Senator Lindsey Graham, Ranking Member
Questions for the Record
Ms. Susan Kim DeClercq
Nominee to be United States District Judge for the Eastern District of Michigan

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

   Response: I am not familiar with the context of this statement, but I disagree with the statement. A judge must always follow the law and precedent when interpreting the Constitution, regardless of the judge's personal values.

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

   Response: I am not familiar with the context of this statement, but with due respect to Judge Reinhardt, I disagree with this approach. If I were confirmed as a district judge, I would faithfully follow Supreme Court and Sixth Circuit precedent in all cases.

3. **Please define the term "living constitution."**

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

4. **Please describe your *criminal* law experience, specifically:**
   a. **How many jury trials have you prosecuted during the course of your career?**

      Response: I have been a lawyer for 23 years, primarily as a civil litigator handling both defensive and affirmative cases, and now work as in-house counsel, so I have not handled any criminal jury trials.

   b. **How many bench trials?**

      Response: I have been a lawyer for 23 years, primarily as a civil litigator handling both defensive and affirmative cases, and now work as in-house counsel, so I have not handled any criminal bench trials.

5. **Please describe your *civil* law experience as an AUSA, specifically:**
   a. **How many jury trials have you prosecuted during the course of your career?**

Response: Through my work as an AUSA for 18 years, as well as in private practice at Skadden Arps and now at Ford Motor Co., I have handled hundreds of cases at virtually every stage of litigation, from conducting pre-suit investigations to engaging in hard fought discovery, two bench trials to judgment, and post judgment appellate work. I've represented both plaintiffs and defendants. I've briefed and argued dozens of motions. I've taken dozens of depositions, both expert and fact, and conducted hundreds of witness interviews. I've also handled dozens of settlement conferences, mediations, and less formal negotiations.

b. **How many bench trials?**

Response: Please see my response to Question 5(a).

c. **Is that number typical for your district and/or representative of the *civil* AUSA experience, generally?**

Response: Yes, civil trials are not common.

6. **When did the Eastern District of Michigan establish its Civil Rights Unit? Please provide a list of examples of the types of affirmative cases it prosecuted.**

Response: The Civil Rights Unit was established in 2010. Here is a list of cases that reflect the types of affirmative cases it prosecuted:

- *In re: Learning Care Group* - Americans with Disabilities Act (Title III)
- *United States v. Michigan Department of Corrections* – Employment (Title VII)
- *United States v. City of Detroit* – Law Enforcement Misconduct (34 U.S.C. §12601)
- *United States v. City of Troy* – Religious Land Use and Institutionalized Persons Act
- *In re: Hartland Consolidated Schools* – Racial Harassment (Title IV)
- *United States v Tel-Clinton Trailer Courts, Inc*. – Fair Housing Act (familial status discrimination)
- *Baetz v. City of Highland Park* – Uniformed Services Employment and Re-employment Act
- *United States v. City of Eastpoint* – Voting Rights Act
- *In re: Wayne County Jail* – Civil Rights of Institutionalized Persons Act
- *In re: Michigan Department of Health and Human Services* – Americans with Disabilities Act (*Olmstead*)

a. **How many of those cases were you involved in as the lead counsel?**

Response: Of the cases listed, I was lead counsel in five cases. I was lead counsel in many other cases brought by the Civil Rights Unit that are not listed as well.

b. **How many of those cases were you involved in as the co-counsel?**

Response: Of the cases listed, I was co-counsel in two cases. I was co-counsel in many other cases brought by the Civil Rights Unit that are not listed.

c. **How many of those types of cases proceeded to trial?**

Response: Of the cases listed, none of them proceeded to trial.

7. **In 2022 you authored a chapter in the Department of Justice's Journal of Federal Law and Practice, entitled "Friends of the Court: Amicus Briefs and Statements of Interest in Civil Rights Cases." You noted that DOJ statements of interest are a "powerful tool" and an "effective mechanism for the Department to influence the development of federal civil rights laws across the country." Do you think the Department of Justice filing statements of interest on controversial topics such as gender identity in schools builds trust in the impartiality of the Department of Justice? Please explain why or why not.**

Response: The Department of Justice is an advocate and its client is the United States. It files statements of interest on a wide range of cases on a wide range of legal issues to advance the interest of its client, the United States.

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

Response: The Constitution is an enduring document that sets forth enduring principles that can be applied to different circumstances as society changes, but the principles themselves are generally fixed. *See New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

Response: A "fact" is evidence that is admissible under the federal rules of procedure and federal rules of evidence. Courts consider Supreme Court and circuit precedent to determine whether something is a question of fact or a question of law.

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

Response: Genuine disagreement over the quality of an opinion can be done in a focused and respectful manner and such disagreements or criticism would ordinarily be protected by the First Amendment. In contrast, when the discourse strays outside of the merits of the opinion, such as to personal attributes of the judge, it seems to be more than "mere criticism." Moreover 18 U.S.C. §1507 prohibits certain conduct that could be considered an "attack" in the way contemplated by this question. According to that statute, "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both." *Id*.

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

Response: To the extent I have a personal opinion on sentencing, it is irrelevant. What matters is the legislature's pronouncements on sentencing. Congress has set forth the factors that a judge must consider when sentencing a defendant in 18 U.S.C. §3553, which include, (A) "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…." In enacting §3553, Congress did not direct courts to favor one factor over another. In addition, the sentencing guidelines, although not mandatory, set forth a very specific structure by which to analyze the individual facts relevant to sentencing decisions. I would apply the relevant factors in §3553, look to the guidelines, and apply any binding Supreme Court and Sixth Cir precedent to craft a sentence that is "sufficient, but not greater than necessary" as directed by Congress in §3553(a).

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

Response: Having never been a judge I have not had an opportunity to put my judicial philosophy into effect. I can only speak to my experience as a lawyer, to the judges before whom I have appeared, and to the approach that I would take if I were fortunate enough to be confirmed. To that end, I would approach each case with an open mind, and will listen to the facts and the arguments with no preconceived notions. I would also research the applicable law, I will faithfully apply all Supreme Court and Sixth Circuit precedent, I will treat lawyers and parties fairly, and I will be fair and even handed to the

administration of justice. I am not aware of any Supreme Court decision that is a typical example of this.

13. **Please identify a Sixth Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.**

    Response: Having never been a judge I have not had an opportunity to put my judicial philosophy into effect. I can only speak to my experience as a lawyer, to the judges before whom I have appeared, and to the approach that I would take if I were fortunate enough to be confirmed. To that end, I would approach each case with an open mind, and will listen to the facts and the arguments with no preconceived notions. I would also research the applicable law, I will faithfully apply all Supreme Court and Sixth Circuit precedent, I will treat lawyers and parties fairly, and I will be fair and even handed to the administration of justice. I am not aware of any Sixth Circuit decision that is a typical example of this.

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

    Response: 18 U.S.C. § 1507 states the following: "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both."

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

    Response: In *Cox v. Louisiana*, 379 U.S. 559 (1965), the Supreme Court upheld the constitutionality of a state law modeled on 18 U.S.C. §1507.

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

    Response: In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), the Supreme Court held that speech is not protected under the First Amendment when "by their very utterance inflict injury or tend to incite an immediate breach of the peace" by listeners.

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

Response: In *Virginia v. Black,* 538 U.S. 343, 359 (2003), the Supreme Court held that a statement is not protected speech 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."

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

    a. **Was *Brown v. Board of Education* correctly decided?**
    b. **Was *Loving v. Virginia* correctly decided?**
    c. **Was *Griswold v. Connecticut* correctly decided?**
    d. **Was *Roe v. Wade* correctly decided?**
    e. **Was *Planned Parenthood v. Casey* correctly decided?**
    f. **Was *Gonzales v. Carhart* correctly decided?**
    g. **Was *District of Columbia v. Heller* correctly decided?**
    h. **Was *McDonald v. City of Chicago* correctly decided?**
    i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
    j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**
    k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

    Response to all subparts: As a judicial nominee, it is not appropriate for me to give my opinion about whether any specific Supreme Court case was correctly decided. However, because they involve issues that are so foundational to our legal system that they are unlikely to be relitigated, I believe that both *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided. In addition, I recognize that *Roe v. Wade* and *Planned Parenthood v. Casey* were overruled by the decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

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

    Response: In *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), the Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S. Ct. 2111 (2022), the Supreme Court held, "In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2126 (citation omitted).

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

Response: As a judicial nominee, it is inappropriate for me to opine on a law or regulation that I either support or oppose as a matter of policy because such a law or regulation could come before me if I am fortunate enough to be confirmed as a district judge. If confirmed, I would apply all binding precedent of the Supreme Court and the Sixth Circuit.

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

Response: Please see my answer to Question 20.

22. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**
    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

Response to all subparts: No.

23. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**
    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

Response to all subparts: No.

24. **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?**
    b. **Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.**
    c. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**
    d. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

    Response to all subparts: No.

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

    Response to all subparts: No.

26. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**
    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

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

Response to all subparts: No.

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

Response: The Eastern District of Michigan has a judicial selection commission. Senators Stabenow and Peters engaged a bipartisan committee to screen and interview candidates, and the committee provided the senators with a list of candidates they recommended for the position. On June 14, 2022, I submitted an application, and I interviewed with the committee on July 13, 2022. On August 19, 2022, I interviewed with attorneys from the White House Counsel's Office. Since February 9, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On May 3, 2023, the President announced his intent to nominate me and my nomination was submitted to the Senate.

28. **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.

29. **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.

30. **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.

31. **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.

32. **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.

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

Response: The Eastern District of Michigan has a judicial selection commission. Senators Stabenow and Peters engaged a bipartisan committee to screen and interview candidates, and the committee provided the senators with a list of candidates they recommended for the position. On June 14, 2022, I submitted an application, and I interviewed with the committee on July 13, 2022. On August 19, 2022, I interviewed with attorneys from the White House Counsel's Office. Since February 9, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On May 3, 2023, the President announced his intent to nominate me and my nomination was submitted to the Senate.

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

Response: The Office of Legal Policy provided me with these questions on June 15, 2023. I submitted draft responses to the Office of Legal Policy for feedback and finalized my answers for submission.

Senate Judiciary Committee
Nominations Hearing
June 7, 2023
Questions for the Record
Senator Amy Klobuchar

Susan DeClercq, nominee to be U.S. District Court Judge for the Eastern District of Michigan

For eighteen years, you served in the U.S. Attorney's Office for the Eastern District of Michigan. During your tenure as an Assistant U.S. Attorney you handled hundreds of cases, led investigations, supervised other attorneys, and spearheaded community outreach.

- **What are some challenges you faced as a prosecutor that will inform your approach as a judge?**

  Response: I was very fortunate to have served in many different capacities at the U.S. Attorney's Office for the Eastern District of Michigan. There were a number of challenges that I faced in those roles that will inform my approach as a judge, if I were to be confirmed. When I handled civil rights cases, which also involved conducting a great deal of community outreach, I was often interacting with people who were unfamiliar with the legal system, or often had a negative impression of it due to their prior life experience. Although they were not my clients, it was still very important to me to make sure that they understood everything that was going on and why certain things were happening (or not). In this way I hoped to instill in them confidence in the system and comfort in the proceedings. If confirmed as a judge, I would also be very deliberate about making sure all people involved in a case, not just the parties but the victims, witnesses, and even spectators, understand the proceedings and the reasoning behind any decision. In addition, spending years personally conducting investigations has given me a profound appreciation of the importance of scrupulously learning the facts of a case. Like the old adage, "the devil is in the details," I am acutely aware that cases can often turn on the slightest difference in facts and circumstances. Finally, as a manager of the Civil Rights Unit and later the entire Civil Division, I understand the importance of treating people well and having high expectations of them. I would bring this to the management of my personal chambers and the lawyers who appear before me.

Senator Mike Lee
Questions for the Record
Susan DeClercq, Nominee to the United States District Court for the Eastern District of Michigan

1. How would you describe your judicial philosophy?

Response: Having never been a judge I have not had an opportunity to put my judicial philosophy into effect. I can only speak to my experience as a lawyer, to the judges before whom I have appeared, and to the approach that I would take if I were fortunate enough to be confirmed. To that end, I would approach each case with an open mind, and will listen to the facts and the arguments with no preconceived notions. I would also research the applicable law, I will faithfully apply all Supreme Court and Sixth Circuit precedent, I will treat lawyers and parties fairly, and I will be fair and even handed to the administration of justice.

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

Response: I would first look to the plain language of the text of the statute. If it is clear and unambiguous, my analysis would stop there. If not, I would then look to Supreme Court and Sixth Circuit precedent. If there was no binding precedent, I would look at other analogous cases, relevant canons of statutory interpretation, and legislative history only to the extent allowed by Supreme Court precedent. If confirmed as a district judge, I would follow Supreme Court and Sixth Circuit precedent in analyzing and interpreting any federal statute.

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

Response: I would first look to the plain language of the text of the constitutional provision. If it is clear and unambiguous, my analysis would stop there. If not, I would then look to Supreme Court and Sixth Circuit precedent. If there was no binding precedent, I would look at other analogous cases, relevant canons of statutory interpretation, and legislative history only to the extent allowed by Supreme Court precedent. If confirmed as a district judge, I would follow Supreme Court and Sixth Circuit precedent in analyzing and interpreting any constitutional provision.

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

Response: Please see my answer to Question 3. If I am fortunate enough to be confirmed as a district judge, I would follow Supreme Court and Sixth Circuit precedent with respect to the role of text and original meaning of constitutional provisions when interpreting the Constitution. *See e.g., District of Columbia v. Heller,* 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment).

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

Response: Please see my answer to Question 2.

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

Response: "Plain meaning" refers to the understanding of words held by the general public at the time of the statutory or constitutional provision's enactment, that is, the original public meaning for original public understanding. If I am fortunate enough to be confirmed as a district judge, I would follow Supreme Court precedent with respect to the role of text and "plain meaning" of constitutional provisions when interpreting the Constitution. *See e.g., District of Columbia v. Heller,* 554 U.S. 570 (2008); *Bostock v. Clayton Cty*, 140 S. Ct. 1731 (2020).

6. What are the constitutional requirements for standing?

Response: The Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), held that the plaintiff must have "actual or imminent" injury that is "concrete and particularized," there must be a causal connection between the injury and the accused conduct, and it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

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

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

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

Response: Under binding Supreme Court precedent, Congress need not specifically reference a constitutional enumerated power for the Congressional action to be constitutionally sound. *See e.g., Nat'l Federation of Ind. Business v. Sebelius*, 567 U.S. 519, 570 (2012) ("the question of the constitutionality of action taken by Congress does not depend on recitals of the power that it undertakes to exercise.")

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

Response: Yes. The Supreme Court has held that there are rights that are not specifically enumerated in the Constitution. *See Washington v. Glucksberg*, 521 U.S.

702 (1997) In *Glucksberg*, the Supreme Court noted 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.'" *Id*. at 720-21. Such rights include, among others, the right to marry, to have children, and to use contraceptives. *See id.* at 720 (citing rights recognized by the Supreme Court beyond those "protected by the Bill of Rights.")

10. What rights are protected under substantive due process?

Response: Please see my answer 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: In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Supreme Court determined that economic rights in *Lochner v. New York* were overturned. In addition, the right to abortion was overturned in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). If confirmed as a judge, I would follow binding Supreme Court and Sixth Circuit precedent on the issue of substantive due process.

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

Response: In *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), the Supreme Court held that Congress has the authority to regulate (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) "those activities having a substantial relation to interstate commerce." (internal citations omitted.)

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

Response**:** The Supreme Court has identified race, religion, national origin, and alienage as suspect classes. In determining a suspect classification, the Supreme Court takes into consideration whether such individuals have "as a historical matter,…been subjected to discrimination," "exhibit obvious, immutable, or distinguishing characteristics," and are "a minority or politically powerless." *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

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

Response: The framers of the Constitution were deliberate in setting forth separate powers between the legislative, executive, and judicial branches. *See* Constitution,

Art. I - III. The checks and balances that each branch holds on the others is integral "to protect each branch of government from incursion by the others" but also "the structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011).

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

Response: If I were confirmed as a judge and faced with a case where one branch assumed authority not granted it by the text of the Constitution, I would review the Constitutional text and apply any relevant binding precedent from the Supreme Court or the Sixth Circuit. *See e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (holding that executive order exceeded president's authority where that there was no statute or act of Congress that authorized such action, and noting that the Constitution's framework, which sets forth "the President's power to see that the laws are faithfully executed refutes the idea that he is to be lawmaker.")

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

Response: None. Empathy should not play a role in a judge's consideration of a case. Decisions should be guided solely by the law and the facts of the case and by application of any binding precedent.

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

Response: They are both wrong.

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

Response: I do not know what accounts for this change; I would leave that to historians and law professors. If confirmed as a district judge, I will follow the Supreme Court and Sixth Circuit precedent when reviewing federal statutes.

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

Response: According to Black's Law Dictionary (11th ed. 2019), 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." Whereas it defines judicial supremacy as "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." *Id.*

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: Article VI of the constitution requires all elected and judicial officials to swear by oath or affirmation to support the constitution. Further, the Supreme Court has itself held that elected officials are bound to respect duly rendered judicial decisions that interpret the constitution. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

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

Response: It is important for judges to remember that the role of the judiciary is a limited one, confined only to the review of cases and controversies before them.

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

Response: If I were to be confirmed as a district judge, I would faithfully follow applicable Supreme Court and Sixth Circuit precedent, regardless of whether I agreed with the opinion.

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: None. A defendant should be sentenced based on the factors set forth in 18 U.S.C.§ 3553, as guided by the Sentencing Guidelines, not on group identities.

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

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

Response: I am not familiar with this statement. Black's Law Dictionary (11th ed. 2019) defines "equity" as "fairness; impartiality; evenhanded dealing."

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

Response: Black's Law Dictionary (11th ed. 2019) defines "equity" as "fairness; impartiality; evenhanded dealing" and defines "equality" as "The quality, state, or condition of being equal; esp., likeness in power or political status."

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

Response: The 14th Amendment's Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction, the equal protection of the laws." I am not aware of any Supreme Court of Sixth Circuit decision addressing whether the 14th Amendment guarantees "equity" as defined in Question 24.

27. How do you define "systemic racism?"

Response: The online Merriam-Webster dictionary defines "systemic racism" as "the oppression of a racial group to the advantage of another as perpetuated by inequity within interconnected systems (such as political, economic, and social systems)." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/systemic%20racism.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "critical race theory" as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities."

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

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

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

Questions for the Record for Susan Kim DeClercq, nominated to be United States District Judge for the Eastern District of Michigan

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.

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

Response: The Supreme Court has held that there are rights that are not specifically enumerated in the Constitution. *See Washington v. Glucksberg*, 521 U.S. 702 (1997). In *Glucksberg*, the Supreme Court noted 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.'" *Id*. at 720-21. Such rights include, among others, the right to marry, to have children, and to use contraceptives. *See id.* at 720 (citing rights recognized by the Supreme Court beyond those "protected by the Bill of Rights.") If confirmed as a district judge, I would faithfully apply binding Supreme Court and Sixth Circuit precedent to any case involving a right that is not enumerated in the Constitution.

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: Having never been a judge I have not had an opportunity to put my judicial philosophy into effect. I can only speak to my experience as a lawyer, to the judges before whom I have appeared, and to the approach that I would take if I were fortunate enough to be confirmed. To that end, I would approach each case with an open mind, and will listen to the facts and the arguments with no preconceived notions. I would also research the applicable law, I will faithfully apply all Supreme court and Sixth Circuit precedent, I will treat lawyers and parties fairly, and I will be fair and even handed to the administration of justice. I believe that all of the named Justices are similar in this way.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "originalism" as the "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." I would not define myself by any particular label but if confirmed as a district judge, I would follow all Supreme Court and Sixth Circuit precedent concerning interpretative methods.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "living constitution" as the doctrine that "the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." I would not define myself by any particular label but if confirmed as a district judge, I would follow all Supreme Court and Sixth Circuit precedent concerning interpretative methods.

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

Response: If I were to be confirmed as a district judge, I would be bound to follow the interpretive methods established by the Supreme Court and the Sixth Circuit. I would begin my analysis with the text, and look to Supreme Court and Sixth Circuit precedent interpreting analogous provisions, as well as canons of construction.

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: It is relevant only to the extent that it comports with Supreme Court precedent. *See, e.g., Miller v. California*, 413 U.S. 15, 16 (1973) (holding that the test for obscenity should apply "contemporary community standards."); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (noting that an excessive punishment claim is judged the standards "that currently prevail.")

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

Response: The Constitution is an enduring document that sets forth enduring principles that can be applied to different circumstances as society changes, but the principles themselves are generally fixed. *See New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

Response: I recognize that the Supreme Court's ruling in *Dobbs* is established precedent and I would be duty bound to follow it if confirmed.

a. **Was it correctly decided?**

Response: As a judicial nominee, it is not appropriate for me to share any personal opinion on a particular case but I recognize *Dobbs* as binding Supreme Court precedent that I must follow.

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

Response: I recognize that the Supreme Court's ruling in *Bruen* is binding precedent that I must follow.

a. **Was it correctly decided?**

Response: As a judicial nominee, it is not appropriate for me to share any personal opinion on a particular case but I recognize *Bruen* as binding Supreme Court precedent that I must follow.

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

Response: I recognize that the Supreme Court's ruling in *Brown* is binding precedent that I must follow.

a. **Was it correctly decided?**

Response: Yes. As a judicial nominee, it is generally not appropriate for me to share any personal opinion on a particular case. However, because it involves issues that are so foundational to our legal system that they are unlikely to be relitigated, I believe that *Brown v. Board of Education* was correctly decided.

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

Response: Under 18 U.S.C. §3142(e), criminal offenses can give rise to a rebuttable presumption for pretrial detention where a judicial officer finds, among other things, that:

- "the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;
- the offense described [above] was committed while the person was on release pending trial for a Federal, State, or local offense; and
- a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1) of this subsection, whichever is later."

Also, if "there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of 10 years or more is prescribed" or "there is probable cause to believe that the person committed an offense under 18 U.S.C. § 924(c)."

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

Response: Under the Bail Reform Act, pretrial detention is concerned with reasonably assuring the appearance of the person and the safety of any other person and the community. *See* 18 U.S.C. §3142(c).

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

Response: Religious freedom is one of our country's oldest and most cherished rights so generally strict scrutiny is applied to a law that creates a substantial burden on the free exercise of religion. But, if there is a facially neutral state action with general applicability that only incidentally impacts religion, strict scrutiny is not applied. *See Tandon v. Newsom,* 141 S. Ct. 1294 (2021); *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* 138 S. Ct. 1719 (2018); *Burwell v. Hobby Lobby,* 573 U.S. 682 (2014). In addition, the Religious Freedom Restoration Act of 1993 "prohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

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

Response: Please see my answer to Question 13.

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63 (2020), the Supreme Court held that the religious entity-applicants were entitled to a preliminary injunction because they showed that the imposed Covid restrictions were not facially neutral because they treated similar secular activity more favorably and a loss of a First Amendment freedom was an irreparable harm.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), the Supreme Court held that governmental regulations are not facially neutral and generally applicable if they "treat *any* comparable secular activity more favorably than religious exercise." Accordingly, they must satisfy strict scrutiny. Moreover, simply because the regulations may have been withdrawn, the case is not moot because they could be reinstated. *Id*. at 1297.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* 138 S. Ct. 1719 (2018), the Supreme Court held that an order of the Colorado Commission evaluating a cake owner's refusal to make a cake for a same-sex wedding violated the free exercise clause. The Court held that the order was not a neutral state action because members of the Commission had made religiously hostile comments at public meetings.

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

Response: Yes, according to the Supreme Court in *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014), if the beliefs are sincerely held, they are protected even if the belief is not "the command of a particular religious organization."

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

Response: Please see my answer to Question 19.

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

Response: Please see my answer to Question 19.

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

Response: I am not familiar with the "official position of the Catholic Church," but my general understanding is that this is not consistent with it.

20. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses

foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court held that courts should "defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial'" and therefore exempt from employment anti-discrimination laws.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that the law at issue was not a neutral, generally applicable law because it allowed exceptions and did not apply to the general public, so it was subject to strict scrutiny, which it did not meet.

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

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that the state could not withhold otherwise generally available payments to a religious school simply because of its religious nature.

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

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court held that private prayer by a coach during his personal time was protected as religious expression and the school district's concern that such conduct could possibly be an Establishment clause violation is not a compelling state interest.

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

Response: In his concurrence in *Mast v. Fillmore County*, 141 S. Ct. 2430, 2432 (2021), Justice Gorsuch emphasized that courts cannot "rely on 'broadly formulated'" governmental interests, but must "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." He also stressed that it is the government's burden to show both a compelling state interest and that any imposition

on religious exercise is narrowly tailored, so that "if the government can achieve its interests in a manner that does not burden religion, it must do so." (citing *Fulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021)).

25. Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?

Response: 18 U.S.C. §1507 states: "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both." The First Amendment protects the right to peaceably assemble. As a judicial nominee, it would be inappropriate for me express an opinion on an issue or matter that may come before me if I were fortunate enough to be confirmed as a district judge. However, if faced with such a question, I would carefully research Supreme Court and Sixth Circuit precedent, review the records and arguments of parties, and fairly and impartially apply the law to the facts of the case.

26. 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;**

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

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

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

Response to all parts: To the extent that any such trainings would violate Title VII or any other employment related laws, it would not be appropriate for the court to provide such trainings.

27. 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.

28. 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.

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

Response: As a judicial nominee, I feel that it is inappropriate for me to opine on a policy matter or the constitutionality of an issue that could come before me if I am fortunate enough to be confirmed as a district judge. If confirmed, I would carefully research Supreme Court and Sixth Circuit precedent, review the records and arguments of parties, and fairly and impartially apply the law to the facts of the case.

30. Is the criminal justice system systemically racist?

Response: This is a question that is best addressed by social scientists and policymakers. If I am confirmed as a district judge, I would handle each case before me on an individual basis, guided only by legal precedent and the facts of the case.

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

Response: This is a question that is best addressed by the Legislative branch. If I am confirmed as a district judge, I would handle each case before me on an individual basis, guided only by legal precedent and the facts of the case.

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

Response: No.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), the Supreme Court held, looking at the original public meaning, that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court

held that there is an individual right to possess a firearm. The court recognized, however, that the right is not unlimited, and longstanding prohibitions such as possession by felons or mentally ill individuals may be constitutionally permissible. The Supreme Court in *New York State Rifle & Pistol Ass'n v. Bruen,* 142 S. Ct. 2111 (2022) further clarified that "if a firearm regulation is consistent with this Nation's historical tradition" a court may conclude that "the individual's conduct falls outside the Second Amendment[ ]."

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." It further held, in *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) that it is a "fundamental right[ ] necessary to our system of ordered liberty."

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." In *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2156, the Supreme Court specifically noted that "the constitutional right to bear arms in public for self-defense is not a 'second-class right'." I am not aware of any Supreme Court or Sixth Circuit case holding that the Second Amendment right to possess a firearm is less protected that any other individual right specifically enumerated in the Constitution.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." I am not aware of any Supreme Court or Sixth Circuit case holding that the Second Amendment right to possess a firearm is less protected that any other Constitutional right, including right to vote.

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

Response: A president is obligated under Article II of the Constitution to "take Care that the Laws be faithfully executed." Under *United States v. Nixon*, 418 U.S. 683, 693 (1974), the "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."

39. Explain your understanding of what distinguishes an act of mere 'prosecutorial

discretion' from that of a substantive administrative rule change.

Response: The "decision whether or not to prosecute, and what charges to bring," as well as plea negotiation, "rests entirely in [the prosecutor's] discretion." *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). A substantive administrative rule change generally falls within the Administrative Procedure Act.

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

Response: Under current federal law, the death penalty is a lawful punishment in certain circumstances and the Supreme Court has upheld its constitutionality. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *Coker v. Georgia*, 433 U.S. 584 (1977). Congress generally sets penalties for unlawful conduct and no constitutional provision permits a president to overrule duly enacted legislation setting such penalties.

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

Response: During the COVID-19 pandemic, the Directors of the Centers for Disease Control "imposed a nationwide moratorium on evictions of any tenants who live in a county that is experiencing substantial or high levels of COVID-19." *Alabama Ass'n of Realtors v. Dept. of Health and Human Services,* 594 U.S. __, 2021. The District Court for the District of Columbia "vacated the moratorium on that ground that it is unlawful" but stayed the judgment pending appeal. *Id*. The Supreme Court denied the application to vacate stay. The per curium opinion agreed with the lower court's decision that the CDC exceeded its authority when it issued a nationwide moratorium on evictions.

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

Response: As a judicial nominee, it is inappropriate for me to publicly comment on an issue that could come before me if I am fortunate enough to be confirmed as a district judge. If confirmed and faced with such a case, I would follow Supreme Court and Sixth Circuit precent and render a fair and impartial decision.

43. You co-authored an amicus brief arguing for affirmative action in *Grutter v Bollinger*. In 2023, twenty years after the decision, is the use of race as a factor in university admission decisions still appropriate?

Response: Under current Supreme Court precedent, including *Grutter v. Bollinger,* 539 U.S. 306 (2003) and *Fisher v. Univ. of Texas,* 579 U.S. 365 (2016), race can be used as part of an admissions decision by a university only if "the admissions process can withstand strict scrutiny." *Fisher*, 579 U.S. at 376. The university must be able to "demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary…to the

accomplishment of its purpose.'" *Id*. quoting *Fisher I*, 570 U.S. at 309. This issue, however, is currently pending before the Supreme Court in *Students for Fair Admissions v. Harvard*. I would faithfully apply binding Supreme Court and Sixth Circuit precedent on this topic should it come before me if I were confirmed as a district judge.

a. **If yes, when will it become inappropriate?**

Response: Please see my response to Question 43.

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

Response: As a judicial nominee, it is not appropriate for me to comment on the Chief Justice's statement, made in *Parents Involved in Cmty Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). If confirmed as a district judge, I would faithfully follow binding Supreme Court and Sixth Circuit precedent on questions of race discrimination.

Senator John Kennedy
Questions for the Record

Susan DeClercq

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

   Response: Having never been a judge I have not had an opportunity to put my judicial philosophy into effect. I can only speak to my experience as a lawyer, to the judges before whom I have appeared, and to the approach that I would take if I were fortunate enough to be confirmed. To that end, I would approach each case with an open mind, and will listen to the facts and the arguments with no preconceived notions. I would also research the applicable law, I will faithfully apply all Supreme Court and Sixth Circuit precedent, I will treat lawyers and parties fairly, and I will be fair and even handed to the administration of justice.

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

   Response: The Constitution is an enduring document that sets forth enduring principles that can be applied to different circumstances as society changes, but the principles themselves are generally fixed. *See New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

   Response: No. If confirmed as a judge, I would first look to Supreme Court and Sixth Circuit precedent to see if the law's text had been previously addressed. If not, I would determine if the meaning of the test is clear and unambiguous. If it is, my analysis would stop there.

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

   Response: I am not aware of any Supreme Court or Sixth Circuit precedent that instructs consideration of statements made by a president to be part of legislative history.

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

   Response: In *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), the Supreme Court held that a shopping center owner can "restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its

commercial functions." If confirmed as a district judge, I would follow Supreme Court and Sixth Circuit precedent as well as applicable state law to decide an issue like this.

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

   Response: Although not specifically relating to privacy, the Supreme Court has held that due process extends to non-citizens. *See e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

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

   Response: In *United States v. Ramsey*, 431 U.S. 606, 615-17 (1977), the Supreme Court noted the long history of cases holding that border searches "were not subject to the warrant provisions of the Fourth Amendment" that that "searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border."

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

   Response: In *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228, 2261 (2022) the Supreme Court expressly noted that its opinion "is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." I am not aware of any Supreme Court or Sixth Circuit precedent resolving this question.

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

   a. **Do you agree?**

      Response: As a judicial nominee, it is inappropriate for me to comment publicly on an issue that may come before me, if I am fortunate enough to be confirmed as a district judge.

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

      Response: As a judicial nominee, it is inappropriate for me to comment publicly on an issue or matter that may come before me, if I am fortunate enough to be

confirmed as a district judge. However, judges are obligated at all times to follow precedent.

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

Response: No.

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

Response: The Supreme Court in *Crawford v. Marion County Election Board,* 553 U.S 181 (2008) has held that voter identification laws are constitutional. If I am confirmed as a district judge, I will follow binding Supreme Court and Sixth Circuit precedent on this, and all other issues.

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

Response: In *New York State Rifle & Pistol Ass'n v. Bruen,* 142 S. Ct. 2111 (2022), the Supreme Court held that a court must first assess whether "the Second Amendment's plain text covers an individual's conduct. *Id*. at 2126. If so, "the Constitution presumptively protects that conduct" and the government bears the burden of "demonstrating that the regulation is consistent with this nation's historical tradition of firearms regulation." *Id*. To do so, the government must identify a historical regulation that is "relatively similar" to the challenged regulation. *Id.* at 2132. If I am confirmed as a district judge, I will follow binding Supreme Court and Sixth Circuit precedent on this, and all other issues.

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

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

Response: The Supreme Court considers five factors: "the quality of [the prior decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *See Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

b. Is one factor alone ever sufficient?

Response: I am not aware of any Supreme Court decision indicating how many factors are necessary to provide a specific justification for overturning precedent.

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

Response: According to Black's Law Dictionary (11th ed. 2019), 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." Whereas Black's Law Dictionary defines judicial supremacy as "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."

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

Response: Like the rest of the Constitution, the Ninth Amendment sets forth enduring principles that can be applied to different circumstances as society changes, but the principles themselves are generally fixed. *See New York State Rifle & Pistol Ass'n v. Bruen,* 142 S. Ct. 2111 (2022).

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

Response: The Ninth Amendment states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other retained by the people." Constitution, Article IX. In holding that the Second Amendment protects individual rights, Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008) noted that the "Ninth Amendment uses very similar terminology." If I were to be confirmed as a judge, I will follow Supreme Court and Sixth Circuit precedent when interpreting constitutional provisions.

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

Response: The Ninth Amendment should be understood in relation to other amendments since its text makes that clear.

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

Response: In cases like *Heller* and *Bruen*, the Supreme Court has looked to Founding-era history to understand the meaning of the Second Amendment, so such history could be applied to understanding other amendments. If I were to be confirmed as a judge, I will look to Supreme Court and Sixth Circuit precedent on the use of Founding-era history.

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

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

Response: In *Heller*, the Supreme Court stated that "in all six other provisions of the Constitution that mention 'the people' the term unambiguously refers to all members of the political community, not an unspecified subset." The Court also referenced that in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court had previously stated that "'the people' protected by the Fourth Amendment and by the First and Second Amendments" included "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

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

Response: Please see my response to Questions 19(a) and 20.

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

Response: the supreme court has held that "the people" captures non-citizens within the meaning of some amendments. For example, in *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court held that immigrants and their children, although unlawfully present in the United States, are "people" for purposes of the Equal Protection Clause.

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

Response: The Constitution sets forth enduring principles that can be applied to different circumstances as society changes, but the principles themselves are generally fixed. *New York State Rifle & Pistol Ass'n v. Bruen,* 142 S. Ct. 2111 (2022).

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

Response: I am not aware of any Supreme Court or Sixth Circuit precedent interpreting the Privileges or Immunities Clause as a source of unenumerated rights. As a judicial nominee, it is inappropriate for me to make public statements on issues or matters that may come before me if confirmed. If confirmed as a district judge, I will follow Supreme Court and Sixth Circuit precedent when interpreting constitutional provisions.

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

Response: Please see my answer to Question 22.

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

Response: In *Chevron U.S.A., Inc. v. Nat'l Resources Defense Council*, 467 U.S. 837, 845 (1984), the Supreme Court held that "Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude[d] that the EPA's use of that concept here is a reasonable policy choice for the agency to make." Other cases such as *Auer v. Robbins,* 519 U.S. 452 (1997), *Skidmore v. Swift & Co.,* 323 U.S.134 (1944), and *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022) have more precisely defined the level of deference agencies are afforded. I recognize that the Supreme Court has granted cert in a case involving Chevron deference, *Loper Bright Enterprises v. Raimando*, and will faithfully apply binding Supreme Court and Sixth Circuit precedent when analyzing agency decisions.

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

Response: In *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2022), the Supreme Court stated that the agency must convince the court of "something more than a merely plausible textual basis for the agency action" and instead, "point to clear congressional authorization for the power it claims." (internal quotation and citation omitted).

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

Response: The framers of the Constitution were deliberate in setting forth separate powers between the legislative, executive, and judicial branches. *See* Constitution, Art. I - III. The checks and balances that each branch holds on the others is integral "to protect each branch of government from incursion by the others" but also "the structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). The Tenth Amendment also limits the powers by reserving those not given to the federal government to the states.

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

Response: In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court held that Congress has the authority to regulate (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons, or things in interstate commerce," and (3) "those activities having a substantial relation to interstate commerce."

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

Response: In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court held that Congress could not prohibit the possession of a firearm within 1,000 feet from a school because it had no relationship to interstate commerce.

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

Response: The Due Process guarantee in the Fifth Amendment applies to the federal government while the Fourteenth Amendment applies to the states. They are generally interpreted with similar analysis.

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

Response: As a judicial nominee, it is inappropriate for me to make public statements on issues or matters that may come before me if confirmed. I will follow all Supreme Court and Sixth Circuit precedent on delegation issues, if confirmed as a district judge.

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

Response: In *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2610 (2022), the Supreme Court held that there are "extraordinary cases" involving "major questions" where courts should "hesitate before concluding" that Congress meant to confer certain authority to an agency. The Court looked at the "history and breadth of the authority" and the "economic and political significance" of the asserted authority in its decision. *Id*. at 2595.

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

Response: In *New York v. United States*, 505 U.S. 144, 161 (1992), the Supreme Court held that Congress cannot "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." This concept is consistent with the Constitution's power to "regulate individuals, not States." However, the Supreme Court held that Congress can use its "spending power" to "encourage a State to regulate in a particular way."

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

Response: Like the rest of the Constitution, the Eighth Amendment sets forth enduring principles that can be applied to different circumstances as society changes, but the principles themselves are generally fixed. *See New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022). However, the Supreme Court has held that an excessive punishment claim is judged under the standards "that currently prevail."

Atkins v. Virginia, 536 U.S. 304, 311 (2002).

34. Do you believe the death penalty is constitutional?

Response: Under current federal law, the death penalty is a lawful punishment in certain circumstances and the Supreme Court has upheld its constitutionality. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

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

Response: Congress's authority is broad, but cannot usurp that of other branches of the government including the Executive Branch.

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

Response: As a judicial nominee, it is inappropriate for me to make public statements on issues or matters that may come before me if confirmed.

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

Response: In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Supreme Court held that a state requirement permitting free expression and petition on privately owned shopping center property does not infringe on the owner's property rights.

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

Response: As a judicial nominee, it is inappropriate for me to make public statements on issues or matters that may come before me if confirmed.

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

Response: Although the Supremacy Clause establishes that federal law is the "supreme law of the land," the Adequate and Independent State Grounds doctrine says that the Supreme Court has no jurisdiction to review a state court judgment if there exists a state ground that is adequate to support the judgment and completely independent of federal law. *See Herb v. Pitcairn*, 324 U.S. 117 (1945). If, however, there is a similar federal law, federal jurisdiction exists.

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

Response: As a judicial nominee, it is inappropriate for me to make public statements on issues or matters that may come before me if confirmed.

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

Response: To the best of my understanding the standards of review come from the Supreme Court. If confirmed as a district judge, I would follow all Supreme Court and Sixth Circuit precedent to determine whether state laws or regulations violate constitutional rights.

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

Response: Injunctions generally are governed by Federal Rule of Civil Procedure 65. When an injunction is issued against the federal government prohibiting enforcement of a specific law that can apply to anyone, it can have nationwide or "universal" effect. The Sixth Circuit has also held that a "court's ability to issue injunctions…springs from the court's inherent equitable powers." *Innovation Ventures v. N2G Distrib.,* 763 F.3d 524, 544 (6th Cir. 2014). If confirmed as a district judge, I would follow all binding Supreme Court and Sixth Circuit precedent when addressing a case involving a potential nationwide or universal injunction.

Questions from Senator Thom Tillis
for Susan Kim DeClercq,
Nominee to be United States District Court for the Eastern District of Michigan

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

   Response: Yes. If confirmed as a judge, my personal beliefs would not be relevant to interpreting and applying the law.

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

   Response: Black's Law Dictionary (11th ed. 2019) defines "judicial activism" as "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Judicial activism is not appropriate.

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

   Response: Judges are expected to be impartial and fair. If confirmed as a district judge, I would be both.

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

   Response: No. A judge's role is to decide cases based on the binding law and established facts; what a judge desires the outcome to be should never be a consideration.

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

   Response: Yes, faithfully interpreting the law can sometimes result in an outcome not personally desired by the judge. As a lawyer, I have had occasion to make an argument desired by my client and supported by the law that I have not agreed with, but that was part of my role as an advocate. I understand the obligation of a judge to follow precedent and if I am confirmed as a district judge, I will faithfully follow Supreme Court and Sixth Circuit precedent.

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

   Response: No. Please also see my answer to Question 1.

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

Response: If I am confirmed as a district judge, I will faithfully follow Supreme Court and Sixth Circuit precedent, including the decisions set forth in *Heller*, *McDonald*, and *Bruen*.

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

   Response: As with all cases if I were confirmed as a judge, when evaluating a lawsuit challenging a policy involving handgun permits I would research the law and precedents including *Heller*, *McDonald*, and *Bruen*, scrupulously learn the facts of the case, apply the law to the facts and render a fair and impartial decision.

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: As with all cases if I were confirmed as a judge, the process I would follow when considering qualified immunity cases is that I would research the law and precedents, scrupulously learn the facts of the case, apply the law to the facts and render a fair and impartial decision. Through *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court has held that qualified immunity is granted to law enforcement personnel unless the conduct had been "clearly established" to be unconstitutional at the time of the alleged incident.

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

    Response: As a judicial nominee, it is inappropriate for me to express any personal beliefs on issues or matters that may come before me if confirmed. However, having defended many *Bivens* cases as an Assistant United States Attorney, I understand the very difficult job of law enforcement.

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

    Response: Through *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court has held that qualified immunity is granted to law enforcement personnel unless the conduct had been "clearly established" to be unconstitutional at the time of the alleged incident. If I were to be confirmed as a judge, I would be bound by the laws and precedent of the Supreme Court and the Sixth Circuit and would follow them, regardless of what I personally thought on any subject.

12. **Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in**

abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: In my 23 years of being a lawyer, including being an AUSA for 18 years doing both defensive and affirmative litigation, as well as being in private practice at a law firm and in-house, I have not encountered this issue. But if I were to be confirmed as a district judge, I would follow Supreme Court, Sixth Circuit, and Federal Circuit precedent on patent eligibility and every issue.

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

Response: Please see my answer to Question 12.

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

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

    Response: When I was a law clerk over 20 years ago, I may have handled a case that involved copyright law. If I were confirmed as a district judge, I would approach this issue the same way that I approach new and novel issues as practicing attorney. I would research the laws, review in depth the arguments of the litigants, apply binding Supreme Court and Sixth Circuit precedent and impartially and fairly apply the law to facts.

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

    Response: I have not had any particular experiences involving the Digital Millennium Copyright Act. Same as above.

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

    Response: I have not had any experience in 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: Although I have had some experience with free speech cases, I have not had any experience addressing free speech issues in the context of intellectual property or copyright cases.

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

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

Response: When deciding a case involving Congressional intent, I would start with the plain text and application of binding precedent. I would look at legislative history only if other methodologies do not provide the answer. *See Garcia v. United States*, 469 U.S. 70, 75 (1984) (noting that legislative history is "an additional tool of analysis" but "only the most extraordinary showing of contrary intentions from those data would justify a limitation on the 'plain meaning' of the statutory language.")

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

Response: The Supreme Court has held that the advice and analysis of an agency will be given deference if its interpretation is reasonable and "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp*., 533 U.S. 218, 226-27 (2001).

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 judicial nominee, it is inappropriate for me to comment on an issue that could come before me, if confirmed. If I were confirmed as a district judge, I would faithfully follow Supreme Court and Sixth Circuit precedent on issues of copyright infringement, as well as any other legal issue.

16. 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 judicial nominee, it is inappropriate for me to comment on an issue that could come before me, if confirmed. If I were confirmed as a district judge, I would faithfully follow Supreme Court and Sixth Circuit precedent on how to interpret and apply the DMCA, as well as any other law.

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: As a judicial nominee, it is inappropriate for me to comment on an issue that could come before me, if confirmed. If I were confirmed as a district judge, I would faithfully follow Supreme Court and Sixth Circuit precedent on how to interpret and apply prior judicial opinions on then-current state of technology, as well as any other legal issue.

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

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

Response: In my experience with the U.S. District Court for the Eastern District of Michigan, I have not seen this problem. The Easter District of Michigan has a random case assignment approach to limit or prevent judge shopping.

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

Response: Please see my answer to Question 12 (a).

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

Response: No.

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

Response: Yes, I commit not to engage in such conduct.

18. 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 judicial nominee, it is inappropriate for me to comment on an issue that could come before me, if confirmed.

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

Response: If confirmed as a district judge, I would confer with my colleagues on such issues if they were presented.