Senator Dick Durbin Chair, Senate Judiciary Committee Written Questions for Laura Mate Nominee to be Commissioner and Vice Chair, United States Sentencing Commission June 15, 2022

- 1. In 2013, you joined a letter—along with five other individuals—to the then-Chair of the U.S. Sentencing Commission, Judge Patti Saris. The lead signatory of the letter was Marjorie Meyers, Chair of the Federal Defender Sentencing Guidelines Committee. The other individuals who signed off on the letter were all—like you—affiliated with the Sentencing Resource Counsel Project. The first sentence of this letter stated: "On behalf of the Federal Public and Community Defenders, and pursuant to 28 U.S.C. § 994(o), we offer the following comments on the Commission's Proposed Priorities for the 2014 amendment cycle." (emphasis added).
 - a. Did you participate in this letter in your personal capacity, or in your role as an employee of the Office of the Federal Public Defender?

Response: I participated in this letter in my role as an employee of the Office of the Federal Public Defender and conveyed the position of the Federal Defenders. I did not participate in that letter in my personal capacity. If confirmed and asked to consider the issues addressed in this letter as a Commissioner today, I would want to review the relevant data and evidence, consult with experts, and confer with my fellow Commissioners before formulating a view.

b. If confirmed, how would your role on the U.S. Sentencing Commission differ from your role with the Office of the Federal Public Defender?

Response: In my role with the Office of the Federal Public Defender, my obligation is defined by the Sixth Amendment's promise of zealous advocacy toward favorable dispositions for Federal Defender clients. In my role if confirmed as a Commissioner on the U.S. Sentencing Commission, my obligation would be defined by Congress which set forth the purposes of the Commission in the Sentencing Reform Act: (1) "establish sentencing policies and practices" "that assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18," "provide certainty and fairness," "avoiding unwarranted sentencing disparities," "while maintaining sufficient flexibility to permit individualized sentences," and "reflect, to the extent practicable, advancement in knowledge of human behavior"; and (2) "develop means of measuring the degree to which the sentencing penal and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2)." 28 U.S.C. § 991(b). To fulfill this obligation if confirmed as a Commissioner, I would work collaboratively on the bipartisan Commission collecting data, researching, and seeking input as necessary for the Commissioners to consider whether to make changes to the guidelines and/or make any recommendations to Congress.

Senator Chuck Grassley, Ranking Member Questions for the Record Ms. Laura Elizabeth Mate

Nominee to be the Commissioner and Vice-Chair of the U.S. Sentencing Commission

1. What is the correct comparator for sentencing disparities and why do you think so:

- a. sentencing disparities among similarly situated defendants before a single judge;
- b. sentencing disparities among similarly situated defendants within a single district:
- c. sentencing disparities among similarly situated defendants within a single circuit:
- d. sentencing disparities among all similarly situated defendants;
- e. any other comparator.

Response: If confirmed as a Commissioner, in fulfilling the statutory obligation of the Commission to avoid unwarranted disparities in 28 U.S.C. § 991(b), I would want to monitor all identified disparities and collaborate with my fellow Commissioners both to determine what additional information and input to collect, as well as on possible responses. I would also follow the statutory direction that the Commission "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d).

As to the scope of the unwarranted disparity inquiry under section 3553(a)(6), I have not recently reviewed the case law on this issue, but am aware that many circuit courts have found that the unwarranted disparity analysis in section 3553(a)(6) is to be national in scope, although courts are not prohibited from considering other unwarranted disparities as a matter of discretion consistent with the other section 3553(a) factors. *United States v. Simmons*, 501 F.3d 620, 624 (6th Cir. 2007) (collecting cases).

2. What role should empathy play in sentencing defendants?

Response: In my work I have always tried to bear in mind our common humanity. But empathy is not one of the factors Congress has directed courts to consider when imposing sentences. 18 U.S.C. § 3553(a).

3. Should sentences take into consideration principles of social "equity"?

Response: Section 3553(a) requires courts consider a wide variety of factors including, among many others, "the nature and circumstances of the offense and the history and characteristics of the defendant"; and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

4. What, if anything, do you think is the relationship between morality and the law when it comes to punishing criminals?

Response: In section 3553(a)(2) Congress established that one of the purposes of sentencing is to "provide just punishment." Congress also authorized the Sentencing Commission to make recommendations on "matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy." 28 U.S.C. §995(a)(20).

5. Some have argued that 18 U.S.C. § 3553(a)(6) permits a district judge to consider racial disparities in crafting a sentence. Do you agree? Please explain with citations to case law.

Response: Congress provided that one of the purposes of the Sentencing Commission is to "establish sentencing policies and practices" that "avoid[] unwarranted disparities." 28 U.S.C. § 991(b). Congress has also directed that the Commission "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d). If confirmed as a Commissioner and I became aware of arguments that section 3553(a)(6) permits a judge to consider racial disparities in fashioning a sentence, I would want to review those arguments and learn more about the racial disparities at issue to see if they implicate any of the Commission's statutory obligations.

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

Response: Any time release from prison before the end of a sentence is being considered, protection of the public is paramount, and the determination necessarily and appropriately requires an individualized assessment. *See* 18 U.S.C. § 3582(c)(1)(A) (requiring consideration of the factors set forth in § 3553(a) which includes "protect[ing] the public").

7. When, if ever, is it appropriate for a prosecutor to charge multiple counts of 18 U.S.C. § 924(c)?

Response: Within the bounds of the statute set by Congress, prosecutorial charging decisions are an executive function.

8. Besides eliminating mandatory minimums, what other measures do you believe will alleviate the "unwarranted disparit[ies] in federal sentencing"?

Response: Avoiding unwarranted disparities is one of the core purposes Congress assigned to the Commission. 28 U.S.C. § 991(b). Congress also directed that the "Commission periodically shall review, and revise, in consideration of comments and data coming to its attention, the guidelines." 28 U.S.C. § 994(o). Consistent with these obligations, if confirmed as a Commissioner, I would work collaboratively with my fellow Commissioners to review relevant data and evidence, consult with experts and review input from a wide range of stakeholders to consider whether there are evidence-based revisions to the guidelines that would reduce unwarranted disparities.

9. Should the fact that a defendant threatened to brandish a firearm during a bank robbery alter the sentencing range for the defendant?

Response: The sentencing guidelines currently provide enhancements where a "firearm was brandished or possessed" and where "a threat of death was made." USSG §2B3.1(b)(2).

10. Is threatening Supreme Court Justices right or wrong? Please explain your answer.

Response: A threat of physical harm against a Supreme Court Justice is illegal. 18 U.S.C. § 115.

11. What weight should a judge give to a criminal defendant's economic background during sentencing?

Response: Congress has directed that the Commission "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d). In individual cases, judges may consider a wide variety of factors and information. See 18 U.S.C. §§ 3553(a); 3661.

12. In 1983, I supported the Protection of Children Against Sexual Exploitation Act. In 2012, I sent a letter to the Sentencing Commission urging the Commission not to recommend lower sentences for the possession of child pornography. I wrote that "it would be a disservice to the American people to have the Commission issue a report that advocates for the reduction in sentencing for a class of criminals who cause profound and lasting damage to their victims." But some have argued that the sentencing enhancements for child pornography offenses are too severe. Do you believe the sentencing enhancement based on the number of images is flawed?

Response: The Commission examined the enhancement for the number of images in its 2012 Report to the Congress: Federal Child Pornography Offenses, and recommended that there might be factors that would "better reflect the technological changes and new expert knowledge and also to account for current offenders' varying degrees of culpability and dangerousness." It has been almost a decade since the Commission issued these recommendations. The Commission issued two updates to that report in 2021

(Federal Sentencing of Child Pornography: Non-Production Offenses and Federal Sentencing of Child Pornography: Production Offenses) but there has not been a quorum to consider the new data. If confirmed as a Commissioner, I understand my responsibility would be to review the updated data and research, get input from stakeholders, and collaborate with my fellow Commissioners before making an evidence-based recommendation on this topic.

13. For non-production child pornography offenses, an application note in the guidelines defines each video as the equivalent to 75 images. See USSG §2G2.2, comment. (n.6 (B)(ii)). Do you believe this note is flawed or have a policy objection to it?

Response: Please see my response to Question 12.

14. Do you believe mandatory minimums are inappropriate for offenses involving non-production of child pornography?

Response: Congress sets the minimum penalties for criminal offenses, and the Commission in turn sets sentencing ranges that must be "consistent with all pertinent provisions of title 18, United States Code," including mandatory minimums. 28 U.S.C. § 994(b)(1). If confirmed as a Commissioner, I would work collaboratively with my fellow Commissioners to ensure that all guidelines are consistent with federal law.

The Commission has previously provided Congress with reports and recommendations on mandatory minimums, and has indicated that "[a] strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act." The Commission's reports and recommendations were issued only after the Commission engaged in extensive review of the issue. For example, as described in the Commission's 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, "[t]he Commission reviewed legislation, analyzed sentencing data, and studied scholarly literature to prepare this report. The Commission sought the views of stakeholders in the criminal justice system in a variety of ways. The Commission consulted with its advisory groups and representatives from all three branches of the federal government, and heard from social scientists, scholars and others who apply or study mandatory minimum sentencing provisions." If confirmed as a Commissioner, I would follow this approach, and look to the data and evidence in collaboration with my fellow Commissioners before forming opinions and making recommendations to Congress and others.

15. Do you believe mandatory minimums are inappropriate for offenses involving production of child pornography?

Response: Please see my response to Question 14.

16. 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.

17. 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.

18. 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, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

c. Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara

Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

- 22. Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."
 - a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: Yes, my husband, Brent Pattison, was awarded a two-year Soros Justice Fellowship in 1998 to advocate for children with disabilities in the juvenile justice system while employed by TeamChild in Seattle, Washington. He has had no subsequent association with the Open Society Foundations.

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

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

Response: No.

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

Response: No.

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

Response: No.

- 25. The Raben Group is "a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the corporate, nonprofit, foundation, and government sectors." It manages the Committee for a Fair Judiciary.
 - a. Has anyone associated with The Raben Group or the Committee for a Fair Judiciary requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

b. Are you currently in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?

Response: No.

c. Have you ever been in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?

Response: No.

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

Response: On December 3, 2021, I interviewed with White House Counsel's Office. Since the week following that interview, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On May 12, 2022, the President announced his intention to nominate me.

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

Response: I received the questions by email on June 15, 2022, and immediately began preparing my responses. I conducted research on Westlaw, and a few other online sources. I shared my responses with employees of the Department of Justice, Office of Legal Policy, who offered feedback on some of my responses that I considered before finalizing my answers for submission to the Senate Judiciary Committee.

Nomination of Laura E. Mate to be a Member and Vice Chair of the United States Sentencing Commission Questions for the Record Submitted June 15, 2022

QUESTIONS FROM SENATOR COTTON

1. Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?

Response: No.

2. Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?

Response: No.

3. What are the purposes of criminal sentencing? Of those purposes, which do you believe is the most important and why?

Response: Congress defined the purposes of sentencing in 18 U.S.C. § 3553(a): (A) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; (B) "to afford adequate deterrence to criminal conduct"; (C) "to protect the public from further crimes of the defendant; and (D) "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." By statute all of these purposes must be considered at each individual sentencing, although judges need not mention each purpose by name at every sentencing hearing. I believe public safety is the paramount consideration in the criminal justice system, and that the relative importance of the various purposes of sentencing may be different from case to case in service of that primary goal.

4. Is deterrence a product of the severity of a sentence, a product of the likelihood of punishment, or a combination of the two? If you believe that deterrence is a combination of the two, please explain which of the two is a stronger factor in deterrence.

Response: I have not had the opportunity to examine comprehensively the current empirical research on this topic. If confirmed as a Commissioner, I would review the data and research in this area so that I could better collaborate with my fellow Commissioners in fulfilling the purposes of the Sentencing Commission.

5. Please describe what you believe to be "success" in the context of your work if you are confirmed as a member of the Sentencing Commission.

Response: If confirmed as a member of the Sentencing Commission, "success" would be effective collaboration with my fellow Commissioners to implement the Congressionally

directed purposes of the Sentencing Commission. "Success" would be collegial discussions regarding the priorities and decisions of the Commission based on input from a wide variety of sources and extensive review of relevant research and data.

6. Do you believe that it is the purpose of the Sentencing Commission to reduce the number of criminals in prison?

Response: No. Congress set forth the purposes of the Commission in the Sentencing Reform Act: (1) "establish sentencing policies and practices" "that assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18," "provide certainty and fairness," "avoiding unwarranted sentencing disparities," "while maintaining sufficient flexibility to permit individualized sentences," and "reflect, to the extent practicable, advancement in knowledge of human behavior"; and (2) "develop means of measuring the degree to which the sentencing penal and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2)." 28 U.S.C. § 991(b).

7. As a general matter, should criminals who commit crimes that tend to involve violence face stronger sentences, weaker sentences, or approximately the same sentences as criminals who commit crimes that do not tend to involve violence?

Response: Yes, as a general matter, all other things being equal, Congress recognized in the Sentencing Reform Act that violent crimes warrant higher penalties than crimes that do not involve violence. 28 U.S.C. § 994(j).

8. Does the Sentencing Commission have the authority to undermine mandatory minimum or maximum sentences passed by Congress?

Response: No, the Sentencing Commission does not have the authority to undermine mandatory minimum or maximum sentences passed by Congress.

9. Please describe what you believe to be the Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Response: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

10. Please describe what you believe to be the Supreme Court's holding in *Blakely v. Washington*, 542 U.S. 296 (2004).

Response: The "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. at 303.

11. Please describe what you believe to be the Supreme Court's holding in *United States v. Booker*, 543 U.S. 220 (2005).

Response: The "imposition of an enhanced sentence under" the then-mandatory "United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant" violates the Sixth Amendment, as interpreted in *Apprendi* and *Blakely*. 543 U.S. at 243-44, 245. "[I]n light of this holding, two provisions of the Sentencing Reform Act of 1984 (SRA) that have the effect of making the Guidelines mandatory must be invalidated." *Id.* at 227, 245.

12. Please describe what you believe to be the correct application of 18 U.S.C. § 3553.

Response: A court must impose a sentence sufficient but not greater than necessary to comply with Congressionally defined purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2), based on a consideration of the factors set forth in § 3553(a).

13. Do you believe that the Sentencing Commission has inherent authority to apply sentencing guidelines amendments retroactively? Please explain in your answer what you believe to be the limits on the Sentencing Commission's authority to make retroactive changes.

Response: The Sentencing Commission is a creature of Congress, and its authority derives from statute. In 28 U.S.C. § 994(a)(2)(C), Congress provided the Commission with authority to promulgate "policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18," specifically including "the sentence modification provisions" set forth in 18 U.S.C. § 3582(c). In § 3582(c)(2) Congress authorized district courts, where "consistent with applicable policy statements issued by the Sentencing Commission," to reduce a sentence "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered the Sentencing Commission."

14. The Sentencing Commission recently released a report on the recidivism rates for offenders who participated in vocational training programs in federal prison, and found that participation in such job training programs had no meaningful effect on the recidivism rates of those offenders. Please explain what factors, if any, you believe to have the greatest effect on reducing recidivism rates.

Response: I have not had the opportunity comprehensively to examine the current empirical research on this topic. I am aware of this report and another recent report regarding recidivism rates for individuals who participated in two of the Bureau of Prisons' drug programs, but have not yet had the opportunity to review them carefully. If confirmed as a Commissioner, I would look to original research by the Commission, as well as relevant empirical research by others, and input from stakeholders, to inform myself about the evidence on this issue and to better collaborate with the other Commissioners in fulfilling the statutory purposes of the Commission.

15. Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.

Response: I received the questions by email on June 15, 2022 and immediately began preparing my responses. I conducted research on Westlaw, and a few other online sources. I shared my responses with employees of the Department of Justice, Office of Legal Policy, who offered feedback on some of my responses that I considered before finalizing my answers for submission to the Senate Judiciary Committee.

16. Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please identify the department or agency with which those officials are employed.

Response: No.

SENATOR TED CRUZ

U.S. Senate Committee on the Judiciary

Questions for the Record for Laura Mate, Nominee to be a Member and Vice Chair of the United States Sentencing Commission

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 Commission, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

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

II. Questions

1. Is racial discrimination wrong?

Response: Yes, discrimination on the basis of race is wrong.

2. If confirmed, what will your top priorities be for the U.S. Sentencing Commission?

Response: If confirmed, my top priority would be to work collaboratively with my fellow Commissioners to determine, collectively, the Commission's priorities, consistent with the purposes of the Commission as set forth in 28 U.S.C. § 991(b). To help inform that determination, I would not bring a specific agenda or list of priorities, but would thoroughly review new laws, court decisions, input from other stakeholders, and relevant data.

3. What do you believe is the essential function of the U.S. Sentencing Commission?

Response: I believe the essential function of the U.S. Sentencing Commission was established by Congress when it defined its purposes: to (1) "establish sentencing policies and practices" "that assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18," "provide certainty and fairness," "avoiding unwarranted sentencing disparities," "while maintaining sufficient flexibility to permit individualized sentences," and "reflect, to the extent practicable, advancement in knowledge of human behavior"; and (2) "develop means of measuring the degree to which the sentencing penal and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2)." 28 U.S.C. § 991(b).

4. How does the Separation of Powers inform your view of the Commission and your role as a potential Commissioner?

Response: Congress set forth the purposes of sentencing in 18 U.S.C. § 3553(a) and created an independent expert body to help implement those purposes. 28 U.S.C.§ 991(b). Congress creates the laws and defines the parameters in which the Commission operates. The Commission may make evidence-based recommendations to Congress based on data, research and input from stakeholders, but the ultimate decisions rest with Congress.

5. Is the criminal justice system systemically racist?

Response: I am not aware of any consistent definition of the term "systemic racism." If confirmed as a Commissioner, I would follow the mandate from Congress to the Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status." 28 U.S.C. § 994(d)(11). I

would also follow the direction from Congress to the Commission to "establish sentencing policies and practices" "that "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B).

6. What do you believe is the role of incapacitation in sentencing?

Response: In 18 U.S.C. § 3553(a)(2), Congress required that when determining the particular sentence to be imposed, courts consider several purposes of sentencing including the need for the sentence "to protect the public from further crimes of the defendant." In 28 U.S.C. § 991(b)(1)(A), Congress required the Commission to "establish sentencing policies and practices" to "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2).

7. What do you believe is the role of general deterrence in sentencing?

Response: In 18 U.S.C. § 3553(a)(2), Congress required that when determining the particular sentence to be imposed, courts consider several purposes of sentencing including the need for the sentence "to afford adequate deterrence to criminal conduct." In 28 U.S.C. § 991(b)(1)(A), Congress required the Commission "establish sentencing policies and practices" to "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2).

8. Do you believe in specific deterrence?

Response: In 18 U.S.C. § 3553(a) Congress required that when determining the particular sentence to be imposed, courts consider several purposes of sentencing including the need for the sentence "to afford adequate deterrence to criminal conduct." In 28 U.S.C. § 991(b)(1)(A), Congress required the Commission to "establish sentencing policies and practices" to "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)."

9. Should a sentencing judge consider retributive concerns when fashioning a sentence?

Response: In 18 U.S.C. § 3553(a)(2), Congress required that when determining the particular sentence to be imposed, courts consider several purposes of sentencing including the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment." In 28 U.S.C. § 991(b)(1)(A), Congress required the Commission to "establish sentencing policies and practices" to "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)."

10. How will your views of the Eighth Amendment's prohibition on "cruel and unusual" punishment inform your work as a Sentencing Commissioner?

Response: I have not had occasion to carefully consider the Eighth Amendment's prohibition on "crime and unusual" punishment recently, but I believe the "proportionality precept," *Atkins v. Virginia*, 536 U.S. 304, 311 (2002), is relevant to the work of the Sentencing Commission, and is consistent with the Congressional directive to courts that sentences "reflect the seriousness of the offense," 18 U.S.C. § 3553(a), and to the Commission that it establish policies that "assure the meeting of the purposes of sentencing" and "provide fairness in meeting the purposes of sentencing." 28 U.S.C. § 991(b).

11. What sentences do you understand the U.S. Supreme Court's current Eighth Amendment jurisprudence as prohibiting?

Response: I have not had occasion to comprehensively review the Supreme Court's jurisprudence on this issue recently, but I am aware of the following: The Supreme Court has found the Eighth Amendment's prohibition on "cruel and unusual" punishment bars the death penalty for defendants under age 18, *Roper v. Simmons*, 543 U.S. 551 (2005); the intellectually disabled, *Atkins v. Virginia*, 536 U.S. 304 (2002); a defendant convicted of (non-homicide) rape, *Coker v. Georgia*, 433 U.S. 584 (1977); and a defendant convicted of the rape of a child in cases where the victim did not die and death was not intended, *Kennedy v. Louisiana*, 554 U.S. 407 (2008). The Court has also found the Eighth Amendment prohibits the imposition of a sentence of life without parole on a juvenile convicted of a non-homicide crime, *Graham v. Florida*, 560 U.S. 48 (2010), and the mandatory imposition of life without parole on a juvenile convicted of homicide, *Miller v. Alabama*, 567 U.S. 460 (2012).

12. Do you believe that the U.S. Supreme Court's current Eighth Amendment jurisprudence is consistent with the original public meaning of that provision?

Response: I do not have a view on this issue because I have not researched this issue. This issue has not come up in my work to date. If confirmed as a Commissioner and I needed to address this issue, I would first review the Court's jurisprudence on the Eighth Amendment more thoroughly.

13. Do you believe that capital punishment is constitutional?

Response: While it is unlikely this issue would be relevant to my work on the Sentencing Commission since the Commission does not set guidelines for offenses punishable by death, it is well-established that capital punishment is constitutional. *See, e.g, Gregg v. Georgia*, 428 U.S. 153 (1976).

14. In light of the leak of the draft of the U.S. Supreme Court opinion in *Dobbs* v. *Jackson Women's Health Organization*, will you commit to maintaining the confidentiality of non-public Commission documents and instruct all staff and individuals with access to such documents to do the same?

Response: Yes, if confirmed as a Commissioner, I would follow all of the Commission's rules and regulations regarding confidentiality.

15. In July 2013, you co-authored a letter which said that mandatory minimums are never needed or appropriate, at least in the context of child pornography cases. Do you still hold that view today?

Response: I participated in that letter in my role as an employee of the Office of the Federal Public Defender and conveyed the position of the Federal Defenders. I did not participate in that letter in my personal capacity. If confirmed and asked to consider this question as a Commissioner today, I would want to review the relevant data and evidence, consult with experts, and confer with my fellow Commissioners before formulating a view.

a. Are mandatory minimums appropriate for any crimes, in your view?

Response: Congress sets the minimum penalties for criminal offenses, and sentencing ranges set by the Commission must be "consistent with all pertinent provisions of title 18, United States Code," including mandatory minimums. 28 U.S.C. § 994(b)(1). If confirmed as a Commissioner, I would work collaboratively with my fellow Commissioners to ensure that all guidelines are consistent with federal law.

The Commission has previously provided Congress with reports and recommendations on mandatory minimums, and has indicated that "[a] strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act." The Commission's reports and recommendations were issued only after the Commission engaged in extensive review of the issue. For example, as described in the Commission's 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, "[t]he Commission reviewed legislation, analyzed sentencing data, and studied scholarly literature to prepare this report. The Commission sought the views of stakeholders in the criminal justice system in a variety of ways. The Commission consulted with its advisory groups and representatives from all three branches of the federal government, and heard from social scientists, scholars and others who apply or study mandatory minimum sentencing provisions." If confirmed as a Commissioner, I would follow this approach, and look to the data and evidence in collaboration with my fellow Commissioners before forming opinions and making recommendations to Congress and others.

16. Do you believe that child pornographers are the victims of a "modern day witch hunt," as the July 2013 letter you co-authored suggests?

Response: I participated in that letter in my role as an employee of the Office of the Federal Public Defender and conveyed the position of the Federal Defenders. I did not participate in that letter in my personal capacity. The letter quotes an article from *The*

Guardian. If confirmed and asked to consider this question as a Commissioner today, I would want to review the relevant data and evidence, consult with experts, and confer with my fellow Commissioners before formulating a view.

17. Do you believe that American society is experiencing a "moral panic" with regards to child sex-crimes, as the July 2013 letter you co-authored suggests?

Response: I participated in that letter in my role as an employee of the Office of the Federal Public Defender and conveyed the position of the Federal Defenders. I did not participate in that letter in my personal capacity. The letter quotes an article from the *Stanford Law and Policy Review*. If confirmed and asked to consider this question as a Commissioner today, I would want to review the relevant data and evidence, consult with experts, and confer with my fellow Commissioners before formulating a view.

18. In July 2013, you co-authored a letter which urged the then-Chair of the Sentencing Commission to support recently proposed legislation that would create a new "safety-valve," that would "allow judges to impose sentences below those penalties whenever the mandatory minimum sentences does not fulfill the purposes of sentencing set forth at 18 U.S.C. § 3553(a)." If confirmed, would you encourage your colleagues and the United States Congress to actively endorse such legislation today?

Response: I participated in that letter in my role as an employee of the Office of the Federal Public Defender and conveyed the position of the Federal Defenders. I did not participate in that letter in my personal capacity. If confirmed as a Commissioner, I would not bring an agenda, but would work collaboratively with my fellow Commissioners to determine priorities and address issues collectively, consistent with the purposes of the Commission as set forth in 28 U.S.C. § 991(b). To help inform that process, I would thoroughly review new laws, court decisions, input from other stakeholders, and relevant data.

19. The July 2013 letter you co-wrote specifically requested the then-Chair of the Sentencing Commission work on amending the drug trafficking offense guidelines to focus on individuals' "functional roles" in a drug trafficking scheme rather than the quantity of drugs involved. Do you still hold to that view today?

Response: I participated in that letter in my role as an employee of the Office of the Federal Public Defender and conveyed the position of the Federal Defenders. I did not participate in that letter in my personal capacity. If confirmed and asked to consider this question as a Commissioner today, I would want to review the relevant data and evidence, consult with experts, and confer with my fellow Commissioners before formulating a view.

20. The July 2013 letter you co-wrote urged the Commission to reexamine its definitions of "crimes of violence," "aggravated felony," "violent felony," and "drug trafficking offense," stating that the current definitions "lack empirical basis,

produce arbitrary distinctions, and result in grossly unjust sentences that contribute to the problem of over incarceration." As a Commissioner, would you urge your colleagues to re-examine these definitions?

Response: I participated in that letter in my role as an employee of the Office of the Federal Public Defender and conveyed the position of the Federal Defenders. I did not participate in that letter in my personal capacity. If confirmed as a Commissioner, I would not bring an agenda, but would work collaboratively with my fellow Commissioners to determine priorities and address issues collectively, consistent with the purposes of the Commission as set forth in 28 U.S.C. § 991(b). To help inform that process, I would thoroughly review new laws, court decisions, input from other stakeholders, and relevant data.

a. If yes, please outline what language you would like the revised definitions to reflect.

Response: Not applicable.

21. In December 2020, you co-authored a memo for public defenders nationwide that criticized AG Barr and the Bureau of Prisons for not using the COVID-19 pandemic to reduce prison populations. Do you believe that we should always pursue reducing incarceration rates, no matter what the impact on public safety is?

Response: No, public safety must always be considered.

a. Do you believe it undermines the administration of justice for public defenders to attempt to weaponize a pandemic in order to seek a reduction in the sentence originally imposed by a U.S. District Court?

Response: I am not aware of public defenders attempting to weaponize a pandemic.

22. Do you still believe the spread of COVID-19 in prison populations is a bigger threat to public safety than lowering prison populations, as stated in the December 2020 memo you co-wrote?

Response: I participated in that letter in my role as an employee of the Office of the Federal Public Defender and conveyed the position of the Federal Defenders. I did not participate in that letter in my personal capacity. If confirmed and asked to consider this question as a Commissioner today, I would want to review the relevant data and evidence, consult with experts, and confer with my fellow Commissioners before formulating a view.

Senator Josh Hawley Questions for the Record

Laura Mate Nominee, U.S. Sentencing Commission

1. Identify every crime for which you think a mandatory minimum would be an appropriate sentence as a policy matter, and identify the mandatory minimum length.

Response: Congress sets the minimum penalties for criminal offenses, and sentencing ranges set by the Commission must be "consistent with all pertinent provisions of title 18, United States Code," including mandatory minimums. 28 U.S.C. § 994(b)(1). If confirmed as a Commissioner, I would work collaboratively with my fellow Commissioners to ensure that all guidelines are consistent with federal law.

The Commission has previously provided Congress with reports and recommendations on mandatory minimums, and has indicated that "[a] strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act." The Commission's reports and recommendations were issued only after the Commission engaged in extensive review of the issue. For example, as described in the Commission's 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, "[t]he Commission reviewed legislation, analyzed sentencing data, and studied scholarly literature to prepare this report. The Commission sought the views of stakeholders in the criminal justice system in a variety of ways. The Commission consulted with its advisory groups and representatives from all three branches of the federal government, and heard from social scientists, scholars and others who apply or study mandatory minimum sentencing provisions." If confirmed as a Commissioner, I would follow this approach, and look to the data and evidence in collaboration with my fellow Commissioner before forming opinions and making recommendations to Congress and others.

- 2. Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.
 - a. Do you agree that the penalties should be aligned?

Response: The Commission recommended these penalties be aligned in its 2012 Report to the Congress: Federal Child Pornography Offenses. It has been almost a decade since the Commission issued this recommendation. The Commission issued two updates to that report in 2021 (Federal Sentencing of Child Pornography: Non-Production Offenses and Federal Sentencing of

Child Pornography: Production Offenses) but there has not been a quorum to consider the new data. If confirmed as a Commissioner, I understand my responsibility would be to review the updated data and research, get input from stakeholders, and collaborate with my fellow Commissioners before making an evidence-based recommendation on this topic.

b. If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?

Response: Please see my answer to Question 2(a).

3. In *Terry* v. *United States*, decided last year, the Supreme Court acknowledged the argument that *under*enforcement of the law can have a negative disparate impact based on race. Given that racial minorities are more likely to be victims of crimes, do you agree that underenforcing criminal laws—including by issuing sentences that are too low— disproportionately harms victims who are racial minorities?

Response: In *Terry*, the Supreme Court noted that in the mid-1980s, Congress passed a bill setting "lower trigger thresholds for crack offenses" with "near unanimity," including with support from the Congressional Black Caucus. The impact of the underenforcement of criminal laws is not something I have studied, but if confirmed as a Commissioner, I understand my responsibility would be to review relevant data, research and input from stakeholders, and collaborate with my fellow Commissioner before providing an evidence-based response on topics such as this one.

4. Current law requires judges to impose sentences on firearms offenders "consecutively," not "concurrently." That means that if a person was convicted of three counts of 18 U.S.C. §924(c), he would have to serve time for each count. The Commission previously advocated making these sentences run "concurrently" in certain circumstances. This would mean that a person with three sentences of 5 years would serve them all at the same time. In effect, this would be identical to 5 years in jail. Do you agree with the Commission's recommendation?

Response: I am aware that in its 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, the Commission recommended Congress consider "eliminat[ing] the 'stacking requirement" and "giv[ing] the sentencing court discretion to impose sentences for multiple violations of section 924(c) concurrently with each other." It has been more than a decade since the Commission issued these recommendations and there have been a number of changes since then, including changes to § 924(c) in the First Step Act. If confirmed as a

Commissioner, I understand my responsibility would be to review data, research and input and collaborate with my fellow Commissioners before making an evidence-based recommendation on this topic.

5. Please rank these four aims of criminal law in order of general importance, recognizing that they may change from case to case: retribution, deterrence, incapacitation, and rehabilitation.

Response: Congress established the purposes of sentencing in 18 U.S.C. § 3553(a): (A) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; (B) "to afford adequate deterrence to criminal conduct"; (C) "to protect the public from further crimes of the defendant"; and (D) "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." By statute all of these purposes must be considered at each individual sentencing, although judges need not mention each purpose by name at every sentencing hearing. I believe public safety is the paramount consideration in the criminal justice system, and that the relative importance of the various purposes of sentencing may be different from case to case in service of that primary goal.

6. During the Antifa riots of 2020, Montez Lee killed a man. He burned down a building with the man still inside. Rather than press for a tough sentence, the Biden administration argued that Lee deserved leniency because he had a political motive to commit the crime. The Department of Justice tried to excuse this horrific crime on the theory that "a riot is the language of the unheard" and that Lee—by burning down a building and killing a man—was just trying to give voice to his anger and frustration after the death of George Floyd. If a person commits a crime at a protest, do you believe that the person's motivation to further the political aim of that protest can ever serve as a reason for a lower sentence?

Response: Politics should not play a role in sentencing. A court must impose a sentence sufficient but not greater than necessary based on a consideration of the factors set forth in § 3553(a). Those factors include: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant"; and (2) "the need for the sentence imposed" (A) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; (B) "to afford adequate deterrence to criminal conduct"; (C) "to protect the public from further crimes of the defendant"; and (D) "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

Questions for the Record for Laura Elizabeth Mate From Senator Mazie K. Hirono

- 1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:
 - a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

Response: No.

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

Response: No.

Questions for the Record Laura Mate

Senator John Kennedy

1. You criticized the sentencing guidelines for child pornography cases as excessive, noting that they resulted "in overly severe [] ranges in nearly all cases." If confirmed, would you advocate for lowering sentences for individuals convicted of possessing or distributing child pornography?

Response: I participated in that letter in my role as an employee of the Office of the Federal Public Defender and conveyed the position of the Federal Defenders. I did not participate in that letter in my personal capacity. The possession and distribution of child pornography are serious crimes. The Commission has previously studied the guidelines for these offenses, but it has been almost a decade since the Commission issued recommendations in its 2012 Report to the Congress: Federal Child Pornography Offenses. The Commission issued two updates to that report in 2021 (Federal Sentencing of Child Pornography: Non-Production Offenses and Federal Sentencing of Child Pornography: Production Offenses) but there has not been a quorum to consider the new data. If confirmed as a Commissioner, I understand my responsibility would be to review the updated data and research, get input from stakeholders, and collaborate with my fellow Commissioners before making an evidence-based recommendation on this topic.

2. Do you believe prosecutors who decline to prosecute entire classes of crime improve the criminal justice system or public safety?

Response: For the past decade I have focused on federal criminal practice, and I am not aware of this being an issue in federal jurisdictions. The discretion to set prosecution priorities is an executive function. If confirmed as a Commissioner and the Commission considered this issue, in collaboration with my fellow Commissioners, I would look to the data and evidence, and seek input from a wide range of stakeholders before forming opinions and making recommendations to Congress and others.

3. Have you ever been accused of or disciplined for maintaining an inappropriate workplace relationship?

Response: No.

Senator Mike Lee Questions for the Record Laura Mate, Nominee to the United States Sentencing Commission

1. What factors or information will you consider before making sentencing recommendations?

Response: In making any recommendations regarding sentencing policies and practices, if confirmed as a Commissioner, I would look to the purposes Congress set forth for the Commission. By statute, the Commission is to work to (1) "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18," "provide certainty and fairness," "avoiding unwarranted sentencing disparities," "while maintaining sufficient flexibility to permit individualized sentences," and "reflect, to the extent practicable, advancement in knowledge of human behavior"; and (2) "develop means of measuring the degree to which the sentencing penal and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2)." 28 U.S.C. § 991(b).

2. Please define the term "mens rea" and explain why it is important in criminal law.

Response: Black's Law Dictionary defines "mens rea" as "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime." Black's Law Dictionary also provides that "[m]ens rea is the second of two essential elements of every crime at common law, the other being the actus reus."

3. Would the severity of a statute's mens rea standard factor into your sentencing recommendations?

Response: The "need for the sentence imposed . . . to reflect the seriousness of the offense" is one of the statutory purposes of sentencing courts are required to consider in every case, 18 U.S.C. § 3553(a)(2), and the Commission is charged with "assur[ing] the meeting" of those statutory purposes of sentencing, 28 U.S.C. § 991(b)(1)(A).

4. Do you think it is important for criminal law statutes to have an explicit mens rea requirement? Should statutes without a mens rea standard be treated differently than those with an explicit standard in terms of sentencing?

Response: As Justice Kavanaugh recently noted, the "deeply rooted presumption of *mens rea* generally requires the Government to prove the defendant's *mens rea* with respect to each element of a federal offense, unless Congress plainly provides otherwise." *Wooden v. United States*, 142 S. Ct. 1063, 1076 (2022) (Kavanaugh, J., concurring).

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: When reading a statute, I first consider the case law interpreting the specific statute. In the absence of case law definitively interpreting the statute, I first consider the text of the statute, followed by the context and purpose of the statute.

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: I have not considered this issue for a long time since it has not come up in my current work and I would not expect it to come up in my work with the Commission, should I be confirmed. But as a general matter, my understanding is that while courts must apply established statutes and constitutional provisions to new circumstances, the meaning of the statute and the Constitution itself does not change.

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

Response: I am not familiar with the statement referenced here. "Equity" is defined in Black's Law Dictionary as "[f]airness; impartiality; evenhanded dealing."

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

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

8. Does 18 U.S.C. § 3553(a) allow for the consideration of "equity" as defined by the Biden Administration (listed above in question 6)?

Response: Section 3553(a) requires courts consider a wide variety of factors including, among many others, "the nature and circumstances of the offense and the history and characteristics of the defendant"; and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

9. Should 18 U.S.C. § 3553(a)(6) – the need to avoid unwarranted sentence disparities – be weighed more strongly than other § 3553 factors?

Response: Section 3553(a) does not direct courts as to the weight they should assign each of the factors outlined in the statute, and courts must "impose a sentence sufficient but not greater than necessary" based on consideration of all the § 3553(a) factors.

10. Should the desire to reduce the prison population across the United States be considered at any stage of sentencing, either by the Sentencing Commission or by federal judges?

Response: Congress has mandated that the Sentencing Commission formulate guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." 28 U.S.C. § 994(g).

11. What role, if any, should an offender's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the consideration of an appropriate sentence?

Response: Congress has mandated that the Sentencing Commission "shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d).

12. How much deference should judges give to the sentencing guidelines promulgated by the Sentencing Commission?

Response: While the sentencing guidelines are no longer mandatory after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Court has held that the "district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007). "A district court contemplating a non-Guidelines sentence 'must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Peugh v. United States*, 569 U.S. 530, 541 (2013) (quoting *Gall*, 552 U.S. at 50). Further, appellate courts may presume that a within-Guidelines sentence is reasonable. *Rita v. United States*, 551 U.S. 338, 347 (2007).

13. Is it ever appropriate for a judge to deviate from or disregard the sentencing guidelines? If so, under what circumstances is it appropriate?

Response: Please see my response to Question 12.

14. According to data from the Sentencing Commission, less than one-third of non-production child pornography offenders receive a sentence within the Commission's guideline range. What do you think accounts for this trend? Are

you concerned that the majority of judges appear to have disregarded the Sentencing Commission's work in this area?

Response: The Commission conducted a study on the child pornography guidelines and found growing sentencing disparities for these offenses based on practices such as (1) "charging decisions"; (2) "plea agreements containing guideline stipulations"; (3) "non-government sponsored variances and departures"; and (4) "government sponsored variances and departures." 2012 Report to the Congress: Federal Child Pornography Offenses at 317 (2012). This report and its findings were issued only after the Commission engaged in extensive review of the issue. If confirmed as a Commissioner, I would follow this approach, and look to the data and evidence in collaboration with my fellow Commissioners before forming opinions and making recommendations to Congress and others.

15. What will you do to encourage judges to follow the guidelines more closely in child pornography cases?

Response: It has been almost a decade since the Commission issued recommendations in its 2012 Report to the Congress: Federal Child Pornography Offenses. The Commission issued two updates to that report in 2021 (Federal Sentencing of Child Pornography: Non-Production Offenses and Federal Sentencing of Child Pornography: Production Offenses) but there has not been a quorum to consider the new data. I understand my responsibility would be to review the updated data and research, get input from stakeholders, and collaborate with my fellow Commissioners before making an evidence-based recommendation on this topic.

16. In a 2013 letter to the chair of the Sentencing Commission, providing commentary on the proposed priorities, you stated your belief that the "guidelines for child pornography offenses are severely flawed." Do you stand by this statement?

Response: I participated in that letter in my role as an employee of the Office of the Federal Public Defender and conveyed the position of the Federal Defenders. I did not participate in my personal capacity. If confirmed and asked to consider this issue as a Commissioner today, I would want to review the relevant data and evidence, consult with experts, and confer with my fellow Commissioners before formulating a view.

17. What data or experience informs your belief that the sentencing guidelines for child pornography offenses are severely flawed?

Response: Please see my response to Question 16.

18. Is it appropriate for judges to depart from the sentencing guidelines simply because they disagree with the underlying policy?

Response: The Supreme Court has held that the guidelines are advisory, *United States v. Booker*, 543 U.S. 220 (2005), and that district courts may impose sentences outside the guidelines range "based on a policy disagreement with those Guidelines," *Spears v. United States*, 555 U.S. 261 (2009); *see also Kimbrough v. United States*, 552 U.S. 85 (2007).

19. In offenses involving controlled substances what role, if any, should the quantity of a drug in the possession of an offender play in determining the appropriate sentence?

Response: By statute, the quantity of a controlled substance plays a significant role in determining the applicable statutory range. *See*, *e.g.*, 21 U.S.C. § 841(b). The quantity of a controlled substance also plays a significant role under the guidelines. *See* USSG §2D1.1. If confirmed as a Commissioner and the Commission considered this issue, in collaboration with my fellow Commissioners, I would look to the data and evidence, and seek input from a wide range of stakeholders before forming opinions and making recommendations to Congress and others.

20. In 2013 letter referenced in question 16, you advocated shifting the focus in drug offenses from drug quantity to the "role" of drugs. ("an increased emphasis on role would better serve the purposes of sentencing.") Please explain what focusing on the "role" of drugs would look like, especially how it is different from a system focusing on drug quantity.

Response: I participated in that letter in my role as an employee of the Office of the Federal Public Defender and conveyed the position of the Federal Defenders. I did not participate in my personal capacity. If confirmed and asked to consider this issue as a Commissioner today, I would want to review the relevant data and evidence, consult with experts, and confer with my fellow Commissioners before formulating a view. To clarify, the letter referred to the functional role of the individual charged with the offense. The Commission has previously analyzed the functions performed by individuals as part of their offenses. See, e.g., Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System (2017).

21. In your experience, can the quantity of drugs in the possession of an offender provide information on the "role" the drugs played or the severity of the offense?

Response: Please see my response to Question 20.

22. Criminal law is generally understood to have four main purposes: deterrence, reformation, retribution and prevention. Are mandatory minimums an effective way to accomplish these purposes? Why or why not?

Response: Congress established the purposes of sentencing in 18 U.S.C. § 3553(a): (A) "to reflect the seriousness of the offense, to promote respect for the law, and to

provide just punishment for the offense"; (B) "to afford adequate deterrence to criminal conduct"; (C) "to protect the public from further crimes of the defendant; and (D) "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

Congress also sets the minimum penalties for criminal offenses, and sentencing ranges set by the Commission must be "consistent with all pertinent provisions of title 18, United States Code," including mandatory minimums. 28 U.S.C. § 994(b)(1). If confirmed as a Commissioner, I would work collaboratively with my fellow Commissioners to ensure that all guidelines are consistent with federal law.

The Commission has previously provided Congress with reports and recommendations on mandatory minimums, and has indicated that "[a] strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act." The Commission's reports and recommendations were issued only after the Commission engaged in extensive review of the issue. For example, as described in the Commission's 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, "[t]he Commission reviewed legislation, analyzed sentencing data, and studied scholarly literature to prepare this report. The Commission sought the views of stakeholders in the criminal justice system in a variety of ways. The Commission consulted with its advisory groups and representatives from all three branches of the federal government, and heard from social scientists, scholars and others who apply or study mandatory minimum sentencing provisions." If confirmed as a Commissioner, I would follow this approach, and look to the data and evidence in collaboration with my fellow Commissioners before forming opinions and making recommendations to Congress and others.

23. Are there areas of law in which you think mandatory minimums are inappropriate?

Response: Please see my response to Question 22.

Questions for Laura E. Mate from Sen. Ossoff:

The United States Sentencing Commission issued a series of reports that study demographics in sentencings. In the most recent report, from 2017, the Commission found that "sentences of Black male offenders were 19.1 percent longer than those of White male offenders." The Commission has documented that racial disparity is pervasive in federal sentencing. It has also recognized that some strategies, like changes to the crack/powder disparity, helped to reduce that racial disparity.

(a) What responsibility does the Commission have to identify strategies to ameliorate the racial disparity in federal sentencing?

Response: Establishing sentencing policies and practices to "avoid[] unwarranted disparities" is one of the core purposes Congress assigned to the Commission. 28 U.S.C. § 991(b). Congress also directed the Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d).

(b) Beyond conducting studies and publishing reports, how would you – as a member of a collaborative commission - work to avoid racially disparate outcomes in federal sentencings across the country?

Response: Avoiding unwarranted disparities is one of the core purposes Congress assigned to the Commission. 28 U.S.C. § 991(b). Congress also directed that the "Commission periodically shall review, and revise, in consideration of comments and data coming to its attention, the guidelines." 28 U.S.C. § 994(o). Consistent with these obligations, if confirmed as a Commissioner, I would work collaboratively with my fellow Commissioners to review relevant data and evidence, consult with experts and review input from a wide range of stakeholders to consider whether there are evidence-based revisions to the guidelines that would reduce unwarranted disparities.

(c) Will you commit to prioritizing the elimination of racial disparities in federal sentencing?

Response: Yes, establishing sentencing policies and practices to "avoid[] unwarranted disparities" is one of the core purposes Congress assigned to the Commission. 28 U.S.C. § 991(b).

¹ Demographic Differences in Sentencing: An Update to the 2012 Booker Report (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114 Demographics.pdf at 2.

 $^{^{\}frac{1}{2}}$ *Id*. at 4.

Questions from Senator Thom Tillis for Laura Mate

Nominee to be Commissioner and Vice Chair of the U.S. Sentencing Commission

1. Do you believe the crack and powder cocaine disparity should be addressed?

Response: The statutory thresholds for the penalty provisions that apply to crack and powder cocaine can be changed only by Congress. The Commission has a statutory obligation to work to avoid "unwarranted sentencing disparities," 28 U.S.C. § 991(b), and has previously made several recommendations to Congress to address the crack and powder cocaine disparity. If confirmed as a Commissioner and the Commission considered this issue, in collaboration with my fellow Commissioners, I would look to the data and evidence, and seek input from a wide range of stakeholders before forming opinions and making recommendations to Congress and others.

2. How does the crack and powder cocaine disparity impact sentencing? Do you believe that the disparity leads to excessive incarceration?

Response: The Commission's prior reports to Congress have indicated that the disparity in the thresholds between crack and powder cocaine generate unwarranted sentencing disparities. See, e.g., 2002 Report to Congress: Federal Cocaine Sentencing Policy. The Commission has previously recommended that Congress increase the threshold amounts for crack, not decrease the threshold amount for powder cocaine. Id. If confirmed as a Commissioner and the Commission considered this issue, in collaboration with my fellow Commissioners, I would look to the data and evidence, and seek input from a wide range of stakeholders before forming opinions and making recommendations to Congress and others.

3. Do you agree with the 1-to-1 ratio suggested in the EQUAL Act? Or, do you recommend another ratio?

Response: In 1995, the Commission proposed a 1-to-1 ratio for crack and powder cocaine. 60 Fed. Reg. 25075-25077 (1995). Following Congress' rejection of this proposal, the Commission recommended another possible ratio in 1997, and in 2002 recommended lowering the ratio "at least" to 20-to1. 2002 Report to Congress: Federal Cocaine Sentencing Policy. If confirmed as a Commissioner and the Commission considered this issue, in collaboration with my fellow Commissioners, I would look to the data and evidence, and seek input from a wide range of stakeholders before forming opinions and making recommendations to Congress and others.

4. What challenges would the sentencing commission face when trying to implement the EQUAL Act?

Response: Following the passage of the Fair Sentencing Act of 2010, the Commissioners successfully collaborated to amend the guidelines to reflect the new law. I do not foresee

any reason a new Commission could not successfully amend the guidelines in response to this Act or any other Act passed by Congress that implicates federal sentencing.

5. Do you believe that individuals that share Child Sexual Abuse Material (CSAM) should receive lenient or enhanced penalties?

Response: Sharing CSAM is a very serious offense. The Commission has previously studied the guidelines for these offenses, but it has been almost a decade since the Commission issued recommendations in its 2012 Report to the Congress: Federal Child Pornography Offenses. The Commission issued two updates to that report in 2021 (Federal Sentencing of Child Pornography: Non-Production Offenses and Federal Sentencing of Child Pornography: Production Offenses) but there has not been a quorum to consider the new data. If confirmed as a Commissioner, I understand my responsibility would be to review the updated data and research, get input from stakeholders, and collaborate with my fellow Commissioners before making an evidence-based recommendation on this topic.

6. What factors would you look at when articulating sentencing guidelines for CSAM cases?

Response: If confirmed as a Commissioner and the Commission considered this issue, in collaboration with my fellow Commissioners, I would look to the data and evidence, and seek input from a wide range of stakeholders before forming opinions and making recommendations to Congress and others.

7. What is your view on the Protect Act of 2022? Do you believe individuals who possess child pornography should receive the same mandatory minimum for receiving?

Response: The Commission recommended aligning the penalties for possession in receipt in its 2012 Report to the Congress: Federal Child Pornography Offenses. It has been almost a decade since the Commission issued this recommendation. The Commission issued two updates to that report in 2021 (Federal Sentencing of Child Pornography: Non-Production Offenses and Federal Sentencing of Child Pornography: Production Offenses) but there has not been a quorum to consider the new data. If confirmed as a Commissioner, I understand my responsibility would be to review the updated data and research, get input from stakeholders, and collaborate with my fellow Commissioners before making an evidence-based recommendation on this topic.