Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Andre Mathis
Nominee to the Court of Appeals for the Sixth Circuit
January 19, 2022

1. **You were born and raised in Memphis and have spent your legal career practicing at firms located in Tennessee. As letters received by the Committee make clear, you enjoy tremendous support from those within the State—including from business leaders, attorneys, union leaders, and civil rights leaders.**

   As a native Tennessean, what would it mean to you to sit on the Sixth Circuit Court of Appeals?

   Response: It would be the greatest honor of my professional life to serve the public as a judge on the United States Court of Appeals for the Sixth Circuit. Serving as a circuit court judge would combine two things that I am very passionate about—the law and public service. Regarding the law, I have litigated more than 100 civil and criminal cases in federal courts in Tennessee, Arkansas, and Mississippi. I have litigated hundreds more in state courts in Tennessee, Arkansas, and Mississippi. In these various matters I have represented individuals, governmental entities, small businesses, and large corporations as plaintiffs and defendants. Regarding public service, throughout my legal career, I have ensured that public service was a vital part of my legal practice. To that end, I have accepted court-appointed criminal cases in federal and state courts for indigent defendants, I have provided pro bono services to individuals, in civil and criminal cases, that could not afford the services of an attorney, and I represented domestic violence victims through Memphis Area Legal Services who sought orders of protection against their alleged abusers.

   I would also be honored to follow in the footsteps of Judge Bernice B. Donald, a trailblazer in the legal community and someone I have greatly admired throughout my legal career.

2. **At your confirmation hearing, some of my colleagues raised questions about your experience.**

   a. **Please describe your appellate experience—including in Tennessee state appellate courts—and how that experience has prepared you for the Sixth Circuit.**

      Response: Throughout my career, I have litigated a total of 23 appeals to final decision in cases litigated in the United States Court of Appeals for the Sixth Circuit, the Tennessee Court of Appeals and the Tennessee Court of Criminal Appeals. I have one case currently pending before the United States Court of Appeals for the Sixth Circuit that has been fully briefed and is awaiting a decision by the court. I was the primary drafter of the appellate briefs in 22 of the 24 appeals that I have handled. I have argued 10 appeals to the Tennessee Court of Appeals and the Tennessee Court of Criminal Appeals.

My appellate experience has prepared me to serve on the United States Court of Appeals for the Sixth Circuit because I am thoroughly familiar with the appellate process, including the identification of issues for appeal, thoroughly reviewing the record, researching the pertinent legal issues to identify the pertinent precedents, and applying the law to the facts in each case.

b. Please describe your trial experience—including in Tennessee state courts—and how you think that experience is relevant to the work of a judge on the Sixth Circuit.

Response: Throughout my career, I have tried 19 jury and non-jury trials in courts of record. Seven of those trials were in federal court and 12 were in state court. Of those 19 trials, I served as chief counsel or sole counsel in 12 of the 19 trials. I have tried civil and criminal cases. I have also litigated hundreds of cases in federal and state courts that were resolved prior to trial by dispositive motions, guilty pleas (in criminal cases), or settlement.

My trial court experience is relevant to the work of a judge on the Sixth Circuit because the Sixth Circuit, in most cases, is reviewing alleged errors made in lower courts/tribunals in civil and criminal cases. I have significant experience in litigating, in trial courts, many of the types of issues that are adjudicated by the Sixth Circuit.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Mr. Andre B. Mathis
Nominee to be United States Circuit Judge for the Sixth Circuit

1. **You have frequently represented clients *pro bono*, which is laudable. In one such case, you represented a man convicted of felony robbery. The man was found guilty of hiding in the backseat of a woman's vehicle and attacking her with a knife when she got into her car. He was identified by his victim, convicted, and sentenced to 49 years in prison. You argued that the conviction should be overturned because "[n]o DNA testing was done on the knife or on a shirt that was left in the victim's vehicle and the fingerprints lifted from the vehicle did not match [the defendant]."**

    a. **What is the standard of review the Sixth Circuit uses to evaluate a claim that a guilty verdict should be overturned because of a lack of DNA evidence?**

    Response: Assuming the issue has been properly preserved for appeal, the Sixth Circuit reviews a district court's denial of a motion for judgment of acquittal based on the insufficiency of evidence under a *de novo* standard of review. *See United States v. Clay*, 667 F.3d 689, 693 (6th Cir. 2012). The Sixth Circuit must "construe the evidence in the light most favorable to the government, and then determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

    b. **In your view, when, if ever, is DNA evidence a prerequisite for an affirmable guilty verdict?**

    Response: DNA evidence is not a prerequisite to obtaining a criminal conviction.

2. **After you found out you were nominated to serve as a judge on the Sixth Circuit, did anyone suggest to you that you should meet with Senator Blackburn or Senator Hagerty? If yes, why did you elect not to?**

    Response: I met with Senator Hagerty by Zoom on January 12, 2022, and I am scheduled to meet with Senator Blackburn on February 1, 2022. Prior to my nomination, I met jointly with counsel from Senator Blackburn's office and Senator Hagerty's office on June 17, 2021. I never indicated to the White House or anyone else that I was unwilling to meet with the Senators or their staff. Indeed, I am grateful for the opportunity to meet with them and honored to be considered for a position of public trust for a Tennessee seat on the Sixth Circuit.

3. **Please describe your understanding of the constitutionality of nationwide or universal injunctions based on current Supreme Court and Sixth Circuit precedent.**

    Response: Rule 65 of the Federal Rules of Civil Procedure governs injunctions and temporary restraining orders. The Supreme Court has opined that "the District Court in

exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction." *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952). The Supreme Court has further opined that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiff[]." *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

4. **What Sixth Circuit and Supreme Court precedent would you apply in evaluating a claimed religious exemption to a vaccine mandate imposed by a state or local government?**

   Response: The First Amendment of the United States Constitution, as applied to the states through the Due Process Clause of the Fourteenth Amendment, protects the free exercise of religion. The Supreme Court has held that "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." *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). But, if a law burdening the free exercise of religion is not neutral or generally applicable, strict scrutiny applies and the burden is justified only if the law "advances 'interests of the highest order' and is narrowly tailored to achieve those interests." *Id.* at 1881 (citation omitted); *see, e.g., Dahl v. Bd. of Trustees of W. Mich. Univ.*, 15 F.4th 728, 731-35 (6th Cir. 2021) (applying this framework to a vaccination requirement imposed by a state university).

5. **When you are considering a case, do you have a process for ensuring that you correctly understand how the law should apply, without letting personal preferences shape your view? If so, what is your process or approach?**

   Response: Yes. First, I intend to identify the issues raised by the parties. Second, I intend to thoroughly review the record. Third, I intend to research and identify the binding precedent applicable to the issues raised on appeal. And fourth, I intend to apply the law to the facts, taking into account the appropriate standard of review.

6. **Please explain whether you agree or disagree with the following statement: "The judgments about the Constitution are value judgments. Judges exercise their own independent value judgments. You reach the answer that essentially your values tell you to reach."**

   Response: I disagree with the statement.

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

   Response: Yes, the Supreme Court has made such a holding. *See Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925).

8. **Is whether a specific substance causes cancer in humans a scientific question?**

Response: Whether a specific substance causes cancer in humans is most likely a scientific or medical question.

9. **Is when a "fetus is viable" a scientific question?**

Response: The Supreme Court has indicated that viability is determined based on scientific and medical evidence. For example, in 1992, the Supreme Court recognized that "advances in neonatal care had advanced viability to a point somewhat earlier" than "was true in 1973." *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992).

10. **Is when a human life begins a scientific question?**

Response: In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court stated that it would not attempt to resolve the "the difficult question of when life begins." *Id.* at 159. The Court stated that "when those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary . . . is not in a position to speculate as to the answer." *Id.*

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

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

Response: If I am fortunate enough to be confirmed as a judge to the United States Court of Appeals for the Sixth Circuit, I would be required to follow all Supreme Court and Sixth Circuit precedents and I would do so without reservation. Because circuit court judges are required to follow precedent without regard to personal views, and because the Code of Conduct for United States Judges prohibits judges from commenting on legal issues that could become the subject of litigation, it is generally not appropriate for me to comment on the merits of any particular Supreme Court precedent. Prior judicial nominees have made exceptions to that general rule for *Brown v. Board of Education* and *Loving v. Virginia*, because litigation regarding *de jure* racial segregation or the right to interracial marriage is highly unlikely to reoccur. Consistent with the judgment of prior

judicial nominees, I believe it is appropriate to comment on the merits of those cases, and I agree that they were correctly decided.

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

    Response: On March 3, 2021, Congressman Stephen Cohen contacted me regarding a potential vacancy on the United States Court of Appeals for the Sixth Circuit; he asked if I was interested in being considered for nomination for such a vacancy and, if so, to submit a letter of interest to him. I advised Congressman Cohen that I would be interested in being considered for nomination to the Sixth Circuit. On March 7, 2021, I submitted my letter of interest to Congressman Cohen. On May 21, 2021, the White House Counsel's Office asked whether I was interested in being considered for nomination to the Sixth Circuit. On May 24, 2021, I interviewed with attorneys from the White House Counsel's Office. Since June 2, 2021, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On June 17, 2021, I interviewed with counsel for Senators Marsha Blackburn and Bill Hagerty. On November 15, 2021, I was informed that President Biden would be nominating me to be a judge on the United States Court of Appeals for the Sixth Circuit. On November 18, 2021, my nomination was submitted to the Senate.

13. **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?**
    b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**
    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

    Response: No.

14. **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?**
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?**
c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

Response: No.

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

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

Response: No.

16. **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?**
b. **Are you currently in contact with anyone associated with the Open Society Foundations?**

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

Response: No.

17. **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?**
    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?**
    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.

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

    Response: Please see my answer to Question 12.

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

    Response: To my knowledge, I did not communicate with any officials from or anyone directly associated with Demand Justice and no one did so on my behalf.

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

    Response: To my knowledge, I did not communicate with any officials from or anyone directly associated with American Constitution Society and no one did so on my behalf.

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

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

Response: To my knowledge, I did not communicate with any officials from or anyone directly associated with Arabella Advisors or any of its subsidiaries and no one did so on my behalf.

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

Response: To my knowledge, I did not communicate with any officials from or anyone directly associated with Open Society Foundations and no one did so on my behalf.

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

Response: To my knowledge, I did not communicate with any officials from or anyone directly associated with Fix the Court and no one did so on my behalf.

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

Response: On March 3, 2021, Congressman Stephen Cohen contacted me regarding a potential vacancy on the United States Court of Appeals for the Sixth Circuit; he asked if I was interested in being considered for nomination for such a vacancy and, if so, to submit a letter of interest to him. I advised Congressman Cohen that I would be interested in being considered for nomination to the Sixth Circuit. On March 7, 2021, I submitted my letter of interest to Congressman Cohen. On May 21, 2021, the White House Counsel's Office asked whether I was interested in being considered for nomination to the Sixth Circuit. On May 24, 2021, I interviewed with attorneys from the White House Counsel's Office. Since June 2, 2021, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On June 17, 2021, I interviewed with counsel for Senators Marsha Blackburn and Bill Hagerty. On November 15, 2021, I was informed that President Biden would be nominating me to the be a judge on the United States Court of Appeals for the Sixth Circuit. On November 18, 2021, my nomination was submitted to the Senate. Since I was nominated, I have been in contact with lawyers from Office of Legal Policy at the Department of Justice and the White House Counsel's Office regarding preparations for my confirmation hearing.

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

Response: I received the questions on January 19, 2022. I drafted answers to each question based on my own knowledge and research. I submitted draft answers to the Office of Legal Policy for feedback and, after receiving feedback, I finalized my answers for submission on January 31, 2022.

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

Questions for the Record for Andre B. Mathis, Nominee for the Sixth Circuit

I. Directions

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

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

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

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

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

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

II. Questions

1. **In January 2022, the Supreme Court reversed the Sixth Circuit, granting a stay which had the effect of blocking the Biden Administration's OSHA emergency temporary standard that would require most large private employers to mandate vaccination among employees. This lawsuit is ongoing, but please answer the following questions that do not require prejudging the case:**

    a. **Please describe the majority's reasoning in *National Federation of Independent Business v. Department of Labor*.**

Response: The Supreme Court found that the petitioners were likely to succeed on their claim that the Secretary of Labor exceeded his statutory authority in issuing the emergency temporary standard and that the equities did not justify withholding interim relief through a stay. Specifically, the Supreme Court held that the Occupational Safety and Health Act did not plainly authorize the emergency temporary standard. Therefore, the Supreme Court stayed the emergency temporary standard pending disposition of the petitions for review pending before the Sixth Circuit.

b. **Please describe the reasoning in Justice Gorsuch's concurrence.**

Response: Justice Gorsuch reasoned that the Secretary of Labor's emergency temporary standard fails the major questions doctrine's test.

c. **Describe your understanding of the nondelegation doctrine.**

Response: "The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government." *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019).

d. **Describe your understanding of the major questions doctrine.**

Response: The Supreme Court has held that "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *See Ala. Ass'n of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (citations omitted).

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

Response: If I am fortunate enough to be confirmed, I intend to use to following approach in reviewing and deciding cases. First, I will try to be satisfied that there is subject matter jurisdiction. Second, I will identify the issues raised by the parties. Third, I will become thoroughly familiar with the record. Fourth, I will research and identify the binding Supreme Court and Sixth Circuit precedent for the issues raised (or the state law precedent in diversity cases). I would then apply to law to the facts of the case, keeping in mind the appropriate standard of review.

3. **Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an "originalist"?**

Response: Black's Law Dictionary (9th ed. 2009) defines originalism as "[t]he theory that the U.S. Constitution should be interpreted according to the intent of those who drafted and adopted it." Originalism has also been explained as the principle that the text of the

U.S. Constitution should be interpreted in a way consistent with how it would have been understood at the time it was written. I have not characterized myself as an originalist.

4. **Please briefly describe the interpretive method often referred to as living constitutionalism. Would you characterize yourself as a "living constitutionalist"?**

Response: I generally understand the term living constitutionalism to mean that the meaning of the U.S. Constitution can change over time. I have not characterized myself as a living constitutionalist.

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

Response: For a constitutional issue of first impression, courts should first consider the text of the constitutional provision at issue. *See N.L.R.B. v. Noel Canning*, 573 U.S. 513, 557 (2014). If the text of the constitutional provision is unclear or ambiguous, courts have considered various interpretive measures, including relying on the original public meaning to interpret some constitutional provisions. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: The Supreme Court has held that the original public meaning of certain constitutional provisions should be considered in interpreting those provisions. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). Similarly, the Supreme Court has held that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *See Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1738 (2020).

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

Response: No.

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

Response: The Religious Freedom Restoration Act, as amended, prohibits the government from substantially burdening a person's exercise of religion unless the government demonstrates that the burden is in furtherance of a compelling governmental interest and

is the least restrictive means of furthering the compelling governmental interest. *See* 42 U.S.C. § 2000bb-1; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Additionally, a law that incidentally burdens the free exercise of religion is subject to strict scrutiny under the Free Exercise Clause of the First Amendment if it is not neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S 520 (1993).

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

Response: No. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

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

Response: The Supreme Court found that the petitioners were entitled to injunctive relief from the occupancy restrictions imposed on houses of worship during the COVID-19 pandemic, as such restrictions violated the Free Exercise Clause. A law that incidentally burdens the free exercise of religion is subject to strict scrutiny if it is not neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S 520 (1993). The *Roman Catholic Diocese* Court found that the restrictions were not neutral or of general applicability, which meant that the government had to satisfy strict scrutiny. While the Supreme Court found that there was a compelling government interest in stopping the spread of COVID-19, the government did not meet its burden of establishing that the challenged regulations were narrowly tailored.

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

Response: The Supreme Court held that the government's restrictions on private gatherings during the COVID-19 pandemic violated the petitioners' free exercise rights because comparable secular activities were treated more favorably than at-home religious exercise. The *Tandon* Court opined that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). The Court found that the government failed to establish that its restrictions on at-home religious exercise were narrowly tailored.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop*, the Colorado Civil Rights Commission ("Commission") issued a cease and desist order to a cake shop, requiring it to not violate the Colorado Anti-Discrimination Act ("Act") by discriminating against potential customers because of their sexual orientation. Under Supreme Court precedent, a law that incidentally burdens the free exercise of religion is subject to strict scrutiny if it is not neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S 520 (1993). The *Masterpiece Cakeshop* Court held that the Commission did not apply the Act neutrally because the Commission showed hostility toward the cake shop's sincere religious beliefs. Additionally, the Commission allowed other bakers to refuse a customer's request that would have required them to violate secular commitments.

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

Response: The Supreme Court has held "that the Free Exercise Clause does not demand adherence to a tenet or dogma of an established religious sect." *See Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989).

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

Response: The Supreme Court has held an individual receives protection for sincerely held religious beliefs regardless of "disagreement among sect members" or whether the beliefs are "responding to the commands of a particular religious organization." *See Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 833-34 (1989).

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

Response: The Supreme Court has held an individual receives protection for sincerely held religious beliefs regardless of "disagreement among sect members" or whether the beliefs are "responding to the commands of a particular religious organization." *See Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 833-34 (1989).

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

Response: As a judicial nominee, it would not be appropriate for me to comment on the official position of any religion.

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

Response: The Supreme Court, applying the ministerial exception to employment discrimination claims announced in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), held that the First Amendment's Religion Clauses foreclosed the adjudication of the plaintiffs' employment discrimination claims. The Court found that the plaintiffs were considered "ministers" for purposes of the ministerial exception because they performed vital religious duties, such as educating their students in the Catholic faith and guiding their students to live their lives in accordance with their faith.

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

Response: Under Supreme Court precedent, a law that incidentally burdens the free exercise of religion is subject to strict scrutiny if it is not neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S 520 (1993). The *Fulton* Court found that the City's foster care contract was not generally applicable because it permitted exceptions, at the sole discretion of the commissioner, to the requirement that foster care agencies provide services to prospective foster parents without regard to their sexual orientation. The *Fulton* Court further found that the City could not satisfy strict scrutiny because it could not show that maximizing the number of foster families, protecting the City from liability, and treating prospective foster parents and foster children equally were compelling interests that justified the City's burdening of Catholic Social Services' free exercise rights.

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

Response: In Justice Gorsuch's concurrence in *Mast v. Fillmore County*, he expressed his opinion that the defendants could not meet their strict scrutiny burden in defending against the plaintiffs' Religious Land Use and Institutionalized Persons Act claim.

18. **Is it be appropriate for the court to provide its employees trainings which include the following:**

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

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

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

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

    Response: No.

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

    Response: Yes.

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

    Response: The question of whether the criminal justice system is systemically racist is best left to policy makers. If I am fortunate enough to be confirmed to the United States Court of Appeals for the Sixth Circuit, I will work to ensure that all litigants are treated fairly.

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

    Response: Under Article II of the United States Constitution, the President of the United States has the power to nominate and appoint, with the advice and consent of the Senate, ambassadors, judges and other officers of the United States. As a judicial nominee, it would not be appropriate for me to comment on the constitutionality of any nomination or appointment made by the President of the United States.

22. **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 make statements about whether the size of the Supreme Court should be expanded. I am bound by, and will apply, Supreme Court precedent without reservation.

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

Response: The Second Amendment right to keep and bear arms is a fundamental right. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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

Response: I am unaware of any Supreme Court or Sixth Circuit precedent finding that the right to keep and bear arms has less protection than other individual rights specifically enumerated in the U.S. Constitution.

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

Response: I am unaware of any Supreme Court or Sixth Circuit precedent finding that the right to keep and bear arms has less protection than the right to vote under the U.S. Constitution.

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

Response: Article II of the United States Constitution vests the executive power of the government in the President of the United States. Article II, § 3 of the United States Constitution provides that the President "shall take Care that the Law be faithfully executed."

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

Response: In general, my understanding is that prosecutorial discretion is the term used to describe a decision by a prosecutor or governmental enforcer about whether to bring an enforcement action in a particular case. *See Bond v. United States*, 572 U.S. 844, 865 (2014) ("prosecutorial discretion involves carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State"). A substantive administrative rule change involves an amendment to an administrative agency's existing regulations which must follow the applicable procedural requirements of the Administrative Procedure Act. *See* 5 U.S.C. § 553.

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

Response: I am aware of no authority in the United States Constitution or in any law passed by Congress granting the President of the United States the authority to abolish the death penalty.

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

Response: The Supreme Court found that the petitioners were likely to succeed on their claim that the Centers for Disease Control and Prevention ("CDC") exceeded its statutory authority in imposing a nationwide eviction moratorium for residential properties and that the equities weighed against a stay of judgment pending appeal. Specifically, the Supreme Court held that Section 361(a) of the Public Health Service Act did not authorize the CDC to impose an eviction moratorium to control the spread of COVID-19.

Senator Josh Hawley
Questions for the Record

Andre Mathis
Nominee, U.S. Court of Appeals for the Sixth Circuit

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: No.

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

      Response: Judges should comply with the obligations of the oath they take as codified at 28 U.S.C. § 453.

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

   Response: Regarding *Pullman* abstention, the Supreme Court has "held that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *See Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). The two requirements for *Pullman* abstention are: (1) an unclear state law; and (2) the likelihood that a decision on the state issue would obviate the need to decide the federal question. *See Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011).

   Regarding *Burford* abstention, the Supreme Court has held that "[w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcend the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (citation omitted); *see also Saginaw Housing Comm'n v. Bannum, Inc.*, 576 F.3d 620, 626-28 (6th Cir. 2009).

   The *Younger* abstention doctrine is designed to prevent federal courts from interfering with the functions of state courts while preserving equity and comity. *See Younger v. Harris*, 401 U.S. 37 (1971). *Younger* permits abstention when there are: (1) ongoing

state proceedings, (2) the proceedings involve an important state interest, and (3) the state proceedings will provide the federal plaintiff with an adequate opportunity to raise constitutional claims. *See Doe v. Univ. of Ky.*, 860 F.3d 365, 369 (6th Cir. 2017).

When determining whether *Colorado River* abstention is appropriate, the Sixth Circuit considers: "(1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; and (4) the order in which jurisdiction was obtained . . . (5) whether the source of governing law is state or federal, (6) the adequacy of the state court action to protect the federal plaintiff's rights, (7) the relative progress of the state and federal proceedings, and (8) the presence or absence of concurrent jurisdiction. These factors, however, do not comprise a mechanical checklist. Rather, they require a careful balancing of the important factors as they apply in a given case depending on the particular facts at hand." *See Romine v. Compuserve Corp.*, 160 F.3d 337, 340-41 (6th Cir. 1998) (citations omitted).

For *Thibodaux* abstention, federal courts abstain from deciding issues of state law that are "intimately involved with sovereign prerogative." *See La. Power & Light Co. v. Thibodaux*, 360 U.S. 25, 28 (1959); *Superior Beverage Co., Inc. v. Schieffelin & Co.*, 448 F.3d 910, 913 (6th Cir. 2006).

The ecclesiastical abstention doctrine provides that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by . . . church judicatories . . ., the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *See Watson v. Jones*, 80 U.S. 679, 727 (1871); *see also Hutchison v. Thomas*, 789 F.2d 392, 395 (6th Cir. 1986).

3. **Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?**
    a. **If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.**

Response: No.

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's usual method of constitutional interpretation relies on the text, structure, and history of the constitutional provision at issue. *See Alden v. Maine*, 527 U.S. 706, 721-22 (1999). Additionally, the Supreme Court has relied on the original public meaning in interpreting constitutional provisions. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

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

Response: The Supreme Court has considered legislative history in interpreting ambiguous statutory text. *See County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1471-72 (2020).

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 opined that "[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (citations omitted). The Court has also stated that "excerpts from committee hearings and scattered floor statements by individual lawmakers" are "'among the least illuminating forms of legislative history.'" *Advocate Health Care Network v Stapleton*, 137 S. Ct. 1652, 1661 (2017) (citation omitted).

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 the U.S. Constitution is a domestic document, it is not appropriate to consult the laws of foreign nations when interpreting the Constitution.

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

Response: An inmate bringing an Eighth Amendment method-of-execution claim must show that an alternative method of execution that is feasible and readily implemented and that entails a lesser risk of pain is available, and that the government has refused to adopt the alternative method without a legitimate penological reason. *See Bucklew v. Precythe*, 139 S. Ct. 1112 (2019); *Glossip v. Gross*, 576 U.S. 863 (2015); *Baze v. Rees*, 553 U.S. 35 (2008).

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: In *Glossip*, the Supreme Court held that the petitioners failed to establish a likelihood of success on the merits of their Eighth Amendment claim because they "failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims." *See Glossip v. Gross*, 576 U.S. 863, 867 (2015).

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

   Response: No. *See District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72-73 (2009).

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

   Response: No.

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

    Response: A law that incidentally burdens the free exercise of religion is subject to strict scrutiny if it is not neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S 520 (1993). If a law is neutral and generally applicable, rational basis scrutiny applies. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-82 (1990). "[A] law that discriminates against religious practices usually will be invalidated because it is the rare law that can be 'justified by a compelling interest and is narrowly tailored to advance that interest.'" *See Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (quoting *Church of Lukumi Babalu*, 508 U.S. at 553).

    The Supreme Court has held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

    Response: The Supreme Court has held that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, *see Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-79 (1990),

and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S 520, 533 (1993).

12. 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: In evaluating whether a person's religious belief is sincerely held, "[c]ourts are to determine whether the line drawn by the plaintiff between conduct consistent and inconsistent with her or his religious beliefs reflects an honest conviction. Sincerity is distinct from reasonableness. Once plaintiffs allege that certain conduct violates their sincerely held religious beliefs as they understand them, it is not within the court's purview to question the reasonableness of those allegations, or to say that plaintiff's religious beliefs are mistaken or insubstantial." *See Fox v. Washington*, 949 F.3d 270, 277 (6th Cir. 2020) (citations omitted).

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

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

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

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

Response: No.

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

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

Response: It seems that Justice Holmes meant that the Due Process Clause does not embody a particular conception of appropriate economic policy. The Supreme Court has since endorsed that view, explaining that "the day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of businesses and industrial conditions, because

they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

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

Response: The Supreme Court has held that "[t]he doctrine that prevailed in *Lochner* . . .—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

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

a. If so, what are they?

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

Response: If I am confirmed as a judge to the United States Court of Appeals for the Sixth Circuit, I would be bound by all Supreme Court cases that have not been overruled by constitutional amendments or subsequent Supreme Court precedents. I am not aware of any Supreme Court opinions that have not been overruled by constitutional amendments or subsequent Supreme Court precedents that are no longer good law.

16. 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?

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

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

Response: The Sixth Circuit has held that there are two ways to establish that an entity holds monopoly power. "The first is by presenting direct evidence 'showing the exercise of actual control over prices or the actual exclusion of competitors.' The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market." *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999) (citations omitted). For cases arising under the Sherman Act, I will apply Supreme Court and Sixth Circuit precedent without reservation.

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

Response: The Supreme Court has held that "[t]here is no federal general common law." *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The Court has explained that "only limited areas exist in which federal judges may appropriately craft the rule of decision" as a matter of federal common law, such as "admiralty disputes and certain controversies between States." *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020).

18. 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 Sixth Circuit construes state constitutional provisions in accordance with state law. *See Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348, 364 (6th Cir. 2018). When resolving issues of state law, the Sixth Circuit looks "to the final decisions of the state's highest court, and if there is no decision directly on point, then we must make an *Erie* guess to determine how that court, if presented with the issue, would resolve it." *See Conlin v. Mortg. Elec. Registration Sys., Inc.*, 714 F.3d 355, 358-59 (6th Cir. 2013).

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

Response: Please see my response to Question 18(a).

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

Response: The Ninth Amendment to the United States Constitution provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Tenth Amendment to the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." These provisions permit states to provide greater protections than are granted by the U.S. Constitution as long as state laws do not run afoul of, or are otherwise preempted by, federal law.

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

Response: If I am fortunate enough to be confirmed as a judge to the United States Court of Appeals for the Sixth Circuit, I would be required to follow all Supreme Court and Sixth Circuit precedents and I would do so without reservation. Because circuit court judges are required to follow precedent without regard to personal views, and because the Code of Conduct for United States Judges prohibits judges from commenting on legal

issues that could become the subject of litigation, it is generally not appropriate for me to comment on the merits of any particular Supreme Court precedent. Prior judicial nominees have made exceptions to that general rule for *Brown v. Board of Education* because litigation regarding *de jure* racial segregation is highly unlikely to reoccur. Consistent with the judgment of prior judicial nominees, I believe it is appropriate to comment on the merits of that case, and I agree that it was correctly decided.

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

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

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

Response: Rule 65 of the Federal Rules of Civil Procedure governs injunctions and temporary restraining orders. The Supreme Court has opined that "the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction." *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952). The Supreme Court has further opined that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiff[]." *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

21. 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 my answer to Question 20.

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

Response: The Supreme Court has held that "[t]he federal system rests on what might at first seem a counterintuitive insight, that freedom is enhanced by the creation of two governments, not one. The Framers concluded that allocation of powers between the National Government and the States enhances freedom first by protecting the integrity of the governments themselves, and second by protecting the people, from who all governmental powers are derived." *See Bond v. United States*, 564 U.S. 211, 220-21 (2011) (internal citation omitted).

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

Response: Please see my answer to Question 2.

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

Response: Courts consider four factors when determining whether injunctive relief is appropriate: (1) whether the party moving for the injunction is facing immediate, irreparable harms, (2) the likelihood that the movant will succeed on the merits, (3) the balance of the equities, and (4) the public interest. *See D.T. v. Sumner Cty. Schs.*, 942 F.3d 324, 326 (6th Cir. 2019). In the Sixth Circuit, it is well established that "an injunction generally should not issue if there is an adequate remedy at law." *See CSX Transp., Inc. v. Tenn. Bd. of Equalization*, 964 F.2d 548, 551 (6th Cir. 1992). At times, litigants seek injunctive relief when damages would be insufficient or inadequate to cure the harm allegedly caused by the opposing party.

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

Response: The list of fundamental rights and liberty interests that the Supreme Court has recognized as protected by substantive due process includes the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to interstate travel, to terminate one's pregnancy, and possibly to refuse unwanted lifesaving medical treatment. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *see also Califano v. Aznavorian*, 439 U.S. 170, 176 (1978); *Seal v. Morgan*, 229 F.3d 567, 574-75 (6th Cir. 2000).

26. 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: Please see my answer to Question 10.

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

Response: The Supreme Court has held that "[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment." *See Lee v. Weisman*, 505 U.S. 577, 591 (1992). The Court has explained that "the 'exercise of religion'" protected by the First Amendment "involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014) (citation omitted).

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: The Sixth Circuit has held that "a burden must have some degree of severity to be considered 'substantial.'" *Livingston Christian Schs. v. Genoa Charter Tp.*, 858 F.3d 996, 1003 (6th Cir. 2017). For example, the Supreme Court has held that a substantial burden exists if a religious adherent is forced to choose between engaging in conduct that "seriously violates their religious beliefs" and facing fines or disciplinary actions. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014); *see also Holt v. Hobbs*, 574 U.S. 352, 361 (2015).

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: In evaluating whether a person's religious belief is sincerely held, "[c]ourts are to determine whether the line drawn by the plaintiff between conduct consistent and inconsistent with her or his religious beliefs reflects an honest conviction. Sincerity is distinct from reasonableness. Once plaintiffs allege that certain conduct violates their sincerely held religious beliefs as they understand them, it is not within the court's purview to question the reasonableness of those allegations, or to say that plaintiff's religious beliefs are mistaken or insubstantial." *See Fox v. Washington*, 949 F.3d 270, 277 (6th Cir. 2020) (internal citations omitted).

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

Response: The Religious Freedom Restoration Act, as amended, prohibits the government from substantially burdening a person's exercise of religion unless the government demonstrates that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering the compelling governmental interest. *See* 42 U.S.C. § 2000bb-1; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). The prohibition applies to "all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a); *see Bostock v. Clayton Cty., Ga.*, 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.

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that a judge's personal views should play no role in the judge's rulings.

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

a. If yes, please provide appropriate citations.

Response: I do not believe so.

29. 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.

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

Response: As I stated during my confirmation hearing, I believe the United States of America is the greatest country in the world. The question of whether America is systemically racist is best left to policy makers. If I am fortunate enough to be confirmed to the United States Court of Appeals for the Sixth Circuit, I will work to ensure that all litigants are treated fairly.

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

Response: Yes.

32. How did you handle the situation?

Response: I complied with my ethical obligations and zealously advocated for my client. *See* Tenn. Sup. Ct. R. 8, RPC Preamble & Scope at n.3 ("As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

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

Response: Yes.

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

Response: Federalist No. 78.

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

Response: My personal views on that subject would have no bearing on my decisions in any case in which that question was potentially relevant. As in any other case, I would apply the law, including applicable Supreme Court and Sixth Circuit precedent, to the facts.

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

Response: Yes. In May 2010, the State Place Owners Association filed a lawsuit against me in Shelby County General Sessions Court (No. 1428391), alleging that I failed to make a $1,000 capital payment to my homeowners' association. I testified at the trial on September 15, 2010.

In 2017 or 2018, I testified at a petition for postconviction relief hearing in the matter of *Wilson v. State*, Shelby County Criminal Court (No. 12-03231).

My testimony in these cases is not available online and I do not have a record of my testimony in these proceedings.

37. 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.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response: No.

39. 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: I do not believe that I have authored or edited a brief that was filed in court without my name on the brief since I became licensed to practice law.

40. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: Not that I am aware of.

41. 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: Immediately before testifying before the Senate Judiciary Committee, I swore to tell the truth. I truthfully answered all questions posed to me.

Senator Mike Lee
Questions for the Record
Andre B. Mathis, Nominee to be United States Circuit Judge for the Sixth Circuit

1. How would you describe your judicial philosophy?

Response: If I am fortunate enough to be confirmed, I intend to use to following approach in reviewing and deciding cases. First, I will try to be satisfied that there is subject matter jurisdiction. Second, I will identify the issues raised by the parties. Third, I will become thoroughly familiar with the record. Fourth, I will research and identify the binding Supreme Court and Sixth Circuit precedent for the issues raised (or the state law precedent in diversity cases). I would then apply the law to the facts of the case, keeping in mind the appropriate standard of review.

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

Response: When deciding how to interpret a statute, I would first consider Supreme Court and Sixth Circuit precedent, because if the Supreme Court or Sixth Circuit has construed the statute, I would be bound to follow that precedent. Assuming there is no precedent, I would first look to the text of the statute. If the text of the statute is clear, that would be the end of the analysis, I would apply the clear, unambiguous meaning of the statute to the issues in the case. If, for some reason, the text of the statute is ambiguous or unclear, I would look to the various statutory construction tools that the Supreme Court and Sixth Circuit have endorsed to determine the meaning of the statute. Those tools include looking at the statutory scheme as a whole and relying on the ordinary meaning of the words in the statute. If those tools do not provide an interpretation of the statute, I would consider how other circuits have construed the statute.

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

Response: When deciding how to interpret a constitutional provision, I would first consider Supreme Court and Sixth Circuit precedent, because if the Supreme Court or Sixth Circuit has construed the provision, I would be bound to follow that precedent. At this point in time, either the Supreme Court or the Sixth Circuit has probably construed every constitutional provision that could come before the Sixth Circuit. Assuming there is no precedent, I would first look to the text of the constitutional provision. If the text of the constitutional provision is clear, that would be the end of the analysis, I would apply to clear, unambiguous meaning of the provision to the issues in the case. If, for some reason, the text of the constitutional provision is unclear or ambiguous, I would try to determine the meaning of the constitutional provision by using the methodology the Supreme Court or the Sixth Circuit used in construing analogous constitutional provisions. If those tools do not provide an

interpretation of the constitutional provision at issue, I would consider how other circuits have construed the provision.

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

Response: The Supreme Court's usual method of constitutional interpretation relies on the text, structure, and history of the constitutional provision at issue. *See Alden v. Maine*, 527 U.S. 706, 721-22 (1999). Additionally, the Supreme Court has relied on the original public meaning in interpreting constitutional provisions. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

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

Response: Please see my answer to Question 2.

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

Response: The Supreme Court has held that the original public meaning of certain constitutional provisions should be considered in interpreting those provisions. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). Similarly, the Supreme Court has held that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *See Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1738 (2020).

6. What are the constitutional requirements for standing?

Response: To establish standing, first, a plaintiff must have suffered an injury in fact. Second, there must be a causal connection between the injury and the conduct complained of. And third, it must be likely that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

7. When does a federal court have subject matter jurisdiction over a case?

Response: Pursuant to Article III, Section 2 of the U.S. Constitution, the judicial power of the United States extends to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under Grants

of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Congress has authority to establish and define the jurisdiction of the lower federal courts and it has exercised that authority in a variety of statutes. Some of the most commonly invoked jurisdictional statutes include those granting jurisdiction over cases arising under federal law, *see* 28 U.S.C. § 1331, and cases involving diversity of citizenship among the parties, *see* 28 U.S.C. § 1332.

8. Can subject matter jurisdiction be waived?

Response: No. *See Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012).

9. When should a federal court apply state law?

Response: Federal courts apply state law in diversity of citizenship cases. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

10. When should a court apply federal common law?

Response: The Supreme Court has held that "[t]here is no federal general common law." *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The Court has explained that "only limited areas exist in which federal judges may appropriately craft the rule of decision" as a matter of federal common law, such as "admiralty disputes and certain controversies between States." *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020).

11. Can federal courts decide issues of state-law?

Response: Yes. *See Combs v. Int'l Ins. Co.*, 354 F.3d 568, 577 (6th Cir. 2004).

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

Response: The Supreme Court has held that, pursuant to the Necessary and Proper Clause, the Constitution grants Congress implied powers to implement the Constitution's express powers granted to Congress. *See McCulloch v. Maryland*, 17 U.S. 316 (1819).

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

Response: The Supreme Court has held that the "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *See Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1938). In evaluating such an issue, I would first look to Supreme Court and Sixth Circuit precedent to determine if there is precedent on the issue. I would consider the record as developed in the trial court, including the arguments made regarding the

constitutional authority that supports the statute. I would apply the controlling law to the facts of the case.

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

Response: The Supreme Court has held that the Fifth and Fourteenth Amendments protect certain unenumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The list of fundamental rights and liberty interests that the Supreme Court has recognized as protected by substantive due process includes the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to interstate travel, to terminate one's pregnancy, and possibly to refuse unwanted lifesaving medical treatment. *See id.* at 720; *see also Califano v. Aznavorian*, 439 U.S. 170, 176 (1978); *Seal v. Morgan*, 229 F.3d 567, 574-75 (6th Cir. 2000). The First Amendment also protects the right to freedom of association. *See Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021).

15. What rights are protected under substantive due process?

Response: The list of fundamental rights and liberty interests that the Supreme Court has recognized as protected by substantive due process includes the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to interstate travel, to terminate one's pregnancy, and possibly to refuse unwanted lifesaving medical treatment. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *see also Califano v. Aznavorian*, 439 U.S. 170, 176 (1978); *Seal v. Morgan*, 229 F.3d 567, 574-75 (6th Cir. 2000).

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

Response: The Supreme Court has held that the Fifth and Fourteenth Amendments protect certain unenumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Supreme Court has held that "[t]he doctrine that prevailed in *Lochner* . . .—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

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

Response: The Supreme Court has opined that Congress, pursuant to the Commerce Clause and the Necessary and Proper Clause, may regulate: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities having a substantial relation to" or that "substantially affect" interstate commerce. *See United States v. Lopez,* 514 U.S. 549, 558-59 (1995).

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

Response: In determining whether a class is suspect, courts examine whether the class historically has been subjected to discrimination, whether members of the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group," and whether the group is "a minority or politically powerless." *See Lyng v. Castillo*, 477 U.S. 635, 638 (1986). The Supreme Court has designated race, alienage, national origin, and religion as suspect classes requiring strict scrutiny. *See, e.g., Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 n.4 (1976); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: The Supreme Court has repeatedly observed that checks and balances and separations of powers are core principles of the U.S. Constitution's design, which are essential to the protection of individual liberty. *See Stern v. Marshall*, 564 U.S. 462, 482-84 (2011).

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

Response: I would consider the record as developed in the trial court. I would research and identify the Supreme Court or Sixth Circuit precedent that applies to the issues raised by the parties. I would then apply the law the facts.

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

Response: A judge's role is to apply the law to the facts and reach a decision on that basis alone.

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

Response: Invalidating a constitutional law and upholding an unconstitutional law are both improper.

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

Response: I have not had the opportunity to study Supreme Court trends between 1789 and 1857, or from 1857 to the present time and, thus, I do not know what accounts for any changes in the manner in which the Supreme Court invalidates federal statutes.

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

Response: Black's Law Dictionary (9th ed. 2009) defines judicial review as "[a] court's power to review the actions of other branches or levels of government; esp., the court's power to invalidate legislative and executive actions as being unconstitutional." Judicial supremacy is the idea that the U.S. Constitution means for everybody what the Supreme Court says it means in deciding a case. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

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

Response: As a judicial nominee, it would not be appropriate for me to comment on how elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions.

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

Response: Hamilton's statement reinforces the limited authority granted to federal courts by Article III of the U.S. Constitution.

27. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should

a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: If I am fortunate enough to be confirmed as a judge to the United States Court of Appeals for the Sixth Circuit, I will be bound by Supreme Court and Sixth Circuit precedent.

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

Response: None. *See* U.S.S.G. § 5H1.10.

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

Response: As a judicial nominee, it would not be appropriate for me to comment on statements made by the President of the United States. Black's Law Dictionary (9th ed.) defines equity as "[f]airness; impartiality, evenhanded dealing" and "[t]he body of principles constituting what is fair and right."

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

Response: Black's Law Dictionary (9th ed.) defines equity as "[f]airness; impartiality, evenhanded dealing" and "[t]he body of principles constituting what is fair and right." Black's Law Dictionary (9th ed.) defines equality as "the quality or state of being equal; esp., likeness in power or political status."

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

Response: The text of the Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

32. How do you define "systemic racism?"

Response: I am unaware of any specific definition of systemic racism.

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

Response: Black's Law Dictionary (9th ed.) defines critical race theory as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities."

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

Response: Because I do not have a definition of systemic racism, I am unable to distinguish between critical race theory and systemic racism.

35. How many cases before the Sixth Circuit have you handled as primary counsel?

Response: I have litigated a total of five cases before the Sixth Circuit to final decision. I have one case pending before the Sixth Circuit that has been fully briefed and is awaiting decision. I was the primary drafter of the appellate briefs in four of the six cases. I have also litigated 18 appeals before the Tennessee Court of Appeals and Tennessee Court of Criminal Appeals. I was the primary drafter of the appellate briefs in all of those cases. I have argued 10 cases to the Tennessee Court of Appeals and Tennessee Court of Criminal Appeals.

36. According to your Senate questionnaire you have been asked to correct filings that you submitted to the Sixth Circuit eight times. This is a big number considering that you have been involved in less than ten federal appellate cases. What assurance can you offer this committee that you have the appellate experience necessary to be a circuit court judge?

Response: Throughout my career, I have litigated a total of 23 appeals to final decision in cases litigated in the United States Court of Appeals for the Sixth Circuit, the Tennessee Court of Appeals and the Tennessee Court of Criminal Appeals. I have one case currently pending before the United States Court of Appeals for the Sixth Circuit that has been fully briefed and is awaiting a decision by the court. I was the primary drafter of the appellate briefs in 22 of the 24 appeals that I have handled. I have argued 10 appeals to the Tennessee Court of Appeals and the Tennessee Court of Criminal Appeals.

37. Do you believe the fair administration of the law requires attention to detail?

Response: Yes.

38. What assurances can you offer this committee that you have the attention to detail required to fulfill the role of a circuit court judge?

Response: I have the experience and attention to detail to fulfill the role of a circuit court judge. I have litigated a total of 23 appeals to final decision in cases litigated in the United States Court of Appeals for the Sixth Circuit, the Tennessee Court of

Appeals and the Tennessee Court of Criminal Appeals. I have one case currently pending before the United States Court of Appeals for the Sixth Circuit that has been fully briefed and is awaiting a decision by the court. My clients and co-counsel have entrusted me to serve as the primary drafter of the appellate briefs in 22 of the 24 appeals that I have handled.

I have also tried 19 jury and non-jury trials in courts of record. Seven of those trials were in federal court and 12 were in state court. Of those 19 trials, I served as chief counsel or sole counsel in 12 of the 19 trials. I have tried civil and criminal cases. I have also litigated hundreds of cases in federal and state courts that were resolved prior to trial by dispositive motions, guilty pleas (in criminal cases), or settlement.

While I cannot guarantee the committee that I will never make a mistake, I can assure the committee that if I am confirmed as a judge to the United States Court of Appeals for the Sixth Circuit, I will endeavor to ensure that my work product is free from technical or substantive errors. In the legal profession, experience is the best teacher, and I am fortunate to have a significant amount of appellate (and trial) experience which provides me with a strong base to serve as a circuit court judge.

Questions from Senator Thom Tillis for Andre B. Mathis
Nominee to be United Stated Circuit Judge for the Sixth Circuit

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

   Response: Yes.

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

   Response: Black's Law Dictionary (9th ed.) defines judicial activism as "[a] philosophy of judicial decision-making whereby judges allow their person views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent." Judicial activism is not appropriate.

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

   Response: Impartiality is an expectation for a judge.

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: Yes, faithfully interpreting the law can sometimes result in an undesirable outcome. However, judges should be neutral and impartial adjudicators and must focus on applying the law to the facts in each case, without seeking to reach an outcome that is desirable to the judge.

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

   Response: No.

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

   Response: The Second Amendment right to keep and bear arms is a fundamental right applicable to the States through the Due Process Clause of the Fourteenth Amendment.

See District of Columbia v. Heller, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010). I will apply binding Supreme Court and Sixth Circuit precedent in cases raising Second Amendment issues without reservation.

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: In such a case, I would identify the issues raised by the parties. I would thoroughly review the record of the proceedings from the trial court. I would research and identify binding Supreme Court and Sixth Circuit precedent. I would then apply the law to the facts. Because this question raises issues that are potentially the subject of current or future litigation, it would not be appropriate for me to comment further.

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: The Sixth Circuit has held that "[q]ualified immunity protects government officials performing discretionary functions unless their conduct violates a clearly established statutory or constitutional right of which a reasonable person in the official's position would have known." *See Brown v. Lewis*, 779 F.3d 401, 411 (6th Cir. 2015). In *Pearson v. Callahan*, 555 U.S. 223 (2009), the Supreme Court clarified the two-prong test for qualified immunity. To satisfy the first prong, the plaintiff must show that a constitutional violation has occurred. For the second prong, the plaintiff must show that the violation involved a clearly established constitutional right of which a reasonable person would have known. "'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

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

Response: If confirmed as a judge to the United States Court of Appeals for the Sixth Circuit, I would apply the Supreme Court's and the Sixth Circuit's qualified immunity jurisprudence without reservation.

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

Response: Please see my answer to Question 9.

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

    a. **What experience do you have with copyright law?**

    Response: Throughout my career, I have litigated more than 100 hundred civil and criminal cases in federal court and hundreds more in state court but I have not litigated a case involving copyright law.

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

    Response: Throughout my career, I have litigated more than 100 hundred civil and criminal cases in federal court and hundreds more in state court but I have not litigated a case involving copyright law.

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

    Response: Throughout my career, I have litigated more than 100 hundred civil and criminal cases in federal court and hundreds more in state court but I have not litigated a case involving intermediary liability for online service providers that host unlawful content posted by users. I am aware that 47 U.S.C. § 230(c)(2) provides: "No provider or user of an interactive computer service shall be held liable on account of--
    (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
    (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)."

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

    Response: The right to access judicial records is rooted in the First Amendment. *See Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983). I litigated issues related to the right to access court documents in *Kocher v. Bearden*,

2018 WL 6423030 (Tenn. Ct. App. Dec. 5, 2018) and *Kocher v. Bearden*, 546 S.W.3d 78 (Tenn. Ct. App. 2017).

I litigated a trademark dispute before the Trademark Trial and Appeal Board of the United States Patent and Trademark Office. I have also assisted clients with obtaining trademarks through the United States Patent and Trademark Office.

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

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

    Response: When deciding how to interpret a statute, I would first consider Supreme Court and Sixth Circuit precedent, because if the Supreme Court or Sixth Circuit has construed the statute, I would be bound to follow that precedent. Assuming there is no precedent, I would first look to the text of the statute. If the text of the statute is clear, that would be the end of the analysis, I would apply the clear, unambiguous meaning of the statute to the issues in the case. If, for some reason, the text of the statute is ambiguous or unclear, I would look to the various statutory construction tools that the Supreme Court and Sixth Circuit have endorsed to determine the meaning of the statute. Those tools include looking at the statutory scheme as a whole and relying on the ordinary meaning of the words in the statute. If those tools do not provide an interpretation of the statute, I would consider how other circuits have construed the statute.

    The Supreme Court has considered legislative history in interpreting ambiguous statutory text. *See County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471-72 (2020).

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

    Response: The Sixth Circuit applies *Chevron* deference "when Congress delegated authority to the agency generally to make rules carrying the force of law and the agency interpretation in question was promulgated in the exercise of that authority."

See Gun Owners of America, Inc. v. Garland, 19 F.4th 890, 898 (6th Cir. 2021) (citation omitted). Where *Chevron* deference applies, the Court first asks "whether the intent of Congress is clear." *Id.* at 904. "[I]f so, 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Id.* (quoting *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984)). "If, on the other hand, the court determines Congress has not directly addressed the precise question at issue and the statute is ambiguous with respect to the issue," the Sixth Circuit asks whether "the agency's interpretation is 'based on a permissible construction of the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 843).

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

Response: If such a case were presented to me, I would identify the issues raised by the parties. I would thoroughly review the record of the proceedings from the trial court. I would research and identify binding Supreme Court and Sixth Circuit precedent. I would then apply the law to the facts. Because this question raises issues that are potentially the subject of current or future litigation, it would not be appropriate for me to comment further.

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

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

Response: When deciding how to interpret a statute, I would first consider Supreme Court and Sixth Circuit precedent, because if the Supreme Court or Sixth Circuit has construed the statute, I would be bound to follow that precedent. Assuming there is no precedent, I would first look to the text of the statute. If the text of the statute is clear, that would be the end of the analysis, I would apply the clear, unambiguous meaning of the statute to the issues in the case. If, for some reason, the text of the statute is ambiguous or unclear, I would look to the various statutory construction tools that the Supreme Court and Sixth Circuit have endorsed to try to determine the meaning of the statute. Those tools include looking at the statutory scheme as a whole and relying on the ordinary meaning of the words in the statute. If those tools do not provide an interpretation of the statute, I would consider how other circuits have construed the statute.

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

Response: If confirmed as a judge to the United States Court of Appeals for the Sixth Circuit, I would be bound by Supreme Court and Sixth Circuit precedent.

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

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

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

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

d. **If so, please explain your reasoning.**

Response: As a judicial nominee, it would not be appropriate for me to comment on the conduct of a federal judge. In the 2021 Year-End Report on the Federal Judiciary, Chief Justice Roberts indicated that the Committee on Court Administration and Case Management of the Judicial Conference of the United States is reviewing the issues raised by this question.

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

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

Response: Please see my answer to Question 15.

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

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

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

    Response: Please see my answer to Question 15.