

RESPONSE: Because I am not currently at the Department, I am not familiar with the nature of the contracts the Bureau of Prisons or the U.S. Marshals Service has with privately owned facilities. If I am confirmed, the Department will work to ensure that the operations of the U.S. Marshals Service are not negatively impacted.

Asylum

24. As the head of the Department, you will be responsible for the Executive Office of Immigration Review. In this role, you will have extensive authorities over the removal process for illegal immigrants. How does the Biden Administration plan to define asylum?

RESPONSE: I would refer you to President Biden's Executive Orders on immigration policy and enforcement. As a federal judge for the last 24 years, I have not had occasion to become familiar with the federal government's asylum policies. If I am confirmed as Attorney General, I will study this issue. As a general matter, asylum is part of American law and the Department of Justice has an obligation to apply the federal asylum laws.

25. What are your thoughts on the previous Administration's decision to appropriately limit the scope of asylum in Matter of A.B.? Do you have any intention of expanding the definition of asylum to encompass more general acts of crimes committed against individuals?

RESPONSE: This is the subject of ongoing litigation. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges prohibits me from commenting on pending or impending cases.

26. If you do expand the definition of what qualifies for asylum, are you concerned this could cause an increase in unlawful immigration, something which would just further overwhelm our already strained immigration system?

RESPONSE: As a federal judge for the last 24 years, I have not had occasion to become familiar with the federal government's asylum policies. If I am confirmed as Attorney General, I will study this issue. As a general matter, asylum is part of American law and the Department of Justice has an obligation to apply the federal asylum laws.

27. What will the Biden Administration do to prevent family separations and reunite separated children?

RESPONSE: I would refer you to President Biden's Executive Orders on immigration policy and enforcement. As I testified in my confirmation hearing, the prior administration's family separation policy was shameful. I cannot imagine anything worse than tearing parents from their children. If I am confirmed as Attorney General, the Department of Justice will provide all the cooperation that we possibly can to help reunite separated children and their families.

28. What actions will you take to reduce the backlog of immigration cases? Additionally, for those who have final orders of removal, what steps will you take, in coordination with the Department of Homeland Security, to actually effectuate their removal?

RESPONSE: As I testified in my confirmation hearing, the immigration court backlog is an extraordinarily serious problem. As a federal judge for the last 24 years, I have not had occasion to study the particulars of this issue, but I look forward to learning more. If I am confirmed, I am committed to ensuring that immigration judges are supervised appropriately to ensure effective and efficient processing of immigration cases consistent with principles of fairness and due process and other applicable law.

Sanctuary Cities

29. I believe very strongly that sanctuary city policies are misguided and dangerous. It is incomprehensible that we should be releasing dangerous criminal aliens back into our communities. For many years we have seen sheriffs across our nation, including some in the State of North Carolina, who have ignored the notification and detainer requests made by federal ICE agents. For example in 2019, Mecklenburg County's Sherriff in

North Carolina ignored over 200 detainer requests. These reckless actions have led to criminal aliens being released back into our communities and jeopardizing public safety.

Do you agree with me that sanctuary city policies are a threat to public safety, and that it is unwise for sheriffs to ignore detainer requests which release criminal aliens back in to our communities? If not, why?

RESPONSE: I have not studied these specific issues. As a general matter, however, the Department of Justice's commitment to protecting public safety includes not only enforcing the law but also ensuring the safety and security of our communities, including promoting policies that enhance trust between law enforcement and those they serve. If confirmed as Attorney General, I will work to ensure that the Department works collaboratively with state and local jurisdictions and law enforcement to promote public safety and fair treatment.

30. The previous administration attempted to stop sanctuary city policies by limiting access to federal grant funding for sanctuary cities. The Justice Department previously asked the Supreme Court to hear three cases to determine whether federal funds may be conditioned on whether sanctuary cities comply with federal immigration enforcement. Will you allow for this important issue to be litigated before the Supreme Court? Or will you direct the Justice Department to change its position in this case?

RESPONSE: This is the subject of ongoing litigation. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges prohibits me from commenting on pending or impending cases.

31. Do you believe that the federal government has the authority to condition federal grant funds on whether jurisdictions comply with federal immigration law?

RESPONSE: This is the subject of ongoing litigation. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges prohibits me from commenting on pending or impending cases.

Deportation Moratorium

32. As you know, the Department of Homeland Security issued a memorandum on January 20 that put in place a ban on deportation for 100 days. Currently there is an injunction filed in a federal district court in Texas preventing it from going into effect. If this injunction is lifted, it may exempt dangerous criminal aliens from being deported. Do you believe this is a wise policy by the Department of Homeland Security? More importantly, do you think this policy is even legal?

RESPONSE: This is the subject of ongoing litigation. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges prohibits me from commenting on pending or impending cases.

33. Do you believe that sanctuary city policies will shield dangerous criminal aliens who are released back in to communities because of this moratorium? What will the impact of this be on public safety?

RESPONSE: This is the subject of ongoing litigation. As a sitting federal judge, Canon 3 of the Code of Conduct for United States Judges prohibits me from commenting on pending or impending cases.

34. If you are confirmed as the Attorney General, what action will the DOJ take to protect American citizens if criminal aliens are released into communities because of the moratorium?

RESPONSE: If I am confirmed as Attorney General, I will continue and strengthen the Department's work to protect our Nation's communities from crime, regardless of the source.

International Parental Child Abduction

35. I have a specific interest in the issue of international parental child abduction, where one parent will unlawfully kidnap an American citizen child to another country. Many of these countries often refuse to return the children. This practice is devastating to left-behind parents, who must navigate international law to get their children returned. Will you make this issue a top priority if you are confirmed as Attorney General?

RESPONSE: International parental child kidnapping is a deeply concerning issue. If I am confirmed as Attorney General, I look forward to learning more about and working to further strengthen the efforts the Department has undertaken to work with left-behind parents and advocacy organizations to return every child kidnapped abroad. I would also welcome working with you and other Members of Congress to effectively address this important issue.

36. In your career as an attorney, prosecutor, and judge, how much have you engaged with the issue of parental child abduction either through individual cases or broader policy?

37. Are you committed to working with left-behind parents to return each and every child kidnapped abroad? What steps will you take, yourself, to engage directly with left behind parents and their advocacy organizations?

RESPONSE: Please see my response to Question 35.

38. How will you direct the Department to prevent and resolve cases of international parental child abduction? Will you commit to directing US Attorneys and DOJ staff to aggressively prosecute cases of international parental child abduction?

RESPONSE: If confirmed, I look forward to engaging with you on ways to enhance the Department's current efforts to prevent and resolve cases of international parental abduction.

39. Preventing parental child abduction and resolving cases requires an interagency process between the DOJ, State, and DHS. How will you work with your colleagues at other agencies to reunite kidnapped children with their left- behind parents?

RESPONSE: If confirmed, I will prioritize assessing the Department's current structure and capacity to help ensure that all the tools available to the Department and our interagency partners, including at the Departments of State and Homeland Security, are being put to their best use to prevent and resolve cases of international parental kidnapping.

40. Are you willing to utilize extradition as a tool to bring those who kidnap children to justice in the United States?

RESPONSE: Please see my response to Question 39.

First Amendment Issues

41. Over the past few months, Americans have needed their faith and the support that comes with their faith communities, but some governors have prohibited faith communities from gathering to worship. In many cases, the restrictions on religious gatherings have been much stricter than the requirements to go to the local Walmart. Judge Garland—is there a difference between Americans' right to assemble and participate in peaceful protest and their right to practice their religion?

RESPONSE: The First Amendment guarantees the right to assemble in peaceful protest and the right to the free exercise of religion. Those rights protect different activities, but both are fundamental to our constitutional structure.

42. As Attorney General what will you do to protect Americans' right to practice their faith during this incredibly difficult time?

RESPONSE: If I am confirmed, I will seek to ensure that the Department of Justice upholds the rights of all Americans under the Constitution and the laws of the United States, including the provisions of the Constitution and laws securing religious liberty.

43. The Religious Freedom Restoration Act is the leading federal civil rights law that protects all Americans' religious freedom. For nearly three decades, it has protected the religious freedom of all Americans of all faiths. If confirmed, will you commit that the Department of Justice will not support any legislative or executive action that would alter in any way the Religious Freedom Restoration Act's protection for Americans of all faiths?

RESPONSE: As I testified at my hearing, I am a strong believer in religious liberty. If I am confirmed as Attorney General, I will seek to ensure that the Department of Justice scrupulously complies with the Constitution and all federal statutes, including the Religious Freedom Restoration Act. I have not studied the question of potential legislative amendments to the Act. If I were asked to consider such an amendment, my position would be informed by my strong belief in religious liberty and guided by a careful review of the relevant facts and law.

44. In a 2007 opinion, the Office of Legal Counsel affirmed that a religious organization that administers a federal grant retains its right, under the Civil Rights Act of 1964 and the Religious Freedom Restoration Act, to hire staff who agree with its religious mission. Despite pressure from outside groups, the Obama Administration refused to rescind that opinion. If confirmed, will you continue the Obama Administration's policy of leaving that opinion in place?

RESPONSE: I have not studied this Office of Legal Counsel opinion or the legal issues it addresses. If I were confirmed and called upon to consider those issues, I would follow the same approach I would use in any other context where I was asked to provide legal advice: I would carefully review the relevant facts and law; consult with lawyers in the Department of Justice and other relevant agencies; consider any relevant Department practices and procedures; and ultimately reach a conclusion based on my best view of the law.

45. Is there a line where a First Amendment activity or peaceful protesting becomes rioting and is no longer protected? What is that line? Do you agree that looting, burning property, and causing other destruction is not a protected First Amendment activity?

RESPONSE: The First Amendment protects speech and other expressive activity. It does not protect theft, arson, property damage, or violence.

Second Amendment

46. President Biden repeatedly promised during his campaign that on his first day in office he would send a bill to Congress repealing liability protections on gun manufacturers, closing the background check loophole and waiting period. I am pleased that he did not actually do this on his first day in office. Can you commit to this Committee today that as Attorney General you will not take any actions to limit liability protections for gun manufactures, expand the background check requirements or extend the waiting period beyond what is mandated by Congress—unless Congress passes a law touching on one of these subjects?

RESPONSE: As I testified at the hearing, the role of the Department of Justice in matters of policy is to advance the policy program of the President and the administration as long as it is consistent with the law. President Biden has been a strong supporter of and advocate for gun safety measures throughout his professional life. I would not adopt or support any policy that is inconsistent with the law, including the Second Amendment and

the statutes enacted by Congress. But where there is room under the law for the President's policies to be pursued, I believe he is entitled to pursue them.

47. President Biden selected Kristen Clarke to lead DOJ's Civil Rights Division. Yet in publicly accessible tweets issued on July 16, 2019, Ms. Clarke lauded the late Justice John Paul Stevens for calling for the repeal of the Second Amendment. Does it concern you at all that President Biden's choice of DOJ's Civil Rights Division supports repealing a constitutional provision that protects an individual civil right?

RESPONSE: If I am confirmed as Attorney General, I will uphold all provisions of the Constitution, including the Second Amendment. With respect to Ms. Clarke, she is exactly the person we need to be running the Civil Rights Division. She is a person of integrity; she is an experienced former line prosecutor; and her views about the Civil Rights Division are in line with my own. If she is confirmed, I have no doubt that she will likewise faithfully uphold all provisions of the Constitution.

48. What will you do as Attorney General to ensure that Americans feel confident that DOJ will protect their Second Amendment rights and ensure Ms. Clarke doesn't use her possible position leading the Civil Rights Division to attack individual gun owners?

RESPONSE: For the reasons stated in my response to Question 47, I am confident that Ms. Clarke's investigative and enforcement decisions as the head of the Civil Rights Division would be guided by the facts and the law. I have no basis whatsoever to believe that she would use her position to attack individual gun owners.

Gunfire Protection

49. It is increasingly clear that technology provides very useful tools in crime fighting and crime prevention, especially when they are in an integrated system. I would like to see Federal support for these technologies increased. Most gunshot incidents, for example, go unreported to local law enforcement. Gunfire detection and location technology where it has been deployed, including communities in my state, has helped local law enforcement respond to more gunshot incidents, and in a safer and timely way. This enables police to collect the shell casings, interview witnesses, and sometimes catch a fleeing suspect. When those shell casings are run through another technology, the National Integrated Ballistic Information Network (NIBIN), law enforcement agencies can determine if the gun has been used in other crimes and thus focus their investigation. The technology also facilitates a faster emergency medical response for gunshot victims. The use of cameras in public spaces is another valuable tool. Will you support increased Federal resources to assist state and local governments in deploying these kinds of technologies?

RESPONSE: I am very supportive of law enforcement using technology appropriately and effectively to investigate, reduce, and combat crime. Because I am not in the Department, I am not currently aware of Department resources available for these purposes, but if

confirmed, I look forward to learning more about ways the Department can provide appropriate support while protecting civil liberties.

Pastor Cao

50. I'd like to ask about the case of Pastor Cao. Pastor Cao is a lawful permanent resident who lives in North Carolina. He's been arbitrarily detained by the Communist Chinese Government since March 2017 and is currently being held in Kumming Prison. My understanding is that he is on the U.N. Working Group on Arbitrary Detention's list of people who should be immediately released. Will you commit to me to do everything in your power to secure Pastor Cao's release, including raising his unlawful detention each and every time you meet with your Chinese counterparts?

RESPONSE: If I am confirmed as Attorney General, I commit to reviewing the matter. However, because I am not currently at the Department and I am not familiar with these circumstances, it would not be appropriate for me to comment further.

Prohibiting the Use of "Slush Fund Settlements"

51. As you may know, the Obama Administration had instituted a policy where legal settlements between the DOJ and companies were used to fund third-party, special interest groups that were not parties to the litigation. This practice, required by the Department as a condition for settling a case, has been called "slush fund settlements."

In some cases, the Department required donations that restored funding that Congress had specifically cut. The Department justified "slush fund settlements" by claiming that business defendants were "voluntarily" making these third-party payments as part of settling claims. But many of these companies were boxed into accepting these types of settlements because they had a tremendous amount of liability on the line if they were to litigate the matter, in addition to the risk of losing government licenses and contracting permits. In reality, these companies never had a choice.

In 2017, the Trump Administration forbade this practice; and last year, the Department incorporated this ban into the Justice Manual (85 FR 81409). The Biden Administration recently announced that it is reviewing the bar on this potentially unlawful and unethical practice. Will you commit to oppose the reinstatement of this potentially unlawful and unethical practice if you are confirmed?

RESPONSE: As I testified at my hearing, I have not studied this specific issue. If I am confirmed, I will carefully consider the matter and the arguments on both sides, including both the reasons why this practice developed and the reasons why it was changed.

Maintaining the Corporate Enforcement Policy

52. Over the past four years, the Department has updated and reformed the enforcement of the Foreign Corrupt Practices Act (FCPA), a process that began under the Obama

Administration. Specifically, in 2016, under Attorney General Loretta Lynch, the Department announced an FCPA “pilot project,” which was designed to promote voluntary self-disclosure, cooperation with the government, and remediation of violations in exchange for mitigated penalties. In 2017, the Department enhanced this pilot project and incorporated it into the U.S. Attorneys’ Manual as the FCPA Corporate Enforcement Policy (CEP); the Department has since stated that it will apply the principles of the CEP to contexts other than the FCPA.

It appears that these reforms are having a positive effect on compliance. If you are confirmed, will you continue to support and improve the Corporate Enforcement Policy in a way that appropriately incentivizes the private sector to invest voluntarily in compliance programs and cooperate with the Department?

RESPONSE: I am committed to the vigorous enforcement of the Foreign Corrupt Practices Act and other federal anti-corruption laws, including efforts to foster voluntary compliance and cooperation with the Department of Justice. I have not studied the Corporate Enforcement Policy. If I am confirmed, however, I will look forward to consulting with the relevant Department officials to learn more about that initiative and to identify ways in which it might be further supported or improved.

Safeguards on the Use of Sub-regulatory Guidance

53. Guidance documents, also known as sub-regulatory guidance, are a way for agencies to announce policy changes, establish new procedures, and sometimes set forth new obligations on the private sector. This guidance often takes a variety of forms, such as Frequently Asked Questions, compliance memos, and other tools that can help agencies accomplish their goals but can unfairly impose burdens on private parties. Sub-regulatory guidance does not have to comply with statutory law or be formally promulgated as rules in accordance with the Administrative Procedure Act (most notably the notice and comment obligations). Agencies often issue it without any restrictions.

Since agencies are not required to notify the public when issuing new guidance, it may be impossible for private parties to comply with it. This is particularly problematic when the “guidance” purports to be binding, even though it is not based in law or regulation. Worse still, agencies have increasingly sought to bring enforcement actions predicated on it.

The abuse by the government of sub-regulatory guidance prompted the Trump Administration to act. In 2017, former Attorney General Sessions issued a memo rescinding existing guidance documents that went too far and prohibiting the Department from issuing new ones that have the effect of adopting new regulatory requirements or amending the law. On January 25, 2018, former Associate Attorney General Rachel Brand released the Brand Memo, which forbids the Department from treating sub-regulatory guidance as binding legal requirements in certain cases.

The Department later broadened the Brand Memo and incorporated it into the Justice Manual, so it covered all civil and criminal enforcement actions.

In October 2019, the last Administration made the Department’s important reforms in this area apply across the Executive Branch; it issued two Executive Orders (EO), EO 13891 and EO 13982, which respectively required agencies to treat guidance documents as “non-binding both in law and in practice” and limited the ability of agencies to enforce standards of conduct that were not publicly stated or issued in formal rulemaking. These EOs also required transparency to the American people—guidance documents now had to be posted on-line, and the government had to receive Americans’ input on the guidance it was issuing.

It is troubling that on his first day in office, President Biden rescinded Executive Orders 13891 and 13982. However, the particular reforms and safeguards that are designed to prevent the unfair application and abuse of sub-regulatory guidance are still policy at the Department. Do you commit to preserving these important safeguards at the Department if you are confirmed?

RESPONSE: I have not studied the memos issued by Attorney General Sessions and Associate Attorney General Brand or the corresponding provisions of the Justice Manual. In general, however, enforcement actions must be based on a violation of a statute or a “legislative rule” that has “the force and effect of law.” *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 95 (2015) (citation omitted). By definition, the guidance documents referenced in the question lack that force and effect. A violation of a guidance document thus cannot, by itself, be the basis for an enforcement action. Guidance documents may, however, serve valuable functions. For example, they can ““advise the public’ of how the agency understands, and is likely to apply, its binding statutes and legislative rules.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (plurality opinion). If I am confirmed, any action I take in this area will be consistent with these principles.

Transparency of Third-Party Litigation Funding in False Claims Act Cases

54. As you may know, third-party litigation funding (TPLF) is a growing phenomenon in the United States. TPLF involves third-party financiers investing in litigation for a cut of any final settlement or judgment. For many cases involving TPLF, the existence of a TPLF agreement is never required to be disclosed to the opposing party or even to the court, which means that funders may be exercising strategic control over the litigation instead of the actual plaintiffs.

This practice is especially problematic in the context of qui tam False Claims Act (FCA) litigation brought by relators. This is because qui tam relators stand in the shoes of the government. In these cases, the Department has little insight into the extent to which TPLF funders are backing qui tam cases that the Department is investigating, litigating, or otherwise monitoring. These non-party funders may be exercising substantial control over relators’ litigation and settlement decisions in cases that were brought in the name of the United States.

Third party litigation funders and the government may have entirely divergent interests. Because of this possible divergence of interests, the Department has the right and the need to know if third-party funders are behind qui tam actions.

To achieve this desired level of transparency, the Department recently began instructing its attorneys to ask a series of questions at each relator interview designed to reveal whether third party funders are involved in the underlying litigation. Do you agree that TPLF raises particular ethical issues in qui tam FCA cases? If you are confirmed, will you continue to require DOJ attorneys to ask these questions at each relator interview?

RESPONSE: The False Claims Act, and its qui tam provisions, play a critical role in the federal government’s effort to ensure that those who do business with the government do so honestly. However, as a federal judge for the last 24 years, I have not had occasion to become familiar with the particulars of this issue.

Asbestos Oversight

55. The Department of Justice has repeatedly and publicly committed to investigate conduct related to asbestos trusts that is illegal under federal law. I and others on this committee have introduced legislation, the PROTECT Asbestos Victims Act, that would make it easier for asbestos-related fraud and abuse to be identified and addressed. While I continue to believe that statutory reforms are necessary, I applaud the Department’s commitment to using available tools to ensure that legitimate asbestos victims are able to receive the compensation they are due without dilution of their claims through fraud.

Most recently, the Department filed a Statement of Interest in a case pending in U.S. Bankruptcy Court for the Western District of North Carolina, *In re Bestwall LLC*. In a press release announcing the filing, the Department was clear that it is “increasingly common for claimants’ counsel to seek duplicative recoveries from multiple sources by misrepresenting the asbestos products to which claimants were exposed” and that fraudulent claiming “depletes resources that would otherwise be available to compensate deserving claimants filing claims in the future.”

The Department is also acting separately to protect the United States’ interest in the appropriate resolution of asbestos claims. As the Department’s *Bestwall* filing explained, “[i]n many cases, payment of personal injury claims will trigger reimbursement obligations to the United States under the Medicare Secondary Payer Statute (“MSP Statute”), 42 U.S.C. § 1395y(b)(2).” Misdirection of asbestos funds through waste, fraud, or abuse may prevent proper reimbursements. Asbestos trusts’ public disclosures and court filings make clear that the Department is actively investigating potential violations of the federal False Claims Act and MSP Statute.

Will you commit, if confirmed, to continue the Department’s important efforts to detect and prosecute illegal asbestos-related conduct and provide the Civil Division, U.S. Trustee Program, and other Department components with the resources needed to do so?

RESPONSE: While Canon 3 of the Code of Conduct for United States Judges bars me from commenting on any pending or impending case that is in any court, if I am confirmed, I will work to ensure full and faithful enforcement of our laws, including laws pertaining to conduct related to asbestos trusts. I would also look forward to reviewing current resource allocation and needs across the relevant components of the Department.

Senator Blackburn

Responses to Questions from Senator Blackburn to Judge Merrick Garland, Nominee to be United States Attorney General

1. Is the death penalty appropriate punishment for domestic terrorists such as the Oklahoma City bomber Timothy McVeigh and the Boston Marathon bomber Dzhokhar Tsarnaev?

RESPONSE: As I testified at my hearing, I supported the death penalty for Timothy McVeigh and believed it was appropriate at that time in that specific case. Regarding Dzhokhar Tsarnaev, this question implicates a pending case, so I am barred from commenting on this matter by Canon 3 of the Code of Conduct for United States Judges.

2. Do you support any modifications to the consumer welfare standard?

RESPONSE: Strong antitrust enforcement must be anchored by the rule of law. If confirmed, it will be my direction that our antitrust laws be used to effectively promote market competition. As a sitting judge and Justice Department nominee, I do not have a preconceived notion of how best to achieve that goal.

3. Does the consumer welfare standard include consideration for non-price harms such as diminished privacy?

RESPONSE: Strong antitrust enforcement must be anchored by the rule of law. If confirmed, it will be my direction that our antitrust laws be used to effectively promote market competition. As a sitting judge and Justice Department nominee, I do not have a preconceived notion of how best to achieve that goal.

4. Are reforms necessary to reshape the limits of liability protection under Section 230 of the Communications Act? What speech should or should not be protected?

RESPONSE: As I testified at my hearing, I have relatively limited information about Section 230. I know that you and other members of the committee have ideas about how the statute should be amended, and if confirmed, I look forward to talking with you and others about those ideas.

5. If confirmed, how do you plan to handle investigations within the U.S. Department of Justice (DOJ) that were initiated by prior administrations?

RESPONSE: As the nominee for Attorney General, I am not familiar with current investigations being undertaken by the Department. If confirmed, I will make all decisions concerning investigations based on the facts and the law, without regard to partisan or other improper considerations.

6. On January 26, 2021, President Biden signed an executive order on privately operated detention facilities, stating: “The Attorney General shall not renew Department of Justice

contracts with privately operated criminal detention facilities, as consistent with applicable law.” The U.S. Marshals Service (USMS) oversees 60,000 detainees daily. If the USMS loses access to contractor-operated secure facilities, there is the real risk of not being unable to find needed capacity that meets federal requirements and standards for detainees, including the requisite level of medical care.

- a. Will state and county detention facilities provide a sufficient alternative if the USMS loses access to contractor-operated secure facilities?

RESPONSE: Because I am not currently at the Department, I am not familiar with the nature of the contracts the Bureau of Prisons or the U.S. Marshals Service has with privately owned facilities. If I am confirmed, the Department will work to ensure that the operations of the U.S. Marshals Service are not negatively impacted.

- b. If state and county detention facilities fail to provide a sufficient alternative to contractor-operated secure facilities, how will the USMS effectively carry out its mission of exercising custody of federal prisoners and providing for their security and transportation to correctional facilities?

RESPONSE: Because I am not currently at the Department, I am not familiar with the nature of the contracts the Bureau of Prisons or the U.S. Marshals Service has with privately owned facilities. If I am confirmed, the Department will work to ensure that the operations of the U.S. Marshals Service are not negatively impacted.

7. In 1994, President Clinton and Congress enacted a ban on assault weapons that barred the purchase of numerous common, self-defense, and hunting firearms. In 2016, Obama issued 23 Executive Actions on gun violence, including a call to ban assault weapons and high-capacity magazines. There are reports President Biden plans to enact similar gun control measures via Executive Actions. If confirmed as Attorney General, would you use your authority over the Bureau of Alcohol, Tobacco, Firearms and Explosives to promote a similar reenactment of these types of gun bans?

RESPONSE: As I testified at the hearing, President Biden has been a strong supporter of and advocate for gun safety measures throughout his professional life. The role of the Justice Department on policy matters is to advance the policy program of the administration as long as it is consistent with the law.

8. Please describe any limits under federal law that bar the use of taxpayer funds for abortion.

RESPONSE: As a federal judge for 24 years, I have not had occasion to become familiar with the limits under federal law related to the use of taxpayer funds for abortion.

9. Although marijuana is still considered a federally controlled schedule one drug, some states have legalized marijuana use within their jurisdictions. Do law enforcement agencies at the federal, state or local level have universal access to technology that can

accurately assess whether a driver has unsafe levels of THC in his or her system? If not, what solution do you recommend for the public safety problem of driving under the influence of marijuana?

RESPONSE: I have not had an opportunity to examine this public safety issue. If I am confirmed, I look forward to learning about this concern, and determining if the Department has programs or resources that could be helpful.

10. The Wall Street Journal recently reported that some illegal immigrants anticipate more lenient treatment by the Biden Administration. In January 2021, U.S. Border Patrol successfully arrested 7,260 illegal aliens attempting to enter the United States compared to 4,500 in December 2019. As Attorney General, how do you plan to prioritize illegal reentry cases, and will you carry through with a zero-tolerance policy for illegal immigration enforcement?

RESPONSE: As a federal judge, I have not had the occasion to become familiar with the particulars of this issue. If I am confirmed, I will study this topic.

11. What steps should DOJ take, from filing amicus briefs, statements of interests, to initiating lawsuits, to ensure that the First Amendment is upheld for all viewpoints on college campuses? Please describe some recent efforts taken on behalf of campus free speech initiatives that you believe should be continued.

RESPONSE: I have not studied the Department of Justice's recent efforts in this area, but in general I firmly believe that the Department should seek to uphold all constitutional rights, including the rights protected First Amendment. The appropriate steps to uphold those rights will depend on the context, including the Department's relevant legal authorities, other applicable law, and the facts and circumstances of each case.