

Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Lydia Griggsby
Nominee to be United States District Judge for the District of Maryland

1. When Justice Elena Kagan was nominated to the Supreme Court, she explained her view that the American founders “wrote a Constitution for the ages.” Justice Kagan famously went on to say: “Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.”

a. When you consider your approach to constitutional law, would you say that there is any sense in which you are an originalist? Please explain why you are or are not.

Response: I agree with Justice Kagan’s view that the Framers of the Constitution wrote a Constitution for the ages. I believe that the provisions of the Constitution are enduring and can apply to new circumstances that arise in a modern society.

b. If you are required to interpret constitutional text, do you consider what the text was publicly understood to mean at the time that it was written?

Response: Yes. The original public meaning of the Constitution, as informed by history, tradition, and precedent, is an important consideration in constitutional interpretation.

c. If you are required to interpret constitutional text, are you interested in briefing on what the text was publicly understood to mean at the time that it was written? And if you felt that the briefing on this constitutional history or context was too sparse, would you consider requesting supplemental briefing?

Response. Yes. As discussed above, I believe that the original public meaning of the Constitution, as informed by history, tradition, and precedent, is an important consideration in constitutional interpretation. I believe that it is important to afford all parties the opportunity to provide briefing on the legal issues presented in a case that is before me, including providing supplemental briefing when warranted.

2. When government actions curtail individual rights, the relevant standard of review can make a tremendous difference in the outcome of litigation. I am referring to

standards of review such as strict scrutiny—not to standards of review such as de novo review. I would appreciate understanding your thoughts on several related questions.

- a. Please explain the contours of the strict-scrutiny legal standard and when it applies, with relevant case law discussing the standard.**

Response: Strict scrutiny is a form of judicial review that the federal courts apply to determine the constitutionality of certain laws, often in connection with an equal protection claim. To satisfy the strict scrutiny test, a law must further a “compelling governmental interest,” and be narrowly tailored to achieve that interest. *See, e.g., Skinner v. State of Oklahoma, ex rel. Williamson*, 316 U.S. 535 (1942). The court applies the strict scrutiny test when evaluating the constitutionality of a law that infringes upon a fundamental right, or involves a suspect classification, such as race, national origin, religion and alienage. For example, the Supreme Court held in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), that all race-based classifications must be subjected to strict scrutiny. The Supreme Court has also held that content-based restrictions on speech are reviewed under the strict scrutiny standard. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

- b. Strict scrutiny is widely viewed as favorable for individuals asserting their constitutional or civil rights, regardless of the facts—while rational basis is widely viewed as an easier standard for the government, regardless of the facts. When federal courts apply intermediate scrutiny, does the standard itself tend to favor either individuals or the government? Please explain using relevant case law.**

Response: In *Craig v. Boren*, 429 U.S. 190 (1976), the Supreme Court established the intermediate scrutiny test and applied this test to a statute that discriminated upon the basis of gender. To satisfy the intermediate scrutiny test the law at issue must further an important government interest and do so by means that are substantially related to that interest. The level of scrutiny that a court applies under the intermediate scrutiny test is higher than the level of scrutiny applied under the rational basis test. I would not characterize the application of the intermediate scrutiny test as favoring either individuals or the government.

- c. Many circuit courts apply “heightened rational basis review,” a phrase that draws in part from the Supreme Court’s opinion in *Plyler v. Doe*, 457 U.S. 202, 238 (1982). Under this heightened review, “[r]ather than relying upon**

the various post-hoc rationalizations that *could* conceivably have justified the laws, the Court focused on the motivations that *actually* lay behind the laws.” *Bishop v. Smith*, 760 F.3d 1070, 1099 (10th Cir. 2014) (Holmes, J., concurring) (emphases in original). How would you define (1) ordinary rational-basis review and (2) heightened rational-basis review?

Response: Under rational basis review, the court determines whether a law is “rationally related” to a “legitimate” government interest. *Railway Express Agency, Inc. et al. v. New York*, 336 U.S. 106 (1949). In *Plyler v. Doe*, 457 U.S. 202, 238 (1982), the Supreme Court held that a Texas law that denied undocumented school aged children the public education that it provides to children who are citizens of the United States or legally admitted aliens was unconstitutional. In that case, the Supreme Court compared the State of Texas’s asserted interests against the substantial harm to the plaintiffs, and determined that the law in question violated the Equal Protection Clause. This test has been referred to as “heightened rational basis review.” If confirmed as a district judge and confronted with this issue, I would strictly adhere to and apply Supreme Court and Fourth Circuit precedent to the facts of the case.

d. Assuming that you were choosing between ordinary and heightened rational basis, how would you decide which to apply?

Response: Please see my response to question 2(c).

3. As a Federal Claims judge, you have overseen complex statutory and regulatory litigation. One of the federal courts’ important functions is reading statutes and regulations, determining what they mean, and determining how they apply to the facts at hand.

a. How do you determine whether statutory or regulatory text is ambiguous?

Response: When interpreting a federal statute, I start with the plain text of the statute in question to determine whether the statute is ambiguous. When interpreting a regulation, I also start with the plain text of the regulation.

b. Do you apply different standards to determining whether statutory text and regulatory text were ambiguous? If so, how do the ambiguity standards differ?

Response: A regulation must be consistent with the statute that authorizes the regulation. And so, I would also consider the relevant statute when interpreting the regulation.

c. When interpreting ambiguous text, what tools do you use to resolve the ambiguity?

Response: If a statute is ambiguous, I consider binding Supreme Court precedent and other controlling precedent interpreting the statute at issue. If there is no binding precedent on the issue, I would also consider persuasive authority from other federal courts interpreting the statute in question. I would also consider canons on statutory interpretation. If there is no binding or persuasive authority interpreting the statute, I would also examine the legislative history to determine the meaning of the statute as Congress intended.

d. When interpreting ambiguous text, how do you handle two competing and contradictory canons of statutory interpretation?

Response: If there are competing or contradictory canons of statutory interpretation, I would apply the canons of statutory interpretation so as to give meaning to the text at issue and to avoid an absurd result.

4. Federal courts usually examine the law de novo because each court is usually obligated to correctly interpret the law to the best of its own ability. But in some cases, federal courts defer to how others interpret the law. A number of Supreme Court decisions outline this deference.

a. What is *Skidmore* deference? Please summarize the Fourth Circuit's *Skidmore* jurisprudence.

Response: “*Skidmore* deference” is the administrative law principal of judicial review of federal agency actions that applies when a court defers to a federal agency's interpretation of a statute that is administered by the agency according to the agency's ability to demonstrate persuasive reasoning. *Skidmore* deference permits a federal court to determine the appropriate level of deference for each case, based upon the agency's ability to support its position. In *Carlton & Harris Chiropractic v. PDR Network, LLC*, 982 F.3d. 258, 264 (4th Cir. 2020), the Fourth Circuit recognized that when a federal agency's interpretation of a statute does not create law, courts must decide whether to afford that interpretation *Skidmore* deference. Citing *Skidmore*, the Fourth Circuit also recognized that the weight that courts afford to the agency's interpretation depends upon, the

thoroughness evident in the agency’s consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and “all those factors which give it power to persuade.” The Fourth Circuit has also recognized in several cases that the amount of deference afforded under *Skidmore* varies depending upon the persuasiveness of the agency’s interpretation.

b. What is *Chevron* deference? Please summarize the Fourth Circuit’s *Chevron* jurisprudence.

Response: The Supreme Court addressed a principle of administrative law that requires federal courts to defer to interpretations of statutes made by the federal agencies charged with enforcing the statutes in question in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, the court first considers whether the statute in question is ambiguous. If not, the clear meaning of the statute controls and the court determines whether the regulation is consistent with the statute. If the statute is ambiguous, the court considers whether the agency’s interpretation of the ambiguous provision is based upon a permissible construction of the statute. In *Carlton & Harris Chiropractic, Inc. v. PDR Network*, 982 F. 3d 258, 264 (4th Cir. 2020), the Fourth Circuit recognized that the Supreme Court has held that *Chevron* deference applies only when a court interprets a rule issued pursuant to an agency’s authority to “make rules carrying the force of law.”

c. What is *Auer* deference? Please summarize the Fourth Circuit’s *Auer* jurisprudence.

Response: In *Auer v. Robbins*, 519 U.S. 452 (1997), the Supreme Court explained that *Auer* deference affords federal agencies a highest level of deference in interpreting their own regulations. *Auer* deference applies to a federal agency’s interpretation of its own regulation, while *Chevron* deference applies to a federal agency’s interpretation of the statute. The Supreme Court recently clarified the circumstances when *Auer* deference is warranted in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019): “[A] court should not afford *Auer* deference unless” the court determines that “the regulation is genuinely ambiguous” after “exhaust[ing] all the ‘traditional tools’ of construction.” *Id.* at 2415. The Supreme Court further explained that, even “[i]f genuine ambiguity remains,” deference is only required when “the agency’s reading” is “reasonable”—*i.e.*, “it must come within the zone of ambiguity the court has identified after employing all its interpretive tools.” *Id.* at 2415–16. And so, the Supreme Court has established a multi-factor process for courts to determine when this kind of deference is proper. *Id.* at 2414–18. The Fourth Circuit held in *Humanoids Group v. Logan*, 375 F.3d 301 (4th Cir. 2004), that *Auer* deference applies when

an agency interprets its own regulation, as opposed to a statute. The Fourth Circuit has also recognized that *Auer* deference is due only when the language of the regulation is ambiguous.

d. Is there an analytical difference between *Auer* deference and *Seminole Rock* deference? If so, please explain the difference.

Response: *Auer* deference has at times also been referred to as *Seminole Rock* deference, based upon the earlier Supreme Court case *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In *Kisor v. Wilkie*, the Supreme Court observed that: “This Court has often deferred to agencies’ reasonable readings of genuinely ambiguous regulations” and “[w]e call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

5. Do you agree with the Supreme Court’s statement in *Bostock v. Clayton County*, 590 U.S. ___ (2020), that the Free Exercise Clause lies at the heart of a pluralistic society? If so, does that mean that the Free Exercise Clause legally requires that religious organizations and individuals should be free to act consistently with their beliefs in the public square?

Response: Justice Gorsuch explained in the majority opinion in *Bostock v. Clayton Cty.*, Georgia, 140 S. Ct. 1731, 1754 (2020), that: “We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society.” *Bostock*, 140 S. Ct. at 1754. The text of the First Amendment protects the free exercise of religion and the Supreme Court has interpreted this provision in a number of cases. As a federal judge, I am bound by the Supreme Court’s interpretation of the First Amendment and I follow that binding precedent.

6. In *McGowan v. Maryland*, 366 U.S. 420, 442 (1961), the Supreme Court wrote that “the ‘Establishment’ Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.” Do you agree that secular actions with some religious overlap can be constitutional?

Response: In the majority opinion in *McGowan v. Maryland*, 366 U.S. 420, 442 (1961), Chief Justice Warren explained that Maryland laws requiring the Sunday closing of a department store do not violate the establishment clause of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment, because the purpose and effect of the statutes at issue is not to aid religion but to set aside a day of rest and recreation.

Chief Justice Warren also explained that if the purpose of such a law is to use the state's power to aid religion, the law would violate the Establishment Clause. As discussed above, the text of the First Amendment protects the free exercise of religion and the Supreme Court has interpreted this provision in a number of cases. As a federal judge, I am bound by the Supreme Court's interpretation of the First Amendment and I follow this binding precedent.

- 7. In the 1870s, Rep. James Blaine promoted a federal constitutional amendment that would have prevented federal funds from going to sectarian schools. The Blaine Amendment was supported by anti-Catholic Americans, including white supremacists who were upset that Catholic schools educated African American children. Charleston's Bishop John England, for example, faced local opposition and mob violence as he opened schools for African American students in the 1830s. The Blaine Amendment failed federally, but many states adopted similar language in their state constitutions. The Supreme Court recently addressed state Blaine Amendments in *Espinoza v. Montana Department of Revenue*, 591 U.S. ____ (2020). Please explain your understanding of current Supreme Court jurisprudence on the constitutionality of Blaine Amendments.**

Response: In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the Supreme Court held that a state-based scholarship program that provides public funds for students to attend private schools cannot discriminate against religiously affiliated schools under the Free Exercise Clause of the Constitution. As a federal judge, I am bound by the Supreme Court's interpretation of the First Amendment and I follow that binding precedent.

- 8. After many years of relative quiet, Second Amendment jurisprudence developed into a substantially larger body of law during the past decade. I would appreciate understanding your thoughts on several related questions.**

- a. According to the Supreme Court, what are the permissible limits on an individual's right to keep and bear arms?**

Response: The Supreme Court has held that the Second Amendment confers, "an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). The Supreme Court identified this right as a fundamental right that applies to the states pursuant the Fourteenth Amendment in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Writing for the majority in *Heller*, Justice Scalia explained that: "Of course the right was not unlimited, . . . Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the

right of citizens to speak for *any purpose*.” *District of Columbia v. Heller*, 554 U.S. at 595 (emphasis in original).

- b. Do the Supreme Court’s precedents leave room for other constitutionally permissible limits—on an individual’s right to keep and bear arms—that the Supreme Court has not already specified?**

Response: Writing for the majority in *Heller*, Justice Scalia explained that: “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *District of Columbia v. Heller*, 554 U.S. 570, 628 n.26 (2008).

- c. Is the Second Amendment individual right to “keep” arms at all different from the right to “bear” arms?**

Response: In the majority opinion in *Heller*, Justice Scalia explained that the operative clause in the Second Amendment, “the right of the people to keep and bear Arms, shall not be infringed,” guarantees an individual right to possess and carry weapons.

- 9. Please explain, with detail, the process by which you became a district-court nominee.**

Response: On December 22, 2020, I interviewed with a judicial selection committee established to recommend candidates to fill vacancies on the United States District Court for the District of Maryland. The committee recommended my nomination. On January 12, 2021, I interviewed with Senators Benjamin Cardin and Christopher Van Hollen. In January 2021, Senators Cardin and Van Hollen recommended that the President nominate me to the position of Judge, United States District Court for the District of Maryland. Since early February 2021, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On February 5, 2021, I interviewed with attorneys from the White House Counsel’s Office. On March 30, 2021, the President announced his intent to nominate me to the position of Judge, United States District Court for the District of Maryland and the President submitted my nomination to the Senate on April 19, 2021.

- 10. Have you had any conversations with individuals associated with the group Demand Justice—including, but not limited to, Brian Fallon or Chris Kang—in connection with this or any other potential judicial nomination? If so, please explain the nature of the conversations.**

Response: No.

11. Have you had any conversations with individuals associated with the American Constitution Society—including, but not limited, to Russ Feingold—in connection with this or any other potential judicial nomination? If so, please explain the nature of the conversations.

Response: No.

12. Please explain with particularity the process by which you answered these questions.

Response: On May 19, 2021, these questions were forwarded to me by the Office of Legal Policy at the Department of Justice. I personally reviewed the questions, conducted legal research as necessary, and drafted my responses. I then shared my responses with the Office of Legal Policy for feedback before submitting my responses to the Committee.

13. Do the answers in this document reflect your true and personal views?

Response: Yes.

**Nomination of the Honorable Lydia Kay Griggsby
to be United States District Judge for the District of Maryland
Questions for the Record
Submitted May 19, 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 May 19, 2021, these questions were forwarded to me by the Office of Legal Policy at the Department of Justice. I personally reviewed the questions, conducted legal research as necessary, and drafted my responses. I then shared my responses with the Office of Legal Policy for feedback before submitting my responses 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.

Senator Josh Hawley
Questions for the Record
Lydia Griggsby

United States District Judge for the District of Maryland

- 1. In 2017, you authored a ruling in *Blue Cross & Blue Shield of North Carolina v. United States* that was subsequently reversed by the Supreme Court. In that case, you applied *Chevron*, giving significant leeway to the agency, which ultimately allowed them not to reimburse a number of insurance companies who lost money in the online marketplaces. Please explain your understanding of the *Chevron* doctrine and how it would influence your work as a federal judge.**

Response: In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court addressed a principle of administrative law that requires federal courts to defer to interpretations of statutes made by the federal agencies charged with enforcing the statutes in question. Under *Chevron*, the court first considers whether the statute in question is ambiguous. If not, the clear meaning of the statute controls and the court determines whether the regulation is consistent with the statute. If the statute is ambiguous, the court considers whether the agency's interpretation of the ambiguous provision in the statute is based upon a permissible construction of the statute. As a Judge of the United States Court of Federal Claims, I am bound to follow *Chevron* and controlling Federal Circuit precedent. If confirmed as district judge, I would be bound to follow *Chevron* and Fourth Circuit precedent in this area.

Questions for the Record from
Senator Thom Tillis
For Judge Lydia Kay Griggsby

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

Response: Yes.

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

Response: I understand judicial activism to involve a judge rendering a decision based upon her personal views. A judge has a duty to follow the rule of law and to carry out her judicial duties impartially and fairly. And so, judicial activism is not appropriate.

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

Response: A judge has a duty to follow the rule of law and to carry out her judicial duties impartially and fairly. As a federal judge, I am expected to be impartial when deciding the cases before me.

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

Response: No.

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

Response: I believe that faithful adherence and fidelity to the rule of law provides certainty and consistency in our judicial system. My personal views about whether an outcome is desirable are irrelevant. I am duty-bound to follow the law.

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

Response: No.

Second Amendment

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

Response: The Supreme Court has held that the Second Amendment confers, “an individual right to keep and bear arms.” *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). The Supreme Court identified this right as a fundamental right that applies to the states pursuant to the Fourteenth Amendment in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). If confirmed as a district court judge, I would be bound by this 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: I would conduct my evaluation by first identifying the constitutional rights at issue. I would then examine the applicable Supreme Court and Fourth Circuit precedent to determine the scope of the right and the appropriate standard of review for analyzing the alleged constitutional violation. I would then apply the Supreme Court and Fourth Circuit precedent to the specific facts of the case.

Law Enforcement

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: Qualified immunity can be raised as a defense in a broad range of circumstances and this doctrine provides government officials with civil immunity from suit for their actions in certain circumstances. In considering whether qualified immunity is appropriate in a particular case, I would consider whether the defendant was acting as a government official performing a discretionary function consistent with controlling law. I would then consider whether the specific acts undertaken by the official met the “good faith” and “objectively reasonable” test set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). Supreme Court precedent makes clear that “qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018)). I would also be bound by Fourth Circuit precedent in this area.

- 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: There is a significant body of jurisprudence in the Fourth Circuit and Supreme Court regarding qualified immunity and, if confirmed as a district judge, I would follow this precedent.

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

Response: This policy issue is beyond my purview as a federal judge.

Patent Eligibility

- 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: The Supreme Court set forth the test for patent eligibility in *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014). If confirmed, I would carefully review the claims of the patent before me and apply binding precedent from the Supreme Court and the relevant circuit courts to evaluate the eligibility of the patent claims.

- 13. 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: Please see my response to question 12.