Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Julianna Michelle Childs
Nominee to the Court of Appeals for the District of Columbia Circuit
May 4, 2022

1. **The D.C. Circuit hears more administrative law cases than any other federal court of appeals, and throughout your career, you have dealt with administrative law in a variety of capacities. First, you administered federal and state programs as the Deputy Director of the Division of Labor for the South Carolina Department of Labor, Licensing & Regulation. Then, as Commissioner for the South Carolina Workers' Compensation Commission, you served as an Administrative Law Judge. Now you serve as a federal District Court Judge.**

    a. **How has this combination of practical and judicial experience with administrative law during your career prepared you for the heavy administrative law docket that the D.C. Circuit hears?**

    Response: The combination of my experiences as both a state and federal trial judge, a practicing lawyer, Deputy Director of a state agency, and a Workers' Compensation Commissioner has helped me prepare for both the substance and the weight of the D.C. Circuit Court docket. During my years in private practice, I appeared before several administrative agencies including the Equal Employment Opportunity Commission, the South Carolina Human Affairs Commission, the South Carolina Employment Security Commission, the United States Department of Labor, the South Carolina Department of Labor, Licensing and Regulation, state and county grievance boards, and handled various administrative law issues before other agencies.

    As the Deputy Director of the South Carolina Department of Labor, Licensing and Regulation's Division of Labor, I administered six (6) of the agency's regulatory programs: Wages and Child Labor, Occupational Safety and Health, Occupational Safety and Health Volunteer Programs, Migrant Labor, Elevators and Amusement Rides, and Labor-Management Conciliation. During my tenure, I also issued decisions regarding appeals of the agency's rulings on the interpretation of statutes administered by the agency, responded to consumer and business disputes regarding the agency's enforcement of its statutes, and handled legislative matters before the South Carolina General Assembly.

    As a South Carolina Workers' Compensation Commissioner, I issued rulings regarding compensability, medical treatment, and temporary, partial, and permanent disability awards for injured workers. I also served in an appellate capacity reviewing decisions appealed from other workers' compensation commissioners.

    As both a state and federal trial judge, I have handled many cases involving statutory and constitutional interpretation and lawsuits appealing administrative agency decisions.

2. **Despite its heavy administrative law caseload, the D.C. Circuit is still an appellate court of general jurisdiction, hearing cases involving a wide range of federal civil and criminal matters.**

    a. **What other lessons have you learned from your 12 years as a federal District Court Judge and four years as a state trial court judge that will serve you well on the D.C. Circuit?**

    Response: During my four (4) years as a general jurisdiction state trial judge, I handled complex and high-profile cases. I also presided over cases involving statutory and constitutional interpretation, criminal law, and other broad subject matters. Additionally, I served as the Chief Administrative Judge for Business Courts, the Chief Administrative Judge for General Sessions (criminal court), and sat by designation with the South Carolina Supreme Court.

    As a United States District Judge for the past twelve (12) years, I have handled over 5,000 cases involving complex and high-profile litigation, and presided over cases encompassing a broad variety of subject matters including administrative cases, multi-district litigation, bankruptcy, tax, intellectual property, patent, contracts, labor issues, and statutory and constitutional interpretation. Because of my familiarity with cases in these areas, as well as my general ability to get up to speed on new areas of law, I am confident that I can effectively transition to serve as a judge on the United States Court of Appeals for the D.C. Circuit.

    Additionally, in my combined sixteen (16) years as a judge at the state and federal level, I have always approached each case mindful that all parties should be afforded equal access to the courts, that all matters should be adjudicated fairly and impartially, and that it is my duty and responsibility to ensure equal justice under the law. I constrain myself to the limits of judicial review to cases or controversies presented to me and the limited jurisdiction of the court as to the types of matters to be heard. I decide each case on its own merits based on the record and the arguments before me. After consideration of the parties' oral and written presentations, I perform independent and thorough research and thereafter issue a well-reasoned and understandable decision based on the relevant precedents.

Senator Chuck Grassley, Ranking Member
Questions for the Record
The Honorable Michelle Childs
Judicial Nominee to the United States Court of Appeals
for the District of Columbia Circuit

1. **Judge Childs, you issued a decision in *Yin v. Columbia International University*, where you wrote that the ministerial exception "bars suits challenging a religious group's decision to fire an employee." For the Senate record, I would appreciate your elaborating on the legal standard that applies in cases implicating the ministerial exception.**

   Response: In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), the United States Supreme Court adopted the "ministerial exception" to laws governing the employment relationship between a religious institution and certain key employees. The Court declined to adopt a rigid formula for deciding when an employee qualifies as a minister. Instead, the Court identified four (4) relevant factors: 1) the teacher's church had given her the title of "minister, with a role distinct from that of most of its members;" 2) the teacher's position "reflected a significant degree of religious training followed by a formal process of commissioning;" 3) the teacher held herself out as a minister and claimed certain tax benefits; and 4) the teacher's "job duties reflected a role in conveying the Church's message and carrying out its mission." *Id.* at 191–92. Additionally, in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court determined that the "ministerial exception" applied to two (2) Catholic school teachers because they "performed vital religious duties." *Id.* at 2066. In making this determination, the Court focused on "function" and not labels, thereby holding that the "ministerial exception" under the religion clauses of the First Amendment impacts the adjudication of employment discrimination claims of the Catholic school teachers. *Id.* at 2063. The Court did caution that the factors listed in *Hosanna-Tabor* are not a "rigid formula," and "called on courts to take all relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of the [ministerial] exception." *Id.* at 2067.

2. **You have spoken publicly about implicit bias in the justice system. For example, as a panelist for the Federal Judicial Center's New York University Employment Law Workshop for Federal Judges in April 2021, you talked about implicit bias. Your notes said, in part, that "judges, lawyers, and the average 'citizen-turned juror' all play vital, albeit differing, roles in the administration of equal justice. Therefore, impartiality is critical to the decision-making process." You went on to discuss implicit bias in the context of voir dire, peremptory strikes and Batson challenges, and jury instructions.**

Your speeches have often discussed how judges—and trial judges, perhaps especially—can address implicit bias. I would appreciate your elaborating on whether you see appellate judges as having a role in considering the influence that implicit bias may have had in a case, particularly if the trial record does not raise implicit bias as an issue.

Response: It is imperative that judges attempt to ensure that our unconscious biases, perceptions, and attitudes do not affect our decision-making process. As we conduct trials, we must also ensure that jurors do not make decisions on these bases. As a result, during jury trials I remind jurors through the voir dire process and jury instructions that the case must be decided solely on the admissible testimony and other evidence, that they should not allow their prejudices, biases, or any other influences to determine the outcome of the case, and that they should objectively determine and weigh the credibility of the evidence. As an appellate judge, I would be limited to the record before the court and, therefore, my considerations would be generally limited to the issues preserved at trial or in an administrative record and raised on appeal.

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

Response: Black's Law Dictionary provides the following definition for super precedent:

> A precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation. . . . A precedent that has become so well established in the law by a long line of reaffirmations that it is very difficult to overturn it; specif., a precedent that has been reaffirmed many times and whose rationale has been extended to cover cases in which the facts are dissimilar, even wholly unrelated, to those of the precedent.

Super precedent, Black's Law Dictionary (10th ed. 2014). However, as a United States District Judge, I have applied all binding Supreme Court precedent equally without regard to whether a particular case meets the definition of "super precedent."

4. **You can answer the following questions yes or no:**
   a. **Was *Brown v. Board of Education* correctly decided?**
   b. **Was *Loving v. Virginia* correctly decided?**
   c. **Was *Griswold v. Connecticut* correctly decided?**
   d. **Was *Roe v. Wade* correctly decided?**
   e. **Was *Planned Parenthood v. Casey* correctly decided?**
   f. **Was *Gonzales v. Carhart* correctly decided?**
   g. **Was *District of Columbia v. Heller* correctly decided?**
   h. **Was *McDonald v. City of Chicago* correctly decided?**

i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
j. **Was *Sturgeon v. Frost* correctly decided?**
k. **Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided?**

Response: As a sitting judge and judicial nominee for the District of Columbia Circuit Court, it is not appropriate for me to comment on the reasoning of any precedent or issues that might come before the court. I would be bound to faithfully and fully apply Supreme Court precedent.

Even offering an opinion on those cases that are not likely to be revisited by the Supreme Court could give a preconceived notion about my personal views on certain issues, which are not relevant to my decision making. Nevertheless, I will state that *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided.

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

Response: Yes.

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

Response: No. All judicial decisions should be based on the Constitution and precedent of the respective jurisdiction.

7. **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: Disagree.

8. **Is climate change real?**

Response: If a case came before me that presented an issue related to climate change, I would carefully consider the facts in the record, the arguments of the parties, and the applicable legal precedents. I would then reach a well-reasoned decision.

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

Response: Yes. *See Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth A]mendment.").

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

Response: Generally, a scientific question is a question that can be answered using scientific tools or observation. In this regard, a scientific question is testable, measurable, answered by experimentation, and not a matter of opinion. In litigation, the question of whether a specific substance causes cancer in humans would require expert testimony subject to review pursuant to *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and Federal Rules of Evidence 702 and 703.

11. Is when a "fetus is viable" a scientific question?

Response: In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court analyzed fetal viability and observed that "advances in neonatal care have advanced viability to a point somewhat earlier" than 1973, the year the Court decided *Roe v. Wade*, 410 U.S. 113 (1973). *Casey*, 505 U.S. at 860. The Court further observed that fetal viability might occur even earlier if "fetal respiratory capacity can somehow be enhanced in the future." *Id.*

12. Is when a human life begins a scientific question?

Response: The Supreme Court has observed that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. at 851.

13. Can someone change his or her biological sex?

Response: As a United States District Judge, I have not sufficiently researched changing of one's biological sex in a way that would allow me to have a substantive opinion on the matter.

14. Is threatening Supreme Court justices right or wrong?

Response: Wrong. It is illegal under federal law to threaten government officials, including United States Supreme Court Justices, if the threat meets the requirements of 18 U.S.C. §§ 875, 876.

15. Does the president have the power to remove senior officials at his pleasure?

Response: Generally speaking, yes. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191–92 (2020).

16. Do you believe that we should defund or decrease funding for police departments and law enforcement, including the law enforcement entities responsible for protecting the federal courthouses in Portland from violent rioters? Please explain.

Response: Any response to this question would suggest an encroachment on the legislative branch's policy making authority and generally does not fall within the purview of the judicial branch.

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

Response: Any response to this question would suggest an encroachment on the legislative branch's policy making authority and generally does not fall within the purview of the judicial branch.

18. What is more important during the COVID-19 pandemic: ensuring the safety of the community by keeping violent, gun re-offenders incarcerated or releasing violent, gun re-offenders to the community?

Response: As a sitting United States District Judge and judicial nominee for the District of Columbia Circuit Court, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before the court. I would apply all relevant Supreme Court and, if confirmed, District of Columbia Circuit precedent to a case that came before me that implicated these questions.

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

Response: If confirmed, I will apply all United States Supreme Court and District of Columbia Circuit precedent governing Second Amendment challenges. For example, the Supreme Court has held that the Second Amendment protects an individual's right to keep and bear arms in defense of self and home. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

20. Do state school-choice programs make private schools state actors for the purposes of the Americans with Disabilities Act?

Response: I am not aware of any United States Supreme Court or United States Court of Appeals for the District of Columbia Circuit precedent resolving this question. If confirmed to the District of Columbia Circuit and if this issue comes before me, I will thoroughly research the law and apply it to the facts in the record.

21. Does a law restrict abortion access if it requires doctors to provide medical care to children born alive following failed abortions?

Response: I am not aware of any United States Supreme Court or United States Court of Appeals for the District of Columbia Circuit precedent resolving this question. If confirmed to the District of Columbia Circuit and if this issue comes before me, I will thoroughly research the law and apply it to the facts in the record.

22. Under the Religious Freedom Restoration Act the federal government cannot "substantially burden a person's exercise of religion."

a. Who decides whether a burden exists on the exercise of religion, the government or the religious adherent?

Response: The Religious Freedom Restoration Act prohibits the government from substantially burdening a person's "exercise of religion even if the burden results from a rule of general applicability[.]" 42 U.S.C. § 2000bb-1(a). An exception exists where the government can demonstrate that the burden 1) furthers a compelling governmental interest, and 2) is the least restrictive means of furthering that compelling governmental interest. *Id.* § 2000bb-1(b). Neither the government nor the religious adherent decides whether the burden exists on the exercise of religion. Instead, the person who believes their religious practices are burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief." *Id.* § 2000bb–1(c). Once a case or controversy is brought challenging such alleged burden, the court can decide whether a law substantially burdens the exercise of religion. *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 719 (2014).

b. How is a burden deemed to be "substantial[]" under current caselaw?

Response: The Supreme Court identified two (2) factors in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), to determine if a burden is substantial: (1) non-compliance with the mandate would cause "severe" economic consequences for the plaintiffs; and (2) compliance with the mandate would require the plaintiffs to violate their sincerely held religious beliefs. *Burwell*, 573 U.S. at 719–726. The District of Columbia Circuit Court of Appeals has stated that a substantial burden on the exercise of religion exists when government action puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]" *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 333 (D.C. Cir. 2018) (citing *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008)).

23. Judge Stephen Reinhardt once explained that, because the Supreme Court hears a limited number of cases each year, part of his judicial mantra was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?

Response: I am unaware of Judge Reinhardt's statement or its meaning. However, as a United States District Judge for the past twelve (12) years, I have rigorously applied Supreme Court and Fourth Circuit precedent in every case that came before me.

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

Response: No. While civil clients are not entitled to court-appointed counsel, their identity should not affect their entitlement to quality legal representation.

25. Do Blaine Amendments violate the Constitution?

Response: The Blaine Amendments refer to state constitutions that prohibit the government from providing funds to private schools with religious affiliations. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000). In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the Supreme Court held that the application of Montana's "no-aid" provision to the scholarship program discriminated against religious schools and the families whose children attended or hoped to attend those schools in violation of the Constitution's Free Exercise Clause.

26. Is the right to petition the government a constitutionally protected right?

Response: Yes. The right to petition the government is protected by the First Amendment. U.S. Const. amend. I.

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

Response: The First Amendment protects freedom of speech, but that right is not unlimited. Although the government cannot prohibit expression of ideas merely because society finds such expression offensive or disagreeable, "speech that is '"vulgar," "offensive," and "shocking"' is not entitled to absolute constitutional protection under all circumstances." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)). Additionally, speech constituting "fighting words," is "generally proscribable under the First Amendment." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citing *Cohen v. California*, 403 U.S. 15, 20 (1971)). "Fighting words" have been defined as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Id.*

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

Response: The First Amendment protects freedom of speech, but that right is not unlimited. Although the government cannot prohibit expression of ideas merely because

society finds such expression offensive or disagreeable, "speech that is '"vulgar," "offensive," and "shocking"' is not entitled to absolute constitutional protection under all circumstances." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)). Additionally, the First Amendment permits states to ban statements that are considered "true threats." *Virginia v. Black*, 538 U.S. 343, 359 (2003). "True threats" have been defined to "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." *Id.*

29. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

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

30. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

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

Response: 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.

31. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.**

    Response: No.

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

    Response: No.

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

    Response: No.

32. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: On September 29, 2021, I was contacted by an attorney from the White House Counsel's Office regarding my interest in being considered for potential nomination to United States Court of Appeals for the Fourth Circuit or the United States Court of Appeals for the District of Columbia Circuit. I interviewed with attorneys from that Office. Since that date, I have been in contact with attorneys from the Office of Legal Policy at the Department of Justice. On December 23, 2021, the President announced his intent to nominate me to the United States Court of Appeals for the District of Columbia

Circuit. On January 10, 2022, the President sent my nomination to the United States Senate. Since that time, I have been in communication with staff from the White House and the Department of Justice in preparation for my Senate confirmation hearing.

35. 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.

36. 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.

37. 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.

38. 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.

39. 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.

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

Response: On September 29, 2021, I was contacted by an attorney from the White House Counsel's Office regarding my interest in being considered for potential nomination to United States Court of Appeals for the Fourth Circuit or the United States Court of Appeals for the District of Columbia Circuit. I interviewed with attorneys from that

Office. Since that date, I have been in contact with attorneys from the Office of Legal Policy at the Department of Justice. On December 23, 2021, the President announced his intent to nominate me to the United States Court of Appeals for the District of Columbia Circuit. On January 10, 2022, the President sent my nomination to the United States Senate. Since that time, I have been in communication with staff from the White House and the Department of Justice in preparation for my Senate confirmation hearing.

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

Response: The substantive responses to the questions are my own. I answered the questions to the best of my ability based on my personal knowledge and performed research to respond to some questions. I obtained the assistance of my law clerks to check case citations and make non-substantive, general edits. I spoke with representatives of the Justice Department and, after receiving feedback, I then provided final responses.

Senator Marsha Blackburn
Questions for the Record to Judge Julianna Michelle Childs
Nominee for the District of Columbia Circuit

1. **During the 2020 election cycle, you granted injunctive relief against South Carolina's witness requirement for absentee ballots. You highlighted a letter from the South Carolina Election Commission executive director that said the signature offers no benefit to election officials and concluded that the requirement's burdens "far outweigh[ed] the imprecise, and ineffective, state interests of combating voter fraud and protecting voting integrity." Can you discuss your understanding of a state's authority to regulate its own elections, and the limits of that authority?**

   Response: Article 1 Section 4 of the United States Constitution provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." However, "these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). If there is a constitutional challenge to that authority or constitutional challenge to the fundamental right to vote, then courts can decide these constitutional issues under the appropriate legal standard. *See Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

   In the above-referenced case of *Thomas v. Andino*, Nos. 3:20-cv-01552-JMC & 3:20-cv-01730-JMC, 2020 WL 2617329 (D.S.C. May 25, 2020), I granted a preliminary injunction upon finding that the plaintiffs had identified burdens inflicted by the relevant law that were at least of sufficient magnitude to warrant the injunction under the *Anderson-Burdick* balancing test, as such burdens to the plaintiffs' right to vote "far outweigh[ed] the imprecise, and [] ineffective, state interests of combating voter fraud and protecting voting integrity."

   Ultimately, the United States Supreme Court stayed the preliminary injunction order pending appeal and petition for certiorari, stating that courts should abide by the Court's holding in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), in which it held that federal courts ordinarily should not alter state election rules in the period close to an election.

   I will faithfully and fully abide by the Supreme Court's ruling.

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

Questions for the Record for J. Michelle Childs, Nominee for the District of Columbia Circuit

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

Response: Yes. Discrimination on the basis of race, pursuant to the many anti-discrimination statutes enacted by Congress, is illegal.

2. What is the proper role, if any, for weighing feelings of empathy on the basis of race or gender for a federal judge?

Response: Judges should not make decisions based on empathy. Judges should approach each case affording equal access to the court and equal justice under law, despite the status of the party. Judges should provide a fair opportunity for all parties to be heard in the case and to consider all perspectives and then make just, well-reasoned decisions.

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: In my four (4) years as a state trial judge and twelve (12) years as a federal trial judge, I have approached my cases with a rigid methodology that has resulted in a low reversal rate. For example, in the over 5,000 cases I have handled as a District Court Judge, I have always approached each case mindful that all parties should be afforded equal access to the courts, that all matters should be adjudicated fairly and impartially, and that it is my duty and responsibility to ensure equal justice under the law. I constrain myself to the limits of judicial review to cases or controversies presented to me and the limited jurisdiction of the court as to the types of matters to be heard. I decide each case on its own merits based on the record and the arguments before me. After consideration of the parties' oral and written presentations, I perform independent and thorough research and thereafter issue a well-reasoned and understandable decision based on the relevant precedents.

I have studied many written opinions from each of these justices but do not believe my philosophy wholly aligns with any particular justice.

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

Response: Black's Law Dictionary defines originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." *Originalism*, Black's Law Dictionary (10th ed. 2014).

I do not characterize myself by any particular label because, as a district court judge, and a circuit court judicial nominee, I am limited by and would continue to follow the methods of interpretation directed by the Supreme Court and the relevant circuit courts.

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 defines living constitutionalism as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living constitutionalism*, Black's Law Dictionary (10th ed. 2014).

I do not characterize myself by any particular label because, as a district court judge, and a circuit court judicial nominee, I am limited by and would continue to follow the methods of interpretation directed by the Supreme Court and the relevant circuit courts.

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: Yes. The original public meaning plays an important role of being the starting point of interpretation of the Constitution. If the original public meaning of the Constitution were clear, it would resolve the issue. I would also look to Supreme Court precedent for guidance on the doctrinal method of interpretation and analysis to be used and would follow such guidance. As a current United States District Judge for the District of South Carolina, I apply Supreme Court and Fourth Circuit precedent to the cases before me. In this regard, I apply the original public meaning of the Constitution when Supreme Court and Fourth Circuit precedent requires me to apply it. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

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: Generally speaking, no. There are limited instances where the Supreme Court has looked to contemporary meaning (*e.g.*, *Miller v. California*, 413 U.S. 15 (1973) for the definition of obscenity).

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

Response: No. I believe the Constitution is an enduring document that can adapt to present circumstances.

9. Are there identifiable limits to what government may impose upon—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 limits based on the First Amendment of the Constitution, and

there are other limits based on the Religious Freedom Restoration Act (which applies to the federal government). Under the First Amendment, the Free Exercise Clause generally does not excuse an individual from complying with laws that are neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S 520 (1993); *Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878–882 (1990).

However, laws that are not neutral or generally applicable receive strict scrutiny and must be justified by a compelling governmental interest and narrowly tailored to advance that interest. Recent cases have provided additional clarifications regarding what laws do not count as neutral or generally applicable. *See, e.g., Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). In addition, in *Masterpiece Cakeshop*, the Supreme Court invalidated an order from the Colorado Civil Rights Commission based on state anti-discrimination laws against a bakery owner who refused to bake a custom wedding cake for the marriage of a gay couple, after finding that the Commission acted without religious neutrality in violation of the Free Exercise Clause. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018).

The Free Exercise Clause also prohibits enforcement of certain employment laws in a manner that would interfere with a religious institution's employment of individuals, such as clergy, involved in religious administration. Thus, the ministerial exception removes organizations whose purpose and character is primarily religious from the scope of certain federal employment discrimination laws. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 191 (2012).

Congress expanded the First Amendment's constitutional protections through the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1, which provides that the government "shall not substantially burden a person's exercise of religion **even if** the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering the compelling government interest." 42 U.S.C. § 2000bb-3(a) (emphasis added). The Supreme Court has determined that the RFRA protects religious organizations like Little Sisters of the Poor and businesses operated by observant owners. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014).

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

Response: Generally speaking, no. Please see my response to Question 9.

11. 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*, the Supreme Court determined that the religious organizations were entitled to a preliminary injunction because they had shown a likelihood of success on their First Amendment claims, that the denial of relief would lead to irreparable injury, and that granting relief would not harm the public interest. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). The Court concluded that the religious organizations had made a "strong" showing that the challenged restrictions violated a "minimum requirement of neutrality" by specifically naming religious entities for restrictions and permitting them to admit only ten or twenty-five people (depending on the classification of the affected area as a "red" or "orange" zone), while allowing secular businesses to essentially admit as many persons as they wished. The Court found these facially discriminatory regulations were unlikely to survive strict scrutiny. Because the regulations implicated the loss of these organizations' and their congregants' First Amendment freedoms, they were likely to cause irreparable harm to those barred from attending religious services in person. Finally, the state had not demonstrated that attendance of religious services in particular had resulted in the spread of disease, and injunctive relief did not therefore counter the public interest.

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

Response: In *Tandon v. Newsom*, the Supreme Court granted an injunction pending appeal to Plaintiffs who wished to gather for at-home religious exercise and brought action alleging that California's Blueprint System for restrictions on private gatherings during the COVID-19 pandemic violated their First Amendment rights to free exercise, free speech, and freedom of assembly, and their Fourteenth Amendment substantive due process and equal protection. 141 S. Ct. 1294 (2021). The Supreme Court held that the state's restrictions on private gatherings contained myriad exceptions and accommodations for secular activities comparable to religious activities. The Court reasoned that government activity is not neutral or generally applicable if it treats certain secular activity more favorably than religious activity, and explained that the standard for comparing such activity was to determine the risks, not the reasons why people gather. The Court found the challenged regulations, which triggered strict scrutiny because they were neither facially neutral nor generally applicable, were unlikely to pass muster because the State had not shown that the prohibited religious activities posed greater risks for the spread of COVID-19. Further, the regulation would only survive strict scrutiny if the religious exercise at issue was shown to be more dangerous than secular activities, even when the same precautions were applied. Finding that the Government could not show that the regulations were narrowly tailored such that less restrictive measures could not address the interest of reducing the spread of disease, the Court concluded the plaintiffs were likely to succeed on the merits of their claims, would be irreparably harmed by the curtailment of their free exercise rights and injunctive relief did not counter the public interest.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop*, the Supreme Court invalidated an order from the Colorado Civil Rights Commission based on state anti-discrimination laws against a bakery owner who refused to bake a custom wedding cake for the marriage of a gay couple, after finding that the Commission and its members had acted without religious neutrality and had expressed impermissible animus against religion in violation of the Free Exercise Clause. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018). For example, one commissioner had stated that while the plaintiff could believe what he wanted to believe, he could not act on those religious beliefs if he wanted to do business in the state. *Id*. at 1729. Another commissioner had stated that freedom of religion has been used to "justify all kinds of discrimination throughout history," such as "slavery" or the Holocaust. *Id*. The Court determined that these statements disparaged and evinced hostility to religion. Because states have a duty "not to base laws and regulations on hostility to religion or a religious viewpoint," the court held that the Commission had violated the First Amendment. *Id*. at 1731.

15. 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 Free Exercise Clause protects an individual's sincerely held religious beliefs. Religious beliefs are protected even if they are not represented as a tenet of a religious organization or sect, or do not correctly represent a religious doctrine, so long as they are sincerely held, or otherwise rooted in religion, rather than purely secular. *Frazee v. Ill. Dep't of Emp. Sec*., 489 U.S. 829, 834 (1989); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981). Courts can only question whether beliefs are sincerely held, not whether they are true or false. *United States v. Ballard*, 322 U.S. 78 (1944). It is not for the courts to question the tenets of particular beliefs or practices or engage in scriptural interpretation. *Id*. at 715–16.

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

Response: If a case came before me that presented this question, I would carefully research and apply Supreme Court and circuit court precedent to that issue. The Free Exercise Clause protects an individual's sincerely held religious beliefs. Religious beliefs are protected even if they are not represented as a tenet of a religious organization or sect, or do not correctly represent a religious doctrine, so long as they are sincerely held, or otherwise rooted in religion. *Frazee v. Ill. Dep't of Emp. Sec*.,

489 U.S. 829, 834 (1989); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981). Courts can only question whether beliefs are sincerely held, not whether they are true or false. *United States v. Ballard*, 322 U.S. 78 (1944). It is not for the courts to question the tenets of particular beliefs or practices or engage in scriptural interpretation. *Id*.at 715–16. The right to free exercise, however, does not "relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990).

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

Response: Generally speaking, only beliefs that are sincerely held and rooted in religion are protected under the Constitution. The Supreme Court has recognized the difficulty of making such findings but has held that the only permitted inquiry is whether an individual's asserted belief "reflects an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 686 (2014) (citations and internal marks omitted). Moreover, individuals can have sincerely held religious beliefs that depart from the generally accepted or "official" practices of his or her religion. The Supreme Court has held that the dominant views in a faith are not determinative as to the sincerity or religious nature of an individual's beliefs. *Frazee v. Ill. Dep't of Emp. Sec*., 489 U.S. 829, 834 (1989); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981). Courts must not engage in the practice of interpreting scripture. The right to free exercise, however, does not "relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990).

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

Response: As a nominee to the United States Court of Appeals for the District of Columbia Circuit, it would be inappropriate for me to opine on the official position of any religious organization or sect.

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

Response: The Supreme Court has held that both the Free Exercise Clause and the Establishment Clause prohibit governmental interference with a religious institution or school's employment of ministerial employees in religious setting. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical*

Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 191 (2012). *Our Lady of Guadalupe* involved Catholic school teachers who sued their employer schools under the Americans with Disabilities Act and the Age Discrimination in Employment Act. The Court reaffirmed the First Amendment's protection of religious institutions to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine" under the so-called "ministerial exception." *Id*. at 2055. The Court held that both teachers' employment discrimination claims could not be adjudicated under the First Amendment's Religion Clauses. These constitutional requirements do not permit the government, including the courts, to get involved in matters of "faith and doctrine," including employment disputes affecting those who have certain "ministerial" positions within religious establishments. Though in *Hosanna-Tabor*, the court had not adopted a rigid formula for determining when an employee qualifies as a minister, *Our Lady of Guadalupe* recognized that many factors could be important in determining whether a particular employee qualifies as a "minister" in this context. Ultimately, the central inquiry is "what an employee does." *Id*. at 2064. Educating young people on the teachings of the faith and inculcating religious values are "at the very core of the mission of a private religious school." *Id*. Because these teachers performed "vital religious duties," and were expected to carry out the school's mission, their employment claims fell within the ministerial exception. *Id*. at 2066.

17. 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 a city policy refusing to contract with state-licensed foster care agencies affiliated with religious organizations who did not certify same-sex couples as foster parents was unconstitutional because it burdened the agencies' free exercise of religion by endorsing practices inconsistent with their religious beliefs. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). The Supreme Court determined that the City's foster care program policies were not generally applicable as required by *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990), because it incorporated individual exemptions at the sole discretion of the Commissioner, and therefore, strict scrutiny was applicable. Because the City of Philadelphia could not demonstrate that it had a compelling interest in denying an exception to the religious organization, the policy could not pass muster under strict scrutiny and violated the Free Exercise Clause.

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

Response: Justice Gorsuch's concurrence in *Mast v. Fillmore Cnty., Minn*., 141 S. Ct. 2430 (2021) urged some additional factors that administrative authorities should consider in their attempt to enforce certain regulations requiring Amish houses to have septic systems to dispose of used water. Justice Gorsuch explained that the demands of the Religious Land Use and Institutionalized Persons Act had been inflexibly applied as the disputes between the County and its Amish residents had been ongoing for years. The courts had erred by "treating the County's *general* interest in sanitation regulations as 'compelling' without reference to the *specific* application of those rules to *this* community." *Id*. at 2432. The courts also failed to consider exceptions available for other groups, such as owners of rustic cabins and campers. The County had not demonstrated why "the same flexibility" had not been "extended to the Amish." *Id*. at 2433. In essence, Justice Gorsuch clarified how strict scrutiny had to be applied in such cases, and that "compelling interests" could not be so generally defined.

19. 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. The courts should provide training for such topics that are relevant to the subject matter that they handle, administrative matters, and compliance laws.

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

Response: No. The courts should provide training for such topics that are relevant to the subject matter that they handle, administrative matters, and compliance laws.

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. The courts should provide training for such topics that are relevant to the subject matter that they handle, administrative matters, and compliance laws.

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

Response: No. The courts should provide training for such topics that are relevant to the subject matter that they handle, administrative matters, and compliance laws.

20. 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. The courts should provide training for such topics that are relevant to the subject matter that they handle, administrative matters, and compliance laws.

21. 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. I always look for a variety of credentials in my hiring practices.

22. Is the criminal justice system systemically racist?

Response: I do not have a basis under which to answer whether an entire criminal justice system is racist.

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

Response: If a case came before me where an individual challenged an employment decision related to a political appointment, I would carefully review the facts of the case, and the relevant precedent. As a judicial nominee, I cannot respond as to whether such considerations are constitutional.

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

Response: I do not have an opinion as to this comment. This is a decision to be left to policymakers.

25. 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 there is an individual constitutional right to keep and bear arms in case of confrontation. This is a personal civil right.

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

Response: I am not aware of any Supreme Court or District of Columbia Circuit precedent holding that the right to own a firearm receives less protection than any other right listed in the Constitution.

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

Response: Please see my response to Question 26.

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

Response: Generally speaking, no. Article II of the Constitution, the Take Care Clause, requires that the President ensure that laws are faithfully executed. Therefore, generally speaking, if the law imposes a mandatory duty, the President should not override that duty.

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

Response: The Executive Branch has the authority and discretion as to who, when, and how to prosecute individual cases.

In my courtroom, my experience has been that criminal cases come through an indictment or information, there is prosecutorial discretion as to seeking indictments from the grand jury and later prosecuting any of the charges in the indictment, whether by guilty plea or trial. The prosecutor also has the discretion as to the dismissal of charges.

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

Response: No. The Supreme Court has upheld the death penalty. *Gregg v. Georgia*, 428 U.S. 153 (1976); *McCleskey v. Kemp*, 481 U.S. 279 (1987). Congress and the states have the authority to prescribe the death penalty for capital offenses.

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

Response: During the pandemic, the Centers for Disease Control (CDC) imposed a nationwide moratorium on evictions. The Alabama Association of Realtors and other plaintiffs obtained a judgment from the United States District Court for the District of Columbia vacating an eviction moratorium on the ground that it was unlawful. Pending appeal, the district court stayed its judgment. Thereafter, the Supreme Court vacated the stay rendering the judgment unenforceable on the basis that the statute on which the CDC relied does not give it the broad sweeping authority it claims.

Senator Josh Hawley
Questions for the Record

J. Michelle Childs
Nominee, U.S. Court of Appeals for the District of Columbia Circuit

1. **Judge Ketanji Brown Jackson, who has been nominated to the Supreme Court, has refused to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether you have used them in the past to increase the sentence you imposed on a child pornography offender. Please provide citations:**

   Response: I refer to the Sentencing Guidelines when sentencing all defendants. I have applied each of these enhancements in various cases.

   a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years.**

      Response: I applied this enhancement in the following matters:

      United States v. Kolodzy, Crim. No. 7:11-cr-02357-JMC-1 (D.S.C.);
      United States v. Mitchell, Crim. No. 3:14-cr-00561-JMC-1 (D.S.C.);
      United States v. Holland, Crim. No. 0:15-cr-00666-JMC-1 (D.S.C.);
      United States v. Rogers, Crim. No. 1:16-cr-00088-JMC-1 (D.S.C.); and
      United States v. Martin, Crim. No. 3:17-cr-01025-JMC-1 (D.S.C.).

   b. **The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence.**

      Response: I applied this enhancement in *United States v. Martin*, Crim. No. 3:17-cr-01025-JMC-1 (D.S.C.).

   c. **The enhancement for offenses involving the use of a computer.**

      Response: I applied this enhancement in the following matters:

      United States v. Kolodzy, Crim. No. 7:11-cr-02357-JMC-1 (D.S.C.);
      United States v. Arthur, Crim. No. 1:14-cr-00431-JMC-1 (D.S.C.);
      United States v. Mitchell, Crim. No. 3:14-cr-00561-JMC-1 (D.S.C.);
      United States v. Holland, Crim. No. 0:15-cr-00666-JMC-1 (D.S.C.);
      United States v. Carter, Crim. No. 3:17-cr-00351-JMC-1 (D.S.C.);
      United States v. Martin, Crim. No. 3:17-cr-01025-JMC-1 (D.S.C.);
      United States v. Cuyler, Crim. No. 3:18-cr-00308-JMC-1 (D.S.C.);

United States v. Woodard, Crim. No. 3:18-cr-00308-JMC-2 (D.S.C.); and *United States v. Karnes*, Crim. No. 3:19-cr-00476-JMC-1 (D.S.C.).

d. The enhancements for the number of images involved.

Response: I applied this enhancement in the following matters:

United States v. Arthur, Crim. No. 1:14-cr-00431-JMC-1 (D.S.C.); *United States v. Holland*, Crim. No. 0:15-cr-00666-JMC-1 (D.S.C.); and *United States v. Martin*, Crim. No. 3:17-cr-01025-JMC-1 (D.S.C.).

2. In a 2018 interview for a podcast, you said, "There is really very little in the law that is clean cut, and particularly constitutional law and federal statutes." How would you approach a case of first impression where you think the law is not "clean cut"?

Response: I do not recall making such a statement during a podcast interview. In a case of first impression where the law is not clear, I would look to Supreme Court and relevant circuit precedent for guidance on the appropriate doctrinal method of interpretation and analysis to be used and would follow such guidance.

3. Do you agree with the Supreme Court's statement that "[t]he Constitution allows capital punishment[?] In fact, death was the standard penalty for all serious crimes at the time of the founding"?

Response: The statement made in *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019), is precedent of the United States Supreme Court. I would faithfully apply the precedent in *Bucklew*.

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

a. Do you agree with that philosophy?

Response: I am not aware of the context of Justice Marshall's statements. As a United States District Judge, I have not applied this philosophy.

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

Response: The judicial oath requires the promise to "administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . discharge and perform all the duties incumbent . . . under the Constitution and laws of the United States." 28 U.S.C. § 453. As a United States District

Judge for the District of South Carolina, my record, based on more than 5,000 cases I have heard, is that I faithfully apply Supreme Court and Fourth Circuit precedent to the facts of the case before me.

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

Response: "*Pullman* abstention 'holds that when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question.'" *John Doe v. Metro. Police Dep't of D.C.*, 445 F.3d 460, 468 n.18 (D.C. Cir. 2006) (quoting *JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1124 (D.C. Cir. 2004)).

"*Younger* abstention is called for when three conditions are satisfied: 'first, ... there are ongoing state proceedings that are judicial in nature; second, the state proceedings must implicate important state interests; third, the proceedings must afford an adequate opportunity in which to raise the federal claims.'" *Eisenberg v. W. Va. Office of Disciplinary Counsel, "OLDC"*, 856 F. App'x 314, 315 (D.C. Cir. 2021) (quoting *Hoai v. Sun Ref. & Mktg. Co.*, 866 F.2d 1515, 1518–19 (D.C. Cir. 1989)).

"*Burford* abstention—[is] appropriate where there have been presented 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.'" *Silverman v. Barry*, 727 F.2d 1121, 1123 n.4 (D.C. Cir. 1984) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814–15 (1976)).

Thibodaux abstention is applicable to cases wherein the issues are "'intimately involved with [the States'] sovereign prerogative,' the proper adjudication of which might be impaired by unsettled questions of state law." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996) (quoting *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959)).

Colorado River abstention "allows a district court to abstain 'due to the presence of a concurrent state proceeding.'" *Sheptock v. Fenty*, 707 F.3d 326, 332 (D.C. Cir. 2013) (quoting *Colo. River Water Conservation Dist.*, 424 U.S. at 818). The Court balances important factors to include "which court 'first assum[ed] jurisdiction over property' involved in the case; 'the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was

obtained by the concurrent forums.'" *Id.* (quoting *Colo. River Water Conservation Dist.*, 424 U.S. at 818).

Under the ecclesiastical abstention doctrine, a civil court must accept as binding the decisions of a religious organization regarding the governance and discipline of its members. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724–25 (1976) (holding that civil courts could not review a church's disciplinary decision regarding one of its members).

6. **Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?**

   Response: No.

   a. **If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.**

7. **What role should the original public meaning of the Constitution's text play in the courts' interpretation of its provisions?**

   Response: The original public meaning plays an important role of being the starting point of interpretation of the Constitution. If the original public meaning of the Constitution were clear, it would resolve the issue. I would also look to Supreme Court precedent for guidance on the doctrinal method of interpretation and analysis to be used and would follow such guidance. As a current United States District Judge for the District of South Carolina, I apply Supreme Court and Fourth Circuit precedent to the cases before me. In this regard, I apply the original public meaning of the Constitution when Supreme Court and Fourth Circuit precedent requires me to apply it. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

   Response: As a United States District Judge for the District of South Carolina, when I am confronted with a question of statutory interpretation, I first apply any binding Supreme Court or Fourth Circuit precedent regarding the meaning of a specific provision. In a case of first impression, I would begin with the text of the statute, and, if the text was clear, my inquiry would end. If the text of the statute was ambiguous, I would then look to other factors, such as principles of statutory construction or persuasive authority from other circuits or district courts. Finally, if the statute remained ambiguous, I would look to legislative history, as guided by the Supreme Court's precedent. *See, e.g., Milner v. Dep't of the Navy,* 562 U.S. 562, 572

(2011); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508–09, 527 (1989). In the same vein, where the text of the underlying statute is unambiguous, legislative history should be disregarded. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006). The Supreme Court has held that of the different types of legislative history, committee reports may be considered more authoritative sources because they "represent the considered and collective judgment of those Congressmen involved in drafting and studying the proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: The Supreme Court has observed that committee reports may be more probative because they contain the collective and considered understanding of particular members of Congress. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (citations omitted).

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

Response: I do not think it is appropriate to consult foreign law to interpret the provisions of the United States Constitution.

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

Response: A petitioner must demonstrate that an execution protocol presents a "substantial risk of serious harm," and he must identify an alternative method of execution that will significantly reduce the "risk of serious pain" and that is "feasible" and "readily implemented." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)); *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1129 (2019) (confirming that "anyone bringing a method of execution claim alleging the infliction of unconstitutionally cruel pain must meet the Baze-Glossip test.").

10. Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?

Response: Yes.

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

Response: No.

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

Response: I do not have any doubt in my ability to fairly and objectively consider issues regarding the death penalty.

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

Response: Laws that burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). A law is not neutral when "the object of [the] law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. A law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021).

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

Response: Laws that burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). A law is not neutral when "the object

of [the] law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. A law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021).

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

Response: Precedent of the United States Supreme Court requires a belief to be grounded in the exercise of religion and "not some other motivation." *Holt v. Hobbs*, 574 U.S. 352, 360–61 (2015). Moreover, the Supreme Court has held that when evaluating a Free Exercise challenge, courts should undertake only the "narrow function" of determining whether a religious belief reflects "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

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

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

Response: The Supreme Court concluded that "on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms," *Heller*, 554 U.S. at 595, and "to possess and carry weapons in case of confrontation." *Id.* at 592. (2008).

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

Response: As a United States District Judge for the District of South Carolina, I have not issued any decisions expressly adjudicating a claim under the Second Amendment or analogous state law.

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

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

Response: As a United States District Judge, I have not researched Justice Holmes' dissenting opinion sufficiently to feel comfortable opining about its meaning or whether I agree with it. However, I am aware that legal scholars generalize that Justice Holmes meant that the Constitution does not embody the economic principles espoused by intellectuals like Spencer.

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

Response: *Lochner* is no longer good law. Subsequent Supreme Court precedents like *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), are now controlling. Therefore, I would not apply *Lochner* in a case before me.

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

a. If so, what are they?

Response: As a sitting United States District Judge and judicial nominee for the District of Columbia Circuit Court, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before the court.

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

Response: I commit to faithfully apply all Supreme Court precedent.

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

Response: The Supreme Court has stated that control of "80% to 95% of the service market, with no readily available substitutes, is, [] sufficient to survive summary judgment under the more stringent monopoly standard of § 2" of the Sherman Act. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992).

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

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

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

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

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

Response: The Supreme Court has held that there is no federal common law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). However, federal common law might exist in limited areas, *i.e.*, admiralty or certain controversies between states. *See e.g.*, *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713 (2020).

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

Response: Federal constitutional provisions must be interpreted in accordance with Supreme Court precedent and precedent from the relevant circuit court jurisdiction. When interpreting a state constitutional provision, a federal court must follow state interpretations of that provision. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

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

Response: Please see my response to Question 21.

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

Response: Generally speaking, yes. The United States Constitution states that it, "and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be 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." U.S. Const. art. VI, cl. 2. Notwithstanding protections provided by specific state provisions, states are bound by the protections granted by the Constitution.

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

Response: As a sitting judge and judicial nominee for the District of Columbia Circuit

Court, it is not appropriate for me to comment on the reasoning of any precedent or issues that might come before the court. I would be bound to faithfully and fully apply Supreme Court precedent.

Even offering an opinion on those cases that are not likely to be revisited by the Supreme Court could give a preconceived notion about my personal views on certain issues, which are not relevant to my decision making. Nevertheless, I will state that *Brown v. Board of Education* was correctly decided.

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

Response: Yes, but injunctions are generally considered to be drastic and extraordinary remedies. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

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

Response: Rule 65 of the Federal Rules of Civil Procedure.

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

Response: As a United States District Judge, I have never been presented with circumstances justifying issuance of a nationwide injunction. As a sitting United States District Judge and judicial nominee for the District of Columbia Circuit Court, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before the court such as what circumstances would lead to issuance of a nationwide injunction.

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

Response: As a United States District Judge, I have never been presented with circumstances justifying issuance of a nationwide injunction. As a sitting United States District Judge and judicial nominee for the District of Columbia Circuit Court, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before the court such as what circumstances would lead to issuance of a nationwide injunction.

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

Response: The federal government provides a national government, but it has limited power–only those powers which are granted to it by the Constitution, expressly or necessarily by implication. Having shared power with the states allows states to enact laws to protect individual rights. State laws may provide greater protections than the Constitution, but all states are bound by the Constitution. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

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

Response: See Response to Question 5.

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

Response: As a United States District Judge, the availability of damages versus injunctive relief is usually dependent on the claim(s) being presented and/or the harm suffered by the plaintiff. In this regard, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before the court such as what circumstances would lead to an award of damages as opposed to injunctive relief.

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

Response: There are rights deemed fundamental that are protected under the Due Process Clause of the United States Constitution. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the United States Supreme Court reiterated "that 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.'" *Washington*, 521 U.S. at 720–21 (internal citations omitted). The Court further observed that "we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 . . . (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 . . . (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*,

262 U.S. 390 . . . (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 . . . (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 . . . (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 . . . (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 . . . (1952), and to abortion, [*Planned Parenthood of Se. Pa. v.*]*Casey* [505 U.S. 833 (1992)], . . . and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan* [*v. Dir., Mo. Dep't of Health*], 497 U.S., [261,] 278–279 . . . ." *Washington*, 521 U.S. at 721. Subsequent to *Glucksberg*, the Supreme Court has also found a right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999), and the right of same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

29. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. What is your view of the scope of the First Amendment's right to free exercise of religion?

Response: Please see responses to Questions 13 and 14.

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

Response: Yes, I believe these terms are often used interchangeably.

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

Response: Laws that burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). A law is not neutral when "the object of [the] law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. A law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021).

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

Response: Precedent of the United States Supreme Court requires a belief to

be grounded in the exercise of religion and "not some other motivation." *Holt v. Hobbs*, 574 U.S. 352, 360–61 (2015). Moreover, the Supreme Court has held that when evaluating a Free Exercise challenge, courts should undertake only the "narrow function" of determining whether a religious belief reflects "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

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

Response: The Religious Freedom Restoration Act requires that strict scrutiny apply to all federal laws that impose a substantial burden on religious practice, even if the law is a neutral rule of general applicability. 42 U.S.C. § 2000bb-1(a). In such cases, the court applies a strict scrutiny test that requires the government to demonstrate: 1) a compelling governmental interest; and 2) the least restrictive means of furthering that compelling governmental interest. *Id.* § 2000bb-1(b). Neither the government nor the religious adherent decides whether the burden exists on the exercise of religion. Instead, in a case or controversy brought challenging such alleged burden, the court can decide whether a law burdens the exercise of religion. *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 719 (2014). In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), the Supreme Court adopted the "ministerial exception" to laws governing the employment relationship between a religious institution and certain key employees. *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), involved Catholic school teachers who sued their employer schools under the Americans with Disabilities Act and the Age Discrimination in Employment Act. The Court reaffirmed the First Amendment's protection of religious institutions to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine" under the so-called "ministerial exception." *Id.* at 2055.

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

Response: No.

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

a. What do you understand this statement to mean?

Response: I believe that Justice Scalia was stating the principle that a judge should make decisions based on the law and facts of a case. A judge's personal views or preferences about the outcome play no role in her decision-making.

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

Response: No.

a. If yes, please provide appropriate citations.

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

Response: No, I do not utilize any social media platform.

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

Response: As a United States District Judge, I have heard cases brought by parties alleging specific violations of federal laws prohibiting discrimination on the basis of race. I would leave conversations about whether any institution is "systemically racist" to policymakers and others. Any further response to this question would suggest an encroachment on the legislative branch's policy making authority and generally does not fall within the purview of the judicial branch.

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

Response: Yes.

35. How did you handle the situation?

Response: I adhered to my fiduciary duty to act in the best interest of my client.

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

Response: Yes.

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

Response: I am unable to cite to a specific Federalist Paper that has shaped my views of the law.

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

Response: I am unaware of any United States Supreme Court or Court of Appeals for the District of Columbia Circuit precedent definitively responsive to this question. As a sitting United States District Judge and judicial nominee for the District of Columbia Circuit Court, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before the court.

My understanding of current Supreme Court precedent is that in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court analyzed fetal viability and stated that "advances in neonatal care have advanced viability to a point somewhat earlier" than 1973, the year the Court decided *Roe v. Wade*, 410 U.S. 113 (1973). *Casey*, 505 U.S. at 860. The Court further observed that fetal viability might occur even earlier if "fetal respiratory capacity can somehow be enhanced in the future." *Id.* Additionally, the Supreme Court observed that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 851.

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

Response: Yes.

On May 5, 2006, I testified at my confirmation hearing before the South Carolina General Assembly's Judicial Merit Selection Commission to be an At-Large Circuit Court Judge. Copies of the documents I submitted to the Judicial Merit Selection Commission for my election and re-election to the South Carolina Circuit Court in 2006 and 2009 were previously supplied to the Senate as attachments to my Senate Judiciary Questionnaire.

On April 4, 2002, I testified at my confirmation hearing before the South Carolina Senate Committee on Judiciary to be a Commissioner on the South Carolina Workers' Compensation Commission. I am unable to locate those materials.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: After receiving my license to practice law in 1992, as a young associate, I cannot recall whether I assisted in editing a brief for a partner without having my name attached to the brief.

If so, please identify those cases with appropriate citation.

43. Have you ever confessed error to a court?

Response: No, I do not recall ever confessing error to a court.

a. If so, please describe the circumstances.

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

Response: My understanding of the duty of candor is that I have to provide all information requested by the Senate Judiciary Committee in connection with my nomination to the United States Court of Appeals for the District of Columbia Circuit.

Senator Mike Lee
Questions for the Record
J. Michelle Childs, Nominee to be United States Circuit Judge for the District of Columbia Circuit

1. How would you describe your judicial philosophy?

Response: In my four (4) years as a state trial judge and twelve (12) years as a federal trial judge, I have approached my cases with a rigid methodology that has resulted in a low reversal rate. For example, in the over 5,000 cases I have handled as a District Court Judge, I have always approached each case mindful that all parties should be afforded equal access to the courts, that all matters should be adjudicated fairly and impartially, and that it is my duty and responsibility to ensure equal justice under the law. I constrain myself to the limits of judicial review to cases or controversies presented to me and the limited jurisdiction of the court as to the types of matters to be heard. I decide each case on its own merits based on the record and the arguments before me. After consideration of the parties' oral and written presentations, I perform independent and thorough research and thereafter issue a well-reasoned and understandable decision based on the relevant precedents.

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

Response: As a United States District Judge for the District of South Carolina, when I am confronted with a question of statutory interpretation, I first apply any binding Supreme Court or Fourth Circuit precedent regarding the meaning of a specific provision. In a case of first impression, I would begin with the text of the statute, and, if the text was clear, my inquiry would end. If the text of the statute was ambiguous, I would then look to other factors, such as principles of statutory construction or persuasive authority from other circuits or district courts. Finally, if the statute remained ambiguous, I would look to legislative history, as guided by the Supreme Court's precedent. *See, e.g., Milner v. Dep't of the Navy,* 562 U.S. 562, 572 (2011); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508–09, 527 (1989). In the same vein, where the text of the underlying statute is unambiguous, legislative history should be disregarded. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006). The Supreme Court has held that of the different types of legislative history, committee reports may be considered more authoritative sources because they "represent the considered and collective judgment of those Congressmen involved in drafting and studying the proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: As a current United States District Judge for the District of South Carolina, I apply Supreme Court and Fourth Circuit precedent to the cases before me. If the Supreme Court or Fourth Circuit had already interpreted the provision at issue, I would follow their interpretation. For example, if the case came before me involving the Second Amendment, I would look to the original public meaning of the Constitution, as well as the binding precedent of those courts.

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

Response: As a current United States District Judge for the District of South Carolina, I apply Supreme Court and Fourth Circuit precedent to the cases before me. In this regard, I apply the original public meaning of the Constitution when Supreme Court and Fourth Circuit precedent requires me to apply it. *See e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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: Plain meaning generally refers to the public understanding of the relevant language at the time of enactment. *See, e.g.*, *Bostock v. Clayton Cnty., Ga.*, 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.").

6. What are the constitutional requirements for standing?

Response: In order to establish Article III standing, "a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) (citation and internal quotation marks omitted).

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

Response: Yes. The United States Constitution grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8. The Supreme Court has interpreted the Necessary and Proper Clause as granting Congress implied powers considered necessary to implement its enumerated powers. *See McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

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

Response: As a United States District Judge for the District of South Carolina, my evaluation would focus on Supreme Court and Fourth Circuit analytical methods and precedent addressing whether the law is within the scope of Congress's powers. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) ("[T]he 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948))). I would also consider whether the law is inconsistent with any other provisions of the Constitution or binding precedent.

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

Response: Yes. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the United States Supreme Court stated "that 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.'" *Washington*, 521 U.S. at 720–21 (internal citations omitted). The Court further observed that "we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 . . . (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 . . . (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 . . . (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 . . . (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 . . . (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 . . . (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 . . . (1952), and to abortion, [*Planned Parenthood of Se. Pa. v.*] *Casey* [505 U.S. 833

(1992)], . . . and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan* [*v. Dir., Mo. Dep't of Health*], 497 U.S., [261,] 278–279 . . . ." *Washington*, 521 U.S. at 721. Subsequent to *Glucksberg*, the Supreme Court has also found a right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999), and the right of same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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 current United States District Judge for the District of South Carolina, I apply Supreme Court and Fourth Circuit precedent regarding due process protections. I further note that *Lochner* is no longer good law. Subsequent Supreme Court precedents like *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), are now controlling. Therefore, I would not apply *Lochner* in a case before me.

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

Response: Any limit to Congress's power under the Commerce Clause requires a determination that the act is unrelated to interstate and foreign commerce. In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court articulated a three-part test for the scope of Congress' power to regulate interstate commerce, holding that Congress "can regulate the use of the channels of interstate commerce," "the instrumentalities of interstate commerce," and "those activities having a substantial relation to interstate commerce." *Id*. at 558-59. The Court reaffirmed the three-part test while further limiting the commerce power in *United States v. Morrison*, 529 U.S. 598 (2000), stating that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only when that activity is economic in nature" (though the Court refrained from "adopt[ing] a categorical rule against aggregating the effects of any noneconomic activity" in this context). *Id*. at 613. Finally, in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court held that Congress may not regulate economic inactivity, by, for example, "compel[ling] individuals to *become* active in commerce by purchasing a product," through the Commerce Clause "on the ground that their failure to do so affects interstate commerce." *Id*. at 551 (emphasis in original).

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

Response: Suspect classes typically involve immutable characteristics determined by the accident of birth, such as race, national origin, and sex. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

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

Response: Separation of powers is a bedrock principle of the United States Constitution. It prevents the arbitrary exercise of power and requires each branch to resist encroachment on the other.

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: Any decision I issue should be based on the United States Constitution and precedent of the respective jurisdiction.

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

Response: Empathy should not play any role in a judge's consideration of a case.

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

Response: A judge should avoid either outcome.

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: As a sitting United States District Judge and judicial nominee for the District of Columbia Circuit Court, I am unaware of what accounts for this change and have not formed any opinions about this trend or similar trends in the Supreme Court's practices.

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

Response: Judicial Review is "[a] court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional." *Judicial review*, Black's Law Dictionary (10th ed. 2014). Judicial supremacy is "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." *Judicial supremacy*, Black's Law Dictionary (10th ed. 2014).

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 should respect duly rendered judicial decisions and enact laws that are consistent with the United States Constitution and the Supreme Court's interpretation of it.

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: Federalist 78 addresses the United States Constitution's case or controversy limitation on the judiciary. Judges do not make the law or enforce the law; their role is limited to interpreting the law in the context of the facts and evidence before them in a given case.

22. 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: The lower court's decision should be based on the United States Constitution, Supreme Court precedent, and precedent of the respective jurisdiction.

Any decision to extend or limit the precedent would presumably be subject to appellate review.

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: These demographics should not play a role in the judge's sentencing decision. Under 18 U.S.C. § 3553, judges should consider the following sentencing factors in individual cases:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for—(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—(i) issued by the Sentencing Commission . . . subject to any amendments made to such guidelines by act of Congress . . . and (ii) that . . . are in effect on the date the defendant is sentenced; . . . .

18 U.S.C. § 3553(a). Moreover, the United States Sentencing Guidelines expressly prohibit consideration of "race, sex, national origin, creed, religion, and socio-economic status" in determining a sentence. *See* U.S.S.G. § 5H1.10.

24. Is it appropriate for juries to consider any of these identities when they decide the outcome of a case?

Response: No.

25. In April 2021 you were a panelist at the Federal Judicial Center's Employment Law Workshop for Federal Judges, during which you spoke about implicit bias in the courtroom. In your notes you encouraged judges to "make jurors aware of social categories" in jury instructions. Please explain what you meant by this recommendation.

Response: In making this statement, I relied on research conducted to prepare for the workshop which recommended strategies to encourage awareness of potential unconscious biases to reduce the impact of such biases on jury deliberations.

26. During this same event you recommended that jury instructions "actively discourage colorblindness and promote jurors' discussion of social categories." Please explain this statement.

Response: In making this statement, I relied on research conducted to prepare for the workshop which recommended strategies to encourage awareness of potential unconscious biases to reduce the impact of such biases on jury deliberations.

27. Your notes for this event also say "judges should encourage discourse on implicit bias in their instructions to prevent attitudes of colorblindness that may lead to further implicit bias." How does an attitude of colorblindness lead to implicit bias?

Response: Research has shown that "exposure to the color-blind perspective" generates greater implicit bias. J.A. Richeson & R.J. Nussbaum, *The impact of multiculturalism versus color-blindness on racial bias*, 40 J. Experimental Soc. Psych. 417 (2004). Stated differently, "believing oneself to be objective is a prime threat to objectivity." Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1184 (2012).

28. Why did you recommend including implicit bias material in jury instructions? Isn't it better to resolve these issues during jury selection?

Response: The entire jury process is susceptible to the influence of implicit bias, from the weighing of testimony and other evidence to the culmination of the jury's deliberations in the verdict. *See* Justin D. Levinson et al, *Implicit Bias: A Social Science Overview*, in Enhancing Justice: Reducing Bias 43, 55–57 (Sarah E. Redfield ed., 2017). As a United States District Judge, I also address implicit bias during jury selection as part of my introductory comments to the jury panel.

29. How would you respond to the argument that including implicit bias material in jury instructions could distract jurors from the facts and the law in the case they are being asked to consider?

Response: I would disagree with the argument citing to the plain language of the implicit bias instruction that I use which is as follows:

> Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes

or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of the evidence, reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

30. 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 the Biden Administration's statement listed above. Black's Law Dictionary defines equity as "[f]airness; impartiality; evenhanded dealing." *Equity*, Black's Law Dictionary (10th ed. 2014).

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

Response: Yes. I note that Black's Law Dictionary defines "equity" as "[f]airness; impartiality; evenhanded dealing" and "equality" as "[t]he quality, state, or condition of being equal; esp., likeness in power or political status." *Equity/Equality*, Black's Law Dictionary (10th ed. 2014).

32. 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 Equal Protection Clause states in part that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Although this question references Question 24, the correct reference is to Question 30. Please see my response to Question 30.

33. How do you define "systemic racism?"

Response: As a United States District Judge, I have not researched the concept of systemic racism in a way that would allow me to suggest a definition. I have also not had such a case before me that required me to define this term.

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

Response: Critical race theory is "[a] reform movement within the legal profession,

particularly within academia, whose adherents believe that the legal system has disempowered minorities" and "observe that even if the law is couched in neutral language, it cannot be neutral because those who fashioned it had their own subjective perspectives that, once enshrined in law, have disadvantaged minorities and even perpetuated racism." *Critical race theory*, Black's Law Dictionary (10th ed. 2014).

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

Response: As a United States District Judge, I have not researched the concepts of systemic racism and critical race theory in a way that would allow me to distinguish between the two (2) concepts. I have also not had such a case before me that required me to define this term.

36. As the director for the ACLU of Illinois, you reviewed a report in the Human Rights Watch which took issue with an Illinois law requiring parental notice of abortion. When making a life-altering medical decision about her life and the life of her unborn child, should the default position be that a child counsel with her parents before making that decision?

Response: I cannot respond to this inquiry because I was never director for the ACLU of Illinois.

37. The Human Rights Watch report notes that the ACLU of Illinois, of which you were the legal director, helped children bypass their parents through the "Judicial Bypass Coordination project." Will you please tell us what your role was in this project?

Response: I cannot respond to this inquiry because I was never director for the ACLU of Illinois.

Senator Ben Sasse
Questions for the Record for Julianna Michelle Childs
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
April 27, 2022

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

   Response: No.

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

   Response: In my four (4) years as a state trial judge and twelve (12) years as a federal trial judge, I have approached my cases with a rigid methodology that has resulted in a low reversal rate. For example, in the over 5,000 cases I have handled as a District Court Judge, I have always approached each case mindful that all parties should be afforded equal access to the courts, that all matters should be adjudicated fairly and impartially, and that it is my duty and responsibility to ensure equal justice under the law. I constrain myself to the limits of judicial review to cases or controversies presented to me and the limited jurisdiction of the court as to the types of matters to be heard. I decide each case on its own merits based on the record and the arguments before me. After consideration of the parties' oral and written presentations, I perform independent and thorough research and thereafter issue a well-reasoned and understandable decision based on the relevant precedents.

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

   Response: I do not characterize myself by any particular label because, as a district court judge, and a circuit court judicial nominee, I am limited by and would continue to follow the methods of interpretation directed by the Supreme Court and the relevant circuit courts.

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

   Response: Please see my response to Question 3.

5. **Do you believe the Constitution is a "living" document whose precise meaning can change over time? Why or why not?**

   Response: No. I believe the Constitution is an enduring document whose meaning can be adapted to present day circumstances as necessary.

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

   Response: I have studied many written opinions of the Supreme Court as required to adjudicate the cases and controversies before me, but I am unable to say that there is a particular Supreme Court Justice or Justices that I admire more than any other Justice or Justices. Nevertheless, I faithfully abide by the Supreme Court's precedents and follow the majority opinion of any of the Justices.

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

   Response: Precedents are important because they allow courts to provide guidance, uniformity, predictability, and stability to parties, future litigants, and society as to how to govern themselves, and build public confidence in the court system. Unless there is a legitimate reason to overturn precedent based on factors articulated by the Supreme Court and the appropriate appellate court, a judge should follow the law of the circuit doctrine which requires that judges abide by prior decisions of the circuit or a panel thereof unless the panel has withdrawn the opinion or the court en banc has overruled it. *Brewster v. Comm'r*, 607 F.2d 1369, 1373 (D.C. Cir. 1979).

   To overturn precedent, the en banc court must consider such factors as whether there are intervening developments of the law, whether there are conflicts or inconsistencies in prior panel decisions, whether prior decisions that are confusing or rendered obsolete by later decisions, and whether the combined weight of authority from other circuits leads to a different result or incorrect statement of law. *See United States v. Burwell,* 690 F.3d 500, 504 (D.C. Cir. 2012) (quoting *Patterson v. Nuclear Regulatory Comm'n,* 491 U.S. 164, 175 (1989)); *Allegheny Def. Project v. Fed. Energy Regul. Comm'n*, 964 F.3d 1, 18 (D.C. Cir. 2020) (quoting *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc)).

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

   Response: Please see my response to Question 7.

9. **What role should extrinsic factors not included within the text of a statute, especially legislative history and general principles of justice, play in statutory interpretation?**

   Response: When interpreting statutes, I consider the text and structure of the statute and look to Supreme Court and relevant circuit precedent to determine how the statute has been interpreted. If there is no helpful precedent, I look to other circuits for interpretation of analogous statutes or similar text, and apply other interpretive tools, including the

canons of construction. Only if the statute remains ambiguous, I would look to legislative history as appropriate based on Supreme Court guidance. Legislative history is a tool for considering the purpose and meaning of the text of a statute. It should be considered when interpreting ambiguous statutes, as guided by the Supreme Court's precedent. *See, e.g., Milner v. Dep't of the Navy,* 562 U.S. 562, 572 (2011); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508-09, 527 (1989). In the same vein, where the text of the underlying statute is unambiguous, legislative history should be disregarded. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006). The Supreme Court has also held that committee reports may be considered because they "represent the considered and collective judgment of those Congressmen involved in drafting and studying the proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: No. Under 18 U.S.C. § 3553, judges should consider the following sentencing factors in individual cases:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for—(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—(i) issued by the Sentencing Commission . . . subject to any amendments made to such guidelines by act of Congress . . . and (ii) that . . . are in effect on the date the defendant is sentenced; . . . .

18 U.S.C. § 3553(a). Additionally, section 5H1.10 of the Sentencing Guidelines Manual provides that race, sex, national origin, creed, and socio-economic status "are not relevant in the determination of a sentence."

Questions from Senator Thom Tillis
for Julianna Michelle Childs
Nominee to be US Circuit Judge for the
District of Columbia Circuit

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

   Response: Yes.

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

   Response: Judicial activism has been defined as follows: "A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." *Judicial activism*, Black's Law Dictionary (10th ed. 2014). I do not consider judicial activism to be appropriate.

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

   Response: Impartiality is an expectation for a judge. For example, Canon 2 of the Code of Conduct for United States Judges expressly requires a judge to "respect and comply with the law and [] act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

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

   Response: No.

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

   Response: Yes. Judges should abide by all precedent of the United States Supreme Court and the appropriate appellate court even if it leads to an undesirable outcome. If a judge has a concern with a decision, he or she should address the concern respectfully to point out pertinent issues to the appellate court while nonetheless applying binding precedent.

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

   Response: No.

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

Response: I will follow the United States Supreme Court's precedent in *District of Columbia v. Heller*, 554 U.S. 570 (2008), which held there is an individual constitutional right to bear arms. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court incorporated this right against the states by virtue of the Fourteenth Amendment.

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

Response: I would evaluate the aforementioned lawsuit in the context of applicable Supreme Court and District of Columbia Circuit precedent. The Supreme Court has held that one does not lose their constitutional rights in a pandemic. *E.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020).

9. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?

Response: I approach each case based on the record before me, the parties' oral and written presentations, and the applicable law. In *Pearson v. Callahan*, 555 U.S. 223 (2009), the United States Supreme Court stated that "[q]ualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Id.* at 232. In conducting this analysis, the court must decide (1) whether the plaintiff has alleged facts to make out a violation of a constitutional right, and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* If either of these criteria is not satisfied, the official is entitled to qualified immunity.

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

Response: It is not appropriate for me to provide an opinion about the sufficiency of the protections of qualified immunity to officers. As a sitting United States District Judge and judicial nominee to the District of Columbia Circuit, I will faithfully apply the precedents of the Supreme Court and the appropriate circuit court to the issues in such cases.

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

Response: In *Pearson v. Callahan*, 555 U.S. 223 (2009), the United States Supreme Court stated that "[q]ualified immunity is applicable unless the official's conduct violated

a clearly established constitutional right." *Id.* at 232. In conducting this analysis, the court must decide (1) whether the plaintiff has alleged facts to make out a violation of a constitutional right, and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* I will faithfully apply the precedents of the Supreme Court and the appropriate circuit courts to the issues in such cases.

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

a. What experience do you have with copyright law?

Response: As a United States District Judge, I reviewed my docket and determined that I presided over two (2) copyright cases: *Bell v. Manhertz*, 0:21-cv-00227-JMC (D.S.C.) and *Broadcast Music Inc. v. Medlin*, 8:14-cv-00559-JMC (D.S.C.). The parties settled *Bell* and I granted a default judgment to Plaintiff in *Medlin*.

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

Response: I do not recall having had any prior experiences involving the Digital Millennium Copyright Act.

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

Response: I do not recall having had any prior experiences addressing 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: I have addressed the First Amendment and free speech in the following cases:

Hawkins v. S.C. Comm'n on Law. Conduct, No. 3:21-cv-01319-JMC (D.S.C.);
English v. Clarke, No. 3:19-cv-02491-JMC (D.S.C.);
Jones v. Grantham & Props., No. 4:19-cv-00779-JMC (D.S.C.);
Holmes v. Town of Clover, No. 0:17-cv-3194-JMC (D.S.C.);
Billioni v. Bryant, No. 0:14-cv-03060-JMC (D.S.C.);
Smith v. Chapman, No. 0:15-cv-02435-JMC (D.S.C);
Hampton v. Edgerton, No. 4:14-cv-04697-JMC (D.S.C.);
Haas v. S.C. Dep't of Motor Vehicles, No. 6:14-cv-04246-JMC (D.S.C.);
Cahaly v. LaRosa, No. 6:13-cv-00775-JMC (D.S.C.);
Livingston v. Wix, No. 3:13-cv-02695-JMC (D.S.C.);

Free v. Owens, No. 1:12-cv-01492-JMC (D.S.C.);
Glidewell v. City of Greenville, No. 6:09-cv-01932 (D.S.C.);
Redden v. Walgreen, Inc., No. 8:10-cv-02504-JMC (D.S.C.); and
Fant v. Floyd, No. 8:10-cv-00253-JMC (D.S.C.).

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

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

Response: As a United States District Judge for the District of South Carolina, when I am confronted with a question of statutory interpretation, I first apply any binding Supreme Court or Fourth Circuit precedent regarding the meaning of the specific provision. In a case of first impression, I would begin with the text of the statute, and, if the text was clear, my inquiry would end. If the text of the statute was ambiguous, I would then look to other factors, such as principles of statutory construction or persuasive authority from other circuits or district courts. Finally, I would look to legislative history, which should be considered when interpreting ambiguous statutes, as guided by the Supreme Court's precedent. *See, e.g., Milner v. Dep't of the Navy,* 562 U.S. 562, 572 (2011); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508-09, 527 (1989). In the same vein, where the text of the underlying statute is unambiguous, legislative history should be disregarded. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006). The Supreme Court has held that of the different types of legislative history, committee reports may be considered more authoritative sources because they "represent the considered and collective judgment of those Congressmen involved in drafting and studying the proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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: In making a determination about the role of an expert federal agency in the decision-making process of the court, I would look to the enabling statute of the federal agency to determine its jurisdiction and authority, the Administrative Procedure Act for governance of the proceedings for federal administrative agencies, and the relevant deference doctrines (*Chevron, Skidmore,* and *Auer*) when the agency is interpreting a statute or regulation that it administers**.** I would also look to

relevant Supreme Court and D.C. Circuit precedent for its guidance on the issues before the court.

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 nominee to the United States Court of Appeals for the District of Columbia Circuit, a response to this question could result in a violation of Canon 3(A)(6) of the Code of Conduct for United States Judges, which prohibits a judge from commenting "on the merits of a matter pending or impending in any court." Because this is an issue that I might have to address in my pending cases and if I am confirmed, it would be inappropriate for me to opine on the issue.

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

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

Response: As a United States District Judge for the District of South Carolina, I have not had the opportunity to research and interpret laws related to our current digital environment sufficiently to allow me to have a substantive opinion on this issue. When constitutional issues are at stake, I will be guided by my belief that the Constitution is an enduring document and can adapt to new technology. When cases involve statutes such as the DCMA and the Copyright Act, judges must apply the current law as written, until it is changed by Congress.

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: Although technology is ever expanding, judges are always called upon to evaluate these issues. These issues have appeared in the context of the First, Fourth, Fifth, and Fourteenth Amendments. When constitutional issues are at stake, I will be guided by my belief that the Constitution is an enduring document and can adapt to new technology. When cases involve statutes such as the DCMA and the Copyright Act, judges must apply the current law as written, until it is changed by Congress.

15. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants.

I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.

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

Response: Judge shopping and forum shopping are not appropriate and can be problematic if the purpose is to obtain certain results in a case before the court.

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

Response: Yes. United States District Judges should ensure that all litigants have equal access to the courts and equal justice under the law, and that all decisions in the case are made on a fair and impartial basis.

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: No. Canon 2 of the Code of Conduct for United States Judges expressly requires a judge to "respect and comply with the law and [] act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

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

Response: As a United States District Judge for the District of South Carolina, I have not researched this issue sufficiently to allow me to have a substantive opinion. But I would reiterate that judge shopping and forum shopping are not appropriate and can be problematic if the purpose is to obtain certain results in a case before the court.

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

Response: As a United States District Judge for the District of South Carolina, I have not researched this issue sufficiently to allow me to have a substantive opinion. But I would reiterate that judge shopping and forum shopping are not appropriate and can be problematic if the purpose is to obtain certain results in a case before the court.

b. 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? Should such a rule apply only where a single judge sits in a division?

Response: As a United States District Judge for the District of South Carolina, I have not researched this issue sufficiently to allow me to have a substantive opinion.

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

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

Response: As a nominee to the United States Court of Appeals for the District of Columbia Circuit, a response to this question could result in a violation of Canon 3(A)(6) of the Code of Conduct for United States Judges, which prohibits a judge from commenting "on the merits of a matter pending or impending in any court." Because this is an issue that I might have to address if I am confirmed, it would be inappropriate for me to opine on the issue.

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

Response: As a nominee to the United States Court of Appeals for the District of Columbia Circuit, a response to this question could result in a violation of Canon 3(A)(6) of the Code of Conduct for United States Judges, which prohibits a judge from commenting "on the merits of a matter pending or impending in any court." Because this is an issue that I might have to address if I am confirmed, it would be inappropriate for me to opine on the issue.