Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Sarah Elisabeth Geraghty
Nominee to be United States District Judge, Northern District of Georgia

1. **You are an active proponent of eliminating cash bail, like some prior Biden nominees before you. Recently, in Waukesha, Wisconsin, a man deliberately drove his SUV into a holiday parade, killing, at the last count 6 people, including one child and injuring dozens more. In that case, the District Attorney admitted, after the fact, that the bail recommendation of $1,000, despite his numerous prior violent charges, in the accused killer's case was "inappropriately low." Granting "inappropriately low" bail can obviously lead to horrific consequences. In advocating to eliminate cash bail, can you explain how you weighed the risks on both sides and what your thought process was on the issue?**

   Response: As the Supreme Court has stated, "liberty is the norm," and detention prior to trial is "the carefully limited exception." *United States v. Salerno,* 481 U.S. 739, 755 (1989). Implicit in this statement of law is the understanding that pretrial release is not consistent with public safety in every case. The Supreme Court has made clear that the right to bail is not absolute and detention to prevent danger to the community is constitutionally permissible. *Id*. at 754-55. If I am confirmed as a district court judge, in considering whether to detain a defendant before trial, I would follow and faithfully apply the factors Congress set forth in 18 U.S.C. § 3142(g), including the potential danger to any person or to the community that would be posed by the person's release.

   I would note that as an advocate, my bail reform litigation experience has focused on pretrial detention in misdemeanor and ordinance violation cases. I have never specifically urged an end to cash bail in a situation in which an individual was arrested for a crime such as running over a person with a car. Rather, on behalf of clients, and consistent with my duty to be a zealous advocate, I have challenged municipal bail policies that condition detention and release only on ability to pay, to the exclusion of consideration of other factors such as risk of flight and public safety. *See, e.g., Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018).

2. **Are there any situations or types of crime where you believe that eliminating cash bail is inappropriate? If so, please explain.**

   Response: The wholesale elimination of cash bail is not constitutionally required. The government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. *Salerno*, 481 U.S. at 738. Further, bail will not be deemed excessive if it is set at a figure reasonably calculated to fulfill its purpose. *See Stack v. Boyle*, 342 U.S. 1, 4-5 (1951). If confirmed, I would follow these and all binding precedents regarding pretrial release and/or detention.

3. **You were a strong proponent of releasing prisoners from jail as a result of the COVID-19 pandemic. You wrote letters to judges and prison officials, requesting that they "reduce populations as much as possible, consistent with public safety."**
    a. **If confirmed, how do you intend to weigh the following interests—the safety of the community versus the health of the defendant—in making detention determinations for violent, repeat offenders?**

    Response: The letters referenced above sought consideration of releases only where "consistent with public safety" (a phrase that appears multiple times in each letter), and only in situations in which Georgia law authorized such release. The letters further made clear that judges and law enforcement officials were the appropriate persons to make release decisions. The letters contained lawful requests made within the bounds of the law and in my role as an advocate.

    I understand the question above to be asking about pretrial detention decisions. With respect to all such decisions, I would follow and faithfully apply the factors Congress set forth in 18 U.S.C. § 3142(g), including the potential danger to any person or to the community that would be posed by the person's release.

    b. **If confirmed, how do you intend to weigh those competing concerns with regard to offenders with prior gun crimes?**

    Response: 18 U.S.C. § 3142 governs release or detention of a defendant pending trial. Under that statute, "[t]he judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community," consider the following factors: (1) the nature and circumstances of the offense; (2) the weight of the evidence against the person; (3) the history and characteristics of the person (including criminal history and physical condition); and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. 18 U.S.C. § 3142(g)(1)-(4). A court would be required to take into account prior gun crimes under § 3142(g)(3) in determining whether the defendant may be a danger to the community if released. *See, e.g., United States v. Jackson*, 847 Fed. Appx. 792, 796-97 (11th Cir. 2021). In addition, there is a presumption that no condition will reasonably assure the appearance of the defendant in certain cases. 18 U.S.C. § 3142(e). I would give due weight and consideration to all statutory factors.

4. **Do you believe that "[g]enuine partnership with nonprofit organizations and advocacy groups must be at the center of efforts to create a network of supports that function effectively, equitably, and without funneling people into the criminal legal system"? Please explain why or why not.**

    Response: I am not familiar with the context for this statement, and unsure of the precise point that its author is attempting to convey. This is not phrasing that I have used or would use.

5. **In the Eleventh Circuit, does domestic violence constitute a "crime of violence"? Please explain why or why not.**

   Response: I am not aware of any specific federal offense titled "domestic violence." Whether a particular offense involving spousal, child, or other domestic violence constituted a "crime of violence" under 18 U.S.C. § 16, 18 U.S.C. § 924, or another federal statute would depend upon the elements of that offense. The definition of a "misdemeanor crime of domestic violence" is set forth at 18 U.S.C. § 921(a)(33)(A); *see also United States v. Castleman*, 572 U.S. 157, 165 (2014) (interpreting "misdemeanor crime of domestic violence" and stating that domestic violence "is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context."). In the context of the federal statute governing removal of certain non-citizens convicted of crimes, a "crime of domestic violence" is considered a "crime of violence." 8 U.S.C. § 1227(a)(2)(E)(i).

6. **What constitutes statutory rape under Georgia law?**

   Response: Under Georgia law, a person commits the offense of statutory rape "when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the victim." O.C.G.A. § 16-6-3(a).

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

   Response: O.C.G.A. § 42-1-12(e) sets forth the offenses that require registration on the Georgia sex offender registry. That statute requires that certain persons convicted of a "dangerous sexual offense" must register. O.C.G.A. § 42-1-12(e)(2), (4). Statutory rape qualifies as a "dangerous sexual offense" under O.C.G.A. § 42-1-12(a)(10)(B – B.4) if the convicted person is 21 years of age or older. Registration is not required if the statutory rape conviction is considered a misdemeanor under § O.C.G.A. 16-6-3 (stating that statutory rape is a misdemeanor where the victim is at least 14 years of age, but less than 16 years of age and the defendant is 18 years of age or younger and no more than four years older than the victim). *See* O.C.G.A. § 42-1-12(a)(9)(C). To determine whether an out-of-state statutory rape conviction requires registration in Georgia, a court would look to O.C.G.A. § 42-1-12(e)(5–8).

   Under federal law, the Sex Offender Registration and Notification Act, 34 U.S.C. § 20911, *et seq*., broadly defines a "sex offense" requiring registration as including, but not limited to, "a criminal offense that has an element involving a sexual act or sexual contact with another" and "a criminal offense that is a specified offense against a minor." 34 U.S.C. § 20911(5)(a)(i-ii) (defining "sex offense"); 34 U.S.C. § 20913 (requiring registration for sex offenders).

8. **Is the "omicron" variant of COVID-19 a sufficient justification to release prisoners from jail?**

   Response: No. The existence of the "omicron" variant of COVID-19 is not in and of itself a sufficient justification to release prisoners from jail.

9. **In your advocacy against some of the provisions of HB 1059, you noted:**

   > **[W]e would have no "John Doe" plaintiffs because a John Doe sex offender would be likely to take on the characteristics of the worst of the worst—a child abductor and a rapist—in the minds of the press and the public. We needed plaintiffs who would engender sympathy, make good witnesses, and be willing to talk to the media.**

   a. **Some of the "named plaintiffs" included individuals who were convicted of statutory rape of a child while the perpetrator plaintiffs were adults. Should grooming a child under the age of 12 for sex not constitute a basis for inclusion on the sex offender registry?**

      Response: In Georgia, the offenses requiring sex offender registration are set forth in O.C.G.A. § 42-1-12(e). To the best of my knowledge, the term "grooming" is not defined in the Georgia sex offender registry statute. However, sex offender registration is required for any conviction which, by its nature, is a sexual offense against a victim who is a minor. *See* O.C.G.A. § 42-1-12(e); O.C.G.A. § 42-1-12(a)(9)(B)(xi); O.C.G.A. § 42-1-12 (a)(10)(B)(xix). Under the sex offender registration statute, persons under 18 are "minors." O.C.G.A. § 42-1-12(a)(14). Under federal law, the "grooming" activities referenced above could violate 18 U.S.C. § 2422. *See, e.g., United States v. Syed*, 616 Fed. Appx. 973, 978, 981 (11th Cir. 2015) (considering "grooming tactics" in prosecution under § 2422).

   b. **Some of the "named plaintiffs" included individuals who were convicted of statutory rape of teenagers while the perpetrator plaintiffs were adults. Should grooming a teenager between the ages of 12 and 17 for sex not constitute a basis for inclusion on the sex offender registry?**

      Response: Please see my response to Question 9(a) above.

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

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

Response: As a judicial nominee, it would not be appropriate for me to comment on the policy of the DOJ in this regard because I would not want to create an impression that I had taken a side regarding a political or social issue.

b. **Which of the following groups of people have the right to protest government intrusion and/or overreach and why?**
   i. **Concerned parents about the curricula in public schools?**
   ii. **Black Lives Matter protestors?**
   iii. **Climate change protestors?**
   iv. **Religious groups protesting abortion?**

Response: The groups listed above all have the right to protest alleged government intrusion and/or overreach. In our constitutional democracy, the right to protest government action is enshrined in the First Amendment. U.S. Constitution, Amend. I ("Congress shall make no law . . . abridging the freedom of speech."). Protesting activities, including but not limited to peaceful picketing and leafletting, are expressive activities involving speech protected by the First Amendment. *See, e.g., United States v. Grace*, 461 U.S. 171, 176 (1983); *see also Shuttlesworth v. City of Birmingham, Ala.,* 394 U.S. 147, 162 (1969) (Harlan, J., concurring) (noting that the right to assemble peaceably to voice political protest is a basic right).

11. **Many people define "equity" as equality in *outcome* as opposed to equality, which is traditionally seen as equality of *opportunity*. Do you see equity as ensuring equality of opportunity? Please explain your response.**

Response: According to the American Heritage Dictionary of the English Language, "equity" is defined as "the state or quality of being just and fair," and "equality is defined as "the state or quality of being equal." If a case involving these terms came before me, I would look to the text of the relevant statute and to relevant Supreme Court and Eleventh Circuit precedents to inform my understanding of the terms.

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

Response: Judicial decisions should not take into consideration principles of social equity unless such consideration is required by a statute or binding precedent. Judicial decisions should be based solely upon the discrete facts of a particular case and the applicable law and precedent.

13. **What is implicit bias?**

Response: As I understand it, "implicit bias" is a term in psychology that refers to a pre-reflective or unconscious tendency to attribute characteristics to individuals based on stereotypes or assumptions. It is likely that different people define this term differently.

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

Response: I have not conducted or examined any research into whether the federal judiciary is affected by implicit bias. I am not aware that I hold any implicit bias toward any person or group. I strive to treat everyone equally and with respect. If confirmed, I would scrupulously obey the judicial oath to administer justice without respect to persons, to do equal right to the poor and to the rich, and to faithfully and impartially discharge my duties under the Constitution and laws of the United States. 28 U.S.C. § 453.

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

Response: Although the First Amendment generally prevents the government from regulating speech, the United States Supreme Court has held that the First Amendment "permits a State to ban a true threat." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (internal quotation marks omitted). A "true threat" is a statement wherein the speaker means to communicate a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id*. The speaker need not intend to carry out the threat. *Id*. at 359-60. In the criminal context, various federal statutes criminalize certain threatening communications. *See, e.g*., 18 U.S.C. § 875; *see also United States v. Martinez*, 800 F.3d 1293, 1295 (11th Cir. 2015) (holding that an indictment under § 875(c) was insufficient where it failed to allege *mens rea* with respect to the threatening nature of the communications at issue).

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

Response:

Georgia

Georgia's self-defense statute states in pertinent part:

> A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to defend himself or herself or a third person against such other's imminent use of unlawful force; however, except as provided in Code Section 16-3-23, a person is justified in using force which is intended or likely to cause death or great bodily harm only if he or she reasonably believes that such force is necessary to prevent death or great bodily injury to himself or herself or a third person or to prevent the commission of a forcible felony.
>
> O.C.G.A. § 16-3-21.

The statute contains additional qualifiers, limiting the defense in cases in which a person initially provokes the use of force, is attempting to commit a felony, or was engaged in "combat by agreement." O.C.G.A. § 16-3-21(b)(1-3). Further rules apply in cases of murder and manslaughter. *See* O.C.G.A. § 16-3-21(d). Other Georgia statutes apply to the use of force for defense of habitation and property. *See* O.C.G.A. § 16-3-23, § 16-3-23.1, § 16-3-24. Under Georgia law, homicide is not justified if the force used by the defendant exceeds that which a reasonable person would believe was necessary to defend against the victim's unlawful conduct. *See Nelson v. State*, 657 S.E.2d 201, 201 (Ga. 2008).

Eleventh Circuit

A defendant who is violently assaulted in a place where he has a right to be has the right to use force against his assailant. *See Beard v. United States,* 158 U.S. 550, 562 (1895). Under *Beard,* the defendant's use of force is justified if he reasonably believed that use of force was necessary to prevent death or great bodily harm. *Id.* A defendant claiming self-defense is under a duty to retreat and avoid confrontation, but the duty is not absolute. *See United States v. Blevins,* 555 F.2d 1236, 1238-39 (5th Cir. 1977). There is an exception to the duty where the defendant reasonably believed that he was in imminent danger of death or serious bodily harm. *Id.*

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

Response: In my twenty years of representing clients in the criminal justice system, I have not advocated for defunding police departments. As a judicial nominee, it would not be appropriate for me to opine on matters of social policy.

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

Response: In my twenty years of representing clients in the criminal justice system, I have not advocated for reallocating funds away from police departments. As a judicial nominee, it would not be appropriate for me to opine on matters of social policy.

19. **What is the legal basis for a nationwide injunction?**

Response: Injunctions in general are authorized by Rule 65 of the Federal Rules of Civil Procedure and a federal court's equitable power. *See Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.") Nationwide injunctions are injunctions pursuant to which a court binds a defendant's conduct with respect to parties that are not before the court. I understand that the legal basis for the issuance of a nationwide injunction (or lack thereof) is currently a subject of jurisprudential debate, as evidenced by opinions from the Supreme Court in *Department of Homeland Security v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III.") and *Trump v. Hawaii*, 138 U.S. 2392, 2425 (2018) (Thomas, J. concurring) ("I am skeptical that district courts have the authority to enter

universal injunctions.") In any case in which an injunction is sought, courts should obey the admonition that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). If confirmed, I would follow precedent regarding the proper scope of equitable remedies and the requirement that a court must act within its Article III powers.

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

Response: Yes, the Supreme Court has held that parents have a fundamental right to direct the upbringing and education of their children. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Meyer v. Nebraska*, 262 U.S. 390 (1923).

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

Response: The False Claims Act's materiality standard is "demanding." *United States of America ex rel. Bibby v. Mortgage Investors Corp*., 987 F.3d 1340, 1347 (11th Cir. 2021) (quoting *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016)). Minor or insubstantial noncompliance will not satisfy the Act's materiality requirement. *See id*. Rather, materiality is defined as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *See id*. While no single factor is dispositive in the materiality analysis, relevant factors include: (1) whether the requirement is a condition of the government's payment, (2) whether the misrepresentations went to the essence of the bargain with the government, and (3) to the extent the government had actual knowledge of the misrepresentations, the effect on the government's behavior. *See id*.

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

Response: In *District of Columbia v. Heller*, the Supreme Court held that "on the basis of both text and history" the Second Amendment protects an "individual right to keep and bear arms." 554 U.S. 570, 595 (2008). While the Second Amendment right is not unlimited, s*ee id*., it protects the right to keep an operable handgun in one's home for purposes of immediate self-defense. *Id*. at 635. The right to keep and bear arms is a fundamental right, and the Supreme Court has extended *Heller* to the states. *See McDonald v. City of Chicago*, 561 U.S. 742 (2010).

The Eleventh Circuit examines Second Amendment claims using a two-part test. *See United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017). First, the court asks whether the regulated activity is protected by the Second Amendment. *See id.* In the first step, the Court analyzes the challenged regulation in light of the historical background of the Second Amendment. Second, the court applies an appropriate means-end scrutiny test. *See id*. If confirmed, I would faithfully apply *Heller*, *McDonald*, and all binding Second Amendment precedent.

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

    a. **Was *Brown v. Board of Education* correctly decided?**
    b. **Was *Loving v. Virginia* correctly decided?**
    c. **Was *Griswold v. Connecticut* correctly decided?**
    d. **Was *Roe v. Wade* correctly decided?**
    e. **Was *Planned Parenthood v. Casey* correctly decided?**
    f. **Was *Gonzales v. Carhart* correctly decided?**
    g. **Was *District of Columbia v. Heller* correctly decided?**
    h. **Was *McDonald v. City of Chicago* correctly decided?**
    i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**

    Response: The solemn duty of a judge is to set aside personal views and decide cases in strict adherence with precedent. If I am confirmed as a judge, I will follow all binding United States Supreme Court precedent, irrespective of any personal views I might hold as to whether a particular case was correctly decided. As a judicial nominee, it would not be appropriate for me to pass a value judgment on a Supreme Court opinion because I would not want to create the appearance that I had prejudged any matter that could come before me. I can say that *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided since it is exceedingly unlikely that *de jure* racial segregation in schools or miscegenation laws would be the subject of any case before the federal court.

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

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

    Response: No.

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

    Response: No.

    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

Response: Yes. Please see my response to Question 30 below.

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

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

    Response: No.

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

    Response: No.

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

    Response: Yes, I have been in contact with Chris Kang. Please see my response to Question 30.

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

    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.**

    Response: No.

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

    Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: Yes. Open Society Foundations has provided funding to the Southern Center for Human Rights where I am employed. I do not and have not played any role in the seeking of or reporting on grants for my office, but I may have come into contact with persons from Open Society Foundations on site visits to my office. I do not recall any particular names or conversations. Additionally, I attended a conference sponsored by the Open Society Foundations about fifteen years ago.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: In March 2021, I submitted my application to the Federal Nominations Advisory Commission established by Georgia Senators Raphael Warnock and Jon Ossoff. On April 12, 2021, I interviewed with the Commission. On April 23, 2021, I interviewed with Senator Ossoff and a member of his staff. On April 27, 2021, I interviewed with Senator Warnock and members of his staff. On May 11, 2021, I was interviewed by attorneys from the White House Counsel's Office. Since May 17, 2021, I have been in contact with officials from the Office of Legal Policy at the Department of Justice and with officials from the White House Counsel's Office. On September 30, 2021, my nomination was submitted to the Senate.

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

Response: Yes. In or around March 2021, I attended part of a Zoom webinar hosted by Chris Kang in which the application process for a federal judgeship was discussed. Following my nomination, I received a congratulatory email from Mr. Kang.

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

Response: Yes. In April 2021, I received an email from the Georgia American Constitution Society (ACS) chapter informing me that I had been placed on an ACS list of potential nominees. I had not asked for my name to be on the ACS list. In April 2021, I spoke briefly by phone with a representative of the Georgia ACS chapter about the various stages of the application process. Following my nomination, I received a congratulatory email from an ACS representative.

32. **During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated**

with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No.

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

Response: No.

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

Response: No.

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

Response: On May 11, 2021, I was interviewed by attorneys from the White House Counsel's Office. On May 17, 2021, I was contacted by a staff member in the Office of Legal Policy (OLP) and advised that I had been selected for judicial vetting. That day, I had a conversation with the staff member about FBI-related paperwork. In the latter part of May 2021, I was in touch by email on several dates with staff members at the OLP regarding the FBI background investigation, instructions for the Senate Judiciary Questionnaire, and related forms and paperwork. Starting in June 2021, I exchanged emails with and occasionally spoke by telephone with a vetting attorney from the OLP regarding the Senate Judiciary Questionnaire. On September 29, 2021, I received a call from a staff member at the White House Counsel's Office informing me that I would be nominated by the President, and I was nominated on September 30, 2021. I have had several meetings since that date with staff in the OLP and/or White House Counsel's Office regarding financial disclosure forms, completion of the Senate Judiciary Questionnaire, scheduling of the hearing before the Senate Judiciary Committee, preparation for the hearing, and Questions for the Record.

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

Response: I read the questions, researched the legal issues, and drafted the responses. I then forwarded my draft to the Office of Legal Policy at the Department of Justice. After receiving feedback, I finalized the document and emailed the final version to the Office of Legal Policy for submission to the Senate Judiciary Committee.

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

Questions for the Record for Sarah Elisabeth Geraghty, Nominee for the Northern District of Georgia

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. **You have been a vocal supporter of ending cash bail. Are there any dangers associated with ending cash bail in the criminal justice system?**

   Response: This is an important question for legislators, policymakers, and social scientists. As a judicial nominee, it would not be appropriate for me to comment on matters of public

policy. To clarify, in my role as an advocate, I did not support "ending cash bail" in all contexts. Rather, on behalf of clients, and consistent with my duty to be a zealous advocate, I challenged municipal bail policies that condition detention and release only on ability to pay to the exclusion of consideration of other factors such as risk of flight and public safety. My bail-related litigation experience has focused on pretrial detention in misdemeanor and ordinance violation cases. *See, e.g., Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018).

2. **On November 21, 2021, a convicted felon out on "inappropriately low" cash bail terrorized a Christmas parade in Waukesha, Wisconsin. This felon, Darrell Brooks, plowed through a crowded Christmas parade full of young children and families, killing six of them and injuring dozens more. The individual responsible for this massacre was a a multiple-time felon, and a convicted sex offender. He posted bail twice in Wisconsin this year despite having an active warrant for jumping bail on a sex crime charge in Nevada. Earlier this month, Milwaukee prosecutors requested just $1,000 bail after this same man was charged for running over a woman with his car. The local prosecutor now admits that his bail was "inappropriately low."**

   a. **Do you believe Darrell Brooks should not have any cash bail requirement after his prior convictions?**

      Response: As a judicial nominee, it would not be appropriate for me to comment on a particular court's release decision, especially without knowledge of the evidence that came before the court. I would note that as an advocate, my bail reform litigation experience has focused on pretrial detention in misdemeanor and ordinance violation cases. I have never specifically urged an end to cash bail in a situation in which an individual was arrested for a crime such as running over a person with a car. If I am confirmed as a judge, in considering whether to detain a defendant before trial, I would follow and faithfully apply the factors Congress set forth in 18 U.S.C. § 3142(g), including the potential danger to any person or to the community that would be posed by the person's release.

   b. **If confirmed to the bench, do you intend to adopt a blanket policy against requiring cash bail?**

      Response: No.

3. **On April 3, 2020, you sent a letter to all Municipal and State Court judges in Georgia, among other stakeholders, urging them to release convicted felons from prison, requesting they "Release As Many People As Possible." Since the time you had sent this letter, many jurisdictions pursued the policy you requested, and the country has simultaneously experienced one of the largest crime waves in decades. In light of the drastic increases in violent crime, do you stand by everything you said in this letter?**

Response: The premise of this question is not correct because the letter did not request relief for "convicted felons from prison." Instead, the April 3, 2020, letter was addressed to Georgia State Court judges (who hear misdemeanors and hold preliminary hearings in criminal cases) and to city court judges (who hear misdemeanors and ordinance violations). The letter, moreover, sought consideration of releases from jail only where "consistent with public safety" (a phrase that appears in the letter three times), and only in situations in which Georgia law authorized such release. The letter further made clear that judges and law enforcement officials were the appropriate persons to make release decisions. I am not aware of any evidence to suggest that the request had any effect on crime.

4. **If confirmed, will you release as many federal offenders as possible?**

Response: No. I have also never advocated for such a policy as a lawyer.

5. **If you are to join the federal bench, and supervise along with your colleagues the court's human resources programs, will it be appropriate for the court to provide its employees trainings which include the following:**

   a. **One race or sex is inherently superior to another race or sex;**

      Response: No.

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

      Response: No.

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

      Response: No.

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

      Response: No.

6. **Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?**

Response: I do not believe that the values of "work ethic" or "self-reliance" are racist or sexist and would not provide or endorse any training that taught otherwise.

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

Response: If I am confirmed as a judge, it would not be within my purview to determine whether the criminal justice system, or any aspect of it, was "systemically racist." I would instead review any claim regarding race by faithfully following Supreme Court precedent and other applicable law.

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

Response: The President and the Senate share the power to make certain appointments to high-level positions in the federal government. U.S. Constitution, Art II, § 2. Every branch of government must abide by the Equal Protection Clause and other constitutional requirements. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent in assessing any allegation of impermissible race or gender discrimination.

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

Response: In this case, the Supreme Court examined the text and history of 42 U.S.C. § 1981, finding that while § 1981's text did not expressly discuss causation, it was "suggestive" of a "but for" causation requirement. The Court determined that the statute's contextual structure and the Court's prior precedent interpreting § 1981 and § 1982 cast doubt on the Ninth Circuit's causation analysis. Further, the Court declined to import the "motivating factor" causation test found in Title VII of the Civil Rights Act of 1964 into § 1981. After applying the traditional tools of statutory interpretation, the Court held that under the "but for" causation standard, a plaintiff must demonstrate that, but for the defendant's unlawful conduct, the plaintiff's alleged injury would not have occurred.

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

Response: Yes. Identification of such limits depends on context but could involve application of the Religious Freedom Restoration Act (RFRA), the First Amendment, the "ministerial exception," and other laws and doctrines.

For example, RFRA "provide[s] very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 693 (2014) (holding that, under RFRA, the government could not require that certain closely-held corporations provide health

insurance coverage for methods of contraception that violated the sincerely held religious beliefs of the companies' owners). RFRA specifically prohibits the federal government from substantially burdening a person's free exercise of religion, even if that burden results from a rule of general applicability, unless the government demonstrates that application of the burden furthers a compelling governmental interest and is the least restrictive means of furthering that compelling interest. 42 U.S.C. § 2000bb-1.

In a case concerning the First Amendment's Free Exercise Clause, a court will look to whether a state governmental action that is alleged to be facially neutral might, upon closer examination, single out religion for unfavorable treatment. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). If the state action is, in fact, a neutral law of general applicability, then it need not withstand the strict scrutiny test. If, however, the state action discriminates against religious practice, the action must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. *Church of the Lukumi*, 508 U.S. at 531-32.

Under the "ministerial exception," courts stay out of employment disputes involving those holding certain important positions within religious institutions so as not to interfere with the institutions' independence in matters of church government. *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

If confirmed, I will follow all binding Supreme Court and Eleventh Circuit precedents, including in cases involving alleged violations of religious liberty.

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

Response: The Free Exercise Clause imposes on government entities an obligation of religious neutrality. *See Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1723 (2018). Governments may not impose regulations "hostile to the religious beliefs of affected citizens" and cannot pass judgment upon or presuppose the illegitimacy of religious practices. *Id*. at 1731. In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990), however, the Supreme Court held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on religious grounds.

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020), the Supreme Court enjoined New York's "severe" COVID-19-related restrictions on the applicants' religious services. The Court found that the applicants were likely to succeed on the merits of their First Amendment claim because the Governor's COVID-19-related executive order singled out houses of worship for especially harsh treatment and thereby violated the minimum requirement of neutrality to religion. Applying strict scrutiny, the Court held that the executive order lacked narrow tailoring because there were less restrictive rules that could be adopted to minimize the risk of COVID-19 to those attending religious services. The Court determined that the plaintiffs satisfied the other preliminary injunction requirements because the loss of First Amendment freedoms for even minimal periods constitutes irreparable injury, and because the requested injunction would not harm the public.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court preliminarily enjoined a California COVID-19 regulation that prevented in-home religious gatherings of more than three households. The Court held that government regulations are not neutral and generally applicable (and therefore trigger strict scrutiny under the Free Exercise Clause) whenever they treat any comparable secular activity more favorably than religious exercise. Applying strict scrutiny to the regulation, the Court determined that narrow tailoring would require the government to show that measures less restrictive of the First Amendment activities in question could not address the state's interest in reducing the spread of the virus. The Court held that the California regulation was not likely to survive the strict scrutiny test in part because it treated comparable secular activities (such as going to a hair salon or movie theater) more favorably than at-home religious exercise.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court reviewed a decision of the Colorado Civil Rights Commission in which the Commission determined that the owner of a Colorado bakery violated the Colorado Anti-Discrimination Act when he declined, for reasons of sincere religious belief, to create a cake for the wedding ceremony of two men. The Court concluded, based in part on pejorative comments by Colorado adjudicators, that the Commission's treatment of the baker's case violated the state's duty under the First Amendment not to base regulations on hostility to religious viewpoints. *Masterpiece*

Cake Shop reaffirmed the religious neutrality principle set forth in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

16. **Under existing doctrine, are an individual's religious beliefs protected if they are contrary to the teaching of the faith tradition to which they belong?**

Response: Yes. *See, e.g., United States v. Ballard*, 322 U.S. 78, 86 (1944) (stating that the First Amendment "embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faith"); *Cambridge Christian School, Inc. v. Fla. High School Athletic Ass'n, Inc.*, 942 F.3d 1215, 1247 (11th Cir. 2019) (stating that the Supreme Court has consistently refused to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.).

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

Response: The Supreme Court has admonished that courts must not "presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 887 (1990). The inquiry into what constitutes a "sincerely held belief" should not be "probing," and courts have rightly shied away from attempting to gauge how central a sincerely held belief is to the believer's religion. *See Cambridge Christian School, Inc. v. Fla. High School Athletic Ass'n, Inc.*, 942 F.3d 1215, 1247 (11th Cir. 2019). *See also Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 725 (2014) (stating that it is not for the court to say that plaintiffs' religious beliefs are mistaken or insubstantial, and that the court's narrow function is to determine whether the line drawn reflects an honest religious conviction). Purely secular beliefs, however, are not protected by the Free Exercise Clause. *See Frazee v. Illinois Department of Employment Services*, 489 U.S. 829, 833 (1989).

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

Response: Probably not. The Supreme Court has said that "[o]ne can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas v. Review Bd. of Indiana Emp. Security Div*., 450 U.S. 707, 715 (1981). Additionally, "[p]ersonal preferences and secular beliefs do not warrant the protection of the Free Exercise Clause." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1256 (11th Cir. 2012) (quoting *Frazee v. Illinois Dep't of Emp't Serv.,* 489 U.S. 829, 833 (1989)).

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

Response: I cannot speak for the Catholic Church as to its official position on abortion or any other matter. I am aware as a general matter that many people of the Catholic faith do not deem abortion acceptable or morally righteous.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court considered employment discrimination claims brought by two elementary school teachers at Catholic schools. At issue was whether the "ministerial exception" set forth in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. 171 (2012), precluded the teachers' discrimination claims. Under the ministerial exception, courts stay out of employment disputes involving those holding certain important positions within religious institutions so as not to interfere with the institutions' independence in matters of church government, faith, and doctrine. Here, the Supreme Court applied its holding in *Hosanna-Tabor* and concluded that the First Amendment foreclosed the adjudication of the teachers' claims because the teachers performed vital religious duties. In so holding, the Court made clear that the test in *Hosanna-Tabor* should not be applied rigidly or focused solely on whether the employees in question held a clerical title, had formal religious schooling, or were practicing members of the employer's religion. A contrary result, the Court held, would have risked judicial entanglement in religious issues.

18. **In *Fulton v. City of Philadelphia*, the U.S. Supreme Court was asked to decide whether Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment. Explain the Court's holding in the case.**

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Court determined that Philadelphia's refusal to contract with Catholic Social Services (CSS) for the provision of foster care services unless CSS agreed to certify same sex couples as foster parents violated the Free Exercise and Free Speech Clauses of the First Amendment. The Court held that a restriction that burdens religious liberty is not generally applicable, and is subject to strict scrutiny when it permits government to exempt individuals on a discretionary basis but does not extend a religious exemption to cases of religious hardship without a compelling reason. Here, the contractual, non-discrimination requirement allowed for exemptions at the sole discretion of the Commissioner. Applying strict scrutiny, the Court held that Philadelphia did not have a compelling interest in denying an exemption to CSS.

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

Response: *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), involved a Minnesota county ordinance requiring homes to have a modern septic system for the disposal of grey water. Members of the Swartzentruber Amish faith filed a state court action under the Religious Land Use and Institutionalized Persons Act (RLUIPA), after they sought and were denied an exemption to the county's septic-system mandate. The Minnesota courts sided with the county, but the Supreme Court vacated the state court judgment and remanded it for further consideration in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

In his concurrence, Justice Gorsuch noted that under a RLUIPA strict-scrutiny analysis, it would not be proper to treat the county's general interest in sanitation regulations as a "compelling interest" without reference to the specific application of the sanitation regulations to the litigants in this case. In other words, according to the concurrence, the Court must scrutinize the alleged harm that would be caused by a specific exemption for members of the Swartzentruber Amish community. Justice Gorsuch further argued that the county was required to offer a compelling explanation for why it permitted exemptions to the septic-system requirement for campers, hunters, fisherman, and others, but not for Amish families.

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

Response: In *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), Georgia college students sought nominal damages in a First Amendment case, after college officials limited the students' ability to hand out religious literature and discuss religion in public spaces on campus. The trial court and Eleventh Circuit determined that the case was moot, notwithstanding the nominal damages claim, because the college discontinued the challenged restrictions on speech. In deciding the case, the Supreme Court considered Article III standing requirements, including whether: (1) plaintiffs suffered an injury in fact, (2) the injury was fairly traceable to the challenged conduct, and (3) the requested remedy of nominal damages would redress the injury. As to the last factor (redressability), the Court looked to forms of relief available at common law in assessing whether nominal damages could redress a past injury. The prevailing view at common law, the Court held, was that plaintiffs could pursue nominal damages whenever they suffered a personal legal injury, without evidence of actual damage. The Court rejected the argument that a plea for compensatory damages was necessary to confer jurisdiction in this case. Because nominal damages were available at common law and in analogous circumstances, the Court held that a request for nominal damages satisfies the

redressability requirement of standing where a plaintiff's claim is based on a completed violation of a legal right.

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

Response: In *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2382-83 (2021), Chief Justice Roberts, joined by Justices Kavanaugh and Barrett, called for an "exacting scrutiny" standard in First Amendment challenges to government-compelled disclosures involving the identities of major donors to charitable organizations. "Exacting scrutiny" requires a "substantial relation between the disclosure requirement and a sufficiently important government interest" and that the disclosure regime be narrowly tailored to the government's asserted interest, even if it is not "the least restrictive means of achieving their ends." *Bonta*, 141 S. Ct. at 2383.

Justice Thomas, who concurred in part and concurred in the judgment, would have applied strict scrutiny, because, he argued, laws directly burdening the right to associate anonymously should be subject to the same legal standard as laws directly burdening other First Amendment rights. *Id*. at 2390. Justice Alito, joined by Justice Gorsuch, wrote that there was "no need to decide which standard should be applied here or whether the same level of scrutiny should apply in all cases in which the compelled disclosure of associations is challenged under the First Amendment." *Id*. at 2392. Justices Gorsuch and Alito concluded that the compelled disclosures in this case failed both the exacting and strict scrutiny tests. *Id*. at 2391.

In *Marks v. United States*, 430 U.S. 188 (1977), the Supreme Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). In the absence of binding precedent from the Eleventh Circuit, I would apply *Marks*, and would also analyze other Supreme Court and Eleventh Circuit cases involving government-compelled membership disclosure.

22. **Describe how you would characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.**

Response: If confirmed, my judicial philosophy would be guided by principles of constraint, efficiency, and faithfulness to text and precedent. My interpretive mode would be informed by Supreme Court and Eleventh Circuit precedent in the specific context of the case at hand. I would carefully consider the arguments of the parties and follow the text of the law as written and the applicable, binding precedent. In every matter, I would endeavor to write clear and accessible opinions and to treat all who come before the court with respect and dignity. I admire Justice O'Connor and Justice Ginsburg for blazing a path for women at the highest level of the legal profession.

23. **Please briefly describe the interpretative method known as originalism.**

Response: As I understand it, originalism is a doctrine according to which constitutional and other legal texts should be interpreted in conformance with the meanings they had at the time of their adoption.

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

Response: As I understand it, living constitutionalism is a doctrine according to which the United States Constitution should be interpreted in a manner that evolves over time, in accordance with changing circumstances and social norms.

25. **If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?**

Response: If confirmed, I would follow all binding precedent, including Supreme Court precedent regarding the appropriate mode of constitutional interpretation.

26. **Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?**

Response: The Supreme Court has stated that the public understanding of a legal text in the period after its enactment or ratification is "a critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008). Similarly, the Supreme Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020).

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

Response: The Constitution is an enduring document. If I am confirmed, my interpretation of the Constitution's meaning and its application will be based on the precedent of the Supreme Court and the Eleventh Circuit.

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

Response: If confirmed, I would be bound by the precedent of the United States Supreme Court regardless of the Court's size. As a judicial nominee, it would not be appropriate for me to comment on what Congress should do with respect to the number of justices on the Supreme Court.

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

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

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

Response: No.

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

Response: No. I am not aware of any case in which the Supreme Court has held that the right to own a firearm receives less protection than any other fundamental right.

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

Response: In *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), the Supreme Court examined the text and history of Section 2 of the Voting Rights Act and concluded that the core requirement of Section 2(b) is the rule that voting be "equally open" to minority and non-minority groups. Under Section 2(b), the Court considers the

"totality of the circumstances" in determining whether voting is "equally open," including, but not limited to, the size of the burden imposed by the challenged voting rule, the degree to which the rule departs from standard practices at the time Section 2 was amended in 1982, and the size of any disparate impact on minority groups. 141 S. Ct. 2321 (2021). The Court explained that voting "necessarily requires some effort and compliance with some rules," and thus a voting system that is "equally open" must tolerate the usual burdens of voting. *Id*. at 2338.

After considering the totality of the circumstances, the Court determined that neither the out-of-precinct policy nor the ballot-collection law violated Section 2 because neither law exceeded the usual burdens of voting. As for the allegations of disparate racial impact, the Court concluded that the racial disparity in burdens allegedly caused by the out-of-precinct policy was "small in absolute terms." *Id*. at 2344. The Court accorded weight to the important state interests furthered by ensuring even distribution of voters among polling places, and the compelling state interests in preserving the integrity of election procedures.

Challenges to Georgia's voting laws are currently pending before the federal court. As a judicial nominee, it would not be appropriate for me to express my opinion on the merits of those cases.

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

Response: Yes. Students facing school disciplinary sanctions are generally entitled to due process. *See, e.g., Goss v. Lopez,* 419 U.S. 565 (1975) (holding that students facing even a temporary school suspension had liberty interests protected by Due Process Clause). Additionally, a student accused of sexual misconduct is entitled to due process in any criminal proceeding that may arise out of the matter.

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

Response: The President must "take Care that the Laws be faithfully executed." U.S. Constitution, Art. II, § 3. *See also Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."). In the criminal context, the Executive Branch generally has broad authority under the law about whether to prosecute a particular violation of law.

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

Response: I am not aware of any Supreme Court or Eleventh Circuit precedent that definitively answers this question. In general terms, prosecutorial discretion refers to the discretion exercised by a prosecutor to make a charging decision or sentencing recommendation, within the bounds of the law, and taking into account the discrete facts and circumstances of a particular case. A substantive administrative rule change refers to the adoption of a new rule with application to all cases across the board.

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

Response: No. The President does not have the authority to abolish the death penalty at the state or federal level. At the federal level, the President has the power of commutation, but only Congress can abolish the death penalty through legislation.

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

Response: In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court determined that the plaintiffs were "virtually certain to succeed" on the merits of their claim that the Centers for Disease Control and Prevention (CDC) exceeded its authority in imposing a COVID-19-related, nationwide eviction moratorium. The Court specifically held that in promulgating and extending the eviction moratorium, the CDC likely exceeded its authority under §361(a) of the Public Health Service Act, a section that "has rarely been invoked – and never before to justify an eviction moratorium." 141 S. Ct. at 2487. In balancing equities, the Court found that the moratorium put landlords at risk of irreparable harm and that the government's interests had decreased over time since the stay was granted. The Court granted the application to vacate the stay of judgment pending appeal, concluding that if a federally imposed eviction moratorium is to continue, Congress must specifically authorize it.

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

Response: In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the Supreme Court declined to extend its third-party doctrine rulings in *United States v. Miller*, 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979), to a "novel circumstance[]" involving certain telecommunications records. 138 S. Ct. at 2217. Specifically, the Court held that a digital database of cell-site location information constituted a qualitatively different category of data from the bank records and telephone numbers at issue in *Miller* and *Smith*. The Court held that, unlike bank records and telephone numbers, cell-site location information could furnish a detailed chronicle of a person's physical presence over a period of years and provide an intimate window into a defendant's life. In finding for the defendant, the Court considered the "deeply revealing nature" of the cell-site location

information, its "depth, breadth, and comprehensive reach," and the "inescapable and automatic nature of its collection." *Id*. at 2223.

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

Response: Justice Gorsuch's dissent argued that the Court should follow a traditional property-rights interpretation of the Fourth Amendment rather than relying on the "reasonable expectation of privacy" analysis from *Katz v. United States*, 389 U.S. 347 (1967). Under Justice Gorsuch's proposed approach, people's "papers and effects" can under certain circumstances be protected by the Fourth Amendment even if they are held by a third party. To determine whether a person has a property interest in the "paper" or "effect" Justice Gorsuch would look to positive law, including statutes and common law property and tort principles.

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

Response: Justice Gorsuch's dissent argued that under the *Katz* "reasonable expectation of privacy" standard, lower courts are left to decide third-party doctrine cases based on "amorphous balancing tests," and "a few illustrative examples that seem little more than the product of judicial intuition." 138 S. Ct. at 2267. Per Justice Gorsuch, courts should decide cases based on "democratically legitimate sources of law," like positive law, rather than their own biases or personal policy preferences. *Id*. at 2268. The dissent added that "positive law may help provide detailed guidance on evolving technologies without resort to judicial intuition." *Id*. at 2270.

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

Response: Justice Gorsuch suggests that a property-rights-centered interpretation of the Fourth Amendment might offer more constitutional protection than *Katz* alone affords. *Carpenter*, 138 S. Ct. at 2272 ("Even if *Katz* may still supply one way to prove a Fourth Amendment interest, it has never been the only way. Neglecting more traditional approaches may mean failing to vindicate the full protections of the Fourth Amendment.").

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

Response: Yes, although it is difficult to answer this question in a specific manner without further context. Generally speaking, the Right to Financial Privacy Act, 12 U.S.C. § 3401, *et seq*., and other federal statutes provide customers of financial institutions with certain privacy protections. Bank records are subject to the third-party doctrine set forth in

United States v. Miller, 425 U.S. 435 (1976). If presented with a case concerning these issues, I would consider the parties' arguments and follow the text of the law as written and the applicable, binding precedent.

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

Response: The scope of the third-party doctrine following *Carpenter v. United States*, 138 S. Ct. 2206 (2018), remains unclear, but in general, banking record remain subject to the doctrine. Specifically, the Court in *Carpenter* characterized its ruling as "narrow" and made clear it did not disturb *United States v. Miller*, 425 U.S. 435 (1976) (holding that a defendant had no reasonable expectation of privacy in bank records turned over to a third-party financial institution). 138 S. Ct. at 2220. Following *Carpenter*, courts analyzing matters under the third-party doctrine will: (1) look to whether the information in question is "deeply revealing," (2) consider its "depth, breadth, and comprehensive reach," and (3) determine whether the process by which the information is collected is "inescapable and automatic." *Id*. at 2223. *See also Presley v. United States*, 895 F.3d 1284, 1287 (11th Cir. 2018) (affirming order denying motion to quash IRS summonses for bank statements, loan proceeds, records of purchase, and checks).

42. **In *Stokeling v. United States*, the Supreme Court affirmed the Eleventh Circuit's decision and held that a state robbery offense that has as one of its elements the use of force sufficient to overcome a victim's resistance, is categorically a "violent felony" under the Armed Career Criminal Act (ACCA). Explain your understanding of how the Court arrived at its decision in the case.**

Response: In *Stokeling v. United States*, 139 U.S. 544 (2019), the Supreme Court considered whether the defendant's prior state robbery conviction justified a sentence enhancement under the Armed Career Criminal Act (ACCA). The Court noted that under Florida law, "robbery" has as an element the use of force sufficient to overcome a victim's resistance. Under ACCA's elements clause, a "violent felony" includes a crime punishable by more than one year in prison that has as an element "the use . . . of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B). The Court examined the original ACCA statute, which defined "robbery" as requiring the use of "force or violence," a clear reference to the common law of robbery. The Court determined that when Congress retained the word "force" in its revisions to ACCA, Congress made clear that the force required for common-law robbery would be sufficient to justify an enhanced sentence under the new ACCA elements clause. According to the Court, the defendant's suggested definition of physical force (force that is "reasonably expected to cause pain or injury") was inconsistent with the degree of force necessary to commit robbery at common law. The fact that many states' robbery statutes would not qualify as ACCA predicates under the defendant's proposed reading further supported the government's position. The Court determined that its reading of ACCA's elements clause was consistent with prior cases, including *Johnson v. United* States, 559 U.S. 133 (2010).

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

Response: In *Van Buren v. United States*, the defendant, a former police supervisor, accepted a cash payment from a citizen to run an unauthorized license-plate search in a law enforcement computer database. 141 S. Ct. 1648, 1652 (2021). The Court determined that while the conduct in question violated police department policy, it did not violate the Computer Fraud and Abuse Act (CFAA) of 1986. CFAA criminalizes conduct that "exceeds authorized access" of a computer. 18 U. S. C. §1030(a)(2). Considering the plain language of the statute, the Court held that CFAA did not reach persons who, like the defendant, had authorization to access the database, but did so with improper motives. The majority rejected the government's proposed, broader reading of the statute, stating that a broad reading of CFAA would criminalize a significant amount of commonplace computer activity.

Senator Josh Hawley

Questions for the Record

Sarah Geraghty
Nominee, U.S. District Court for the Northern District of Georgia

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

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

    Response: No. If confirmed, I would not decide cases based upon "what [I] think is right" from a policy perspective. I would instead decide the discrete legal issues presented in each case based upon careful consideration of the parties' arguments, the legal text as written, and the binding precedent.

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

    Response: If confirmed, I would abide by Canon 1 of the Code of Conduct for United States Judges, which requires judges to "comply with the law" and to act "without fear or favor" in all matters. (Commentary to Canon 1.)

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

    Response: In adherence to principles of comity and federalism, federal courts may abstain from hearing cases that implicate important state interests or are otherwise more properly resolved in state courts.

    Younger abstention: Under the *Younger* doctrine, federal courts of equity should not act to restrain state criminal prosecutions, absent bad faith, harassment, or a patently invalid state statute. *See Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 72, 77 (2013); *Walker v. City of Calhoun*, 901 F.3d 1245, 1254 (11th Cir. 2018). *Younger* abstention is appropriate in matters in which there is: (1) the potential for undue interference with an ongoing state-court proceeding; (2) an important state interest implicated by that proceeding; and (3) an adequate opportunity to raise the relevant claim in that proceeding. *See Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 433 n.12 (1982); *Old Republic Union Insurance Co. v. Tillis Trucking Co. Inc*., 124 F.3d 1258, 1261 (11th Cir. 1997). The Supreme Court extended *Younger* to apply to state civil proceedings that are akin to criminal prosecutions or that implicate a state's interest in enforcing state court orders. *See Sprint Communications, Inc.*, 571 U.S. at 72.

Colorado River abstention: Abstention may be appropriate under the *Colorado River* doctrine in cases of concurrent state and federal litigation. *See Gold-Fogel v. Fogel*, 16 F.4th 790, 799 (11th Cir. 2021). A court considering whether to stay or dismiss federal proceedings under the *Colorado River* doctrine should undertake a two-step analysis. *See id.* (citing *Ambrosia Coal & Constr. Co. v. Pages Morales*, 368 F.3d 1320, 1330-32 (11th Cir. 2004)). First, the court should determine whether the federal and state litigation are "parallel," in that they involve substantially the same parties and substantially the same issues. *Id*. at 801. Second, if the two proceedings are parallel, the court considers whether wise judicial administration warrants a stay or dismissal of the federal litigation, giving regard to conservation of judicial resources and the interest in comprehensive disposition of litigation. *See id.*

Pullman abstention: *Pullman* abstention, named for *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), refers to abstention in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law. *See Gold-Fogel*, 16 F.4th at 799, n.11, 800 (11th Cir. 2021). *Pullman* abstention applies where: (1) the case presents an unsettled question of state law, and (2) the question of state law is dispositive of the case or would materially alter the constitutional question presented. *See Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000) (quoting *Harman v. Forssenius*, 380 U.S. 528, 534 (1965)).

Burford abstention: The *Burford* doctrine presents an "extraordinary and narrow" exception to a federal court's general obligation to exercise jurisdiction. *Deal v. Tugalo Gas Company, Inc*., 991 F.3d 1313, 1327 (11th Cir. 2021). "Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Tugalo Gas Company, Inc*., 991 F.3d at 1326 (citing *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 360-61 (1989)).

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

   Response: No.

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

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

Response: The public understanding of a legal text in the period after its enactment or ratification is "a critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008). *See also Ramos v. Louisiana,* 140 S. Ct.1390, 1396 (2020) (discussing original public meaning in Sixth Amendment context); *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (discussing original and historical understanding in Eighth Amendment context); *United States v. Phillips*, 834 F.3d 1176, 1181 (11th Cir. 2016) (discussing original public meaning in Fourth Amendment context).

5. Do you consider legislative history when interpreting legal texts?

Response: "Given [a] straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales,* 520 U.S. 1, 6 (1997). Courts may, however, consider legislative history where the text is ambiguous and application of canons of construction fails to resolve the ambiguity. *See, e.g., CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225 (11th Cir. 2001).

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

Response: Floor statements by individual legislators "rank among the least illuminating forms of legislative history." *NLRB v. SW General, Inc*. 137 S. Ct. 929, 943 (2017). By contrast, Committee Reports on a particular bill may be considered a more "authoritative" source in terms of discerning legislative intent. *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: Unless directed otherwise by a decision of the Supreme Court or binding circuit precedent, judges should not rely on the laws of foreign nations when interpreting the Constitution.

6. Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

Response: The litigant must show "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019); *see also Jordan v. Commissioner, Mississippi Dep't of Corr*., 947 F.3d 1322, 1325 (11th Cir. 2020). Additionally, under Eleventh Circuit precedent, a method-of-execution claim that challenges the only method of execution permitted by state law must be brought as a petition for a writ of habeas corpus rather than under 42 U.S.C. § 1983. *See Nance v. Commissioner, Georgia Dep't of Corr*., 981 1201, 1203 (11th Cir. 2020).

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

   Response: Yes, that is my understanding of the holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015).

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

   Response: A petitioner in a habeas corpus case has a liberty interest in demonstrating his innocence with new evidence under state law. *See District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). However, there is no freestanding, federal, substantive due process right to DNA testing "untethered from the liberty interests [the petitioner] hopes to vindicate with it." *Id*. at 72. *See also Cunningham v. District Attorney's Office for Escambia County*, 592 F.3d 1237 (11th Cir. 2010) (relying on *Osborne* and affirming denial of request to require state authorities to provide certain evidence for DNA testing).

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

   Response: No.

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

    Response: Identification of the legal standard used to evaluate such claims depends on context but could involve application of: (1) the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb-1; (2) the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc(a); and/or (3) the Establishment and Free Exercise Clauses of the First Amendment.

    RFRA "provide[s] very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 693 (2014). It prohibits the federal government from substantially burdening a person's free exercise of religion, even if that burden results from a rule of general applicability, unless the government demonstrates that application of the burden furthers a compelling governmental interest and is the least restrictive means of furthering that compelling interest. 42 U.S.C. § 2000bb-1.

RLUIPA similarly prohibits a government from imposing a substantial burden on the religious exercise of a person confined to an institution, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on the person is in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000cc(a). Under RLUIPA, the plaintiff bears the initial burden of showing that the challenged law or policy implicates his religious exercise and substantially burdens that exercise. *See Holt v. Hobbs*, 574 U.S. 352, 360-61 (2015). The burden then shifts to the government to show that the law or policy meets the "compelling interest" and "least restrictive means" tests. *Id*. at 362. The Eleventh Circuit described a "substantial burden" under RLUIPA as "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Thai Meditation Ass'n of Alabama, Inc. v. City of Mobile*, 980 F.3d 821, 830 (11th Cir. 2020) (quotations and citations omitted).

In a case concerning the Free Exercise Clause, a court will look to whether a government action that is alleged to be facially neutral might, upon closer examination, single out religion for unfavorable treatment. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993) (holding that "[f]acial neutrality is not determinative."). If the state action is a neutral law of general applicability, then it need not withstand the strict scrutiny test. *Id*. at 531. If, however, the state action discriminates against or targets religious belief or practice, the action must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. *Church of the Lukumi*, 508 U.S. at 531-32.

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

Response: There are many ways of demonstrating "that the object or purpose of a law is the suppression of religion or religious conduct." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). The "minimum requirement of neutrality" is that a law not discriminate on its face. *Id*. Facial neutrality, however, is not determinative of discrimination since the Free Exercise Clause forbids "subtle departures from neutrality" and "covert suppression of particular religious beliefs." *Id*. at 534 (internal quotations and citations omitted). *See also Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232-33 (11th Cir. 2004) (holding that a zoning ordinance excluding churches and synagogues from a business district improperly targeted religious assembly).

Recent Supreme Court decisions have provided further elucidation of the applicable legal standard. For example, in *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), the Court held that government regulations are not neutral and generally applicable (and therefore will trigger strict scrutiny) whenever they treat any comparable secular activity more favorably than religious exercise. The narrow tailoring component of the strict scrutiny

test requires the government to show that measures less restrictive of the religious activity cannot address the government interest behind the regulation. *Id*. at 1296-97. Additionally, in *Masterpiece Cake Shop Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court held that a government adjudication considering the scope of a person's free exercise rights is not neutral where government adjudicators show impermissible hostility toward the person's sincere religious beliefs. And in *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2019 (2017), the Court held that denial of a generally available government benefit solely on account of religious identity imposes a discriminatory penalty on the free exercise of religion, and that such a denial must satisfy strict scrutiny.

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

Response: Injunctions in general are authorized by Rule 65 of the Federal Rules of Civil Procedure and a federal court's equitable power. *See Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.") Nationwide injunctions are injunctions pursuant to which a court binds a defendant's conduct with respect to parties that are not before the court. I understand that the legal basis for the issuance of a nationwide injunction (or lack thereof) is currently a subject of jurisprudential debate, as evidenced by opinions from the Supreme Court in *Department of Homeland Security v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III.") and *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J. concurring) ("I am skeptical that district courts have the authority to enter universal injunctions.") In any case in which an injunction is sought, courts should obey the admonition that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). If confirmed, I would follow precedent regarding the proper scope of equitable remedies and the requirement that a court must act within its Article III powers.

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

Response: The inquiry into what constitutes a "sincerely held [religious] belief" should not be "probing," and "courts have rightly shied away from attempting to gauge how central a sincerely held belief is to the believer's religion." *Cambridge Christian School, Inc. v. Fla. High School Athletic Ass'n, Inc.*, 942 F.3d 1215, 1247 (11th Cir. 2019) (quotations and citations omitted). A judge must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. *See id.* at 1248 (quotations and citations omitted). In the context of the Religious Land Use and Institutionalized Persons Act, the Supreme Court has noted that "prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a

requested accommodation, is authentic." *Freeman v. Sample*, 814 Fed. Appx. 455, 461 (11th Cir. 2020) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005)).

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

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

Response: I believe Justice Holmes meant that it is the role of the legislature, and not the courts, to establish economic policy. In other words, judges should not read into the Constitution a support of their preferred economic policy approach, but rather should leave such matters to the elected representatives. As so interpreted, I agree with the statement.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on whether a United States Supreme Court case was correctly decided. The Supreme Court abrogated *Lochner v. New York* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). It is no longer binding precedent, and I would not apply it.

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that a judge must rule not according to his or her preferred policy outcomes, but rather in conformance with the applicable legal text as written and binding precedent. In other words, a judge must follow the law, irrespective of whether he or she "likes" the result reached.

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

Response: In *Trump v. Hawaii*, the Supreme Court declined to draw an analogy between the forcible relocation of United States citizens to concentration camps in *Korematsu*, and the travel ban at issue in the *Trump* case. The Court noted that the forcible relocation policy in *Korematsu* was "morally repugnant" and that the case was "gravely wrong the day it was decided." *Trump*, 138 S. Ct. at 2423. I understand the above-quoted phrase to mean that the "moral repugnance" of the forcible relocation policy in *Korematsu* has long been acknowledged and accepted by courts and in American society.

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

a. If so, what are they?

Response: As a judicial nominee, it would not be appropriate for me to comment on the correctness of any Supreme Court decision. Only the Supreme Court can overrule its precedent. If confirmed, I will faithfully apply all binding Supreme Court decisions.

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

Response: I commit to faithfully applying all binding Supreme Court precedents as decided.

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

a. Do you agree with Judge Learned Hand?

Response: Judge Learned Hand's statement roughly reflects current antitrust jurisprudence involving market share and monopolization. While I am not aware of any precise market share figure that conclusively establishes whether a company has monopoly power, courts generally have required a dominant market share before monopolization is found. *See, e.g., Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 480 (1992) (holding that litigants' evidence showing that manufacturer controlled 80% to 95% of the service market was sufficient to survive summary judgment under the monopoly standard of § 2 of the Sherman Act). The Eleventh Circuit has held that a "market share at or less than 50% is inadequate as a matter of law to constitute monopoly power." *Bailey v. Allgas, Inc*., 284 F.3d 1237, 1250 (11th Cir. 2002); *see also Exxon Corp. v. Berwick Bay Real Estate Partners*, 748 F.2d 937, 940 (5th Cir. 1984) ("This Court has noted that monopolization is rarely found when the defendant's share of the relevant market is below 70%.").

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

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

Response: Please see my response to Question No. 18(a) above.

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

Response: Federal common law refers to law derived from judicial opinions rather than from statutes. The Supreme Court has held that "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). "Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision." *Rodriguez v. Federal Deposit Insurance Corp.*, 140 S. Ct. 713, 717 (2020) (noting that these limited areas have included admiralty disputes and certain controversies between states). Federal common law plays a "necessarily modest role" under a Constitution that "vests the federal government's 'legislative powers' in Congress and reserves most other regulatory authority to the States." *Id*.

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

Response: I would interpret the state constitutional provision in accordance with state law. A state may decide that its constitution provides greater protection than the United States Constitution as to a particular enumerated right.

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

Response: Not necessarily. If tasked with interpreting the scope of a state constitutional provision, I would defer to the decisions of the highest court in the state in question.

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

Response: It is difficult to answer this question in the abstract. Certainly, in some cases, state constitutional provisions can provide greater protections than their federal constitutional counterparts.

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

Response: Yes. As a judicial nominee, it would generally not be appropriate for me to pass a value judgment on a Supreme Court opinion because I would not want to create the appearance that I had prejudged any matter that could come before me. I can, however, say that *Brown v. Board of Education* was correctly decided since it is exceedingly unlikely that *de jure* racial segregation in schools would be the subject of any case before the federal court.

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

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

Response: Injunctions in general are authorized by Rule 65 of the Federal Rules of Civil Procedure and a federal court's equitable power. *See Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.") Nationwide injunctions are injunctions pursuant to which a court binds a defendant's conduct with respect to parties that are not before the court. I understand that the legal basis for the issuance of a nationwide injunction (or lack thereof) is currently a subject of jurisprudential debate, as evidenced by opinions from the Supreme Court in *Department of Homeland Security v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III.") and *Trump v. Hawaii*, 138 U.S. 2392, 2425 (2018) (Thomas, J. concurring) ("I am skeptical that district courts have the authority to enter universal injunctions.") In any case in which an injunction is sought, courts should obey the admonition that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). If confirmed, I would follow precedent regarding the proper scope of equitable remedies and the requirement that a court must act within its Article III powers.

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

Response: Please see my responses to Question No. 12 and Question No. 22(a) above. If confirmed, I would approach any request for a nationwide injunction with caution, consider the traditional limitations on the authority of a federal court to grant equitable relief, respect the confines of the court's Article III jurisdiction, and faithfully follow all binding precedent.

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

Response: Our federal government is a government of limited, enumerated powers. As such, states and their subdivisions exercise substantial local control over matters including, but not limited to, education, health, and police power. Federalism prevents the excessive concentration of power in any one entity and thus is protective of individual liberties. *See, e.g., Gregory v. Ashcroft*, 501 US. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power.").

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

Response: I am proud of my work challenging the unconstitutional imprisonment of indigent persons for debt, and in particular, my representation of the plaintiff class of women in *Harrison v. Consolidated Gov't of Columbus*, Case No. 4:16-cv-329-CDL

(M.D. Ga.) (challenging an ordinance that authorized court-imposed, "victim fees" assessed against survivors of domestic violence and further challenging related threats of incarceration for inability to pay such fees).

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

Response: Federal courts are courts of limited jurisdiction. In determining whether abstention is appropriate, federal judges should be cognizant of principles of comity and federalism. Please see also my response to Question No. 3 above.

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

Response: In general, an award of damages redresses past harm, whereas injunctive relief is intended to prevent future harm. If I am confirmed as a district court judge, the parties before me will assert claims and defenses as to the appropriate form of relief, and I will adjudicate the claims and defenses in accordance with precedent.

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

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

Response: The protection of religious liberty is a bedrock value of our constitutional democracy and is enshrined in the Bill of Rights. The First Amendment broadly protects religious freedoms including, but not limited to, the right to assemble and worship, the right to be free from anti-religious discrimination, the right of a religious group to shape its own faith and mission, and the right of a religious group to be free from interference with the internal governance of its affairs. Please see also my response to Question 10 above.

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

Response: The right to free exercise of religion encompasses more than solely the freedom of worship. It includes, for example, the right to be free from discrimination by government adjudicators due to religious belief, *Masterpiece Cake Shop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); the right to control certain employment decisions in deference to the tenants of a religious group's faith and doctrine, *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); and the right to receive generally available

government benefits on an equal basis as secular groups, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

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

Response: Please see my response to Question No. 10 above.

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

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

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

Response: The Religious Freedom Restoration Act (RFRA) "provide[s] very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 693 (2014). It prohibits the federal government from substantially burdening a person's free exercise of religion, even if that burden results from a rule of general applicability, unless the government demonstrates that application of the burden furthers a compelling governmental interest and is the least restrictive means of furthering that compelling interest. 42 U.S.C. § 2000bb-1.

Under RFRA, generally applicable employment laws may fail the strict scrutiny test if they substantially burden free exercise. *See, e.g., Burwell*, 573 U.S. at 690-91 (holding that the Affordable Care Act's contraception mandate violated the religious freedom of the owners of a privately held company). Similarly, a generally applicable, federal criminal prohibition that substantially burdens religious practice may fail strict scrutiny if the government fails to show a compelling interest in applying the prohibition to the religious practice. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1225 (2006). RFRA applies to all federal law, and the implementation of that law, whether statutory or otherwise. *See* 42 U.S.C. § 2000bb-3(a).

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

28. Under American law, a criminal defendant cannot be convicted unless found to be guilty "beyond a reasonable doubt." On a scale of 0% to 100%, what is your

understanding of the confidence threshold necessary for you to say that you believe something "beyond a reasonable doubt." Please provide a numerical answer.

Response: To the best of my knowledge, neither the Supreme Court nor the Eleventh Circuit Court of Appeals has articulated a numerical confidence threshold in connection with the "beyond a reasonable doubt" standard. According to the Eleventh Circuit's Criminal Pattern Jury Instructions, the government need not prove a defendant's guilt "beyond all possible doubt." Rather, a "reasonable doubt" is "a real doubt, based on a juror's reason and common sense after he has carefully and impartially considered all the evidence in the case."

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

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

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

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

    Response: I agree that when a state court has applied clearly established federal law to reasonably determined facts in the process of adjudicating a claim on the merits, a federal court in a habeas corpus case may not disturb the state court's decision unless its error lies "beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). The applicable standard requires the petitioner to show more than that the state court's decision was merely wrong or even clear error, *Shin v. Kayer*, 141 S. Ct. 517, 523 (2020) (citing *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017)), but rather "so obviously wrong" that no fairminded jurist could take a different view. *Shin*, 141 S. Ct. at 523 (quoting *Richter*, 562 U.S. at 103). I further agree that 28 U.S.C. 2254(d) is designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions. *See Richter*, 562 U.S. at 103. Regarding the hypotheticals above, federal courts are often called upon to adjudicate habeas petitions filed by persons convicted in state courts. As a judicial nominee, I must respectfully refrain from commenting on the appropriate resolution of matters that may come before me if I am confirmed.

30. In your legal career:

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

b. How many have you tried as second chair?

c. How many depositions have you taken?

d. How many depositions have you defended?

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

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

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

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

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

Response: I have tried one administrative law case as first chair in a matter in which the case settled after presentation of all evidence but before the court ruled. I have tried two criminal jury trials to verdict as second chair and have been counsel in many other criminal matters not tried to verdict. I have been first chair counsel in five, multi-day preliminary injunction and/or TRO evidentiary hearings in federal court. I have taken at least 60 depositions and defended at least 40 depositions. I have filed briefs before the Eleventh Circuit Court of Appeals in six cases. I have presented both oral argument and briefing in approximately eight cases before a state appellate court and have authored briefs in at least two other cases before state appellate courts, where oral argument was not required. I have filed amicus briefs in appellate courts on several occasions. I have not appeared before a federal agency in any capacity. I have presented briefing to trial courts on dispositive motions on at least 45 occasions. I have presented briefing on and/or argued at least 50 evidentiary motions before trial courts.

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

Response: Yes, I have done so on behalf of clients in litigation.

a. If yes, please provide appropriate citations.

Response: To the best of my recollection, I have taken the position that a state statute was unconstitutional in the following two matters:

Complaint, *Whitaker v. Perdue*, 4:06-cv-140-CC (N.D. Ga. June 20, 2006) (alleging that O.C.G.A. § 42-1-15 violated the Ex Post Facto clause, Takings Clause, First Amendment, and other constitutional rights)

Complaint, *Green v. Chitwood*, Case No. 4:15-cv-57-HLM (N.D. Ga. Mar. 17, 2015) (alleging that O.C.G.A. § 16-11-39.2(b)(1) was facially overbroad)

32. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

Response: Following my nomination, I deleted my Facebook account, which consisted almost exclusively of photographs of my young children, due to concerns about privacy. I also deleted my Instagram account, a platform on which I had never posted any content. I have fully responded to the Senate Judiciary Committee's questionnaire and have supplied the Committee with over 2,000 pages of my writings, letters, briefs, and public statements.

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

Response: The Due Process Clause protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them. *See Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). The substantive component of due process provides heightened protection against government interference with fundamental rights, including the right to marry, to direct the education and upbringing of one's children, to marital privacy, to use contraception, and to bodily integrity. *See id*. at 719-20. The Supreme Court employs a two-step method of substantive-due-process analysis. *Id*. at 720. First, the Court asks whether the asserted right is objectively, deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed. *Id*. at 721. Second, the Court requires a "careful description" of the asserted fundamental liberty interest. *Id*. The Supreme Court has been reluctant to expand the concept of substantive due process because the extension of constitutional protection to an asserted right may "place the matter outside the arena of public debate and legislative action." *Id*. at 720.

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

Response: No. While I would not characterize America as a "systemically racist country," there have been instances in American history in which our nation has failed to live up to the promise of equal justice under law for all.

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

Response: Yes.

a. How did you handle the situation?

Response: As a law clerk, I drafted opinions in which the result was not always in adherence with my personal views. In those cases, I set aside my personal views and drafted opinions that followed the law established by the Supreme Court and the Court of Appeals.

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

Response: Yes.

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

Response: Federalist 78.

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

Response: It would not be appropriate for me to share my views, if any, on this subject because if I am confirmed as a judge, I may be required to adjudicate matters related to abortion. In any such case, I would faithfully apply Supreme Court and binding circuit precedent.

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

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

Response: In *District of Columbia v. Heller*, the Supreme Court held that "on the basis of both text and history" the Second Amendment protects an "individual right to keep and bear arms." 554 U.S. 570, 595 (2008). While the Second Amendment right is not unlimited, s*ee id*., it protects the right to keep an operable handgun in one's home for purposes of immediate self-defense. *Id*. at 635.

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

Response: No.

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

Response: Yes. In 2010, I was subpoenaed to testify in the sentencing phase of a capital case in Anderson, South Carolina. The defendant in that case had previously been incarcerated in a Georgia youth prison. I had represented incarcerated persons at that prison. I testified briefly regarding sexual assaults against youth at the prison. The case was *State v. Raymondeze Rivera*. I do not have a transcript of my testimony and do not believe that it is available online.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: Along with my husband, I am a custodian of financial accounts for the benefit of our minor children. My children currently have shares in Apple in their custodial accounts.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: I have never authored a brief that was filed in court without my name on it. I have occasionally edited and proofread briefs that were authored and filed by my colleagues.

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

Response: I do not recall every instance in which I may have edited or proofread a colleague's brief over the last two decades. I recall that I did so in the following case: Brief of Petitioner, *Foster v. Chatman,* No. 14-8349, 2015 WL 4550211 (July 24, 2015). I also edited and/or proofread briefs in the cases of *N.P. v. State of Georgia*, Civil Action No. 2014-cv-241025 (Super. Ct. Fulton County, Georgia) and *Dollar v. Williamson*, Civil Action No. 3:08-cv-39-DHB-WLB (S.D. Ga.).

43. Have you ever confessed error to a court?

Response: Not that I recall.

a. If so, please describe the circumstances.

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

Response: Nominees must provide truthful testimony before the Senate Judiciary Committee. Candor and truthfulness are required by the nominee's oath and because the Senate Judiciary Committee relies on nominees' testimony to fulfil its important and constitutionally mandated advice and consent role.

Senator Mike Lee
Questions for the Record
Sarah Geraghty, Nominee to the District Court for the Northern District of Georgia

1. How would you describe your judicial philosophy?

Response: If confirmed, my judicial philosophy would be guided by principles of constraint, efficiency, and faithfulness to text and precedent. My interpretive mode would be informed by Supreme Court and Eleventh Circuit precedent in the specific context of the case at hand. I would carefully consider the arguments of the parties and follow the text of the law as written and the applicable, binding precedent. In every matter, I would endeavor to write clear and accessible opinions and to treat all who come before the court with respect and dignity.

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

Response: If there was binding Supreme Court or Eleventh Circuit precedent regarding the particular provision at issue, I would apply that precedent. In a case of first impression, I would start with the plain language of the federal statute and with the understanding that courts "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County,* 140 S. Ct. 1731, 1738 (2020). Where the language Congress chooses to express its intent is clear, the judicial inquiry is complete because courts must "presume that Congress said what it meant and meant what it said." *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998). If the statute is ambiguous, I would consult canons of construction, period dictionaries, contextual structure, and persuasive authority from other jurisdictions. Regarding legislative history, where the meaning of a statute is discernable in light of canons of construction, courts should not resort to legislative history or other extrinsic evidence. Legislative history may, however, be considered if the plain language of the statute is ambiguous and the canons of construction do not resolve the ambiguity.

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

Response: I would start with the plain language of the constitutional provision and the binding precedent from the Supreme Court and Eleventh Circuit. I would keep in mind that "the *public understanding* of a legal text in the period after its enactment or ratification" is a "critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (emphasis in original). I would look to the Supreme Court's precedents to discern the appropriate interpretive methodology and legal standards, and I would consider persuasive authority where appropriate.

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

Response: Consideration of the original meaning of the Constitution's text plays an important role in a federal court's constitutional analysis. *See, e.g., Ramos v. Louisiana,* 140 S. Ct. 1390, 1396 (2020) (discussing original public meaning in Sixth Amendment context); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019) (discussing "original and historical understanding" in Eighth Amendment context); *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (discussing original public meaning in Second Amendment context); *United States v. Phillips*, 834 F.3d 1176, 1181 (11th Cir. 2016) (discussing original public meaning in Fourth Amendment context).

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

Response: Please see my responses to Questions 1 and 2 above.

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

Response: The Supreme Court has stated that "the *public understanding* of a legal text in the period after its enactment or ratification" is a "critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (emphasis in original). Similarly, courts "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020).

6. What are the constitutional requirements for standing?

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

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

Response: Yes. The Necessary and Proper Clause grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8. In *McCulloch v. Maryland*, the Court held that the power of Congress to incorporate a Bank of the United States was "implied, and involved in the grant of specific powers in the constitution; because the end involves the means necessary to carry it into effect." 17 U.S. 316, 353 (1819). By way of further example, the Supreme Court held

that the Necessary and Proper Clause provides Congress "implied power to criminalize any conduct that might interfere with the exercise of an enumerated power." *See United States v. Comstock*, 560 U.S. 126, 147 (2010) (upholding statute requiring civil commitment of individuals in federal custody).

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

Response: If the question of Congress's authority to act was presented by the parties and squarely before me, I would consider precedent from the Supreme Court and Eleventh Circuit to determine the source of Congress's authority to enact the law, and whether the law fell within that authority. I would consider the presumption of constitutionality given to acts of Congress. Where appropriate and in accordance with precedent, I would consider the doctrine of constitutional avoidance.

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

Response: Yes. The United States Supreme Court has recognized rights not expressly enumerated in the Constitution. *See, e.g., Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (right to freedom of association); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (right to abortion); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to marital privacy); *United States v. Guest*, 383 U.S. 745 (1966) (right of interstate travel); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to have children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to direct the education and upbringing of one's children).

10. What rights are protected under substantive due process?

Response: The Due Process Clause protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them. *See Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). The substantive component of due process provides heightened protection against government interference with fundamental rights, including the right to marry, to direct the education and upbringing of one's children, to marital privacy, to use contraception, and to bodily integrity. *See id*. at 719-20. The Supreme Court employs a two-step method of substantive-due-process analysis. *Id*. at 720. First, the Court asks whether the asserted right is objectively, deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed. *Id*. at 721. Second, the Court requires a "careful description" of the asserted fundamental liberty interest. *Id*. The Supreme Court has been reluctant to expand the concept of substantive due process because the extension of constitutional protection to an asserted right may "place the matter outside the arena of public debate and legislative action." *Id*. at 720.

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

Response: If confirmed, my personal beliefs about substantive due process would not play a role in my decision-making. The Supreme Court has treated the right to an abortion distinctly from the economic rights in *Lochner*. The Supreme Court has protected the right to abortion under certain circumstances. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). By contrast, the Supreme Court abrogated *Lochner v. New York* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *Lochner* is no longer binding precedent, and I would not apply it. If I am confirmed as a district court judge, I will faithfully apply the binding Supreme Court and Eleventh Circuit precedents in substantive due process cases.

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

Response: Congress may regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and those activities that have a substantial effect on interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 558-559 (1995). However, Congress's power to regulate commerce is not unlimited. In *Lopez*, 514 U.S. at 567-68, the Supreme Court held that the Commerce Clause was inadequate to sustain the Gun-Free School Zones Act because, among other reasons, the regulated activity did not have economic character and there were no congressional findings showing that school violence had a substantial effect on interstate commerce. Similarly, in *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court held that the Commerce Clause could not sustain a portion of the Violence Against Women Act because the regulated activity was not commercial in character, and the aggregate effect of the non-economic activity was insufficient. Additionally, the Commerce Clause does not authorize Congress to compel individuals to become active in commerce by purchasing health insurance. *See National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 552 (2012).

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

Response: The Supreme Court has suggested that certain historically disadvantaged groups have a special need for judicial protection since the ordinary political processes for redressing injury may be unavailable to them. *See United States v. Carolene Products Co*., 304 U.S. 144, 152 n. 4 (1938) (referring to "prejudice against discrete and insular minorities"). Additionally, racial and ethnic distinctions where they are stereotypes are inherently suspect and call for exacting judicial scrutiny. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265, 404 (1978) (Blackmun, J.). The four suspect classifications for purposes of strict scrutiny are: race, alienage, national origin, and religion.

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

Response: The separation of powers doctrine is a bedrock component of our constitutional democracy that keeps our government stable and enduring. Under our system of government, there are three co-equal branches, each with its own powers and limitations. The existence of checks and balances in our governmental structure protects against excessive accumulation of power in a single branch or entity and is also protective of individual liberties.

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

Response: The answer to this question depends on the specific context, but I would carefully research the applicable law and apply binding precedent to the facts of the case. In a matter involving an act of Congress, I would determine whether Congress had authority to act under the Necessary and Proper Clause or otherwise. If a case squarely and unequivocally presented an instance of unconstitutional overreach, a court would have the duty to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

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

Response: Empathy should not play a role in a judge's consideration of a case. A judge must approach each case in a neutral and evenhanded manner and must abide by the rule of law. A judge should further treat parties, counsel, witnesses, jurors, and all who come before the court with respect and decency.

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

Response: All laws enacted by Congress have a presumption of constitutionality. Having said that, both are equally unacceptable.

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

Response: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). A judge should engage in neither "aggressive exercise of judicial review" nor in "judicial passivity." Rather, a judge should focus on the discrete matter at hand and decide each case based upon the facts, the legal texts, and binding precedent. I have not studied the

reasons for the increase in the invalidation of federal statutes between 1857 and the present, and thus cannot give an informed opinion in response to that question.

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

Response: Judicial review means "a court's power to review the actions of other branches or levels of government, esp. the court's power to invalidate legislative and executive actions as being unconstitutional." Black's Law Dictionary 852 (7th ed. 1999). I am not familiar with the term "judicial supremacy." The term may refer to the notion of a court acting outside the bounds of its authority or infringing on the power of the legislative branch. *See, e.g., Obergefell v. Hodges*, 576 U.S. 644, 708 (2015) (Roberts, C.J., dissenting) (referring to the "majority's extravagant conception of judicial supremacy").

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

Response: Legislators, executive officers, and judicial officers are bound by oath to support the Constitution. U.S. Constitution, Art VI. Additionally, legislators, executive officers, and judicial officers are required to follow decisions of the United States Supreme Court interpreting the Constitution. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.")

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

Response: The legislature has the power to make law under Article I of the Constitution and the executive branch has the power to enforce the law under Article II of the Constitution. The federal courts are courts of limited jurisdiction with the authority only to pass judgment on discrete matters in cases or controversies that parties bring before them. *See* Federalist No. 78 ("The interpretation of the laws is the proper and peculiar province of the courts.")

22. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to

speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: If I am confirmed as a district court judge, I would be bound by precedent from the Supreme Court and the Eleventh Circuit, and would follow such precedent, even if I believed that "the precedent in question does not seem to be rooted in constitutional text, history or tradition."

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

Response: First, a sentencing court may not discriminate on the basis of a defendant's group identity. Second, in 18 U.S.C. § 3553(a), Congress set forth the specific factors to be considered in imposing a sentence. Those factors include "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), and the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. *Id*. § 3553(a)(6). Third, 18 U.S.C. § 3661 requires that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." The sentencing court's discretion to consider information at sentencing under § 3661 "is subject to constitutional constraints." *Pepper v. United States*, 562 U.S. 476, 489 n. 8 (2011).

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

Response: I am unaware of any federal statute or binding Supreme Court or Eleventh Circuit opinion that defines equity in the manner described above. As a judicial nominee, it would not be appropriate for me to comment on statements made by the President or other administration officials, or on matters of executive policy.

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

Response: According to the American Heritage Dictionary of the English Language, "equity" is defined as "the state or quality of being just and fair," and "equality" is defined as "the state or quality of being equal." These definitions are consistent with my understanding.

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

Response: Please see my response to Question 24 above.

27. How do you define "systemic racism?"

Response: As I understand it, "systemic racism" refers to policies and practices of an institution that result in racial disparities and/or harmful treatment of persons based on race. I suspect that the term means different things to different people.

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

Response: I am not aware of any consensus definition of "critical race theory." Black's Law Dictionary defines "critical race theory" as "a reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Black's Law Dictionary 382 (7th ed. 1999). If confirmed as a judge, I would base my decisions on binding law and precedent, and not based on any academic theory.

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

Response: Yes. Please see my responses to Questions 27 and 28 above.

Questions from Senator Thom Tillis
for Sarah Geraghty
Nominee to be United States District Judge for the Northern District of Georgia

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

   Response: Yes, I do. The judicial oath of office requires every judge to administer justice without respect to persons, do equal right to the poor and to the rich, and to faithfully and impartially discharge his or her duties under the Constitution and laws of the United States. *See* 28 U.S.C. § 453. A judge has a solemn duty to follow the law, and a judge's personal views on matters of policy and politics must not enter into adjudicative decisions.

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

   Response: As I understand it, the term "judicial activism" refers to the adjudication of cases based on a judge's personal, political, or policy views, rather than on applicable text and precedent. Defined as such, judicial activism is not appropriate and violates a judge's duty to be impartial and faithful to the law.

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

   Response: I believe that impartiality is both an expectation and a requirement for a judge. The judicial oath of office requires it. *See* 28 U.S.C. § 453. If confirmed as a district court judge, I would faithfully abide by Canon 1 of the Code of Conduct for United States Judges, which requires judges to act "without fear or favor" and to "comply with the law" in all matters. (Commentary to Canon 1.)

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

   Response: Legislators are the elected representatives of the people and judges must accordingly show respect for and deference to the acts of Congress and state legislative bodies. Judges have the duty to interpret the law, *Marbury v. Madison*, 5 U.S. 137, 177 (1803), but a judge should never make decisions out of a preference for a particular policy result. If confirmed as a district court judge, I would faithfully follow binding Supreme Court and Eleventh Circuit precedent regarding laws passed by Congress and state legislative bodies.

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

   Response: Yes, it is possible that a faithful interpretation of a law might result in an undesirable outcome. A judge's job is not to guard against what she perceives to be undesirable outcomes, but rather faithfully to interpret legal texts as passed by Congress and state legislative bodies. Outcome-determinative adjudication is not appropriate.

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

   Response: No.

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

   Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court held that "on the basis of both text and history" the Second Amendment protects an "individual right to keep and bear arms." While the Second Amendment right is not unlimited, s*ee id*., it protects the right to keep an operable handgun in one's home for purposes of immediate self-defense. *Id*. at 635. The right to keep and bear arms is a fundamental right, and the Supreme Court has extended *Heller* to the states. *See McDonald v. City of Chicago*, 561 U.S. 742 (2010). If confirmed, I would faithfully apply *Heller*, *McDonald*, and all binding Second Amendment precedent.

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

   Response: The enduring values and requirements of the Constitution must be respected in times of crisis. *See, e.g., Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69, 74 (2020) (Gorsuch, J., concurring) (stating that ["g]overnment is not free to disregard the First Amendment in times of crisis" and that "judicial deference in an emergency or a crisis does not mean wholesale judicial abdication . . ."). I would evaluate the lawsuit described above by carefully reviewing the parties' arguments, methodically researching the Supreme Court and Eleventh Circuit precedents, and applying the law to the discrete facts before me.

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

   Response: Officers are entitled to qualified immunity under 42 U.S.C. §1983 unless: (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quotations and citations omitted). "Clearly established" means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful. *See id*. The "clearly established standard" is "demanding" and protects all but the plainly incompetent or those who knowingly violate the law.

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

Response: The issue of whether law enforcement officers have sufficient protection under current qualified immunity jurisprudence is an important question for legislatures and policymakers. My personal views regarding qualified immunity and its applications would not affect the analysis or result of any case. If confirmed, I would follow all Supreme Court and Eleventh Circuit precedent regarding qualified immunity.

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

Response: The standard for qualified immunity, as set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and reaffirmed in *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018), is binding precedent. I would apply this standard unless Congress enacted a different standard, or the Supreme Court issued a new precedent adopting a different standard.

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

Response: As a judicial nominee, it would not be appropriate for me to place a value judgment on the Supreme Court's patent eligibility jurisprudence. Having said that, I am aware that legislators and others have expressed concerns about patent eligibility jurisprudence and particularly about the Court's exceptions to 35 U.S.C. § 101 involving laws of nature, natural phenomena, and abstract ideas. I am further aware that the United States Solicitor General recently stated that "the Court's recent Section 101 decisions have fostered substantial uncertainty," and that "[t]he confusion created … warrants review in an appropriate case." Brief for the United States as Amicus Curiae, *Hikma Pharmaceuticals USA Inc. v. Vanda Pharmaceuticals Inc*., No. 18-817, 2019 WL 6699397 * 8 (December 6, 2019). I understand that the Supreme Court has recently been asked to clarify the substantive Section 101 standards. *See* Petition for Writ of Certiorari, *American Axle & Manufacturing, Inc. v. Neapco Holdings LLC*, No. 20-891, 2019 WL 11611081 (Nov. 18, 2019). If confirmed, I will follow binding precedent, and any opinion that the Supreme Court may issue regarding the scope of Section 101.

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

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

Response: I must respectfully agree with other judicial nominees who have declined to analyze hypothetical scenarios because I do not want to create the misimpression that I have prejudged any matter. If I am confirmed as a federal judge and called upon to preside over the kinds of cases described in these hypotheticals, I would apply federal law and applicable Supreme Court precedent, which currently includes *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Mayo Collaborative Services v. Prometheus Laboratories, Inc*., 566 U.S. 66 (2012); *Bilski v. Kappos*, 561 U.S. 593 (2010); and *KSR International Co. v. Teleflex Inc*., 550 U.S. 398 (2007).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Response: As a judicial nominee, it would not be appropriate for me to place a value judgment on the Supreme Court's patent eligibility jurisprudence. Having said that, I am aware that legislators and others have expressed concerns about patent eligibility jurisprudence and particularly about the Court's exceptions to 35 U.S.C. § 101 involving laws of nature, natural phenomena, and abstract ideas. I am further aware that the United States Solicitor General recently stated that "the Court's recent Section 101 decisions have fostered substantial uncertainty," and that "[t]he confusion created … warrants review in an appropriate case." Brief for the United States as Amicus Curiae, *Hikma Pharmaceuticals USA Inc. v. Vanda Pharmaceuticals Inc*., No. 18-817, 2019 WL 6699397 * 8 (December 6, 2019). I understand that the Supreme Court has recently been asked to clarify the substantive Section 101 standards. *See American Axle & Manufacturing, Inc. v. Neapco Holdings LLC*, No. 20-891, 2019 WL 11611081 (Nov. 18, 2019). If confirmed, I will follow binding precedent, and any opinion that the Supreme Court may issue regarding the scope of Section 101.

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

a. What experience do you have with copyright law?

Response: When I served as a law clerk to a judge on the U.S. District Court for the Northern District of Illinois, I researched case law and drafted opinions in copyright and patent cases. In my subsequent two decades of experience in criminal and complex civil litigation, I have not handled a copyright case.

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

Response: In my two decades of experience in criminal and complex civil litigation, I have not handled a case involving the Digital Millennium Copyright Act.

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

Response: In my two decades of experience in criminal and complex civil litigation, I have not handled any matter involving this issue.

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

Response: I have represented clients in several First Amendment cases and in a case raising claims under the Religious Land Use and Institutionalized Persons Act. I have also represented clients in free speech cases. Over the years, I have frequently advised incarcerated clients and others on a wide range of First Amendment matters, including on rights and limitations related to religious liberties, prison visitation, communications, reading materials, and access to courts. I have not handled a case involving the intersection of First Amendment and intellectual property rights.

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

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

Response: The statutory text is "the most probative evidence" of congressional intent. *See Nebraska v. Parker*, 577 U.S. 481, 488 (2016) (quotations and citation omitted). The Supreme Court has stated that "[g]iven [a] straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales,* 520 U.S. 1, 6 (1997). Legislative history may, however, be considered when interpreting legal texts if the plain language of the text is ambiguous. *See Solis-Ramirez v. U.S. Dep't of Justice*, 758 F.2d 1426, 1430 (11th Cir. 1985) (stating that "[r]eview of the legislative history is not necessary unless a statute is inescapably ambiguous.").

The Supreme Court has cautioned that floor statements by individual legislators rank among "the least illuminating forms of legislative history." *NLRB v. SW General, Inc*., 137 S. Ct. 929, 943 (2017). By contrast, Committee Reports on a particular bill may be considered a more "authoritative" source in terms of discerning legislative intent. *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: Agency interpretations of a statute that take the form of policy statements, agency manuals, and opinion letters, as opposed to interpretations informed by formal adjudications or notice-and-comment rulemaking are "entitled to respect" to the extent they have the "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citing *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944)); *see also Georgia v. Public.Resource.Org, Inc*., 140 S. Ct. 1498, 1510 (2020) (stating that Compendium of U.S. Copyright Office Practices is a non-binding administrative manual that at most merits deference under *Skidmore*).

The copyright law is "highly detailed" and the U.S. Copyright Office "can bring the benefit of specialized experience to bear on the subtle questions" in a case. *See Olem Shoe Corp. v. Washington Shoe Corp*, 591 Fed. Appx. 873, 882 n. 10 (11th Cir. 2015) (quoting *United States v. Mead Corp*., 533 U.S. 218, 235 (2001) and according *Skidmore* deference to U.S. Copyright Office's construction of its statute).

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

Response: If I am confirmed as a federal district judge and I am assigned to preside over a case involving the obligation of an online service provider associated with a possible copyright infringement, I would look to applicable law, including the Digital Millennium Copyright Act and any other binding precedent in existence at that time.

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

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

Response: I do not have the requisite familiarity with this issue to provide a reasoned response regarding the limitations of existing law to address today's digital environment. To the extent that the DMCA and other law do not adequately address the scope of copyright infringements, Congress has the authority to revisit this issue.

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

Response: The Supreme Court can overrule its own precedent if it concludes that prior decisions are no longer aligned with technological and economic reality. *See, e.g., South Dakota v. Wayfair, Inc*., 138 S. Ct. 2080, 2096-99 (2018). If confirmed, I would be bound to apply Supreme Court and Eleventh Circuit precedent and any laws enacted by Congress.

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

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

Response: Several Supreme Court opinions express concerns about the dangers of forum shopping. *See, e.g., Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (referring to the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."). *See also Southland Corp. v. Keating,* 465 U.S. 1, 15 (1984) (rejecting an interpretation of the Federal Arbitration Act that would encourage and reward forum shopping). I would follow the lead of the Supreme Court and Eleventh Circuit in addressing this issue if a case involving allegedly impermissible forum shopping came before me.

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

Response: I believe that district court judges have a responsibility to follow the law on jurisdiction and venue and to be aware of and informed about issues surrounding alleged "forum shopping."

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

Response: I do not think it is appropriate for a judge to take actions with the intent to attract a particular type of case or litigant.

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

Response: Yes.

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

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

Response: Under the Code of Conduct for United States Judges, judges must uphold the integrity and independence of the judiciary. (Canon 1.) Judges also have a duty to comply with the law. (Commentary to Canon 1.) Violations of the Code of Conduct can lead to disciplinary action. I do not have the full context for the factual scenario set forth above and take no position about whether such action is appropriate in this case.

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

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

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

Response: In theory, it could. I do not have the full context for the factual scenario set forth above and thus cannot provide a reasoned and informed opinion as to whether the concentration of a particular type of litigation in a few judicial districts undermines the perception of fairness.

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

Response: Speaking generally, such an inquiry could be permissible, depending on the specific facts of the case. I do not have the full context for the factual scenario set forth above and thus cannot provide a reasoned and informed opinion.

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

Response: I am not at present sufficiently informed regarding these issues to offer a reasoned commitment regarding such a rule. If confirmed, I would research the issue and confer with colleagues who have direct experience with matters related to

the concentration of particular forms of litigation in one district. I agree that judges should not take actions that undermine the perception of fairness and the judiciary's evenhanded administration of justice.

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

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

Response: Judges have an ethical obligation to follow the law. I am not aware of any precedent from the Supreme Court or Eleventh Circuit that quantifies the number of reversals that must occur before an inference arises that a judge is failing to follow the law.

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

Response: Please see my response to Question 21(a).