Senator Chuck Grassley, Ranking Member
Questions for the Record
Patricia Tolliver Giles
Nominee to be United States District Judge for the Eastern District of Virginia

1. **Please share what has prepared you to handle cases that arise under the U.S. Constitution. And if you faced a constitutional issue, what is the general procedure you would follow for determining what the law required?**

   Response: For the past eighteen years, I have served as a federal prosecutor. I regularly responded to motions where defendants raised constitutional arguments. Prior to that, I was both a civil litigator and a law clerk in the United States District Court for the Eastern District of Virginia. Over the span of my career, I have often been confronted with either new and/or complex issues. My approach was always the same: I would research the issue and identify Supreme Court and Fourth Circuit precedent (or, while in civil practice, whatever circuit or state court that was binding), and then I would carefully apply that precedent to the facts of my case. If I am confirmed to be a United States District Court judge, I will do the same. For cases that arise under the Constitution, I will begin my analysis with the text of the Constitution and faithfully apply all Supreme Court and Fourth Circuit precedent to the case or issue before me.

2. **When government actions curtail individual rights, the relevant standard of review can make a tremendous difference in the outcome of litigation. I am referring to standards of review such as strict scrutiny—not to standards of review such as de novo review. I would appreciate understanding your thoughts on several related questions.**

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

      Response: Strict scrutiny is the standard of review that applies to claims brought under the Equal Protection Clause or the Due Process Clause when those claims involve certain fundamental rights or a suspect classification. Strict scrutiny is the most rigorous standard of review. Under strict scrutiny, the government action must further a compelling government interest and be the least restrictive means of furthering that interest. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). The Supreme Court has identified race, religion, national origin, and alienage as suspect classes. *Johnson v. Robison,* 415 U.S. 361, 374 n. 14 (1974) (noting that traditional indicia of suspectedness include classifications based on "immutable characteristic determined solely by the accident of birth" or classes of persons "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."). In terms of fundamental rights, the Supreme Court has applied strict scrutiny in reviewing challenges to content-based restrictions on free speech, *Reed v. Town of*

Gilbert, Arizona, 576 U.S. 155 (2015), and laws that burden the free exercise of religion and are not neutral and generally applied, treating comparable secular activities more favorably. *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020).

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

Response: The Supreme Court has applied intermediate scrutiny when the challenged law or government action involves a quasi-suspect class, such as gender. *Craig v. Boren*, 429 U.S. 190 (1976). The Supreme Court has also applied intermediate scrutiny for content-neutral speech regulations. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Under intermediate scrutiny, the law or regulation at issue must be substantially related to an important government interest. I do not have an opinion as to whether the intermediate scrutiny test generally favors either individuals or the government. If confirmed and the case came before me that required me to apply intermediate scrutiny, I would do so based on a careful evaluation of the record before me, without a "thumb on the scale" for either party.

c. Many circuit courts apply "heightened rational basis review," a phrase that draws in part from the Supreme Court's opinion in *Plyler v. Doe*, 457 U.S. 202, 238 (1982). Under this heightened review, "[r]ather than relying upon the various post-hoc rationalizations that *could* conceivably have justified the laws, the Court focused on the motivations that *actually* lay behind the laws." *Bishop v. Smith*, 760 F.3d 1070, 1099 (10th Cir. 2014) (Holmes, J., concurring) (emphases in original). How would you define (1) ordinary rational-basis review and (2) heightened rational-basis review?

Response: When applying rational basis review, the court must determine whether the challenged law or action is rationally related to a legitimate government interest. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949). In *Plyler v. Doe*, the Supreme Court held that a Texas statute that withheld from local school districts state funds for school children who were not legally admitted to the United States was unconstitutional. In so doing, the Court stated that the Texas statute could not be considered rational unless it furthered some substantial goal of the state. 457 U.S. 202 (1982).

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

Response: If I am confirmed, I will apply all Supreme Court and Fourth Circuit precedent to the facts before me.

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

Response: To my knowledge, neither the Supreme Court nor the Fourth Circuit have used the term "super precedent." If I am confirmed, I will faithfully follow all binding Supreme Court and Fourth Circuit precedent.

4. One of the federal courts' important functions is reading statutes and regulations, determining what they mean, and determining how they apply to the facts at hand.

a. How would you determine whether statutory or regulatory text was ambiguous?

Response: When interpreting a statute or regulation, I would start with the plain text of the statute or regulation. Whether the text is ambiguous "is determined [not only] by reference to the language itself, [but as well by] the specific context in which the language is used, and the broader context of the statute as a whole." *Yates v. United States*, 574 U.S. 528, 537 (2015); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (addressing question of ambiguity in a regulation).

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

Response: No, both require the court to determine whether the language has more than one reasonable interpretation. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 (2019); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 637 F.3d 280, 284 (4th Cir. 2011).

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

Response: If the text was ambiguous, I would look to canons of statutory construction as well as Supreme Court and Fourth Circuit precedent interpreting the federal statute or regulation at issue. If there was no precedent, I would consider non-binding authority from other courts that have interpreted the particular statute or regulation. If the meaning remained unclear after exhausting all options, I could consult legislative history.

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

Response: If there were two competing and contradictory canons of statutory interpretation, I would research and determine whether the Supreme Court or Fourth Circuit provided any guidance on weighing the canons at issue.

5. **What is more important for a district judge: (a) reaching what he thinks is the correct conclusion or (b) reaching a conclusion that he knows will not be overturned on appeal? How would you decide whether to go with option (a) or (b)?**

Response: A district judge should be concerned with faithfully following the law and applying it to the case or issue before the court. If confirmed as a district judge, I would apply all Supreme Court and Fourth Circuit precedent. If there is precedent, then the district court would necessarily reach "the correct conclusion" and the ruling will not be overturned on appeal. If there is no binding precedent, a district judge should still faithfully follow and apply the law.

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

Response: As noted in the quote above, the Supreme Court has recognized that the Establishment Clause does not prohibit some overlap between government action and the tenets of some or all religions. As a judicial nominee, it would not be appropriate for me to offer my personal views. If confirmed as a district judge, I will follow all Supreme Court and Fourth Circuit precedent.

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

Response: In *Bostock*, the Supreme Court noted that it was "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society." 140 S. Ct. 1731, 1754 (2020). The Supreme Court has interpreted the Free Exercise and Establishment clauses in a number of cases. As a judicial nominee, it would not be appropriate for me to offer my personal views on the Supreme Court's statement. If confirmed, I will follow Supreme Court precedent.

8. Do you agree with the Supreme Court that the principle of church autonomy goes beyond a religious organization's right to hire and fire ministers? Please describe your view on whether and/or how the Supreme Court has placed limits on church autonomy.

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Supreme Court held that the ministerial exception, which is grounded in the First Amendment, barred two teachers' employment discrimination claims against two religious elementary schools. 140 S. Ct. 2049 (2020). In doing so, the Supreme Court did not restrict the ministerial exception to employee's that held the title of "minister," but stated that applying the exception would depend on what the employee does. *Id.* at 2063-64. As a judicial nominee, it would not be appropriate for me to offer my personal views on the Supreme Court's decision. If confirmed, I would follow Supreme Court and Fourth Circuit precedent.

9. The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects an individual's right to possess a firearm, regardless of the individual's participation in a "well regulated Militia." The Supreme Court later expanded on that right in *McDonald v. Chicago*, 561 U.S. 742 (2010), when it held that the Fourteenth Amendment's Due Process Clause incorporated the Second Amendment. What level of scrutiny applies to a Second Amendment challenge in the Fourth Circuit?

Response: In *Heller,* the Supreme Court did not address which level of scrutiny should apply in reviewing Second Amendment challenges. The Fourth Circuit has adopted an analysis similar to the approach to challenges arising under the First Amendment. *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011). The level of scrutiny applied depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right. *Id.* The Fourth Circuit considers "the nature of a person's Second Amendment interest, the extent to which those interest are burdened by government regulation, and the strength of the government's justifications for the regulation." *Id.* The Fourth Circuit has applied intermediate scrutiny to Second Amendment challenges after finding that the claims were not within the core right identified by *Heller. See Masciandaro*, 638 F.3d at 471 (finding a lesser showing was necessary with respect to laws that burden the right to keep firearms outside the home); *United States v. Chester*, 628 F.3d 673, 682-83 (4th Cir. 2010) (applying intermediate scrutiny when the Second Amendment challenge was to a statute that prohibited possession of a firearm by an individual convicted of a misdemeanor crime of domestic violence).

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

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

Response: In *District of Columbia v. Heller*, the Supreme Court recognized that there were limitations on an individual's right to keep and bear arms, including "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626-27 (2008).

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

Response: In *Heller*, the Supreme Court noted that the list of limitations was not exhaustive. 554 U.S. 570, 627 n. 26 (2008).

c. Is the Second Amendment individual right to "keep" arms at all different from the right to "bear" arms?

Response: The Second Amendment confers an "individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). In *Heller*, the Supreme Court concluded that phrase guaranteed "the individual right to possess and carry weapons in case of confrontation." *Id.* at 592.

11. When it comes to drug laws, federal and state laws are not always the same. As a federal judge, would you apply the Controlled Substances Act as it is written—even if a state law was more permissive than the federal law?

Response: Yes.

12. What is implicit bias?

Response: "Implicit bias" may mean different things to different people. I would define "implicit bias" as the subconscious bias that all human beings have.

13. Do you have any implicit biases? If so, what are they?

Response: Because I define "implicit bias" as the subconscious bias that all human beings have, I am sure that I have some implicit biases as well but, by definition, they would be subconscious. While serving as an Assistant United States Attorney, I have always ensured that I treated defendants fairly at every stage of the case (investigation,

charging, trial, sentencing). I questioned the basis of my decisions and made sure they were based on specific facts and that bias played no part in the decision. If I am confirmed as a district judge, I will do the same.

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

Response: On September 27, 2017, I submitted applications to Senators Warner and Kaine for consideration for the position of United States District Judge. On October 24, 2017, I interviewed with the Senators' independent panel of attorneys. On November 2, 2017, I interviewed with Senator Kaine. On November 14, 2017, I interviewed with Senator Warner. On December 21, 2017, Senator Warner advised me that he and Senator Kaine would be referring my name to former President Trump for consideration. On January 4, 2018, I interviewed with attorneys from the White House Counsel's Office.

On May 17, 2018, I submitted applications to Senators Warner and Kaine for consideration for the position of United States District Judge. I was advised that Senators Warner and Kaine referred my name to former President Trump for consideration.

On December 15, 2021, I submitted applications to Senators Warner and Kaine for consideration for the position of United States District Judge. On March 18, 2021, I interviewed with Senators Warner and Kaine's independent panel of attorneys. On April 7, 2021, I was advised that I was selected to have a second-round interview with Senator Warner and Senator Kaine. On April 17, 2021, a representative of Senator Warner's office contacted me and said that since Senators Warner and Kaine had interviewed me previously when I applied for a judicial vacancy, they did not need to re-interview me. On April 26, 2021, I received a call from Senator Kaine advising that Senators Warner and Kaine were recommending me to President Biden.

On April 29, 2021, I was contacted by the White House Counsel's Office to schedule an interview. On April 30, 2021, I interviewed with attorneys from the White House Counsel's Office. Since May 3, 2021, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On June 30, 2021, the President announced his intent to nominate me. On July 13, 2021, President Biden nominated me.

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

Response: No.

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

Response: No.

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

Response: I reviewed the questions, conducted research as needed, and then drafted responses. I provided draft responses to the Department of Justice's Office of Legal Policy. After receiving feedback, I revised and finalized my responses.

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

Response: Yes.

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

Questions for the Record for Patricia Tolliver Giles, to be United States DistrictJudge for the Eastern District of Virginia

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 previousnominee 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 previouslyprovided.

If a question asks for a yes or no answer, please provide a yes or no answer first andthen 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-writtenand then articulate both the premise about which you disagree and the basis for thatdisagreement.

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 tentativeanswer 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, pleasestate the ambiguity you perceive in the question, and provide multiple answers whicharticulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

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

Response: Yes. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment confers an "individual right to keep and bear arms." 554 U.S. 570, 595 (2008). The Supreme Court later held the Second Amendment was a fundamental right that was incorporated under the Fourteenth Amendment's Due Process Clause. *McDonald v. Chicago*, 561 U.S. 742, 791 (2010).

2. Does the right to own a firearm receive less protection than the other individualrights specifically enumerated in the Constitution?

Response: In *District of Columbia v. Heller*, the Supreme Court drew a comparison between the Second Amendment's right to keep and bear arms and the First Amendment's right of free speech. 554 U.S. 570, 595 (2008). In doing so, the Supreme Court noted that the right to keep and bear arms was not unlimited just as the right of free speech was not unlimited. To my knowledge, the Supreme Court and the Fourth Circuit have not held that the Second Amendment right receives less protection than the other individual rights specifically enumerated in the Constitution.

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

Response: Please see my response to Question 2.

Questions for the Record for Patricia Tolliver Giles
From Senator Mazie K. Hirono

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

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

   Response: No.

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

   Response: No.

Senator Mike Lee Questions
for the Record Patricia Giles,
E.D. Va.

1. How would you describe your judicial philosophy?

Response: I have never served as a judge. My experience as a civil and criminal litigator, however, has informed my view of what the role of a judge should be. A judge should approach every case in a fair and impartial manner, and only decide the discrete issue or case before her based on the law. A judge must never allow personal opinions or beliefs to impact decision-making, or approach the case with the end result already in mind. The judge should also treat the parties with dignity and respect, and explain the court's ruling.

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

Response: I would start with the plain text of the federal statute. If the statute was clear and unambiguous, my interpretation process would stop there. If the text was ambiguous, I would look to canons of statutory construction and Supreme Court and Fourth Circuit precedent interpreting the federal statute at issue. If there was no precedent, I could consider non-binding authority from other courts that have interpreted the particular statute. If the meaning remained unclear after exhausting all options, I could consult legislative history.

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

Response: I would start with the plain text of the constitutional provision. I would follow binding Supreme Court and Fourth Circuit precedent interpreting the constitutional provision.

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

Response: The Supreme Court has held that when interpreting constitutional provisions, it is appropriate to start with the text of the Constitution. In some cases, the Supreme Court has interpreted the constitutional provisions based on the original public meaning. *District of Columbia v. Heller*, 554 U.S. 570 (2008). On other occasions, the Supreme Court has not. If confirmed, I would follow Supreme Court and Fourth Circuit precedent about the role of the text and original meaning of a constitutional provision when interpreting the Constitution.

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 response to Question No. 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: "Plain meaning" refers to the public understanding of the relevant language at the time of enactment.

6. What are the constitutional requirements for standing?

Response: The constitutional requirements for standing are that: 1) the plaintiff suffered an injury that is "concrete and particularized" and "actual and imminent," not "conjectural and hypothetical"; 2) that there is a causal connection between that injury and the conduct complained of; and 3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations omitted).

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

Response: In *McCulloch v. Maryland*, the Supreme Court recognized that Congress has implied powers under the Necessary and Proper Clause to carry out the enumerated powers in the Constitution. 17 U.S. 316 (1819).

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

Response: I would research and apply Supreme Court and Fourth Circuit precedent to evaluate whether or not it was a valid exercise of Congress's authority to carry out one of Congress's implied or enumerated powers in the Constitution.

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

Response: The Supreme Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendments protect non-enumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997) (internal quotations omitted). Those rights include the right to marry; to have children; to direct the education and upbringing of one's children; to marital privacy; to use contraception; to bodily integrity; and to an abortion. *Id*. at 720 (collecting and citing cases).

10. What rights are protected under substantive due process?

Response: The Due Process Clauses of the Fifth and Fourteenth Amendments protect fundamental rights.

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

Response: The Supreme Court has held that due process protects some personal rights. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997) (internal quotations omitted). The Supreme Court precedents with respect to economic rights are very different. *See, e.g., West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937). If confirmed, I will follow Supreme Court precedent and personal beliefs will not impact my decision-making.

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

Response: The Supreme Court has held that the Commerce Clause authorizes Congress to regulate three categories of activity: 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 interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

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

Response: The Supreme Court has identified race, national origin, alienage, and religion as suspect classes. *Johnson v. Robison*, 415 U.S. 361, 374 n. 14 (1974) (noting that traditional indicia of suspectedness include classifications based on "immutable characteristic determined solely by the accident of birth" or classes of persons "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. . ..").

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

Response: The separation of powers and checks and balances are vital to our Constitutional structure. They prevent power from being concentrated in any one branch of government or any individual. Concentrations of power could lead to potential abuse of that power.

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

Response: If deciding a case in which one branch assumed an authority not granted it by the text of the Constitution, I would research and apply Supreme Court and Fourth Circuit precedent addressing the proper scope of authority and other alleged unauthorized exercises of authority.

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

Response: Empathy should not play a role in the judge's consideration and decision-making in a case. A judge should carefully listen to the litigants' positions and always treat them with dignity and respect. A judge's decisions must be based on impartially applying the law to the facts before him or her.

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

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

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

Response: I do not have an opinion on the Supreme Court's exercise of its power of judicial review to strike down federal statutes.

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

Response: Judicial review refers to the judicial branch's authority to review actions of other branches of government to determine whether such actions are constitutional. Judicial supremacy describes the Supreme Court's role as the final interpreter of the meaning of the Constitution.

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

Response: Elected officials have an independent obligation to follow the Constitution and a legal obligation to respect duly rendered judicial decisions. As a judicial nominee, it would not be appropriate to offer an opinion as to how an elected official should handle the situation were these duties to conflict.

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

Response: The judicial branch has limited authority. Courts should not enact laws like Congress or enforce laws as the executive branch. The role of the judge is to fairly and impartially decide the discrete issue or case before the court and never permit outside influences to impact the court's decision-making or consideration of a case.

22. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extendthe precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: A lower court must always follow precedent.

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

Response: In sentencing an individual defendant, the defendant's group identities regarding race, gender, nationality, sexual orientation or gender identity should not play a role in the judge's sentencing analysis. Section 5H1.10 of the U.S. Sentencing Guidelines specifically states that race, sex, national origin, creed, religion, and socio-economic status are not relevant factors in determining a sentence. Moreover, these group identities are not included as permissible considerations under the sentencing factors specified in 18 U.S.C. § 3553(a).

24. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including

individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in ruralareas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you defineequity?

Response: I do not have an opinion regarding the Biden Administration's definition of equity.

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

Response: I am not an expert on the terms "equity" and "equality" and appreciate that the terms may mean different things to different people. To some, I understand that "equality" means the distribution of resources evenly and "equity" means the distribution of resources based on circumstances to ensure individuals have an equal outcome.

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

Response: In interpreting the 14th Amendment's Equal Protection Clause, I would look to the text of the constitutional provision and Supreme Court and Fourth Circuit precedent. The text of the 14th Amendment states in part that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

27. How do you define "systemic racism?"

Response: I understand that "systemic racism" may be defined differently by different people. I am aware that some have defined "systemic racism" as patterns, practices, and policies of discrimination and disparate treatment impacting communities of color as opposed to discrete acts of racism by individual actors.

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

Response: I understand that "critical race theory" means different things to different people. In the context of law school, I am aware that critical race theory is an area of scholarship that looks at the intersection of race and the law.

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

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

Senator Ben Sasse
Questions for the Record
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
July 28, 2021

For all nominees:

1. **Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

   Response: No.

2. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No.

For all judicial nominees:

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

   Response: I have never served as a judge. My experience as a civil and criminal litigator, however, has informed my view of what the role of a judge should be. A judge should approach every case in a fair and impartial manner, and only decide the discrete issue or case before her based on the law. A judge must never allow personal opinions or beliefs to impact decision-making, or approach the case with the end result already in mind. The judge should also treat the parties with dignity and respect, and explain the court's ruling.

2. **Would you describe yourself as an originalist?**

   Response: I have not used any terms to describe myself. The extent of my judicial philosophy is contained in my response to Question 1.

3. **Would you describe yourself as a textualist?**

   Response: I have not used any terms to describe myself. The extent of my judicial philosophy is contained in my response to Question 1.

4. **Do you believe the Constitution is a "living" document? Why or why not?**

   Response: I have not used the term "living" to describe the Constitution. I view the Constitution as an enduring document.

5. **Please name the Supreme Court Justice or Justices appointed since January 20, 1953 whose jurisprudence you admire the most and explain why.**

Response: I have a deep respect for all Supreme Court Justices based on their intellect, service to the nation, and the fact that they reflect the penultimate of the legal profession. If I had to select Justices whom I admired the most it would be Thurgood Marshall and Sandra Day O'Connor. This admiration is not based on their jurisprudence but my respect for them personally. I admire Justice Marshall for his advocacy in *Brown v. Board* and for being the first African-American on the Supreme Court. I admire Justice O'Connor for being the first woman on the Supreme Court. Their accomplishments were groundbreaking and inspired me in my own legal career.

6. **Was Marbury v. Madison correctly decided?**

Response: As a judicial nominee, it would not be appropriate for me to opine on the merits of Supreme Court decisions. Prior judicial nominees have made an exception for *Marbury v. Madison* as it established judicial review and it is unlikely that issue would ever come before a court again. I agree.

7. **Was Lochner v. New York correctly decided?**

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all binding precedent.

8. **Was Brown v. Board of Education correctly decided?**

Response: As a judicial nominee, it would not be appropriate for me to opine on the merits of Supreme Court decisions. Prior judicial nominees have made an exception for *Brown v. Board* as it is unlikely that the issue of *dejure* segregation would ever come before a court again. I agree.

9. **Was Bolling v. Sharpe correctly decided?**

Response: As a judicial nominee, it would not be appropriate for me to opine on the merits of Supreme Court decisions. Prior judicial nominees have made an exception for *Brown v. Board* as it is unlikely that the issue of *dejure* segregation would ever come before a court again. I agree, and *Bolling v. Sharpe* is in that same vein.

10. **Was Cooper v. Aaron correctly decided?**

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

11. Was Mapp v. Ohio correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

12. Was Gideon v. Wainwright correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

13. Was Griswold v. Connecticut correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

14. Was South Carolina v. Katzenbach correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

15. Was Miranda v. Arizona correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

16. Was Katzenbach v. Morgan correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

17. Was Loving v. Virginia correctly decided?

Response: As a judicial nominee, it would not be appropriate for me to opine on the merits of Supreme Court decisions. Prior judicial nominees have made an exception for *Loving v. Virginia* as it struck down miscegenation laws and it is unlikely that the issue would ever come before a court again. I agree.

18. Was Katz v. United States correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States

Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

19. Was Roe v. Wade correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

20. Was Romer v. Evans correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

21. Was United States v. Virginia correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

22. Was Bush v. Gore correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

23. Was District of Columbia v. Heller correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

24. Was Crawford v. Marion County Election Bord correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

25. Was Boumediene v. Bush correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

26. Was Citizens United v. Federal Election Commission correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

27. Was Shelby County v. Holder correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

28. Was United States v. Windsor correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

29. Was Obergefell v. Hodges correctly decided?

Response: As a judicial nominee, I am bound by the Code of Conduct of United States Judges and it would not be appropriate for me to opine on the merits of Supreme Court decisions. I will faithfully apply all precedent.

30. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for appellate court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?

Response: In the Fourth Circuit, only the *en banc* court, not a subsequent panel, has the authority to overturn a previous panel's published opinion. *United States v. Guglielmi*, 819 F.2d 451, 457 (4th Cir. 1987); *McMellon v. United States*, 387 F.3d. 329, 332 (4th Cir. 2004). Rule 35 of the Federal Rules of Appellate Procedure provides that an *en banc* hearing will only be ordered when it is "necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a).

31. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for an appellate court to reaffirm its own precedent that conflicts with the original public meaning of the text of a statute?

Response: In the Fourth Circuit, only the *en banc* court, not a subsequent panel, has the authority to overturn a previous panel's published opinion. *United States v. Guglielmi*, 819 F.2d 451, 457 (4th Cir. 1987); *McMellon v. United States*, 387 F.3d. 329, 332 (4th Cir. 2004). Rule 35 of the Federal Rules of Appellate Procedure provides that an *en banc* hearing will only be ordered when it is "necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance."

Fed. R. App. P. 35(a).

32. If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?

Response: A defendant's race or ethnicity should never be considered as a factor during sentencing.

Questions from Senator Thom Tillis
for Patricia Tolliver Giles
Nominee to be United States District Judge for the Eastern District of Virginia

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

   Response: Yes.

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

   Response: I define judicial activism as when a judge allows his or her personal views or beliefs to impact his or her decision-making, or when a judge approaches a case with the end result in mind then attempts to reverse engineer the court's rationale. 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: Judges are not members of the legislative branch. Congress and state legislative bodies are best suited to make policy decisions.

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

   Response: Judges are required to faithfully apply the law without consideration of whether or not an outcome is desirable.

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

   Response: Judges should not interject his or her own politics or policy preferences when interpreting and applying the law. Judges must faithfully interpret and apply the law without consideration of personal views or beliefs.

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

   Response: If confirmed, I will faithfully follow all Supreme Court and Fourth Circuit precedent. The Supreme Court has held under *Heller* and *McDonald* that the Second Amendment confers an individual right to keep and bear arms.

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

Response: I would apply all Supreme Court and Fourth Circuit precedent analyzing challenges to government action based on the Second Amendment. As a judicial nominee, I am bound by the Code of Conduct for United States Judges and it would not be appropriate for me to opine on a matter that could potentially come before me if I were confirmed.

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: If confirmed, I would apply Supreme Court and Fourth Circuit precedent on qualified immunity. Under the law, the court must first determine whether there is a violation of a clearly established constitutional or statutory right. If there is, the court must then determine whether a reasonable official would have known that the defendant's conduct violated that right. *Saucier v. Katz*, 533 U.S. 194, 200-02 (2001).

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: As a judicial nominee, it would not be appropriate for me to comment on whether the Supreme Court's qualified immunity jurisprudence is sufficient protection for law enforcement. If confirmed, I would faithfully follow all Supreme Court and Fourth Circuit precedent. Even if I had a personal opinion, I would not allow any personal opinions to impact my decision-making in a case.

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

Response: Please see my response to Question 10.

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

Response: As a judicial nominee, it would not be appropriate for me to comment on the Supreme Court's patent eligibility jurisprudence. If confirmed, I would faithfully follow all Supreme Court and Fourth Circuit precedent. Even if I had a personal opinion, I would not allow any personal opinions to impact my decision-making in a case.

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

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

Response: As an Assistant United States Attorney for the last 18 years, a law firm associate practicing exclusively civil litigation for over two years before that, and as a federal district court law clerk for two years, I have frequently had to quickly and thoroughly research new areas of the law, which is what I would look forward to doing if a case involving patent law came before me. As a judicial nominee, I must decline to analyze factual hypotheticals as it could suggest how I would decide a case if I were confirmed and the matter came before me. I am of aware of Supreme Court decisions, such as *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014), where the Supreme Court has given guidance about standards for patent eligibility. If confirmed, I would carefully review the patent before me and the underlying facts in the record, and carefully apply all Supreme Court and Fourth Circuit precedent to the facts of the case.

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

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

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

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

d. ***BetterThanTesla ElectricCo*** **develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should**

***BetterThanTesla'*s billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Response: As a judicial nominee, it would not be appropriate for me to comment on the Supreme Court's patent eligibility jurisprudence. If confirmed, I would faithfully follow all Supreme Court and Fourth Circuit precedent. Even if I had a personal opinion, I would not allow any personal opinions to impact my decision-making in a case.