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

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

   Response: "Super precedent" is not a term that I have used in my legal practice or addressed as Chief Circuit Mediator for the federal courts in the D.C. Circuit. To my knowledge, the Supreme Court has not used or defined the term "super precedent." If confirmed, I will faithfully adhere to all Supreme Court and Federal Circuit precedent.

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

   Response: I was in private practice for 20 years and from that experience I know that law firms consider many factors when determining which clients to represent and what pro bono matters to take, including conflicts of interest. Beyond that, I do not have a view about what cases law firms should undertake.

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

   Response: I am not familiar with that quote by Judge Ketanji Brown Jackson. The term "living constitution" can have different meanings to different people, and it is not a term I have ever used in my legal practice. I believe the Constitution is an enduring document. If confirmed, I will faithfully follow the Constitution and Supreme Court and Federal Circuit precedent.

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

   Response: No.

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

   Response: I am not aware of any authority that would provide for private prosecution of federal criminals, nor has this issue arisen in my 30 years of legal experience and public service.

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

Response: Throughout my legal career, I have hired many lawyers, law clerks and interns. I have considered only their qualifications in making hiring decisions, including their academic and professional backgrounds. I have never considered an applicant's membership in the Federalist Society, or any other organization, as a factor in hiring decisions. Similarly, if confirmed, I would not consider a law clerk applicant's membership in the Federalist Society, or any other association.

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

Response: See Answer to Question 2.

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

Response: See Answer to Question 2.

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

Response: No.

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

Response: No. Judges should take into consideration the facts of a particular case and impartially apply relevant law and precedent to those facts.

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

Response: Federal judges should follow the Code of Conduct for United States Judges. Canon 5 provides that a judge should refrain from political activity.

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

Response: It would be wrong to threaten a Supreme Court Justice, or anyone else.

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

Response: The term "attacks" can have different meanings to different people and the meaning also depends on the context in which the word is used. It is not possible to differentiate between "attacks" versus "criticism," without such context.

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

Response: The question of whether the Supreme Court should be expanded is a policy decision. If confirmed, I will follow Supreme Court precedent regardless of the number of Justices on the Court.

15. Should a defendant's personal characteristics influence the punishment he or she receives?

Response: No.

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

Response: I do not have a view about this question and note that the Court of Federal Claims, to which I have been nominated, does not have a criminal docket.

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

Response: A nationwide injunction occurs if a court enjoins all defendants who are in similar disputes nationwide on the basis of its findings and conclusions concerning one matter. This is not the same as enjoining one defendant (the federal government) from implementing a rule that has been invalidated.

I am a nominee to the Court of Federal Claims, which unlike Article III District Courts is a court of limited jurisdiction and hears only monetary claims against the federal government. Moreover, the Court of Federal Claims has only limited authority to issue injunctive relief, and does not have authority to enjoin policies or practices of the federal government. Accordingly, if I am confirmed to be a judge on the Court of Federal Claims, I do not foresee there being an occasion to impose a nationwide injunction.

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

Response: The Court of Federal Claims is a court of limited jurisdiction and hears only monetary claims against the federal government; it does not hear cases involving Second Amendment rights. Therefore, if I am confirmed to be a judge on the Court of Federal Claims, I would not decide matters involving the Second Amendment. My understanding of the holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008) is that the Second Amendment protects an "individual right to possess and carry weapons in case of confrontation." *Id*. at 592. The right is not unlimited, and applies to the types of weapons that were "in common use at the time," not to "dangerous and unusual weapons." *Id*. at 627.

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

Response: Questions regarding funding for police departments and law enforcement are for policy makers to consider.

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

Response: Questions regarding funding for police departments and social services are for policy makers to consider.

21. Is climate change real?

Response: Questions regarding climate change are scientific in nature and for policy makers to consider.

22. Is gun violence a public-health crisis?

Response: Questions regarding gun violence and public health are for policy makers to consider.

23. Is racism a public-health crisis?

Response: Questions regarding racism and public health are for policy makers to consider.

24. Is the federal judiciary systemically racist?

Response: I do not have a personal definition of "systemic racism," and it is not a term I have used in my legal practice. If confirmed as a judge, I will treat all those who appear before me equally, fairly, and with respect.

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

Response: I do not have a view on whether Russia or China is a bigger threat to our national security. This is a question for policy makers to consider.

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

Response: I do not have a view on whether the Cuban Communist Party is a threat to our national security. This is a question for policy makers to consider.

27. Do Blaine Amendments violate the Constitution?

Response: In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the Supreme Court held that if a state provides subsidies for private education, it cannot disqualify private schools from similar aid based on religion. In my current role as Chief Circuit Mediator for the D.C. Circuit, I am bound by the Code of Judicial Ethics, and it would be inappropriate for me to comment on legal issues that could become the subject of litigation or of mediation in the Court's Mediation Program. As a mediator, neutrality is a basic requirement to which I am bound. In addition, it is generally inappropriate for judicial nominees to comment on the merits of any particular Supreme Court decision. If I am confirmed to be a judge on the Court of Federal Claims, I would follow all Supreme Court and Federal Circuit precedent.

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

Response: The Supreme Court has held that the due process clauses of the Fifth and Fourteenth Amendments to the Constitution protect certain unenumerated rights that are "fundamental" and "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Among these rights is the right to parent. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

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

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

Response: No.

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

Response: No.

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

Response: I know Chris Kang, who works at Demand Justice, from when we we both served in the Obama Administration. I spoke to him when I was considering a potential nomination to the Court of Federal Claims, and he offered his congratulations when I was nominated.

30. 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: I have known Nan Aron, the former President of the Alliance for Justice, for approximately twenty years. I am in contact with her periodically.

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: See Answer to Question 29(c) and 30(b).

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

33. 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.

34. 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: I have not been nominated to be a United States District Judge. However, on February 11, 2021, the White House Counsel's Office requested I submit a cover letter and resume to be a judge on the United States Court of Federal Claims. On February 18, 2021, I interviewed with the White House Counsel's Office. Since then, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On June 30, 2021, the President announced his intent to nominate me.

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

a. **Did anyone do so on your behalf?**

Response: See Answer to Question 29(c). In addition, I am not aware of anyone who may have communicated with Demand Justice on my behalf.

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

a. **Did anyone do so on your behalf?**

Response: I did not communicate with anyone from or anyone directly associated with the American Constitution Society during my selection process. I am not aware of anyone communicating with the American Constitution Society on my behalf.

37. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known

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

a. **Did anyone do so on your behalf?**

Response: I did not communicate with anyone from or anyone associated with Arabella Advisors or its subsidiaries during my selection process. I am not aware of anyone communicating with these organizations on my behalf.

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

a. **Did anyone do so on your behalf?**

Response: I did not communicate with anyone from or anyone associated with the Open Society Foundation during my selection process. I am not aware of anyone communicating with this organizations on my behalf.

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

Response: On February 11, 2021, the White House Counsel's Office requested I submit a cover letter and resume to be a judge on the United States Court of Federal Claims. On February 18, 2021, I interviewed with the White House Counsel's Office. Since then, I have been in contact with officials from the White House Counsel's Office and the Office of Legal Policy at the Department of Justice. On June 30, 2021, the President announced his intent to nominate me.

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

Response: On October 13, 2021, I received these questions from the Office of Legal Policy (OLP). I reviewed the questions, conducted legal research, reviewed my records when necessary to refresh my recollection, and drafted my answers. OLP provided feedback on my draft, which I considered, before submitting my final answers to the Committee.

Senator Marsha Blackburn
Questions for the Record to Carolyn N. Lerner

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

   Response: I currently serve as the Chief Circuit Mediator for the federal courts in the D.C. Circuit. In that role, as in my prior roles as an adjudicator and agency head, my approach has been to make sure that every party is treated fairly and with respect. I carefully review the parties' factual arguments, ask clarifying questions, and then research and apply the relevant law, rule or regulation to impartially make a decision, or in the case of a mediation, to provide the parties with an assessment of the strengths and weaknesses of their cases should they request that I do so. This would be my approach if I am fortunate to be confirmed as a judge on the Court of Federal Claims. In addition, as a lower court judge, if confirmed, it would be my obligation to faithfully follow Supreme Court and Federal Circuit precedent.

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

   Response: I would first review the plain text of the statute. If the meaning is plain on its face, then the inquiry ends there. If any ambiguity remains about the plain meaning of the statute, I would look to Supreme Court or Federal Circuit precedent regarding the statute in question. If there were no controlling precedent, I would research precedent on analogous statutes or applicable precedent in other Circuits. As a last resort, I might consider the statute's legislative history, which while not binding can provide assistance in determining Congress's intent when enacting the statute.

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

   Response: If I am confirmed to the Court of Federal Claims, I would be bound by Supreme Court and Federal Circuit precedent concerning the appropriate method of interpreting the text and original meaning of the Constitution. It is difficult to contemplate that I would be faced with a constitutional issue of first impression with no binding precedent from those courts. In the unlikely event that this occurred, I would follow the analysis used by those courts to interpret constitutional issues. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), the Court used the original public meaning of the text.

Nomination of Carolyn Lerner Questions for the Record
Submitted October 18, 2021

QUESTIONS FROM SENATOR COTTON

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

   Response: No.

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

   Response: No.

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

   Response: On October 13, 2021, I received these questions from the Office of Legal Policy (OLP). I reviewed the questions, conducted legal research, reviewed my records when necessary to refresh my recollection, and drafted my answers. OLP provided feedback on my draft, which I considered, before submitting my final answers to the Committee.

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

   Response: No other individual wrote or drafted my answers to these questions or the written questions of the other members of the Committee.

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

Questions for the Record for Carolyn N. Lerner, Nominee for the Court of Federal Claims

1. **Please describe the Federal Circuit's holding in *Kaplan v. Conyers*.**

Response: In *Department of Navy v. Egan*, 484 U.S. 518 (1988), the Supreme Court limited the Merit Systems Protection Board's review over security clearance determinations. The question presented in *Kaplan v. Conyers* was whether *Egan* applied to low-level Defense Department civilian employees who do not hold security clearances, but still hold "sensitive" positions. The *en banc* Federal Circuit held that *Egan's* principles applied and the Board had no authority to review decisions relating to employees holding "sensitive" positions.

2. **While working at the Office of Special Counsel, you criticized the Federal Circuit's opinion in *Kaplan v. Conyers*, because you thought the decision posed a "significant threat to whistleblower protections for hundreds of thousands of federal employees in sensitive positions and may chill civil servants from blowing the whistle." Based on your stated reaction to the opinion, it clearly disappointed you, and you disagreed its outcome.**

   a. As a judge, would you faithfully apply *Kaplan v. Conyers*?

Response: Yes.

   b. Would you faithfully apply precedent with which you disagree?

Response: Yes.

3. **As Special Counsel, you also spoke out in favor of reforming the Hatch Act, arguing that the law is difficult to interpret and apply to modern technologies, and that it encourages agencies not to report violations. As a judge, how would you apply the Hatch Act to modern technologies?**

Response: The Hatch Act only applies to Executive Branch employees and is enforced by the Office of Special Counsel. The Court of Federal Claims does not have jurisdiction over the Hatch Act. Therefore, I would not apply the Hatch Act if I am confirmed to be a judge on the Court of Federal Claims.

4. **Is Congress or the Judiciary best equipped to reform or revise provisions of the Hatch Act?**

Response: Congress is best equipped to reform the Hatch Act and did so in the Hatch Act Modernization Act of 2012.

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

Response: I currently serve as the Chief Circuit Mediator for the federal courts in the D.C. Circuit. In that role, as in my prior roles as an adjudicator and agency head, my approach has been to make sure that every party is treated fairly and with respect. I review the parties' factual arguments carefully, ask clarifying questions, and apply the relevant law, rule or regulation to impartially make a decision, or in the case of a mediation, to provide the parties with an assessment of the strengths and weaknesses of their cases should they request that I do so. This would be my approach if I am fortunate to be confirmed as a judge on the Court of Federal Claims. I have not studied the philosophies of Supreme Court Justices, nor would they be applicable to me as a lower court judge. As a lower court judge, if confirmed, it would be my obligation to follow Supreme Court and Federal Circuit precedent.

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

Response: Black's Law Dictionary defines originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect."

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

Response: Black's Law Dictionary defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values."

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

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

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

Response: No

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

Response: As a judicial nominee, it would not be appropriate for me to express an opinion on potential reform of the Supreme Court. If confirmed, I would follow Supreme Court precedent regardless of the number of Justices on the Court.

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

Response: Yes. The Supreme Court held in *District of Columbia v. Heller* "that the Second Amendment confers an individual right to keep and bear arms." 554 U.S. 570, 622 (2008).

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

Response: I do not have a personal definition of "systemic racism," and it is not a term I have used in my legal practice. If confirmed as a judge, I will treat all those who appear before me equally, fairly, and with respect.

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

Response: The Court of Federal Claims does not hear cases under the Federal Tort Claims Act (FTCA), and the *Feres* doctrine would not arise in cases I would hear if confirmed to be a judge. The *Feres* doctrine is from the Supreme Court's decision in *Feres v. United States*, 340 U.S. 135 (1950). It prevents members of the armed forces who are injured while on active duty from successfully suing the federal government under the FTCA. In *Feres*, the Supreme Court provided three reasons to support the *Feres* Doctrine: (1) the parallel private liability required by the FTCA was absent; (2) Congress could not have intended that local tort law governs the "distinctively federal" relationship between the Government and military personnel; and (3) Congress could not have intended to make FTCA claims available to military personnel who have already received veterans' benefits to compensate them for injuries suffered incident to service.

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

Response: Yes.

b. What are these limitations?

Response: Although not under the Federal Tort Claims Act, the National Defense Authorization Act for 2020 created an administrative process for personal injury or death that was caused by "act or omission constituting medical malpractice occurring in a covered military medical treatment facility."

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

Response: In *Maine Community Health Options v. United States*, health insurance companies relied on the Tucker Act to sue for damages for losses they suffered on policies on the "health benefit exchanges" under the Affordable Care Act. The Supreme Court held that the Patient Protection and Affordable Care Act's "Risk Corridors" statute, which set the formula for payments to insurers for unexpectedly unprofitable plans during the first three years of insurance marketplaces, created a government obligation to pay insurers the full amount of their losses. The Court found that the government's obligation to pay was not suspended even if Congress had not appropriated funds to make the payments.

Senator Josh Hawley
Questions for the Record
Carolyn Lerner
Nominee, Judge for the U.S. Court of Federal Claims

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

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

    Response: I am not familiar with this quote. I can describe the way I would approach every case which would be to first study the underlying facts and parties' arguments, carefully read the relevant statute or regulations, and research and apply applicable Supreme Court or Federal Circuit precedent to the issue at hand without any predetermined notion of how the case should be decided. This is the approach I have previously taken when I have acted as an adjudicator and agency head, and it is the approach I would use if I am confirmed to be a judge on the Court of Federal Claims.

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

    Response: See answer to 1a.

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

Response**:** The Court of Federal Claims is a court of limited jurisdiction that hears claims for money damages against the federal government. Abstention rarely arises in these cases because the Court only hears cases against the federal government and it would be rare for a case to be filed with concurrent state court issues. If confirmed, and I was presented with a motion for abstention, I would look to Supreme Court and Federal Circuit precedent for guidance.

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 Supreme Court has looked to the original public meaning of the Constitution in *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008). The Court stated that "the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." If I am confirmed as a judge on the Court of Federal Claims, I would follow Supreme Court and Federal Circuit precedent in interpreting consitutional provisions.

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

Response: If a case involves the interpretation of a statute and the plain meaning of the statutory text is clear then that ends the analysis. Only if the text is unclear and there is no applicable or analogous precedent, either from the Supreme Court, the U.S. Court of Appeals for the Federal Circuit, or other federal court, would I consider legislative history. If confirmed, I would follow Supreme Court and Federal Circuit guidance regarding the use of legislative history in statutory interpretation. The Court has instructed, "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted).

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

   Response: The Supreme Court has made clear that some types of legislative history are more probative of congressional intent than others. See, e.g., *NLRB v. SW Gen., Inc*., 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history.")

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

   Response: As a general rule, the laws of foreign nations are not relevant to the interpretation of the Constitution. There are narrow, limited exceptions to this general rule. For example, in *District of Columbia v. Heller*, the Court considered English law when determining the meaning of the terms used in the Second Amendment. 554 U.S. 570, 582 (2008).

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 Court of Federal Claims and the Court of Appeals for the Federal Circuit do not have jurisdiction over criminal cases, and therefore do not have any occasion to interpret the Eigth Amendment. The Federal Circuit does not have a legal standard for capital punisment. The Supreme Court has held that to prevail on such a claim, a claimant must 1) show that the State's chosen method of execution creates a substantial risk of severe pain; 2) there is a showing of feasible and available alternatives that would significantly reduce the risk of severe pain; and 3) that the State has refused to adopt these alternative methods without a legitimate penological reason. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019); *Glossip v. Gross*, 576 U.S. 863 (2015).

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. See also Answer to Question 6.

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: The Court of Federal Claims and the Court of Appeals for the Federal Circuit do not have jurisdiction over criminal cases. In *Ledford v. United States*, 297 F.3d 1378 (Fed. Cir. 2002), the Federal Circuit held that the court had no jurisdiction over federal habeas claims. The Supreme Court has not recognized a constitutional right to DNA analysis for habeas corpus petitioners. *District Attorney's Office for the Third Judicial Dist. V. Osborne*, 557 U.S. 52, 72-74 (2009).

9. **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 Justice Scalia's statement to mean that judges should be impartial and make decisions without regard to their personal views about the

result no matter where that result may lead. Assuming this is what Justice Scalia also meant by this statement, I agree with it.

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

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

    Response: I understand there has been ongoing debate on the propriety of issuing unpublished orders. However, as a nominee to serve on the Court of Federal Claims, it would not be appropriate for me to state my opinion on the U.S. Court of Appeals for the Federal Circuit's, or any other U.S. Court of Appeals', practices or procedures.

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

    Response: Please see response to Question 10(a).

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

    Response: The Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit are courts of limited jurisdiction. Neither court adjudicates criminal cases, and judges on those courts do not consider death penalty cases. The Federal Circuit does not have a legal standard for capital punisment.

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

    Response: The Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit are courts of limited jurisdiction. The Court of Federal Claims only hears monetary claims against the federal government. I am not aware of any binding Federal Circuit precedent on claims involving whether a facially neutral state governmental action is a substantial burden on the free exercise of religion. The

Supreme Court has held that there must be a compelling state interest and be narrowly tailored to that interest when impacting the free exercise of religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-532 (1993). *See also Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curium) (addressing COVID gathering restrictions).

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

Response: Please see answer to Question 12.

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

Response: The Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit are courts of limited jurisdiction. The Court of Federal Claims only hears monetary claims against the federal government. I am not aware of any binding Federal Circuit precedent evaluating whether a person's religious beliefs are held sincerely. The Federal Circuit would apply the Supreme Court's precedent if such an issue arose in one of its cases, e.g. *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014).

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

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

Response: My understanding of the holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008) is that the Second Amendment protects an "individual right to possess and carry weapons in case of confrontation." *Id*. at 592. The right is not unlimited, and applies to the types of weapons that were "in common use at the time," not to "dangerous and unusual weapons." *Id*. at 627.

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

Response: No.

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

Response: My understanding of that phrase comports with Chief Justice Roberts's statement that *Korematsu* was "gravely wrong the day it was decided," and the Court's finding that *Korematsu* was a mistaken decision.

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

Response: As the highest court in the United States, the Supreme Court establishes binding precedents and determines the circumstances under which its precedents are no longer good law. As a lower court judge, it would be my duty to follow what the Supreme Court announces concerning overruling precedent. My views, if any, would not dictate how I would decide a case if the Supreme Court has not overruled its own precedent. If confirmed, I will apply all binding Supreme Court and Federal Circuit precedents.

a. If so, what are they?

Response: Please see my response to Question 17.

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

Response: Yes, I will apply all Supreme Court precedent.

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: I am not familiar with the quoted statement by Judge Learned Hand. In addition, the Court of Federal Claims is a court of limited jurisdiction,

and has no jurisdiction over antitrust cases. In the unlikely event that an antitrust case were to arise, I would faithfully apply Supreme Court and Federal Circuit precedent.

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

Response: Please see my response to Question 18.

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 18.

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

Response: My understanding of the term "federal common law" is the law that exists in the absence of any controlling statute, and is the law derived from the binding precedents of the courts of appeals and the Supreme Court in the absence of a controlling federal statute. However, the Supreme Court has stated, "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

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

Response: The Court of Federal Claims is a court of limited jurisdiction that hears monetary claims against the federal government. If I am confirmed to the Court I would not have occasion to interpret civil rights arising under state constitutional law.

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

Response: A state constitutional provision is a matter for the courts of the state and federal courts must defer to those interpretations. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

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

Response: The Federal Constitution is binding on the states, and is the "supreme Law of the Land." U.S. Const., art. VI.

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

Response: In my current role as Chief Circuit Mediator for the D.C. Circuit, I am bound by the Code of Conduct for United States Judges, and it would normally be inappropriate for me to comment on legal issues that could become the subject of litigation in the federal courts of the D.C. Circuit. In addition, it is generally inappropriate for judicial nominees to comment on the merits of any particular precedent because it is a lower court judge's duty to follow precedent without regard to personal views, and because judges are ethically prohibited from commenting on legal issues that could become the subject of litigation. Prior judicial nominees have made exceptions to that general rule for *Brown v. Board of Education* because litigation regarding the issues in that case is highly unlikely to reoccur. Similarly, I agree that it is appropriate to comment on the merits of *Brown* and state that it was correctly decided. As a lower court judge, if confirmed, I would follow all Supreme Court and Federal Circuit precedent.

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

Response: The Court of Federal Claims is a court of limited jurisdiction and lacks jurisdiction to enjoin the conduct of parties not before the court on a nationwide basis or otherwise. The defendant is always the federal government. That being said, the scope of proper injunctive relief is currently being litigated in the federal courts, and it would not be appropriate for me as the Chief Mediator for the federal courts in the D.C. Circuit (bound as I am in that position by the Code of Conduct for United States Judges) or as a judicial nominee, to provide a personal opinion on this question. If confirmed, I would apply Supreme Court and Federal Circuit precedent regarding the scope of proper injunctive relief.

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

Response: Please see answer to Question 22.

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

Response: Please see answer to Question 22.

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

Response: Please see answer to Question 22.

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

Response: "Federalism" as I understand it is a system of government in which the states and the federal government act as dual sovereigns. Both are equally important to protect liberty. Federalism is a way to prevent any one governmental entity from becoming too powerful and restricting liberty.

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

Response: The absention doctrine arises when there is an issue concerning a federal court's interference with state court or administrative proceedings. Various abstention doctrines have developed, such as in *Younger v. Harris*, 401 U.S. 37 (1971) and *Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941). Federal courts will decline to decide a case if it would intrude on the powers of another court. Because the Court of Federal Claims only hears claims against the United States, if confirmed, I would rarely if ever be confronted with a need to apply the abstention doctrine. If a case came before me that raised this issue, I would follow Supreme Court and Federal Circuit precedent.

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

Response: The Supreme Court has held that the due process clauses of the Fifth and Fourteenth Amendments to the Constitution protect certain unenumerated rights that are "fundamental" and "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Among these rights are the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to parent, *Meyer v. Nebraska*, 262 U.S. 390 (1923); and the right to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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 Free Exercise Clause is a fundamental constitutional right. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Under current Supreme Court precedent, "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021).

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

Response: No. The Supreme Court has held that "[t]he Free Exercise Clause protects against laws that impose special disabilities on the basis of religious status." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 U.S. 2012, 2021 (2007)

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

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

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

Response: The Court of Federal Claims is a court of limited jurisdiction, and it is highly unlikely that a case involving a person's religious beliefs under the First Amendment would come before me if I am confirmed to be a judge on that Court. In the unlikely situation that it did, I would follow Supreme Court precedent on the issue, such as *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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

Response: The Supreme Court has stated that the "RFRA operates as a kind of super statute, displacing the normal operation of other federal laws." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020).

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

Response: No.

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

Response: The Court of Federal Claims and the Court of Appeals for the Federal Circuit are courts of limited jurisdiction and do not have jurisdiction over criminal cases. Moreover, if I am confirmed, my personal beliefs on this issue or other issues would be irrelevant. I would follow Supreme Court and Federal Circuit precedent regarding any matter that came before me. I am not aware of any Supreme Court precedent that includes a percentage for determining the reasonable doubt standard.

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

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

Response: I am not familiar with this quote by Justice Holmes. I am aware of *Lochner v. New York*, the holding of which Justice Holmes apparently disagreed. My understanding is that the era typified by *Lochner* ended in the 1930's, *see, e.g*. *West Coast Hotel Company v. Parrish*, 300 U.S. 379 (1937), and the Supreme Court no longer follows the holding in that case.

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

Response: Any opinion that I might have about the holding in *Lochner* would not impact my rulings if I am confirmed to the Court of Federal Claims. I would be obligated to follow Supreme Court and Federal Circuit precedent.

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

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

Response: The Court of Federal Claims and the Court of Appeals for the Federal Circuit are courts of limited jurisdiction and do not have jurisdiction over criminal cases, including writs of habeas corpus. In addition, I am not aware of any cases addressing the situation presented in this question. If I am confirmed, my personal beliefs on this issue or other issues would be irrelevant. Rather, I would follow Supreme Court and Federal Circuit precedent regarding any matter that came before me.

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

Response: Please see my response to Question No. 30(a).

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

Response: Please see my response to Question No. 30(a).

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

Response: Federal Rule of Appellate Procedure 32.1(a) provides that a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason, nor may it restrict the citation of such opinions. If confirmed, I would treat unpublished decisions as non-binding authority, and follow Federal Circuit guidance on how it would expect the Court of Federal Claims to weigh its value. I would neither discourage or prohibit litigants from citing unpublished opinions.

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

Response: Please see my response to Question No. 30(c).

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

Response: See Answer to Question 30(c).

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

Response: See Answer to Question 30(c).

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

Response: See Answer to Question 30(c).

31. 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 to subparts a.- i.: I was a litigator in private practice for 20 years. I left my law firm over ten years ago, and I no longer have access to my case files. I tried two cases to verdict before juries and six cases before administrative law judges. I took and defended dozens of depositions. I recall arguing motions in federal appellate court fewer than five times, and do

not recall arguing before a state appellate court although it is possible that I did so. I appeared before federal agencies numerous times as a litigator, and headed a federal agency for six years where I was responsible for litigation decisions. I estimate that I have argued at least ten dispositive and ten evidentiary motions before trial courts or administrative judges.

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

Response: When I was in private practice I recorded my billable hours.

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

Response: I left private practice over ten years ago and do not have access to my former billing records.

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

Response: Throughout my legal career I have been dedicated to pro bono work. While I do not have my former billing records, a significant portion of my time was devoted to providing pro bono services including serviceas a member of the D.C. Bar's Pro Bono Committee, the D.C. Circuit's Committee on Pro Bono, and volunteering through the D.C. Bar's Legal Advice and Referral Clinic, among other organizations.

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

a. What do you understand this statement to mean?

Response: I understand Chief Justice Roberts's statement to mean that judges should be impartial and make decisions based on the law and facts before them, and do not have the authority to make the laws.

b. Do you agree or disagree with this statement?

Response: Assuming this is what Justice Roberts also meant by this statement, I agree with it.

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

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

Response: I understand Justice Holmes's statement to mean that a judge's job is to faithfully apply the law as set out in statutes and as interpreted by higher courts regardless of their own personal views. This is fundamental to the administration of justice.

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

Response: Assuming this is what Justice Holmes also meant by this statement, I agree with it.

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

Response: The answer to this question depends on the facts and circumstances of the matter at issue, and the type of damages that are being requested by the plaintiff. In general, damages are awarded to remedy harm that has occurred, and injunctive relief is awarded to prevent future harm.

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

Response: No.

a. If yes, please provide appropriate citations.

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

Response: No.

38. What were the last three books you read?

Response: *Difficult Conversations*, by Douglas Stone, Brue Patton and Sheila Heen of the Harvard Negotiation Project; *Carville's Cure*, by Pam Fessler; and *A Promised Land*, by Barack Obama.

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

Response: I do not have a personal definition of "systemic racism," and it is not a term I have used in my legal practice. If confirmed as a judge, I will treat all those who appear before me equally, fairly, and with respect.

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

Response: When I headed the U.S. Office of Special Counsel, the agency's work with Veterans Affairs (VA) whistleblowers improved the quality of care for veterans nationwide. In numerous reports to the President and Congress, I documented a pattern of serious threats to patient care at VA hospitals throughout the country. This led to an overhaul of the VA's internal medical oversight office, as well as other systemic changes at the VA. OSC also secured relief for dozens of VA whistleblowers, helping courageous doctors, nurses, and other VA employees, while addressing ongoing threats to patient health and safety.

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

Response: No.

a. How did you handle the situation?

Response: See response to Question 41.

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

Response: Yes.

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

Response: I do not regularly read any particular law professor's works. However, in my current roles as Chief Circuit Mediator for the federal courts in the D.C. Circuit and as an adjunct law professor at Georgetown University Law Center, I often review articles from the Harvard Project on Negotiation.

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

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

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

Response: I cannot recall having read any particular judicial opinion, law review article or other legal opinion that made me change my mind. I regularly review the decisions from the federal courts in the D.C. Circuit and generally find them to be well-reasoned and persuasive.

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

Response: In *Planned Parenthood of S.E. Pennsylvania v. Casey*, the Court stated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." 505 U.S. 833, 851 (1992). As a judicial nominee, and in my current role as the Chief Circuit Mediator for the federal courts in the D.C. Circuit, I am bound by the Code of Judicial Ethics, and it would not be appropriate to share my own personal views on whether an unborn child is a human being. If confirmed, I would follow Supreme Court and Federal Circuit precedent on this and all other issues.

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

Response: I testified numerous times before congress in my role as head of the U.S. Office of Special Counsel. A list of my testimony is below. The transcripts of the hearings were provided with my answers to the Senate Judiciary Committee Questionnaire for Judicial Nominees.

H. Comm. on Oversight and Government Reform Hearing on Transparency at TSA, 115th Congress (2017) (testimony given as Special Counsel).

S. Comm. on Homeland Security & Governmental Affairs Hearing on the Nominations of Michael J. Missal and Carolyn N. Lerner, 114th Congress (2016) (testimony given as nominee for Special Counsel).

H. Comm. on Oversight and Government Reform Hearing on the Merit Systems Protection Board, Office of Government Ethics, and Office of Special Counsel Reauthorization Before the Subcomm. on Government Operations, 114th Congress (2015) (testimony given as Special Counsel).

S. Comm. on Veterans' Affairs Hearing on Pending Health and Benefits Legislation, 114th Congress (2015) (testimony given as Special Counsel).

S. Comm. on Homeland Security and Governmental Affairs Hearing on Improving VA Accountability: Examining First-Hand Accounts of Department of Veterans Affairs Whistleblowers, 114th Congress (2015) (testimony given as Special Counsel)..

S. Comm. on Appropriations Hearing on A Review of Whistleblower Claims at the Department of Veterans Affairs Before the Subcomm. on Military Construction, Veteran Affairs and Related Agencies, 114th Congress (2015) (testimony given as Special Counsel).

S. Comm. on Veterans' Affairs Hearing on Pending Health and Benefits Legislation, 114th Congress (2015) (testimony given as Special Counsel).

S. Comm. on the Judiciary Hearing on Juvenile Justice Grants Oversight, 114th Congress (2015) (statement given as Special Counsel)..

H. Comm. on Veterans' Affairs Hearing on Addressing Continued Whistleblower Retaliation within the VA Before the Subcomm. on Oversight and Investigations, 114th Congress (2015) (testimony given as Special Counsel).

H. Comm. on Oversight and Government Reform Hearing on Examining the Administration's Treatment of Whistleblowers Before the Subcomm. on Federal Workforce, U.S. Postal Service and the Census, 113th Congress (2014) (testimony given as Special Counsel).

H. Comm. on Oversight and Government Reform Hearing on White House Office of Political Affairs: Is Supporting Candidates and Campaign Fundraising an Appropriate Use of a Government Office?, 113th Congress (2014) (testimony given as Special Counsel).

H. Comm. on Veterans' Affairs Hearing on VA Whistleblowers: Exposing Inadequate Service Provided to Veterans and Ensuring Appropriate Accountability, 113th Congress (2014) (testimony given as Special Counsel).

H. Comm. on Oversight and Government Reform Hearing on Whistleblower Reprisal and Management Failures at the Chemical Safety Board, 113th Congress (2014) (testimony given as Special Counsel).

S. Comm. on Homeland Security & Governmental Affairs Hearing on Examining the Use and Abuse of Administratively Uncontrollable Overtime at the Department of Homeland Security Before Subcomm. on the Efficiency and Effectiveness of

Federal Programs and the Federal Workforce, 113th Congress (2014) (testimony given as Special Counsel).

S. Comm. on Homeland Security & Governmental Affairs Hearing on Examining the Use and Abuse of Administratively Uncontrollable Overtime at the Department of Homeland Security Before Subcomm. on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce, 113th Congress (2013) (testimony given as Special Counsel).

H. Comm. on Oversight and Government Reform Hearing on Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense Before Subcomm. on National Security, 113th Congress (2013) (testimony given as Special Counsel)..

S. Comm. on Homeland Security & Governmental Affairs Hearing on Strengthening Government Oversight: Examining the Roles and Effectiveness of Oversight Positions within the Federal Workforce Before Subcomm. on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce, 113th Congress (2013) (testimony given as Special Counsel).

S. Comm. on Veterans' Affairs Hearing on Pending Benefits Legislation, 113th Congress (2013) (testimony given as Special Counsel).

H. Comm. on Oversight and Government Reform Hearing on Hatch Act: Options for Reform Before Subcomm. on the Federal Workforce, U.S. Postal Service, and Labor Policy, 112th Congress (2012) (testimony given as Special Counsel).

S. Comm. on Homeland Security & Governmental Affairs Hearing on A Review of the Office of Special Counsel and Merit Systems Protection Board Before Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia, 112th Congress (2012) (testimony given as Special Counsel).

H. Comm. on Armed Services Hearing on Dover Port Mortuary (closed session), 112th Congress (2011) (testimony given as Special Counsel).

S. Comm. on Homeland Security & Governmental Affairs Hearing on the Nomination of Carolyn N. Lerner to be Special Counsel, Office of Special Counsel, 112th Congress (2011) (testimony given as nominee for Special Counsel).

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

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

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

c. Systemic racism?

d. Critical race theory?

Response: No.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response: No.

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

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

Response: No.

50. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: No.

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

Response: I believe that the Senate has an important role in advising and consenting to judicial nominees. Therefore, I believe a nominee should be as candid as possible

about her views, subject to the concerns of judicial ethics that numerous nominees of presidents of both parties have expressed to this Committee.

Questions for the Record for Carolyn Lerner
From Senator Mazie K. Hirono

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

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

   Response: No.

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

   Response: No.

Senator Mike Lee

Questions for the Record

Carolyn Nancy Lerner, Nominee for the United States Court of Federal Claims

1. How would you describe your judicial philosophy?

Response: I currently serve as the Chief Circuit Mediator for the federal courts in the D.C. Circuit. In that role, as in my prior roles as an adjudicator and agency head, my approach has been to make sure that every party is treated fairly and with respect. I review the parties' factual arguments carefully, ask clarifying questions, and apply the relevant law, rule or regulation to impartially make a decision, or in the case of a mediation, to provide the parties with an assessment of the strengths and weaknesses of their cases should they request that I do so. This would be my approach if I am confirmed to be a judge on the Court of Federal Claims.

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

Response: I would begin by closely considering the text of the constitutional provision. If the meaning is clear from the plain language, then the analysis would end there. If it is not clear, I would consider Supreme Court and Federal Circuit precedent applying the constitutional provisions. If there is no binding precedent, I would look for guidance from other Circuit courts that had interpreted the constitutional provision. In the rare case that there is no applicable precedent, I would refer to other sources accepted by the Supreme Court and the Federal Circuit for constitutional interpretation.

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

Response: I would begin by closely considering the text of the statute. If the meaning is clear from the plain language, then the analysis would end there. If the plain meaning is not clear, I would consider Supreme Court and Federal Circuit precedent regarding the statute. If I am confirmed, my role would be to follow Supreme Court and Federal Circuit precedent concerning the appropriate method of interpreting the text and how much weight to give the plain meaning of the text.

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

Response: The term "plain meaning" of a statute or constitutional provision has been explained by the Supreme Court as "the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). If I am confirmed, I would follow Supreme Court and Federal Circuit precedent interpreting statutes and constitutional provisions.

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

Response: Standing in the Court of Federal Claims is determined in the same way as it would be in an Article III court. First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

In the context of bid protests, the Court of Federal Claims "shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. Section 1491(b)(1). To meet the "interested party" standard for standing under Section 1491 (b)(1), the plaintiff must be an "actual or prospective bidder" and demonstrate that it possesses a direct economic interest in the contract award. *Sys. Application & Tech., Inc. v. United States,* 691 F.3d 1374, 1382 (Fed. Cir. 2012).

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

Response: Precedent in the Court of Federal Claims plays the same role as it would play in an Article III court**.** Judges on the Court of Federal Claims must follow Supreme Court and Federal Circuit precedent, and its predecessor, the Court of Claims**.**

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

Response: I believe a background in federal court litigation and experience with claims involving the government are the types of legal experience necessary for an effective Court of Federal Claims judge. In my 30 years of legal experience and public service, I have litigated cases on behalf of individuals suing the United States, and represented the government in enforcement actions involving virtually every agency and department in the executive branch. I have broad familiarity with the types of cases heard by the Court of Federal Claims including breach of contract, civilian and military pay cases, and constitutional claims against the government.

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

Response: A judge should treat all those who appear before her with kindness, dignity and respect.

9. The Court of Federal Claims has been called "the keeper of the Nation's conscience" and the "People's court." How do you see the court fulfilling such a role?

Response: When the Court of Federal Claims was established in the 1855, Abraham Lincoln explained the necessity of the Court by stating: "It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals." The Court of Federal Claims' primary purpose is to allow citizens to seek justice against the government. The Court can fulfill its role by promptly and fairly deciding cases that come before it.