Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Judge Loren L. AliKhan
Nominee to be United States District Judge for the District of Columbia
June 14, 2023

1. During your confirmation hearing, you were asked about the amicus brief the District of Columbia filed in the Third Circuit Court of Appeals in *Safehouse v. U.S. Department of Justice*, No. 21-276, Amicus Brief of the District of Columbia, et al., 2021 WL 4462996 (Sept. 2021) (cert. denied).

As the former Solicitor General of the District of Columbia, please explain the role you played in filing this amicus brief, particularly as it related to your duty to execute on the agenda set by the Attorney General of the District of Columbia.

Response: In my former role as Solicitor General of the District of Columbia, I was responsible for overseeing appellate litigation at the direction of the elected Attorney General for the District of Columbia. I "serve[d] under the direction and control of the Attorney General" and was required to "perform such duties as" he assigned. D.C. Code § 1-301.87(b)(1). As with all amicus briefs for which I served as counsel of record, the decision for the District of Columbia to author the brief in *Safehouse v. U.S. Department of Justice* (21-276) was made by the Attorney General. After the Attorney General decided that the District of Columbia should file an amicus brief in that case, it was my responsibility to supervise the drafting of the brief and serve as counsel of record. I did so consistent with my ethical obligation to zealously represent my client within the bounds of the law and my statutory obligation to carry out the duties assigned to me by the Attorney General, relying on then-current data about ways to address the opioid epidemic.

2. During your confirmation hearing, you were asked questions relating to your work defending the District of Columbia's COVID-19 policies in *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284 (D.D.C. 2020).

a. Did you play a role in drafting these policies?

Response: No, I did not. The Mayor, who is elected independently from the Attorney General, drafted these policies.

b. Please explain your role in defending the District in this case and your associated obligations as Solicitor General.

Response: In my former role as Solicitor General of the District of Columbia, I was responsible for overseeing appellate litigation at the direction of the elected Attorney General for the District of Columbia. I "serve[d] under the direction and control of the Attorney General" and was required to "perform such duties as" he assigned. D.C. Code § 1-301.87(b)(1). After the Attorney General decided to

defend the Mayor's COVID-19 policies, I did so consistent with my ethical obligation to zealously represent my client within the bounds of the law and my statutory obligation to carry out the duties assigned to me by the Attorney General. Moreover, I did not become involved in this case until after the district court's decision in *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284 (D.D.C. 2020).

As Solicitor General, I was tasked with advising the Attorney General on whether to take an affirmative appeal of the district court's decision in *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284 (D.D.C. 2020). While my duty of confidentiality prohibits me from disclosing any recommendation I made to, or instructions I received from, my client, it is a matter of public record that the District of Columbia did not appeal the district court's decision.

Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Loren Linn AliKhan
Nominee to be United States District Judge for the District of Columbia

1. 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 am not familiar with this statement or the context in which it was made, but I do not agree with it. Judges must decide cases fairly and impartially and without regard to any personal views or positions previously taken on behalf of any former clients. As a sitting D.C. Court of Appeals judge, I faithfully apply binding precedent from the Supreme Court and the D.C. Court of Appeals to the facts of the cases that come before me. If confirmed as a district judge, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to the facts of the cases that would come before me.

2. When asked why he wrote opinions that he knew the Supreme Court would reverse, Judge Stephen Reinhardt's stock response was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?

Response: I am not familiar with this statement or the context in which it was made, but I do not agree with it. Lower court judges are bound to follow binding precedent. As a sitting D.C. Court of Appeals judge, I faithfully apply binding precedent from the Supreme Court and the D.C. Court of Appeals to the facts of the cases that come before me. If confirmed as a district judge, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to the facts of the cases that would come before me.

3. Please define the term "living constitution."

Response: *Black's Law Dictionary* (11th ed. 2019) defines the term "living constitution" as "[a] constitution whose interpretation and application can vary over time according to changing circumstances and changing social values."

4. In February 2021, you said the American Constitution Society "launched" your career and that you were able to "carry out and live some of the values of ACS" in your work. Please answer the following questions based on your statement:

a. How would you describe the "values of ACS?"

Response: The "values of ACS" that I was referring to were mentorship, public service, and vibrant discussion about legal issues.

b. Do you share ACS's stated vision of a "legal civil society that actively promotes progressive legal transformation and redress of the founding failures of our Constitution and of our laws and legal systems."

Response: I am not familiar with this statement, nor is it a statement that I have ever made or endorsed. As a sitting D.C. Court of Appeals judge, I hear cases fairly and impartially and faithfully apply binding precedent from the Supreme Court and the D.C. Court of Appeals to the facts of the cases that come before me. If confirmed as a district judge, I would hear cases fairly and impartially and would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to the facts of the cases that would come before me.

c. Was it appropriate to "carry out and live some of the values of ACS" as the Solicitor General of Washington, D.C.?

Response: The "values of ACS" that I was referring to were mentorship, public service, and vibrant discussion about legal issues. This included encouraging law students and lawyers to pursue careers in public service. As Solicitor General, it was appropriate to mentor law students and lawyers and encourage them to pursue careers in public service.

d. Do you plan to "carry out and live some of the values of ACS" in your position as a federal judge, if you are confirmed?

Response: The "values of ACS" that I was referring to were mentorship, public service, and vibrant discussion about legal issues. This included encouraging law students and lawyers to pursue careers in public service. If confirmed as a district judge, I would hear cases fairly and impartially and faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to the facts of the cases that would come before me. To the extent consistent with the Code of Conduct for United States Judges, I would continue to mentor law students and lawyers.

e. Would it be appropriate if a member of the Federalist Society said that they used their position in government to "carry out and live some of the values" of the Federalist Society?

Response: I am not familiar with all of the values of the Federalist Society, but in my work with the organization over the years, I understand their values to include education and mentorship, and it would be appropriate for a government employee, consistent with any applicable codes of conduct, to engage in educational activities and mentorship.

5. Under federal law, it is unlawful to "manage or control any place…and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." 21 U.S.C. § 856(a). In amicus briefs filed in *Safehouse v. Department of Justice*, however, you relied on policy arguments to urge the Court to disregard the plain language of this law and permit state-sanctioned "consumption rooms" or "safe injection sites" for illegal drugs like heroin and fentanyl.

a. Do you believe that policy considerations should play a role in interpreting statutes?

Response: In my former role as Solicitor General of the District of Columbia, I was responsible for overseeing appellate litigation at the direction of the elected Attorney General for the District of Columbia. I "serve[d] under the direction and control of the Attorney General" and was required to "perform such duties as" he assigned. D.C. Code § 1-301.87(b)(1). As with all amicus briefs for which I served as counsel of record, the decision for the District of Columbia to author the brief in *Safehouse v. U.S. Department of Justice* (21-276) was made by the Attorney General. After the Attorney General decided that the District of Columbia should file an amicus brief in that case, it was my responsibility to supervise the drafting of the brief and serve as counsel of record. I did so consistent with my ethical obligation to zealously represent my client within the bounds of the law and my statutory obligation to carry out the duties assigned to me by the Attorney General, relying on then-current data about ways to address the opioid epidemic.

As a sitting D.C. Court of Appeals judge, I consider the text of the statute and binding Supreme Court and D.C. Court of Appeals precedent when interpreting a statute. In cases where the statutory text is ambiguous and there is no binding precedent, I employ accepted methods of statutory interpretation, including consulting dictionary definitions, applying appropriate canons of construction, and, as a last resort, reviewing the forms of legislative history that the Supreme Court has endorsed, such as committee reports.

b. Do you believe that the text of a statute can be disregarded if the statute results in bad policy?

Response: No.

c. Do you believe that illegal drugs like heroin or fentanyl can ever be consumed or injected "safely?"

Response: The suitability of any program designed to prevent drug abuse is a question for policymakers. As a sitting D.C. Court of Appeals judge, I faithfully apply binding precedent from the Supreme Court and the D.C. Court of Appeals

to the facts of the cases that come before me. If confirmed as a district judge, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to the facts of the cases that would come before me.

6. You have previously defended the use of nationwide injunctions and said that "[l]imiting the use of universal injunctions would gravely affect some of our country's most vulnerable residents. These injunctions have been necessary to provide complete relief in immigration cases." You also suggested that nationwide injunctions were necessary to address "environmental harms implicating, for example, natural resources, endangered species, greenhouse gases, and fuel emissions."

a. What legal authority grants a district court the power to issue a nationwide or universal injunction?

Response: An injunction is an equitable form of relief, issued in accordance with a court's inherent equitable authority and Federal Rule of Civil Procedure 65. Under the Administrative Procedure Act, Congress has also authorized federal courts to "set aside" unlawful agency action. 5 U.S.C. § 706(2).

The Supreme Court has explained that "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). If confirmed, and if presented with this issue, I would apply precedent from the Supreme Court and the D.C. Circuit to determine whether to issue, and the proper scope of, any injunction.

b. Do you equally support the use of nationwide injunctions when they are used to enjoin COVID-19 mandates or the approval of abortion drugs?

Response: An injunction is an equitable form of relief, issued in accordance with a court's inherent equitable authority and Federal Rule of Civil Procedure 65. Under the Administrative Procedure Act, Congress has also authorized federal courts to "set aside" unlawful agency action. 5 U.S.C. § 706(2).

The Supreme Court has explained that "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). If confirmed, and if presented with this issue—regardless of the subject matter of the case—I would apply precedent from the Supreme Court and the D.C. Circuit to determine whether to issue, and the proper scope of, any injunction.

c. How do you respond to the concern that nationwide injunctions encourage forum shopping?

Response: This is an important issue for policymakers to consider. If confirmed, I would follow the Constitution, applicable federal statutes, Supreme Court and D.C. Circuit precedent, and federal and local rules of procedure in addressing issues related to venue.

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

Response: I am not familiar with this statement or the context in which it was made. To the extent then-Judge Jackson was explaining that the Constitution is a written document, the text of which does not change unless it is amended in accordance with the procedures set forth in Article V, I agree. The Supreme Court has explained that the Constitution is an enduring document with a "historically fixed meaning" that can "appl[y] to new circumstances." *N.Y. Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

8. Under Supreme Court and D.C. Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?

Response: *Black's Law Dictionary* (11th ed. 2019) defines a "fact" as "[s]omething that actually exists; an aspect of reality" or "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." The Supreme Court has "noted the vexing nature of the distinction between questions of fact and questions of law," and has explained that there is no set "rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). Congress often sets forth whether something is a question of fact or a question of law. *See, e.g.*, *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068-69 (2020). In situations where "Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller v. Fenton*, 474 U.S. 104, 114 (1985); *see United States v. Klat*, 213 F.3d 697, 702 (D.C. Cir. 2000).

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

Response: Criticism of judicial opinions, and the judges who write them, is protected by the First Amendment. I understand an "attack" to be something that warrants referral to law enforcement because it implicates judicial security. *See, e.g.*, 18 U.S.C. §§ 1503, 1521.

10. Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?

Response: 18 U.S.C. § 3553(a)(2) sets forth retribution, deterrence, incapacitation, and rehabilitation as the four purposes a judge must consider when imposing a sentence, but the statute does not assign any one purpose greater weight than any other. If confirmed, my approach to sentencing would be to apply the law in a fair and neutral manner to the facts and circumstances of each defendant's individual case. I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit; follow the factors set forth in 18 U.S.C. § 3553(a) and the relevant provisions of the United States Sentencing Guidelines; and consider the presentence report prepared by the United States Probation Department, the presentencing memoranda filed by the parties, the parties' arguments at the sentencing hearing, and any additional relevant materials (such as the plea agreement, victim impact statements, and the defendant's presentence statement).

11. Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.

Response: I am not familiar with every Supreme Court decision from the past 50 years, but my judicial philosophy has three components. First, it includes the humility to recognize that a judge's role is quite limited. Legislatures pass laws and executives enact regulations, and the judge's only role is to read the law and apply it to the facts of the case before them. Next, while judging should be a neutral and impartial process, it should also be one in which all parties leave the courtroom feeling that they have been heard and respected. Finally, it is a core tenet of my judicial philosophy to issue opinions that are faithful to binding precedent, timely, and written in a way that can be understood by lawyers and laypeople alike.

12. Please identify a D.C. Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.

Response: I am not familiar with every D.C. Circuit opinion from the last 50 years. Please see my response to Question 11, which describes my judicial philosophy.

13. Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.

Response: 18 U.S.C. § 1507 provides:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or

> resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both.

It further directs that "[n]othing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt." *Id.*

14. Under Supreme Court precedent, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?

Response: In *Cox v. Louisiana*, 379 U.S. 559 (1965), the Supreme Court upheld a state statute modeled after 18 U.S.C. § 1507, reasoning that the "statute on its face [wa]s a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." *Id.* at 564.

15. What is the operative standard for determining whether a statement is not protected speech under the "fighting words" doctrine?

Response: The Supreme Court described the "fighting words" doctrine as follows:

> [T]he exclusion of "fighting words" from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a "nonspeech" element of communication. Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a "mode of speech," *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (opinion concurring in result); both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed. *Compare Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding, against facial challenge, a content-neutral ban on targeted residential picketing), *with Carey v. Brown*, 447 U.S. 455 (1980) (invalidating a ban on residential picketing that exempted labor picketing).

R.A.V. v. City of Saint Paul, 505 U.S. 377, 386 (1992).

16. What is the operative standard for determining whether a statement is not protected speech under the true threats doctrine?

Response: "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). "The speaker need not actually intend to carry out the threat. Rather, a

prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 359-60 (internal quotations marks and alteration omitted).

17. 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?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). That said, because the constitutionality of *de jure* racial segregation in public schools is one of the very few issues not likely to be relitigated, I am comfortable stating that I believe *Brown v. Board of Education* was correctly decided.

b. Was *Loving v. Virginia* correctly decided?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). That said, because the constitutionality of laws prohibiting interracial marriage is one of the very few issues not likely to be relitigated, I am comfortable stating that I believe *Loving v. Virginia* was correctly decided.

c. Was *Griswold v. Connecticut* correctly decided?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *Griswold v. Connecticut* is binding precedent, and I would apply it fully and faithfully.

d. Was *Roe v. Wade* correctly decided?

Response: The Supreme Court's decision in *Roe v. Wade* was overruled by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). The Supreme Court's decision in *Dobbs* is binding precedent, and I would apply it fully and faithfully.

e. Was *Planned Parenthood v. Casey* correctly decided?

Response: The Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* was overruled by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). The Supreme Court's decision in *Dobbs* is binding precedent, and I would apply it fully and faithfully.

f. Was *Gonzales v. Carhart* correctly decided?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *Gonzales v. Carhart* is binding precedent, and I would apply it fully and faithfully.

g. Was *District of Columbia v. Heller* correctly decided?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *District of Columbia v. Heller* is binding precedent, and I would apply it fully and faithfully.

h. Was *McDonald v. City of Chicago* correctly decided?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *McDonald v. City of Chicago* is binding precedent, and I would apply it fully and faithfully.

i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* is binding precedent, and I would apply it fully and faithfully.

j. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen* is binding precedent, and I would apply it fully and faithfully.

k. Was *Dobbs v. Jackson Women's Health* correctly decided?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *Dobbs v. Jackson Women's Health* is binding precedent, and I would apply it fully and faithfully.

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

Response: Under *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), a court must first assess whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2126. If so, "the Constitution presumptively protects that conduct," and the government bears the burden of "demonstrat[ing] that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* To do so, the government must identify a historical regulation that is "relevantly similar" to the challenged regulation. *Id.* at 2132. This is the legal standard that I would apply to any Second Amendment case.

19. Please describe a law or regulation that you oppose as a matter of policy, but believe is constitutional under current Supreme Court and District of Columbia Circuit precedent.

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is not appropriate for me to comment on matters that could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). In all cases, I apply binding precedent to the facts of the cases that come before me without regard to any personal views or positions my clients previously took when I served as their advocate.

20. Please describe a law or regulation that you support as a matter of policy, but believe is unconstitutional under current Supreme Court and District of Columbia Circuit precedent.

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is not appropriate for me to comment on matters that could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). In all cases, I apply binding precedent to the facts of the cases that come before me without regard to any personal views or positions my clients previously took when I served as their advocate.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: I have not had any contact with any of these groups.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: In December 2022, Congresswoman Eleanor Holmes Norton posted that she was accepting applications for the vacancy on the United States District Court for the District of Columbia created by District Judge Amy Berman Jackson's decision to take senior status. On January 4, 2023, I submitted my application to Congresswoman Norton's Federal Law Enforcement Nominating Commission. On January 18, I was interviewed by the Norton Commission, and on January 24, I was interviewed by Congresswoman Norton. On February 1, I interviewed with attorneys from the White House Counsel's Office. On February 16, an attorney from the White House Counsel's Office notified me that I was under consideration for the vacancy, and I thereafter spoke with officials from the Office of Legal Policy at the Department of Justice to complete my paperwork. On May 3, the President announced his intention to nominate me.

27. 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: No.

28. 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: No.

29. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No.

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

Response: No.

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

Response: No.

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

Response: On February 1, 2023, I interviewed with several attorneys from the White House Counsel's Office. Since that time, I have been in contact with attorneys from the Office of Legal Policy at the Department of Justice and the White House Counsel's Office concerning my nomination and the confirmation process.

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

Response: I received these questions on June 14, 2023, conducted legal research, and drafted my responses. I submitted my draft responses to the Office of Legal Policy at the Department of Justice on June 15, 2023, and received limited feedback. I then finalized and submitted my answers.

Senator Mike Lee
Questions for the Record
Loren AliKhan, Nominee to the United States District Court for the District of Columbia

1. How would you describe your judicial philosophy?

Response: My judicial philosophy has three components. First, it includes the humility to recognize that a judge's role is quite limited. Legislatures pass laws and executives enact regulations, and the judge's only role is to read the law and apply it to the facts of the case before them. Next, while judging should be a neutral and impartial process, it should also be one in which all parties leave the courtroom feeling that they have been heard and respected. Finally, it is a core tenet of my judicial philosophy to issue opinions that are faithful to binding precedent, timely, and written in a way that can be understood by lawyers and laypeople alike.

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

Response: I would consider the text of the statute and binding Supreme Court and D.C. Circuit precedent interpreting the statute. In cases where the statutory text is ambiguous and there is no binding precedent, I would employ accepted methods of statutory interpretation, including consulting dictionary definitions, applying appropriate canons of construction, and, as a last resort, reviewing the forms of legislative history that the Supreme Court has endorsed, such as committee reports.

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

Response: I would consider the text of the constitutional provision and any binding Supreme Court and D.C. Circuit precedent interpreting the provision, construing the provision in related contexts, or construing analogous constitutional provisions. Where the Supreme Court or the D.C. Circuit has set forth a method for interpreting the provision, such as looking to original public meaning in cases concerning the Second Amendment, *see, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008), and the Confrontation Clause, *see, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004), I would apply that interpretive method to the case.

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

Response: If a constitutional issue came before me for which there were no Supreme Court or D.C. Circuit precedent on point, I would begin by examining the text of the constitutional provision. In doing so, I would abide by the Supreme Court's instruction to look to the original public meaning of constitutional provisions at the time that they were enacted. *See District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) ("[T]he

public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." (italics omitted)).

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 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 "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020).

6. What are the constitutional requirements for standing?

Response: There are three requirements to satisfy Article III standing. First, a plaintiff must show that he or she has suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent," rather than conjectural or hypothetical. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Second, "there must be a causal connection between the injury and the conduct complained of," such that the injury is "fairly . . . trace[able] to the challenged action." *Id.* (alterations in original). Third, the injury must be "redress[able]" by a decision in the plaintiff's favor. *Id.* at 561.

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

Response: Since its decision in *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court has recognized that the Necessary and Proper Clause gives Congress certain powers beyond those expressly enumerated in the Constitution.

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 begin by examining both the text of Article I, which enshrines Congress's enumerated powers, as well as any relevant Amendments to the Constitution. I would then look to relevant Supreme Court and D.C. Circuit precedent. The Supreme Court has made clear that the constitutionality of Congressional action "does not depend on recitals of the power which it undertakes to exercise." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012).

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

Response: While the Constitution is generally a Constitution of enumerated rights, the Supreme Court recognized in *Washington v. Glucksberg*, 521 U.S. 702 (1997), that it also protects certain unenumerated rights through the Fifth and Fourteenth Amendments. *Id.* at 719-20. Examples of those unenumerated rights include (but are not limited to) the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), the right to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), and the right to keep one's family together, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

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: As a sitting D.C. Court of Appeals judge, I faithfully apply binding precedent from the Supreme Court and the D.C. Court of Appeals concerning substantive due process. If confirmed as a district judge, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit concerning substantive due process. In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court concluded that substantive due process does not protect a right to abortion, overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). And in *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937), the Supreme Court overturned its decision in *Lochner v. New York*, 198 U.S. 45 (1905).

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

Response: The Supreme Court has held that Congress's power under the Commerce Clause extends to regulating the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that substantially affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). But the Court has made clear that the Commerce Clause does not grant Congress the right "to regulate individuals as such, as opposed to their activities." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557 (2012) ("The Commerce Clause is not a general license to regulate an individual . . . simply because he will predictably engage in particular transactions.").

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 found that a group is a "suspect class" when its members (1) have been "historical[ly] . . . subjected to discrimination"; (2) "exhibit

obvious, immutable, or distinguishing characteristics that define them as a discrete group"; and (3) are "a minority or politically powerless." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). The Court has recognized four suspect classes: race, religion, national origin, and alienage. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

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

Response: The Constitution's checks and balances and its delineated separation of powers are integral to the proper functioning of our democracy. The Supreme Court has explained that our system of checks and balances "was regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (internal quotation marks and citation omitted).

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: As a sitting D.C. Court of Appeals judge, I faithfully apply binding precedent from the Supreme Court and the D.C. Court of Appeals to the facts of the cases that come before me. If confirmed as a district judge, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to the facts of the cases that would come before me. If confronted with such a case, I would look to cases including *Marbury v. Madison*, 5 U.S. 137 (1803), *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and *United States v. Nixon*, 418 U.S. 683 (1974).

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

Response: Judges must approach all cases with an open mind, consider the issues fairly and impartially, and faithfully apply the law to the facts of the case without regard to any personal views or positions previously taken on behalf of former clients.

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

Response: The hypotheticals are equally undesirable and contrary to law.

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 have not had occasion to study this issue. As a sitting D.C. Court of Appeals judge, I faithfully apply binding precedent from the Supreme Court and the D.C. Court of Appeals to the facts of the cases that come before me. If confirmed as a district judge, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to the facts of the cases that would come before me.

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

Response: *Black's Law Dictionary* (11th ed. 2019) defines "judicial review" as "[a] court's power to review the actions of other branches or levels of government," particularly its "power to invalidate legislative and executive actions as being unconstitutional." It defines "judicial supremacy" as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp[ecially] U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states."

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

Response: Elected officials swear an oath to defend and uphold the Constitution of the United States, and that oath requires following properly issued decisions of the Supreme Court that interpret the Constitution. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

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: In Federalist 78, Alexander Hamilton referred to the judiciary as the weakest of the three branches of government because it controls neither the "sword" nor the "purse." The judiciary neither enforces nor makes the laws of the United States. Its role is limited to interpreting and upholding the laws, and it may only do so in actual cases or controversies that come before it.

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

Response: A district judge's role is to apply all binding precedent fairly, faithfully, and impartially to the facts of each case. If binding precedent controls a case's outcome, the court must apply it. If no precedent directly addresses the issue before the court, the court must take guidance from any and all relevant precedent, conduct its own analysis of the facts of the case, and render a reasoned opinion that is grounded in both law and fact.

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: Group identities should play no role in a judge's sentencing analysis. 18 U.S.C. § 3553(a) specifies the factors that a federal judge shall consider in imposing a sentence. Section 5H1.10 of the United States Sentencing Guidelines states that race, sex, national origin, creed, religion, and socio-economic status are not relevant in the determination of a defendant's sentence.

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

Response: I am not familiar with this statement or its context. *Black's Law Dictionary* (11th ed. 2019) defines "equity" as "[f]airness; impartiality; evenhanded dealing."

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

Response: *Black's Law Dictionary* (11th ed. 2019) defies "equity" as "[f]airness; impartiality; evenhanded dealing." It defines "equality" as "[t]he quality, state, or condition of being equal."

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

Response: The Fourteenth Amendment does not reference "equity."

27. How do you define "systemic racism?"

Response: *Black's Law Dictionary* (11th ed. 2019) does not have a definition for systemic racism, but it defines "racism" as "[t]he belief that some races are inherently superior to other races," and the "[u]nfair treatment of people, often including violence against them, because they belong to a different race from one's own." The source further defines "systemic discrimination" as "[a]n ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society or a particular industry, profession, company, or geographic location," and explains that "[e]xamples of systemic discrimination include excluding women from traditionally male jobs, holding management trainee programs on evenings and weekends, and asking unlawful preemployment screening questions."

The Oxford English Dictionary (3rd ed. 2023) defines "systemic racism," as "[d]iscrimination or unequal treatment on the basis of membership in a particular racial or ethnic group (typically one that is a minority or marginalized), arising from systems, structures, or expectations that have become established within society or an institution."

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

Response: *Black's Law Dictionary* (11th ed. 2019) 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."

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

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

30. You are listed as an attorney for the respondent Cheryl Perich on the respondent's brief filed in *Hosanna-Tabor v. EEOC*. Your client lost that seminal case upholding the ministerial exception 9-0. Do you believe that the Supreme Court decided that case correctly?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* is binding precedent, and I would apply it fully and faithfully.

31. During your hearing, Senator Hawley asked you about your work on behalf of the District of Columbia in *Capitol Hill Baptist Church v. Bowser*. As part of your response you referenced the declaration made by Christopher Rodriguez, which you also relied on heavily during the litigation, that religious services involving singing and standing in one place for extended periods are more dangerous than large gatherings where people are moving. The district court did not lend any credence to this argument and found that the restrictions placed on churches by the District of Columbia were unconstitutional. Do you agree with the district court that the assertions made by Christopher Rodriguez did not constitute scientific evidence under the *Daubert* standard?

Response: In my former role as Solicitor General of the District of Columbia, I was responsible for overseeing appellate litigation at the direction of the elected Attorney General for the District of Columbia. I "serve[d] under the direction and control of the Attorney General" and was required to "perform such duties as" he assigned. D.C. Code § 1-301.87(b)(1). At the direction of the Attorney General, I became involved in this case after the district court's decision in *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284 (D.D.C. 2020). In that decision, the trial judge found that Dr. Rodriguez's statement did not comport with *Daubert*. *Id.* at 299. I was not involved in the decision to provide a declaration from Dr. Rodriguez.

As Solicitor General, I was tasked with advising the Attorney General on whether to take an affirmative appeal of the district court's decision in *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284 (D.D.C. 2020). While my duty of confidentiality prohibits me from disclosing any recommendation I made to, or instructions I received from, my client, it is a matter of public record that the District of Columbia did not appeal the district court's decision.

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

Questions for the Record for Loren Linn AliKhan, nominated to be United States District Judge for the District of Columbia

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.

I. Questions

1. Is racial discrimination wrong?

Response: Yes.

2. Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is not appropriate for me to comment on matters that could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). If a case concerning a potential unenumerated right were to come before me, I would apply the test set forth in *Washington v. Glucksberg*, 521 U.S. 702 (1997). Under that test, "the Due Process Clause specially protects those 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." *Id.* at 720-21 (internal quotation marks and citations omitted).

3. 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: I am not familiar with the judicial philosophies of all of the Justices on the Warren, Burger, Rehnquist, and Roberts Courts, but my judicial philosophy has three components. First, it includes the humility to recognize that a judge's role is quite limited. Legislatures pass laws and executives enact regulations, and the judge's only role is to read the law and apply it to the facts of the case before them. Next, while judging should be a neutral and impartial process, it should also be one in which all parties leave the courtroom feeling that they have been heard and respected. Finally, it is a core tenet of my judicial philosophy to issue opinions that are faithful to binding precedent, timely, and written in a way that can be understood by lawyers and laypeople alike.

4. Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an 'originalist'?

Response: *Black's Law Dictionary* (11th ed. 2019) defines "originalism" as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted" and, more specifically, as "the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." I do not characterize myself with labels; instead, I employ the interpretive methods set forth by the Supreme Court for particular issues, such as looking to original public meaning in cases concerning the Second Amendment, *see, e.g.*, *District of Columbia v. Heller*, 554 U.S.

570 (2008), and the Confrontation Clause, *see, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004).

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

Response: *Black's Law Dictionary* (11th ed. 2019) defines the term "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." I do not characterize myself with labels. The Constitution is a written document, the text of which does not change unless it is amended in accordance with the procedures set forth in Article V. The Supreme Court has explained that the Constitution is an enduring document with a "historically fixed meaning" that can "appl[y] to new circumstances." *N.Y. Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

Response: If a constitutional issue came before me for which there were no Supreme Court or D.C. Circuit precedent on point, I would begin by examining the text of the constitutional provision. I would consider Supreme Court and D.C. Circuit cases construing the provision in related contexts or construing analogous constitutional provisions. Where the Supreme Court or the D.C. Circuit has set forth a method for interpreting the provision, such as looking to original public meaning in cases concerning the Second Amendment, *see, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008), and the Confrontation Clause, *see, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004), I would apply that interpretive method to the case.

7. 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: As a sitting judge, I follow the interpretive methods set forth by the Supreme Court for the particular constitutional or statutory provision. *Compare District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (looking to original public meaning of the Second Amendment), *and Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."), *with Graham v. Florida*, 560 U.S. 48, 58 (2010) (considering "evolving standards of decency that mark the progress of a maturing society" in determining whether a form of punishment violates the Eighth Amendment), *and Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 574 (2002) (looking to "contemporary community standards" in assessing obscenity under the First Amendment (italics omitted)).

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

Response: The Constitution is a written document, the text of which does not change unless it is amended in accordance with the procedures set forth in Article V. The Supreme Court has explained that the Constitution is an enduring document with a "historically fixed meaning" that can "appl[y] to new circumstances." *N.Y. Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

9. Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?

Response: *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), is binding precedent.

a. Was it correctly decided?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* is binding precedent, and I would apply it fully and faithfully.

10. Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?

Response: *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), is binding precedent.

a. Was it correctly decided?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen* is binding precedent, and I would apply it fully and faithfully.

11. Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?

Response: *Brown v. Board of Education*, 347 U.S. 483 (1954), is binding precedent.

a. Was it correctly decided?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). That said, because the constitutionality of *de jure* racial segregation in public schools is one of the very few issues not likely to be relitigated, I am comfortable stating that I believe *Brown v. Board of Education* was correctly decided.

12. What sort of offenses trigger a presumption in favor of pretrial detention in the federal criminal system?

Response: Under 18 U.S.C. § 3142(e)(2), there is a rebuttable presumption in favor of pretrial detention for defendants with certain prior convictions, including convictions for certain crimes of violence, crimes for which the maximum penalty is life imprisonment, and other specified offenses. There is also a rebuttable presumption in favor of pretrial detention when the judge finds that there is probable cause to believe that the defendant committed certain drug offenses for which the maximum penalty is ten years or more, certain firearms offenses, certain offenses involving minor victims, offenses involving slavery and human trafficking, and other specified offenses. *Id.* § 3142(e)(3).

a. What are the policy rationales underlying such a presumption?

Response: I am not aware of any Supreme Court or D.C. Circuit precedent explaining the policy rationale for these presumptions. If confirmed, I would apply the statute as written and interpreted by the Supreme Court and the D.C. Circuit.

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

Response: Yes, there are both constitutional and statutory limits. The Free Exercise Clause of the First Amendment prohibits discrimination on the basis of religion, and it constrains the federal government's interactions with private institutions, including religious organizations and small businesses operated by observant owners. If a law or policy burdens religion and is not "neutral and of general applicability," the government must establish that the law or policy satisfies strict scrutiny. To survive that standard, the challenged law "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (internal quotation marks and citation omitted); *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97 (2021) (per curiam). If the government cannot meet this high burden, the action is unconstitutional. *Church of the Lukumi Babalu Aye*, 508 U.S. at 546.

The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, imposes statutory limits. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that RFRA protects the religious exercise of religious organizations and small businesses operated by observant owners. *Id.* at 719. Under RFRA, the federal government may not "substantially burden a person's exercise of religion" unless it can demonstrate that the substantial burden furthers a compelling government interest through the least restrictive means. 42 U.S.C. § 2000bb-1.

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

Response: Please see my response to Question 13.

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court granted religious organizations' applications for injunctive relief pending appeal. The organizations claimed that New York State's COVID-19 occupancy restrictions violated the Free Exercise Clause, and the Court sided with the organizations. First, the Court concluded that the religious organizations were likely to succeed on the merits of their Free Exercise claims because the COVID-19 restrictions "single[d] out houses of worship for especially harsh treatment." *Id.* at 66. Second, the Court explained that "[t]here c[ould] be no question that the challenged restrictions, if enforced, w[ould] cause irreparable harm." *Id.* at 67. Third, the Court determined that New York had not shown that granting the applications would harm the public, especially where "the State ha[d] not claimed that attendance at the applicants' services ha[d] resulted in the spread of" COVID-19. *Id.* at 68. Fourth and finally, the Court held that the matter had not become moot based on changes in the applicable occupancy requirements. *Id.*

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court explained that where a regulation treats comparable religious activity less favorably than secular activity, it fails strict scrutiny unless the government can "show that the religious exercise at issue is more dangerous than [secular] activities even when the same precautions are applied." *Id.* at 1297. In other words, "[t]he State cannot assume the worst when people go to worship but assume the best when people go to work." *Id.* (internal quotation marks and citation omitted).

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

Response: Yes. The First Amendment protects the rights of Americans to hold and exercise religious beliefs in their daily lives. *See, e.g.*, *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995); *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877-78 (1990).

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court considered whether the Colorado Civil Rights Commission's application of the Colorado Anti-Discrimination Act to a bakery comported with the Free Exercise Clause of the First Amendment. The Colorado Civil Rights Commission had determined that the refusal of the petitioner, a bakery business, to provide wedding cakes to same-sex couples on the basis of religious beliefs violated the Act, which prohibits discrimination in places of public accommodation on the basis of protected characteristics, including sexual orientation. *Id.* at 1725-26. The Supreme Court held that the Colorado Civil Rights Commission's consideration of the case exhibited hostility to religion and therefore violated the state's duty under the Free Exercise Clause "not to base laws or regulations on hostility to a religion or religious viewpoint." *Id.* at 1731.

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

Response: Yes. The Supreme Court has explained that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981)). As long as the individual's religious beliefs are sincere, they are protected, even if those beliefs are not based on teachings of the faith tradition to which they belong. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014); *Frazee v. Ill. Dep't of Emp. 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: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: I am not familiar with the official positions of the Catholic Church, and, as a sitting D.C. Court of Appeals judge and as a nominee, it would not be appropriate for me to opine on the positions of a religious institution.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court held that "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." *Id.* at 2069.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that "[t]he refusal of Philadelphia to contract with [Catholic Social Services] for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment." *Id.* at 1882. The Court applied strict scrutiny after determining that Philadelphia's policy burdened the organization's religious beliefs and was not a generally applicable policy. *Id.* at 1876-81.

22. In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that Maine's tuition assistance program, under which parents living in districts without a public high school could direct state-funded subsidies to secular private schools but not to religious private schools, violated the Free Exercise Clause of the First Amendment. *Id.* at 2002. The Court reaffirmed the principle that "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Id.* at 1996. The Court also held that Maine's tuition assistance program, which

disqualified private schools based on their religious character, ran afoul of that principle and could not satisfy strict scrutiny. *Id.* at 1997-98.

23. Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District.*

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), "a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech." *Id.* at 2433. The Supreme Court held that "[t]he Constitution neither mandates nor tolerates that kind of discrimination." *Id.*

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

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), the Supreme Court granted the petition for certiorari, vacated the judgment below, and remanded for further proceedings in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). In his concurrence, Justice Gorsuch wrote that the lower courts had not properly applied the strict scrutiny test required by the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(a). *See Mast*, 141 S. Ct. at 2432-34 (Gorsuch, J., concurring).

25. Would it be appropriate for the court to provide its employees trainings which include the following:

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

26. 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.

27. Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?

Response: Yes.

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

Response: The executive and legislative branches are required to follow the Constitution in making political appointments. If confirmed, and if such an issue were to come before me, I would faithfully apply all binding precedent from the Supreme Court and the D.C. Circuit to resolve the case.

29. Is the criminal justice system systemically racist?

Response: As a sitting judge, I consider each criminal case that comes before me on its individual facts. I am not an academic or a policymaker, and so I have not studied systemic issues.

30. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.

Response: Whether the number of Supreme Court justices should be changed is a question for policymakers. As a sitting D.C. Court of Appeals judge and as a nominee, it would not be appropriate for me to opine on the size of the Supreme Court. As a sitting D.C. Court of Appeals judge, I faithfully apply binding precedent from the Supreme Court and the D.C. Court of Appeals to the facts of the cases that come before me. If confirmed as a district judge, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to the facts of the cases that would come before me.

31. In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?

Response: No.

32. What do you understand to be the original public meaning of the Second Amendment?

Response: The Supreme Court described in detail the original public meaning of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). As a sitting D.C. Court of Appeals judge, I faithfully apply these binding precedents. If confirmed, I would continue to faithfully apply these binding precedents and any other binding Supreme Court or D.C. Circuit precedent interpreting the Second Amendment.

33. What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?

Response: In *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court set forth the test for assessing whether a restriction is prohibited by the Second Amendment. First, the court must assess whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2126. If so, "the Constitution presumptively protects that conduct," and the government bears the burden of "demonstrat[ing] that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* To do so, the government must identify a historical regulation that is "relevantly similar" to the challenged regulation. *Id.* at 2132.

The Court's decisions in *Bruen*, *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), also invalidated certain restrictions on the right to keep and bear arms. In *Heller* and *McDonald*, the Court held that the government may not prohibit law-abiding, responsible citizens from possessing firearms for self-defense within their homes. *Heller*, 554 U.S. at 636; *McDonald*, 561 U.S. at 791. In *Bruen*, the Court held that the Second Amendment applies outside the home, and that New York's "proper cause" licensing provision was incompatible with the Second Amendment. 142 S. Ct. at 2156. As a sitting D.C. Court of Appeals judge, I faithfully apply these binding precedents. If confirmed, I would continue to faithfully apply these binding precedents and any other binding Supreme Court or D.C. Circuit precedent interpreting the Second Amendment.

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

Response: Yes. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms. *Id.* at 602. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court confirmed that the right to keep and bear arms is a fundamental right. *Id.* at 778.

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

Response: No. In *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court explained that the Second Amendment "standard accords with how we protect other constitutional rights." *Id.* at 2130.

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

Response: No. In *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court explained that the Second Amendment "standard accords with how we protect other constitutional rights." *Id.* at 2130.

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

Response: The Constitution states that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. If confirmed, and if such an issue were to come before me, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to resolve the case.

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

Response: *Black's Law Dictionary* (11th ed. 2019) defines "prosecutorial discretion" as a "prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." The same source defines "administrative rule" as "[a]n officially promulgated agency regulation that has the force of law." I thus understand a "substantive administrative rule change" as a substantive change to an administrative rule.

39. Does the President have the authority to abolish the death penalty?

Response: Article I of the Constitution vests Congress with "[a]ll legislative Powers herein granted." U.S. Const. art. I, § 1. Under that power, Congress has authorized the death penalty for certain offenses. *See* 18 U.S.C. §§ 3591-3594. The President cannot unilaterally change federal statutes, but the President does have the "Power to grant Reprieves and Pardons for Offenses against the United States." U.S. Const. art. II, § 2.

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

Response: In *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court vacated the nationwide moratorium on evictions that had been promulgated by the Centers for Disease Control during the COVID-19 pandemic. *Id.* at 2490. The Court concluded that petitioners were likely to succeed on their argument that the Centers for Disease control did not have such authority under 42

U.S.C. § 264(a) and further concluded that the equities militated in favor of vacating the stay. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488-89. The Court emphasized that it "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Id.* at 2489 (internal quotation marks omitted) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

41. Is it appropriate for a prosecutor to publicly announce that they are going to prosecute a member of the community before they even start an investigation as to that person's conduct?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is not appropriate for me to comment on the workings of the executive branch.

42. Are you member of the American Constitution Society?

Response: No, I am not.

43. In 2021, ACS hosted a series on race and the Constitution, including its first event "Reckoning with the Constitution," which, according to ACS "set the stage for discussing how our country's founding document was encoded with white supremacy since its inception and the constitutional, legal, and policy reforms required to address the institutional racism that continues to infect our economic, legal, educational, and health systems."

a. Do you agree with those views that "racism is baked into our laws" and into "our institutions that interpret and apply those laws"?

Response: I am not familiar with this statement or the context in which it was made, but I do not agree with it.

44. ACS President Russ Feingold, appeared before the House Judiciary Committee in December 2022 and testified, "[t]o solve the Supreme Court's legitimacy crisis also requires structural and other non-structural reforms. To fully redress the Right's capture of the Supreme Court and to restore the Court's legitimacy, there must be structural reform. This means expanding the Court to remove the impact of the Right's capture."

a. Do you agree with Russ Feingold that the Supreme Court has a legitimacy crisis?

Response: I am not familiar with this quotation or the context in which it was made, but I do not agree with it.

b. If yes, does the alleged crisis require structural reform?

Response: I do not agree with the statement.

c. If yes, should the Court be expanded?

Response: I do not agree with the statement.

45. At a February 18, 2021 ACS event, you discussed your tenure as the Solicitor General of the District of Columbia and your responsibility for the District's appellate litigation. At this event, you acknowledged, "I think through my job to carry out and live some of the values of ACS."

a. What are the values of ACS that you are living out through your job?

Response: The "values of ACS" that I was referring to were mentorship, public service, and vibrant discussion about legal issues. This included encouraging law students and lawyers to pursue a career in public service. As Solicitor General, it was appropriate to mentor new lawyers and encourage them to pursue careers in public service.

b. How are the values of ACS that you are living out different from the values expressed by ACS and its president?

Response: The "values of ACS" that I was referring to were mentorship, public service, and vibrant discussion about legal issues. I am not aware of all of ACS's values or those of its president.

46. The American Constitution Society's mission statement notes its vision for the federal bench is "a judiciary that reflects the diversity of the public it serves, interprets the U.S. Constitution through the backdrop of history and through the lens of lived experience and protects democratic guardrails, upholds the rule of law and vindicates fundamental rights.

a. Should judges use their "lived experiences" in judging or should judges simply interpret the law without resorting to individual policy preferences?

Response: Judges should not use their "lived experiences" in judging, but should simply apply binding precedent to the facts of the individual cases that come before them. That is what I do as a sitting D.C. Court of Appeals judge, and it is what I would continue to do if confirmed.

b. Does upholding the "rule of law" mean intimidating Supreme Court Justices' in front of their homes?

Response: No. *See* 18 U.S.C. § 1507.

47. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, you argued the ministerial exception, should not apply to a commissioned minister.

a. Should the government be involved in the employment decisions of religious institutions?

Response: The Supreme Court has held that the ministerial exception, which is grounded in the First Amendment, bars employees from bringing claims against religious organizations under the federal civil rights laws, including Title VII, *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), and the Age Discrimination in Employment Act, *see Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

48. In *Texas v. Pennsylvania*, you wrote "simply put, there is no evidence that voting by mail threatens the integrity of elections."

a. Do you disagree with former President Jimmy Carter's determination that "Absentee ballots remain the largest source of potential voter fraud," as set forth in his bipartisan report on voter integrity?

Response: In *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), the Supreme Court acknowledged that "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Id.* at 2347 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam)). Citing "the view of the bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James Baker," the Supreme Court observed that, in the context of that case, "[l]imiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence." *Id.* As a sitting D.C. Court of Appeals judge, I faithfully apply binding precedent from the Supreme Court and the D.C. Court of Appeals to the facts of the cases that come before me. If confirmed as a district judge, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to the facts of the cases that would come before me.

49. In *Abramski v. United States*, your name is on a brief that claimed "[b]ecause the federal false statement prohibitions are indispensable to amici's own efforts to deny prohibited persons access to firearms, combat gun trafficking, and aid law enforcement, amici have a strong interest that these prohibitions be enforced to the full extent of Congress's design."

a. Do you agree that false statements on ATF forms should be prosecuted to the fullest extent of the law?

Response: Under our system of separation of powers, the decision about whether to bring a prosecution and what charges to pursue is generally a matter for local, state, and federal prosecutors. As a sitting D.C. Court of Appeals judge, I

faithfully apply the law to the individual cases that come before me. If confirmed, I would continue to do so.

b. Do you agree Hunter Biden should be prosecuted for lying on a firearm purchase form?

Response: Under our system of separation of powers, the decision about whether to bring a prosecution and what charges to pursue is generally a matter for local, state, and federal prosecutors. As a sitting D.C. Court of Appeals judge, I faithfully apply the law to the individual cases that come before me. If confirmed, I would continue to do so.

50. In *Safehouse v. Department of Justice*, you wrote a brief arguing the Supreme Court should grant certiorari to allow the amici states to assess the viability of safe injection sites in their jurisdictions. You argued "safe injection sites are a promising way to address opioid use disorder and reduce overdose deaths."

a. Are programs that provide tools that let people continue using drugs actually helpful for harm reduction?

Response: In my former role as Solicitor General of the District of Columbia, I was responsible for overseeing appellate litigation at the direction of the elected Attorney General for the District of Columbia. I "serve[d] under the direction and control of the Attorney General" and was required to "perform such duties as" he assigned. D.C. Code § 1-301.87(b)(1). As with all amicus briefs for which I served as counsel of record, the decision for the District of Columbia to author the brief in *Safehouse v. U.S. Department of Justice* (21-276) was made by the Attorney General. After the Attorney General decided that the District of Columbia should file an amicus brief in that case, it was my responsibility to supervise the drafting of the brief and serve as counsel of record. I did so consistent with my ethical obligation to zealously represent my client within the bounds of the law and my statutory obligation to carry out the duties assigned to me by the Attorney General.

The suitability of any program designed to prevent drug abuse is a question for policymakers. As a sitting D.C. Court of Appeals judge, I faithfully apply binding precedent from the Supreme Court and the D.C. Court of Appeals to the facts of the cases that come before me. If confirmed as a district judge, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to the facts of the cases that would come before me.

b. If confirmed, can you commit to following the law and enforcing our nation's drug laws, including mandatory minimums?

Response: Yes. As a sitting D.C. Court of Appeals judge, my role is to faithfully apply the laws, including drug laws and mandatory minimum sentences, to the cases that come before me. If confirmed, I would continue to do so.

51. In *Fisher v. University of Texas*, you drafted an amicus brief arguing "[i]n light of the past discrimination against Latinos in Texas and continuing institutional barriers that still unfortunately exist, it is appropriate for UT to diversify its student body in a constitutional manner by opening its doors to highly qualified Latinos, among other highly qualified students of diverse backgrounds."

a. Do these "continuing institutional barriers" still in exist in 2023?

Response: In 2012, my law firm represented a group of national Latino organizations as amici curiae in support of respondents in *Fisher v. University of Texas* (11-345). The firm drafted and filed the brief at the direction of the clients and did so consistent with the ethical obligation to zealously represent clients within the bounds of the law, relying on the then-governing body of law about affirmative action and social science research. I am not familiar with the current social science research on this issue.

I understand that similar issues are currently pending before the Supreme Court. As a sitting D.C. Court of Appeals judge, and if confirmed, I would faithfully apply those decisions once they are issued.

b. If yes, when will the need for affirmative action become unnecessary?

Response: Please see my response to Question 51(a).

c. Do you agree or disagree with Chief Justice John Roberts who said, "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race"? If you disagree, please explain why.

Response: I am familiar with this quote from Chief Justice Roberts's plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007). As a sitting D.C. Court of Appeals judge, I faithfully apply binding precedent from the Supreme Court and the D.C. Court of Appeals, including precedent on race discrimination, to the facts of the cases that come before me. If confirmed as a district judge, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit, including precedent on race discrimination, to the facts of the cases that would come before me.

52. In *Capitol Hill Baptist Church v. Bowser*, you argued in favor of the District's stringent COVID lockdown policies, including the closure of in-person religious services. Despite the closure of churches, the District simultaneously permitted mass protest marches, despite the COVID risk. You justified this glaring double standard by introducing a declaration by Dr. Christopher Rodriguez, in which he

argued "Different events present different levels of threat about the spread of COVID-19; for example, the risk is higher for an event involving people standing in one place than for one in which people are moving."

a. Isn't it true that Dr. Rodriguez has no medical background whatsoever?

Response: In my former role as Solicitor General of the District of Columbia, I was responsible for overseeing appellate litigation at the direction of the elected Attorney General for the District of Columbia. I "serve[d] under the direction and control of the Attorney General" and was required to "perform such duties as" he assigned. D.C. Code § 1-301.87(b)(1). At the direction of the Attorney General, I became involved in this case after the district court's decision in *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284 (D.D.C. 2020). In that decision, the trial judge wrote that Dr. Rodriguez, who was the Director of the District of Columbia Homeland Security and Emergency Management Authority, "appears to have no medical background." *Id.* at 299 n.13. I was not involved in the decision to provide a declaration from Dr. Rodriguez.

b. Rather, isn't it true that Dr. Rodriguez holds a PhD in political science?

Response: In my former role as Solicitor General of the District of Columbia, I was responsible for overseeing appellate litigation at the direction of the elected Attorney General for the District of Columbia. I "serve[d] under the direction and control of the Attorney General" and was required to "perform such duties as" he assigned. D.C. Code § 1-301.87(b)(1). At the direction of the Attorney General, I became involved in this case after the district court's decision in *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284 (D.D.C. 2020). In that decision, the trial judge noted that, at a court hearing, the Church had "pointed out [that] . . . Dr. Rodriguez earned his Ph.D in political science." *Id.* at 299 n.13. I was not involved in the decision to provide a declaration from Dr. Rodriguez.

c. If yes, why did you offer Dr. Rodriguez's opinion regarding disease transmission vectors, knowing his education was entirely non-medical?

Response: In my former role as Solicitor General of the District of Columbia, I was responsible for overseeing appellate litigation at the direction of the elected Attorney General for the District of Columbia. I "serve[d] under the direction and control of the Attorney General" and was required to "perform such duties as" he assigned. D.C. Code § 1-301.87(b)(1). At the direction of the Attorney General, I became involved in this case after the district court's decision in *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284 (D.D.C. 2020). In that decision, the trial judge noted that, at a court hearing, the Church had "pointed out [that] . . . Dr. Rodriguez earned his Ph.D in political science." *Id.* at 299 n.13. I was not involved in the decision to provide a declaration from Dr. Rodriguez.

Senator John Kennedy
Questions for the Record

Judge Loren AliKhan

1. Please describe your judicial philosophy. Be as specific as possible.

Response: My judicial philosophy has three components. First, it includes the humility to recognize that a judge's role is quite limited. Legislatures pass laws and executives enact regulations, and the judge's only role is to read the law and apply it to the facts of the case before them. Next, while judging should be a neutral and impartial process, it should also be one in which all parties leave the courtroom feeling that they have been heard and respected. Finally, it is a core tenet of my judicial philosophy to issue opinions that are faithful to binding precedent, timely, and written in a way that can be understood by lawyers and laypeople alike.

2. Do you believe the meaning of the Constitution is immutable or does it evolve over time?

Response: The Constitution is a written document, the text of which does not change unless it is amended in accordance with the procedures set forth in Article V. The Supreme Court has explained that the Constitution is an enduring document with a "historically fixed meaning" that can "appl[y] to new circumstances." *N.Y. Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

3. Should a judge look beyond a law's text, even if clear, to consider its purpose and the consequences of ruling a particular way when deciding a case?

Response: As a sitting D.C. Court of Appeals judge, I consider the text of the statute and binding Supreme Court and D.C. Court of Appeals precedent interpreting the statute. If the text is clear, that ends my inquiry.

4. Should a judge consider statements made by a president as part of legislative history when construing the meaning of a statute?

Response: Consistent with Supreme Court and D.C. Circuit precedent, I would consider legislative history only when there is no applicable binding precedent and when the text of the statute at issue is ambiguous. *See Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011). To my knowledge, neither the Supreme Court nor the D.C. Circuit has taken a clear position on whether a presidential statement, like a signing statement, should be considered. I understand that other courts are divided on the issue. *Compare U.S. Aviation Underwriters Inc. v. Nabtesco Corp.*, 697 F.3d 1092, 1099-1100 (9th Cir. 2012), *with Estate of Reynolds v. Martin*, 985 F.2d 470, 477 n.8 (9th Cir. 1993).

5. What First Amendment restrictions can the owner of a shopping center place on private property?

Response: While the private owner of a shopping center may not be constrained by the First Amendment, depending on the specific circumstances of the case, the owner may be constrained by the constitution of the state in which the shopping mall is located. *Compare Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), *with PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

6. Are non-citizens unlawfully present in the United States entitled to a right of privacy?

Response: In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Supreme Court stated that "the [F]ourteenth [A]mendment to the [C]onstitution is not confined to the protection of citizens," but instead applies "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Id.* at 369. More recently, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court observed that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Id.* at 693. As a sitting D.C. Court of Appeals judge, I faithfully apply binding precedent from the Supreme Court and the D.C. Court of Appeals to the facts of the cases that come before me. If confirmed as a district judge, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to the facts of the cases that would come before me.

7. Are non-citizens unlawfully present in the United States entitled to Fourth Amendment rights during encounters with border patrol authorities or other law enforcement entities?

Response: In *United States v. Ramsey*, 431 U.S. 606 (1977), the Supreme Court held that "searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *Id.* at 616.

8. At what point is a human life entitled to equal protection of the law under the Constitution?

Response: In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court returned the issue of abortion "to the people and their elected representatives," *id.* at 2279, and it explained that its "opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth," *id.* at 2261. The answer to this question is thus one for policymakers. As a sitting D.C. Court of Appeals judge, I faithfully apply binding precedent from the Supreme Court and the D.C. Court of Appeals to the facts of the cases that come before me. If confirmed as a district judge, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to the facts of the cases that would come before me.

9. A federal district court judge in Washington, DC recently suggested that the Thirteenth Amendment may provide a basis for the right to abortion in light of the Supreme Court's decision in *Dobbs v. Jackson Women's Health*.

a. Do you agree?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is not appropriate for me to comment on matters that are or could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* is binding precedent, and I would apply it fully and faithfully.

b. Is it ever appropriate for a lower court judge to imply the existence of a constitutional right despite the existence of controlling precedent to the contrary?

Response: No. Lower court judges must follow binding precedent.

10. Is there ever an appropriate circumstance in which a district court judge ignores or circumvents precedent set by the circuit court within which it sits or the U.S. Supreme Court?

Response: No. District court judges must follow binding precedent.

11. Are state laws that require voters to present identification in order to cast a ballot illegitimate, draconian, or racist?

Response: The Supreme Court has held that states may lawfully require voters to present identification in order to cast a ballot. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

12. Please describe the analysis will you use, if confirmed, to evaluate whether a law or regulation infringes on an individual's rights under the Second Amendment in light of the Supreme Court's opinion in *Bruen*.

Response: Under *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), a court must first assess whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2126. If so, "the Constitution presumptively protects that conduct," and the government bears the burden of "demonstrat[ing] that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* To do so, the government must identify a historical regulation that is "relevantly similar" to the challenged regulation. *Id.* at 2132. This is the methodology that I would apply to any Second Amendment case.

13. The Supreme Court relies on a list of factors to determine whether overturning precedent is prudent in the context of stare decisis.

a. How many factors are necessary to provide a special justification for overturning precedent?

Response: In *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018), the Supreme Court considered five factors in deciding whether to overrule an earlier decision: "the quality of [the prior decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* 2478-79. I am not aware of any Supreme Court case specifying how many factors must be present to overturn precedent.

b. Is one factor alone ever sufficient?

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

14. Please explain the difference between judicial review and judicial supremacy.

Response: *Black's Law Dictionary* (11th ed. 2019) defines "judicial review" as "[a] court's power to review the actions of other branches or levels of government," particularly its "power to invalidate legislative and executive actions as being unconstitutional." It defines "judicial supremacy" as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp[ecially] U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states."

15. Do you believe the meaning of the Ninth Amendment is fixed or evolving?

Response: The Ninth Amendment, like the rest of the Constitution, has a "historically fixed meaning" that can "appl[y] to new circumstances." *N.Y. Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

16. Does the Ninth Amendment protect individual rights or does it provide structural protection applicable to the people?

Response: The Ninth Amendment makes clear that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." While I am not aware of any binding Supreme Court precedent on this question, Justice Thomas, in his concurrence in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), wrote that "certain Bill of Rights provisions prevent federal interference in state affairs and are not readily construed as protecting rights that belong to individuals. The Ninth and Tenth Amendments are obvious examples, as is the First Amendment's Establishment Clause, which 'does not purport to protect individual rights.'" *Id.* at 851 n.20 (citations omitted).

17. Are the Bill of Rights informative for understanding the meaning of the Ninth Amendment or should it be interpreted independently of the other amendments?

Response: Yes, because the text of the Ninth Amendment expressly refers to the enumeration of other rights in the Constitution.

18. Is Founding-era history useful for understanding the meaning of the Ninth Amendment?

Response: I am not aware of a Supreme Court case specifically addressing the use of Founding-era history in understanding the text of the Ninth Amendment, but the Supreme Court has looked to original public meaning and historical practices and understandings in interpreting other provisions of the Bill of Rights. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (First Amendment); *N.Y. Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 60 (2004) (Confrontation Clause).

19. The First, Second, Fourth, Ninth, and Tenth Amendments reference "the people."

a. Who is included within the meaning of *'the people'*?

Response: In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court stated that "'the people' seems to have been a term of art employed in select parts of the Constitution." *Id.* at 265. "The Preamble declares that the Constitution is ordained and established by 'the People of the United States.' The Second Amendment protects 'the right of the people to keep and bear Arms,' and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to 'the people.'" *Id.* "While this textual exegesis is by no means conclusive, it suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* Later, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court defined the meaning of "the people" as used in the Second Amendment as referring to "all members of the political community." *Id.* at 580.

b. Is the term's meaning consistent in each amendment?

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

20. Does 'the people' capture non-citizens or illegal immigrants within the meaning of any amendment?

Response: The Supreme Court has held that non-citizens and immigrants are included in "the people" for the purposes of some amendments. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."). As a sitting D.C. Court of Appeals judge, I faithfully apply binding precedent from the Supreme Court and the D.C. Court of Appeals to the facts of the cases that come before me. If confirmed as a district judge, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to the facts of the cases that would come before me.

21. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court determined that the right to assisted suicide is not a fundamental liberty interest protected by the Fourteenth Amendment since its practice has been offensive to our national traditions and practices. Do evolving social standards of acceptance for practices like assisted suicide suggest that the meaning of the Due Process Clause changes over time?

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court held that the Due Process Clauses of the Fifth and Fourteenth Amendments protect fundamental rights that are "deeply rooted in th[e] Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 721. In *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court explained that the Constitution has a "historically fixed meaning" that can "appl[y] to new circumstances." *Id.* at 2132.

22. Could the Privileges or Immunities Clause within the Fourteenth Amendment a source of unenumerated rights?

Response: In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court explained that "[s]ome scholars and Justices have maintained that the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights." *Id.* at 2248 n.22. The Court further noted that "the question whether the Privileges or Immunities Clause protects 'any rights besides those enumerated in the Constitution'" was reserved in *McDonald v. City of Chicago*, 561 U.S. 742, 819-20, 832, 854 (2010) (Thomas, J., concurring in part and concurring in the judgment). *Dobbs*, 142 S. Ct. at 2248 n.22. A majority of the Supreme Court, however, has not endorsed such an approach. If they were to do so in a future case, I would faithfully apply that precedent.

23. Is the right to terminate a pregnancy among the 'privileges or immunities' of citizenship?

Response: Please see my response to Question 22.

24. What is the original holding of *Chevron*? How have subsequent cases changed the *Chevron* doctrine?

Response: In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court held that:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, 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.[] If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute,[] as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[]

Id. at 842-43. The Court's conception of how much deference to afford agency action has evolved in subsequent cases, including the Supreme Court's adoption of the "major questions" doctrine in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), in which the Court presumed that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* at 2609 (citation omitted).

The Supreme Court has granted certiorari to reconsider *Chevron* in *Loper Bright Enterprises v. Raimondo* (22-451). As a sitting D.C. Court of Appeals judge, and if confirmed as a district judge, I will faithfully apply the Court's decision in *Loper* after it is issued.

25. How does the judicial branch decide when an agency exercised more authority than Congress delegated or otherwise exercised its rulemaking powers?

Response: The Supreme Court has explained that "[a]dministrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022). Additionally, the Supreme Court presumes that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (citation omitted). In addition to cases, the judicial branch must assess whether agency action is consistent with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

26. How does the Constitution limit the powers of Congress? Please provide examples.

Response: The Constitution limits Congress's powers through the separation of powers, through federalism, and through the Bill of Rights. First, the Constitution provides for

the separation of powers by expressly dividing authority between Congress (Article I), the Executive (Article II), and the Judiciary (Article III). While Congress maintains certain powers outside of Article I (for example, the ability to create inferior federal courts in Article III, and the ability to levy a federal income tax under the Sixteenth Amendment), this clear allocation of power among the branches of government places important limitations on Congress. Next, through federalism, the Constitution divides powers between the federal and state governments. As the Supreme Court has explained: "The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). Finally, the Bill of Rights places express prohibitions on Congressional action. For example, under the First Amendment, "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."

27. Please describe the modern understanding and limits of the Commerce Clause.

Response: The Supreme Court has held that Congress's power under the Commerce Clause extends to regulating the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that substantially affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). But the Court has made clear that the Commerce Clause does not grant Congress the right "to regulate individuals as such, as opposed to their activities." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557 (2012) ("The Commerce Clause is not a general license to regulate an individual . . . simply because he will predictably engage in particular transactions.").

28. Please provide an example of activity Congress cannot regulate under the Commerce Clause.

Response: In *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court held that the Commerce Clause did not permit Congress to enact a federal civil remedy for victims of gender-motivated violence in the Violence Against Women Act.

29. Should Due Process in the Fourteenth Amendment and Fifth Amendment be interpreted differently? Please explain.

Response: The Supreme Court has applied similar analyses to due process claims arising under the Fifth and Fourteenth Amendments. *See, e.g.*, *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018) (noting that the "standard typically is employed when determining whether governmental action violates due process rights under the Fifth and Fourteenth Amendments"). In the District of Columbia, however, only the Fifth

Amendment, and not the Fourteenth Amendment, applies. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

30. In *Gundy v. United States*, 588 U.S. ___ (2019), justices in dissent indicated willingness to limit the non-delegation doctrine, arguing that Congress scan only delegate authority that is non-legislative in nature. Does the Constitution limit the power to define criminal offenses to the legislative branch?

Response: In *Gundy v. United States*, 139 S. Ct. 2116 (2019), the Supreme Court held that "a delegation is constitutional so long as Congress has set out an intelligible principle to guide the delegee's exercise of authority. Or in a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegee the general policy he must pursue and the boundaries of [his] authority." *Id.* at 2129 (alteration in original) (internal quotation marks and citations omitted).

31. Please describe how courts determine whether an agency's action violated the Major Questions doctrine.

Response: In *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the Supreme Court explained the presumption that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* at 2609 (citation omitted). Accordingly, an administrative agency must be able to point to clear Congressional authorization when it claims the power to make a decision of vast economic and political significance. *Id.* at 2605-10. As far as I am aware, a majority of the Court has not yet provided guidance as to when a decision is one of vast economic and political significance, although Justice Gorsuch proposed some such guidance in his concurring opinion. *Id.* at 2620-21 (Gorsuch, J., concurring).

32. Please describe your understanding and limits of the anti-commandeering doctrine.

Response: "[W]hile Congress has substantial power under the Constitution to encourage the States to [take an action], the Constitution does not confer upon Congress the ability simply to compel the States to do so." *New York v. United States*, 505 U.S. 144, 149 (1992); *see Printz v. United States*, 521 U.S. 898, 935 (1997) ("We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly."). "The anticommandeering doctrine simply represents the recognition of this limit on congressional authority." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). "The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Id.* at 1475.

33. Does the meaning of 'cruel and unusual change over time? Why or why not?

Response: The Constitution is a written document, the text of which does not change unless it is amended in accordance with the procedures set forth in Article V. The

Supreme Court has explained that the Constitution is an enduring document with a "historically fixed meaning" that can "appl[y] to new circumstances." *N.Y. Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022). In the context of the Eighth Amendment, the Supreme Court has explained that "[t]he standard itself remains the same, but its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008), *modified* 554 U.S. 945 (2008); *see Graham v. Florida*, 560 U.S. 48, 58 (2010).

34. Do you believe the death penalty is constitutional?

Response: The Supreme Court has held that the death penalty is constitutional in certain circumstances. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008), *modified* 554 U.S. 945 (2008).

35. Can Congress require a federal prosecutor to convene a grand jury for someone charged with criminal contempt of Congress if prosecutorial discretion belongs to the executive branch?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is not appropriate for me to comment on matters that could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A).

36. Please describe which presidential aides, if any, are entitled to "absolute immunity" from congressional subpoenas.

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is not appropriate for me to comment on matters that could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A).

37. What restrictions on First Amendment activities can owners of a private shopping center put on their property?

Response: Please see my answer to Question 5.

38. Do private social media companies create any type of forum that protects speech against restrictions in the context of the First Amendment?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is not appropriate for me to comment on matters that could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A).

39. How does the Supremacy Clause interact with the Adequate and Independent State grounds doctrine?

Response: The Supremacy Clause in Article VI of the Constitution provides that the Constitution, federal laws, and certain treaties are the "supreme Law of the Land; and the

Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Consistent with the Supremacy Clause, a state court decision that "fails to honor federal rights and duties" is subject to review by the Supreme Court. *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981). But where there is an independent and adequate state-law ground for a result, the Supreme Court will not grant certiorari given the principles of federalism. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely upon thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." (citations omitted)).

40. Please explain why the Fifth Amendment's Due Process Clause does not require the federal government to provide notice and a hearing to an individual before their name is added to the no-fly list.

Response: While I am not aware of any Supreme Court or D.C. Circuit precedent addressing this question, in *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019), the Ninth Circuit held that the government's use of a reasonable suspicion standard in determining whether to place individuals on the no-fly list satisfied procedural due process in light of the government's interest in combatting terrorism, the public's manifest interest in aviation safety, and the availability of post-deprivation process to clear one's name. *Id.* at 380-84, 389.

41. What's the textual source of the different standards of review for determining whether state laws or regulations violate constitutional rights?

Response: To the best of my knowledge, the Supreme Court has not cited a textual source for the different standards of review for determining whether state laws or regulations violate constitutional rights. Instead, the standards of review come from the Court's decisions. *See, e.g.*, *Munn v. People of the State of Ill.*, 94 U.S. 113, 131-32 (1876) (rational basis); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (intermediate scrutiny); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 538-39, 541 (1942) (strict scrutiny).

42. Please describe the legal basis that allows federal courts to issue universal injunctions.

Response: An injunction is an equitable form of relief, issued in accordance with a court's inherent equitable authority and Federal Rule of Civil Procedure 65. Under the Administrative Procedure Act, Congress has also authorized federal courts to "set aside" unlawful agency action. 5 U.S.C. § 706(2).

The Supreme Court has explained that "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). If confirmed, and if presented with this issue, I would apply precedent from the Supreme Court and the D.C. Circuit to determine whether to issue, and the proper scope of, any injunction.

Questions from Senator Thom Tillis
for Loren Linn AliKhan
Nominee to be United States District Court for the District of Columbia

1. Did you write any legal briefs in support of sanctuary city policies, where state and local governments refuse to cooperate with federal immigration officials?

Response: In my former role as Solicitor General of the District of Columbia, I was responsible for overseeing appellate litigation at the direction of the elected Attorney General for the District of Columbia. I "serve[d] under the direction and control of the Attorney General" and was required to "perform such duties as" he assigned. D.C. Code § 1301.87(b)(1). After the Attorney General decided that the District of Columbia should file an amicus brief in a case, it was my responsibility to supervise the drafting of that brief and serve as counsel of record. I did so consistent with my ethical obligation to zealously represent my client within the bounds of the law and my statutory obligation to carry out the duties assigned to me by the Attorney General. This included a handful of briefs supporting other jurisdictions that were challenging the imposition of immigration-related conditions on Byrne JAG grants, which fund important state and local law enforcement functions.

a. If yes, what was the position you took in these cases and who was your client?

Response: At the direction of the Attorney General for the District of Columbia, the position in these briefs was that the proposed immigration-related conditions were not connected to the purpose of Byrne JAG funds and would divert critical resources away from local law enforcement priorities.

2. What is your view of sanctuary city policies? Specifically, do you believe that state and local governments can and should ignore federal immigration law?

Response: Cities' policies on immigration are best left to the decisions of policymakers. As a sitting D.C. Court of Appeals judge, I faithfully apply federal and local law to the facts of the cases that come before me. If confirmed, I would continue to faithfully apply all applicable law to the facts of the cases that come before me.

a. If yes, what is the legal justification you believe permits state and local governments to ignore federal immigration law?

Response: Please see my response to Question 2.

3. It is my understanding you gave a speech to the American Constitution Society where you specifically highlighted their work on sanctuary city policies. You stated the following:

a. "And then we've also participated in cases um you know whether it's LGBTQ discrimination, sanctuary cities, other immigrant issues and so I've

been, I think through my job to carry out and live some of the values of ACS…"

b. Do you believe that supporting sanctuary city policies is a value of ACS?

Response: I do not know whether ACS has a position on sanctuary city policies. The "values of ACS" that I was referring to were mentorship, public service, and vibrant discussion about legal issues.

c. Is supporting sanctuary city policies through your work as Solicitor General part of living "some of the values of ACS"?

Response: Please see my response to Question 3(b).

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

Response: Yes. Judges have a sworn duty to fairly and faithfully apply the laws to the facts of the cases before them, without regard to any personal views or positions previously taken on behalf of former clients.

5. What is judicial activism? Do you consider judicial activism appropriate?

Response: *Black's Law Dictionary* (11th ed. 2019) defines "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." I do not believe that judicial activism is appropriate.

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

Response: Impartiality is indisputably an expectation for a judge.

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

Response: No.

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

Response: A judge is sworn to faithfully interpret the law in every case that comes before her regardless of the judge's personal views on the outcome.

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

Response: No.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms." *Id.* at 595. This right is incorporated against the states via the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court further clarified that any laws regulating the right to keep and bear arms must be "consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. As a sitting D.C. Court of Appeals judge, I faithfully apply these binding precedents. If confirmed, I will continue to do so.

11. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

Response: As a sitting D.C. Court of Appeals judge and as a nominee, it is not appropriate for me to comment on matters that are currently before the courts. *See* Code of Conduct for United States Judges, Canon 3(A). But in all cases, I apply binding precedent to the facts of the cases that come before me, which includes *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

12. 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 qualified immunity inquiry is a two-part test. Government officials are entitled to immunity from claims brought under 42 U.S.C. § 1983 unless (1) they violate a "statutory or constitutional right" and (2) that right was "clearly established at the time" of the violation. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

13. 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 sitting D.C. Court of Appeals judge and as a nominee, it is not appropriate for me to comment on whether existing legal doctrines provide "sufficient" protection from liability. In all cases, I apply binding precedent from the Supreme Court and the D.C. Court of Appeals to the facts of the cases that come before me without regard to any personal views or positions my clients previously took when I served as their advocate. If confirmed as a district judge, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to the facts of the cases that would come before me.

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

Response: In *Wilson v. Layne*, 526 U.S. 603 (1999), the Supreme Court explained that "government officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 609 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). As a sitting D.C. Court of Appeals judge, I faithfully apply binding precedent from the Supreme Court and the D.C. Court of Appeals to the facts of the cases that come before me. If confirmed as a district judge, I would faithfully apply binding precedent from the Supreme Court and the D.C. Circuit to the facts of the cases that would come before me.

15. 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: I have not had occasion to study the Supreme Court's jurisprudence on patent eligibility. As a sitting D.C. Court of Appeals judge and as a nominee, it is not appropriate for me to comment on this issue. If confirmed, I would faithfully apply the relevant patent law decisions of the Supreme Court and the D.C. Circuit to all cases that would come before me.

16. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: Please see my response to Question 15.

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

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

Response: When I was clerking on the U.S. District Court for the Eastern District of Pennsylvania, I handled at least one case involving copyright law. I also handled a considerable number of intellectual property matters as an attorney at O'Melveny & Myers LLP.

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

Response: I cannot recall whether the copyright case I handled while I was clerking involved the Digital Millennium Copyright Act specifically.

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

Response: To the best of my recollection, I have not had the opportunity to handle any matters involving intermediary liability for online service providers that host unlawful content posted by users.

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: From 2008 to 2022, during my time in the Office of the Solicitor General at the U.S. Department of Justice, in private practice at O'Melveny & Myers LLP, and in the Office of the Attorney General for the District of Columbia, I handled several matters involving the First Amendment, free speech, and intellectual property. As noted in my response to Question 17(a), I also handled at least one case involving copyright law while serving as a law clerk.

18. 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 reported that 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: I would consider the text of the Digital Millennium Copyright Act and binding Supreme Court and D.C. Circuit precedent interpreting the statute. If the statutory text were ambiguous and there were no binding precedent, I would employ accepted methods of statutory interpretation, including consulting dictionary definitions, applying appropriate canons of construction, and, as a last resort, reviewing the forms of legislative history that the Supreme Court has endorsed, such as committee reports.

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: Under the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), courts owe deference to a federal agency's proper and reasonable interpretations of ambiguity within their governing statutes.

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: As a sitting D.C. Court of Appeals judge and as a nominee, it is not appropriate for me to comment on matters that could come before the courts. *See* Code of Conduct for United States Judges, Canon 3(A).

19. 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: The question of whether existing digital environment laws are appropriate is one that should be left to policymakers. If I were confronted with a question regarding the Digital Millennium Copyright Act, I would begin by examining the text of the statute and any relevant Supreme Court or D.C. Circuit precedent construing the statute. If the statutory text were ambiguous and there were no binding precedent, I would employ accepted methods of statutory interpretation, including consulting dictionary definitions, applying appropriate canons of construction, and, as a last resort, reviewing those forms of legislative history that the Supreme Court has endorsed, such as committee reports.

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

20. 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 this practice.

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

Response: The question of whether "judge shopping" and "forum shopping" are problems in litigation is one that should be left to policymakers. If confirmed, I will faithfully apply venue and other federal and local procedural rules, as well as any binding precedent, in all cases that come before me. Among those rules is Local Rule 40.3 of the United States District Court for the District of Columbia, under which cases are generally assigned "at random."

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

Response: Please see my response to Question 20(a).

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

Response: I do not believe it is appropriate for any judge to affirmatively take steps to attract a particular set of cases, parties, or issues.

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

Response: I will not take affirmative steps to attract a particular set of cases, parties, or issues.

21. 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: This question is best left to policymakers and the Judicial Conference of the United States. As a judicial nominee, it would not be appropriate for me to comment on this issue. I will faithfully apply venue and other federal and local procedural rules, as well as any binding precedent, in all cases that come before me.

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

Response: Please see my response to Question 21.