Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Robert S. Ballou
Judicial Nominee to the United States District Court for the Western District of Virginia

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 disagree with the statement. A judge should follow Supreme Court and circuit precedent regarding the interpretation of the Constitution, regardless of the judge's personal opinions, beliefs, or "value judgments."

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 either the statement of Judge Reinhardt or the context in which it was given. A judge's duty is to apply the law to the facts and to follow applicable Supreme Court and circuit precedent.

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

   Response: The term "living constitution" as I understand it generally refers to interpreting and applying the Constitution in accordance with changing circumstances and, particularly, with changes in social values. As a United States Magistrate Judge, I do not ascribe to any particular label when interpreting legal text. Rather, I am bound by the guidance from the precedent of the Supreme Court and the Fourth Circuit regarding the interpretation of the Constitution and statutes.

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

   Response: I am not familiar with the context in which Justice Brown Jackson gave this remark. The Constitution is a fixed and enduring document and not subject to amendment except as provided under Article V. If confirmed as a district judge, I will apply the precedent of the Supreme Court and the Fourth Circuit regarding the interpretation of the Constitution.

5. **Please identify a Supreme Court decision from the last 50 years that exemplifies your judicial philosophy and explain why.**

Response: I have not studied the opinions of the Supreme Court justices to distill a judicial philosophy. My judicial philosophy is best identified by the 11 years I have served as a United States Magistrate Judge. I approach every case with an open mind, listen carefully to the evidence presented and arguments of all parties, research thoroughly the legal issues, and make a decision by applying the law to the facts. I approach every matter fairly and impartially and treat each person (litigant and witness) with courtesy, dignity, and respect.

6. **Please identify a Fourth Circuit decision from the last 50 years that exemplifies your judicial philosophy and explain why.**

Response: I have not studied the opinions of the Supreme Court justices to distill a judicial philosophy. My judicial philosophy is best identified by the 11 years I have served as a United States Magistrate Judge. I approach every case with an open mind, listen carefully to the evidence presented and arguments of all parties, research thoroughly the legal issues, and make a decision by applying the law to the facts. I approach every matter fairly and impartially and treat each person (litigant and witness) with courtesy, dignity, and respect.

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

Response: This is a policy decision reserved for local governments as to how best to allocate resources.

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

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

    Response: Canon 3A(6) of the Code of Conduct for United States Judges provides that a judge should not speak publicly regarding the correctness or incorrectness of any judicial opinion, including Supreme Court precedent when such issues could come before me as a district judge. I may comment, however, that *Brown v. Board of Education* was correctly decided as the unconstitutionality of *de jure* segregation is settled law and not likely to come before me.

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

    Response: Canon 3A(6) of the Code of Conduct for United States Judges provides that a judge should not speak publicly regarding the correctness or incorrectness of any judicial opinion, including Supreme Court precedent when such issues could come before me as a district judge. I may comment, however, that *Loving v. Virginia* was correctly decided as the constitutionality of banning interracial marriage by the state is settled law and not likely to come before me.

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

Response: The Supreme Court overruled *Roe v. Wade* in the case of *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). I will follow all Supreme Court and Fourth Circuit precedent if confirmed as a district judge.

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

Response: The Supreme Court overruled *Planned Parenthood v. Casey* in the case of *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). I will follow all Supreme Court and Fourth Circuit precedent if confirmed as a district judge.

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

Response: Canon 3A(6) of the Code of Conduct for United States Judges provides that a judge should not speak publicly regarding the correctness or incorrectness of any judicial opinion, including Supreme Court precedent when such issues could come before me as a district judge. I will apply all applicable Supreme Court and Fourth Circuit precedent if confirmed as a district judge.

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

Response: Please see my response to Question 8(e).

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

Response: Please see my response to Question 8(e).

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

Response: Please see my response to Question 8(e).

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

Response: Please see my response to Question 8(e).

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

Response: Please see my response to Question 8(e).

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

Response: It is a Class A offense under 18 USC § 1507 to picket or parade in or near a building or residence of a United States judge, juror, witness, or court officer with the

intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any such judge, juror, witness or a court officer, in the discharge of their duty.

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

Response: I am not aware of any binding Supreme Court or Fourth Circuit authority which addresses the constitutionality of this statute. Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from giving an opinion on an issue which may come before me either as a sitting United States Magistrate Judge or a district judge if confirmed.

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

Response: The Supreme Court stated in *Virginia v. Black*, 538 U.S. 343, 359 (2003), that fighting words are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction—are generally proscribable under the First Amendment." The Court noted that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* (internal quotation marks and citations omitted). The First Amendment also permits a State to ban a "true threat." *Id.* (internal quotation marks and citations omitted).

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

Response: The Supreme Court has stated that "[t]rue threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Virginia v. Black,* 538 U.S. 343, 359–60 (2003) (internal quotations marks and citations omitted). Generally, "political hyperbole" is not a "true threat." *See Watts v. United States*, 394 U.S. 705, 708 (1969).

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

Response: The Federal Criminal Code prohibits conduct against a judge or the judge's family to include assaults, kidnapping, murder, picketing, or parading with the intent to impede, intimidate, or interfere with the administration of justice. *See* 18 U.S.C. § 115 and 1507. The statutes do not prohibit mere criticism of a judicial opinion.

14. Do you think the Supreme Court should be expanded?

Response: This is a policy decision reserved for Congress.

15. Is the federal judicial system systemically racist? Please explain.

Response: As a sitting United States Magistrate Judge and judicial nominee, I am committed to assuring that all parties who appear before me receive a fair hearing without any prejudice or bias. I have not studied or formed an opinion as to whether the federal judicial system is systemically racist.

a. If you answered yes, if confirmed how will you feel comfortable working in a systemically racist system?

Response: Not applicable.

16. Is the federal judiciary affected by implicit bias?

Response: I have not completed any research on this issue and am not aware of any studies that addresses whether the federal judiciary is affected by implicit bias. I am committed as a sitting United States Magistrate Judge and judicial nominee to consider all sides of any issue to ensure that any decision I render is free of any subconscious biases.

17. 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-offenders to the community?

Response: The role of the court in each case is to apply the law to the facts of the case and, if sentencing, to consider the factors under 18 U.S.C. § 3553(a), or if considering a motion for detention or a request for pre-trial release, to apply the Bail Reform Act, 18 U.S.C. § 3142. Otherwise, Canon 3A(6) of the Code of Conduct for United States Judges prohibits my giving a personal opinion on the issues posited in this question.

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

Response: In *New York State Rifle & Pistol Association, Inc. v. Bruen,* 142 S. Ct. 2111

(2022), the Supreme Court held that any firearm regulation or restriction must be consistent with this Nation's historical tradition of firearm regulation. If confirmed as a district judge, I will follow the Supreme Court and Fourth Circuit precedent regarding the interpretation of the Second Amendment.

19. What is implicit bias?

Response: Merriam-Webster defines implicit bias as "a bias or prejudice that is present but not consciously held or recognized."

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

Response: We may all be subject to subconscious biases. I am committed as a sitting United States Magistrate Judge and judicial nominee to consider all sides of any issue to ensure that any decision I render is free of any subconscious biases.

21. During your selection process, did you talk with anyone from or anyone directly associated with the Raben Group or the Committee for a Fair Judiciary? If so, what was the nature of those discussions?

Response: No.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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 Question 26 and all subparts: No.

27. 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 Question 27 and all subparts: No.

28. 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 Question 28 and all subparts: No.

29. **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 Foundations 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 Question 29 and all subparts: No.

30. **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 Question 30 and all subparts: No.

31. **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?**
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?**
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 to Question 31 and all subparts: No.

32. 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: On March 4, 2021, I submitted an application to Senators Mark Warner and Tim Kaine regarding a position on the United States District Court for the Western District of Virginia. On May 6, 2021, I interviewed with the Senators' selection committee. On July 22, 2021, I interviewed with Senators Warner and Kaine. On August 9, 2021, I interviewed with attorneys from the White House Counsel's Office. Since January 21, 2022, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On July 13, 2022, my nomination was submitted to the Senate.

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

Response: I reviewed the questions, conducted research when necessary, and provided a set of draft answers to the Department of Justice's Office of Legal Policy (OLP). After receiving feedback from OLP, I finalized my responses for submission to the Senate Judiciary Committee.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary
Questions for the Record for Robert Stewart Ballou, Nominee for the United States District Judge for the Western District of Virginia

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a 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. Racial discrimination is wrong and prohibited by law under Title VI and VII of the Civil Rights Act of 1964. The Supreme Court has held that laws or policies containing racial classifications are subject to strict scrutiny, and as a sitting United States Magistrate Judge and current judicial nominee, I pledge to follow all precedent of the Supreme Court and the Fourth Circuit.

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 stated that there are fundamental rights, although not enumerated in the Constitution, which are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted)). Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting on whether there are other unenumerated rights not yet articulated by the Supreme Court. If confirmed as a district judge, I will follow all binding Supreme Court and Fourth Circuit precedent regarding those rights the Constitution protects.

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: My judicial philosophy is best identified by the 11 years I have served as a United States Magistrate Judge. I approach every case with an open mind, listen carefully to the evidence presented and arguments of all parties, research thoroughly the legal issues, and make a decision by applying the law to the facts. I approach every matter before me fairly and impartially and treat each person (litigant and witness) with courtesy, dignity, and respect. I have not studied the decisions, writings and philosophies of any Supreme Court Justice from the Warren, Burger, Rehnquist, or Roberts courts to know the judicial philosophy of any particular justice, and thus, cannot comment on whether any justice from those courts has a similar judicial philosophy.

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

Response: "Originalism" as I understand the term generally refers to giving the words in a legal document the meanings they had when the text was adopted. As a sitting United States Magistrate Judge and judicial nominee, I do not ascribe to any particular label when interpreting legal text. Rather, I am bound by the guidance from the precedent of the Supreme Court and the Fourth Circuit regarding the interpretation of the Constitution and statutes.

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

Response: The term "living constitutionalism" as I understand it generally refers to interpreting and applying the Constitution in accordance with changing circumstances and, in particular, with changes in social values. As a United States Magistrate Judge, I do not ascribe to any particular label when interpreting legal text. Rather, I am bound by the guidance from the precedent of the Supreme Court and the Fourth Circuit regarding the interpretation of the Constitution and statutes.

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: The Supreme Court provided guidance in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008); and *Crawford v. Washington*, 541 U.S. 36 (2004), for interpreting the Constitution and when to look to the original public meaning of Constitutional text to interpret its provisions. If confirmed as a district judge, I will follow the precedent established by the Supreme Court and the Fourth Circuit for interpreting the Constitution.

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: The Supreme Court stated in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1738 (2020), that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." Likewise, the Supreme Court has stated that the meaning of the Constitution is fixed, absent changes made through the Article V amendment process. *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). If confirmed as a district judge, I will follow the precedent of the Supreme Court and the Fourth Circuit for interpreting the Constitution and statutes.

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

Response: Please see my response to the previous question.

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

Response: Yes.

a. Was it correctly decided?

Response: Canon 3A(6) of the Code of Conduct for United States Judges provides that

a judge should not speak publicly regarding the correctness or incorrectness of any judicial opinion, including Supreme Court precedent when such issues could come before me as a district judge. I will apply all applicable Supreme Court and Fourth Circuit precedent if confirmed as a district judge.

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

Response: Yes.

a. Was it correctly decided?

Response: Please see my response to Question 9(a).

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

Response: Yes.

a. Was it correctly decided?

Response: Canon 3A(6) of the Code of Conduct for United States Judges provides that a judge should not speak publicly regarding the correctness or incorrectness of any judicial opinion, including Supreme Court precedent when such issues could come before me as a district judge. I may comment, however, that *Brown v. Board of Education* was correctly decided as the unconstitutionality of *de jure* segregation is settled law and not likely to come before me.

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

Response: The offenses for which a rebuttable presumption exists that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community are set forth in the Bail Reform Act. 18 U.S.C. § 3142(e)(2) and (3). Likewise, a rebuttable presumption of detention arises where probable cause exists that a defendant has committed a federal, state, or local felony while on pre-trial release. 18 U.S.C. § 3148(b).

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

Response: These statutes reflect the conclusions of Congress that a person charged with one of the enumerated offenses in § 3142(e)(2) or (3) or who commits a felony while on pretrial release presents a danger to the community and no conditions of pretrial release can reasonably assure that person's appearance at trial or the safety of the community.

13. Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be a religious organization like Little Sisters of the

Poor or small businesses operated by observant owners?

Response: Yes, and the Supreme Court has recognized that government regulation which discriminates against religious organizations or religious people is not neutral and is generally subject to strict scrutiny. Likewise, statutes such as the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act prohibit government action which substantially burdens the free exercise of religion. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania,* 140 S. Ct. 2367 (2020); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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

Response: The Supreme Court recognizes that strict scrutiny generally applies to government regulation which is not neutral or generally applicable and which discriminates against religious organizations or people. "[S]trict scrutiny requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.'" *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)).

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 addressed regulations regarding the attendance of religious services during the COVID-19 pandemic and held that the applicants met their burden of establishing that they were entitled to a preliminary injunction because they were likely to succeed on the merits of their First Amendment claims, they were likely to suffer irreparable harm, and there was no evidence that granting the injunction would be harmful to the public. The court determined that the challenged restrictions were not narrowly tailored to meet a compelling government interest because other less restrictive means were available to address the health risks at issue.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court addressed the State of California's restrictions on private gatherings during the COVID-19 pandemic. Applying strict scrutiny, the Court found that the regulations were neither neutral nor generally applicable because they treated secular gatherings more favorably than religious gatherings and therefore violated the Free Exercise Clause. *Id*. at 1297. For this reason, the Court further held that the plaintiffs had met the requirements for a preliminary injunction

and were entitled to relief. *Id*.

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, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission violated the Free Exercise Clause through its handling of a discrimination claim against the plaintiff bakery which had refused, based upon sincerely held religious beliefs, to provide services to a same sex couple. The Court found that the Civil Rights Commission demonstrated clear and impermissible hostility toward the sincere religious beliefs of the bakery and showed a religious animus in violation of the Free Exercise Clause.

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

Response: Yes. The Free Exercise Clause protects sincerely held beliefs "rooted in religion" and need not be based upon a "tenet, belief, or teaching of an established religious body." *Frazee v. Illinois Dept. of Employment Sec.,* 489 U.S. 829, 833 (1989). "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981) (also observing that yet, "[o]ne can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause"). In fact, "the notion that one must be responding to the commands of a particular religious organization to claim the protection of the Free Exercise Clause" has been rejected. *Frazee*, 489 U.S. at 834.

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

Response: Please see my response to the previous question.

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

Response: Please see my response to the previous question.

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

Response: I do not know the official position of the Catholic Church on this issue or

any other issue. Furthermore, as a sitting United States Magistrate Judge and judicial nominee, it is inappropriate for me to provide my personal views on the official position of any religious organization.

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: The Supreme Court decision in *Our Lady of Guadalupe School v. Morrisey-Berru,* 140 S. Ct. 2049 (2020), held that the "ministerial exception" protected religious institutions from certain discrimination actions, and that these institutions may decide matters of church government, faith, and doctrine free from state interference. Although the teachers in *Our Lady of Guadalupe School* did not have the title of "minister," their role was part of the "core" of the school's mission. *Id.* at 2055. As such, the Court ruled that the teachers' employment discrimination claims against the school were barred under the ministerial exception. *Id.* at 2060.

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 considered whether the City's refusal to place children in a foster care agency affiliated with the Roman Catholic Church, because it would not certify same-sex couples as foster parents, violated the First Amendment. Applying strict scrutiny, the Court held that the City offered no compelling interest for why it needed to deny an exception to Catholic Social Services while making exceptions available to others and, therefore, the restrictions violated the Free Exercise Clause. *Id.* at 1881-82.

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 considered whether Maine's tuition assistance program for private secondary schools violated the Free Exercise Clause and the Establishment Clause of the First Amendment. The Court held that the Maine law violated the Free Exercise Clause because it was not neutral and disqualified some private schools from funding solely because they are religious. Because the program was not neutral, the Court held that it was subject to strict scrutiny, and it could not meet that high burden.

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

Response: The Supreme Court in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), addressed whether the dismissal of a football coach violated the Free Exercise and Free Speech Clauses of the First Amendment, where the coach held a private prayer on the field after football games. The school district had prohibited the conduct on the grounds that it violated the Establishment Clause under the longstanding *Lemon* test. *Id.* at 2427. The Supreme Court concluded that the coach's private prayer did not, in fact, violate the Establishment Clause and, therefore, the Government's interest did not justify his dismissal. *Id.* at 2429.

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: The Supreme Court remanded *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), to the state court to examine the application of the Religious Land Use and Institutionalized Persons Act (RLUIPA) regarding the objections of the Amish community to certain septic system regulations. In concurrence, Justice Gorsuch concluded that RLUIPA triggers a strict scrutiny analysis where courts "cannot rely on broadly formed governmental interests, but must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 2432 (internal quotation marks omitted). That is, a court cannot treat a state's general interest in a regulation as compelling, without consideration of the specific application of that regulation to the affected community or group.

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: I am not aware of any binding precedent from the Supreme Court or the Fourth Circuit interpreting this statute. Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting on any matter which may come before me as either a United States Magistrate Judge or a district judge if I am confirmed.

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: No. Any training of federal court employees must comply with all applicable laws and regulations.

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: Please see my response to the previous question.

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 sitting United States Magistrate Judge and judicial nominee, it is not appropriate for me to comment on the political decisions of either the executive or legislative branch.

30. Is the criminal justice system systemically racist?

Response: As a sitting United States Magistrate Judge, I am committed to assuring that all parties who appear before me receive a fair hearing without any prejudice or bias. I have not studied or formed an opinion as to whether the criminal justice system is systemically racist.

31. President Biden has created a commission to advise him on reforming the U.S. Supreme Court. 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 matter of policy to be decided by Congress.

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: The Supreme Court held in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2126 (2022) 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." (citations omitted).

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: The analytical framework to decide these issues is forth in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), which teaches that first, the court should look to whether the challenged conduct falls within the meaning of the Second Amendment, and if so, whether the government can show that the restriction it is consistent with the country's historical tradition of firearm regulation.

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

Response: Yes.

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

Response: I am not aware of any existing precedent holding that the right to own a firearm is entitled to any less protection under the Constitution than other enumerated individual rights.

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

Response: No.

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

Response: Under *United States v. Nixon*, 418 U.S. 683, 693 (1974), the executive retains broad prosecutorial discretion, limited in that it may not be exercised "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Wayte v. U.S.*, 470 U.S. 598 (1985) (internal quotation marks omitted). As a sitting United States Magistrate Judge and judicial nominee, it is inappropriate for me to comment on the prosecutorial decisions of the executive.

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

Response: Substantive administrative rules must be "rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). The executive, in the exercise of prosecutorial discretion, is vested with the "exclusive authority and absolute discretion to decide whether to prosecute

a case." *See United States v. Nixon*, 418 U.S. 683, 693 (1974). If confirmed as a district judge, I would apply all Supreme Court and Fourth Circuit precedent which addresses these issues.

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

Response: No.

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

Response: The Supreme Court held in *Alabama Association of Realtors v. HHS,* 141 S. Ct. 2485 (2021), that the Centers for Disease Control and Prevention (CDC) lacked the authority to impose a nationwide moratorium on evictions. The Court indicated that Congress should speak clearly and provide explicit authorization to an agency which exercises powers of vast economic and political significance. *Id.* at 2489.

Senator Josh Hawley
Questions for the Record
Robert Stewart Ballou
Nominee, Western District of Virginia

1. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**

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

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

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

    d. **The enhancements for the number of images involved**

    Response to Question 1 and all subparts: I am not familiar with the sentencing practices of Justice Brown Jackson. Congress has instructed a sentencing judge to follow the factors set out in 18 U.S.C. § 3553(a), including considering the advisory sentencing guidelines and any relevant enhancements to "impose a sentence sufficient, but not greater than necessary" as set forth in § 3553(a)(2). Each defendant is sentenced individually, and if confirmed as a district judge, I will sentence individual defendants before me on a case-by-case basis as required.

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: This is an important policy issue reserved for the legislative branch. As a sitting United States Magistrate Judge and judicial nominee, it is inappropriate for me to speak on these policy issues.

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

Response: This is an important policy issue reserved for the legislative branch. As a sitting United States Magistrate Judge and judicial nominee, it is inappropriate for me to speak on these policy issues.

c. If an offender before you is charged only with possession even though uncontested evidence shows the offender also committed the crime of receiving child pornography, will you aim to sentence the offender to between 5 and 10 years?

Response: Congress has instructed a sentencing judge to follow the factors set out in 18 U.S.C. § 3553(a), including considering the advisory sentencing guidelines and any relevant enhancements to "impose a sentence sufficient, but not greater than necessary" as set forth in § 3553(a)(2). Each defendant is sentenced individually, and if confirmed as a district judge, I will sentence individual defendants before me on a case-by-case basis as required.

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

a. Do you agree with that philosophy?

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

Response to Question 3 and all subparts: I am unfamiliar with the specific context of Justice Marshall's quote. A judge takes an oath to uphold the laws and Constitution of the United States, and thus, is bound by the Rule of Law to decide all cases based upon the facts and the applicable law. I follow this oath as a United States Magistrate Judge, and if confirmed as a district judge, I will continue to follow this oath.

4. Do you believe that the Supreme Court's ruling in *Dobbs* v. *Jackson Women's Health Organization* is settled law?

Response: Yes.

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

Response: The Supreme Court has recognized multiple abstention doctrines in which a federal court abstains from hearing a case in deference to a state court's authority over a case.

The *Rooker-Feldman* doctrine recognizes that a federal court may not reverse or modify a state court judgment involving "injuries caused by state-court judgments

rendered before [federal] district court proceedings." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp*., 544 U.S. 280, 283–84 (2005). Rather, appellate review of any such judgment is limited to the U.S. Supreme Court. *Id.* at 283. The Fourth Circuit has explained, however, that "federal courts may entertain claims previously examined by a state court, so long as those claims do not seek review of the state court decision itself." *Vicks v. Ocwen Loan Servicing, LLC*, 676 Fed. App'x 167, 168 (4th Cir. 2017).

The *Pullman* abstention doctrine advises that federal courts should consider abstaining from federal constitutional challenges to a state law if a state court might interpret the law in a way that avoids the federal issue. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

The *Burford* abstention doctrine provides that federal courts should consider abstaining "(1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans (NOPSI)*, 491 U.S. 350, 361 (1989) (internal quotation marks omitted).

The *Younger* abstention doctrine directs that federal courts should abstain from interfering with state criminal proceedings, or civil proceedings akin to a criminal proceeding, "that implicate a State's interest in enforcing the orders and judgments of its courts." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72-73 (2013); *see also Younger v. Harris*, 401 U.S. 37 (1971). *Younger* abstention is appropriate only in "exceptional" cases. *Jacobs*, 571 U.S. at 73; *see also Air Evac EMS, Inc. v. McVey*, 37 F.4th 89, 93 (4th Cir. 2022).

The *Colorado River* abstention doctrine applies whenever there is parallel state court litigation involving the same parties and the same issues. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Such abstention should be exercised when "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" clearly favors abstention. *Id*. at 817 (internal quotation marks omitted). However, *Colorado River* abstention should be exercised only in exceptional circumstances. *VonRosenberg v. Lawrence,* 849 F.3d 163, 168 (4th Cir. 2017).

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

   Response: No.

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

Response: Not applicable

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

Response: The Supreme Court has explained the meaning of the Constitution is fixed, but the original public meaning of the Constitution's text must apply to circumstances beyond those specifically contemplated by the Founders. *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022) ("[T]he Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated, even though its meaning is fixed according to the understanding of those who ratified it."). If confirmed, I would follow all binding Supreme Court and Fourth Circuit precedent regarding constitutional interpretation.

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

Response: When interpreting a statute or regulation, courts first consider the plain language of the statute or regulation, unless the language is ambiguous. *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015). An ambiguity exists if the statutory language "lends itself to more than one reasonable interpretation [. . .] by reference to the language itself, . . . the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (internal quotation marks and citations omitted). If an ambiguity exists, courts may look to binding Supreme Court and circuit precedent which interprets the statutory language. Additionally, the rules of statutory construction include considering the statutory scheme and "other indicia of congressional intent such as the legislative history to interpret the statute." *Id*. (quoting *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 53 (4th Cir. 2011) (internal quotation marks omitted)).

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

   Response: The Supreme Court and the Fourth Circuit have explained that contemporaneous official committee reports "are more authoritative than comments from the floor." *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (internal quotation marks omitted); *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir. 1986).

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

Response: The United States Constitution is a domestic document, and a court should not consult the laws of a foreign nation when interpreting its provisions.

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

Response: An inmate may challenge a state's execution protocol upon a showing that the method of execution presents a risk that is "sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers." *Baze v. Rees*, 553 U.S. 35, 50 (2008) (citation and internal quotation marks omitted); *accord Emmett v. Johnson*, 532 F.3d 291, 298 (4th Cir. 2008). The inmate must also establish that an alternative method of execution exists which is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Baze*, 553 U.S. at 52; *accord Emmett*, 532 F.3d at 299.

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

Response: In *Glossip v. Gross*, 576 U.S. 863, 878 (2015), the Supreme Court considered a challenge under the Eighth Amendment to the execution protocol used in Oklahoma. The Supreme Court held that to establish that an execution protocol violates the Eighth Amendment, a petitioner must "establish the existence of a known and available alternative method of execution that would entail a significantly less severe risk" of pain. *See also Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022); *Bucklew v. Precythe*, 139 U.S. 1112, 1126 (2019).

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

Response: The Supreme Court held in *District Attorney's Office for the Third Judicial District. v. Osborne*, 557 U.S. 52 (2009), that there is no substantive due process right to the postconviction preservation and testing of DNA evidence. The Supreme Court in *Skinner v. Switzer*, 562 U.S. 521 (2011), allowed a claim under 42 U.S.C. § 1983 alleging a procedural due process violation and seeking post-conviction DNA testing. *Skinner* also recognized that *Osborne* left unanswered

whether a petitioner seeking DNA testing of crime-scene evidence has a claim "cognizable in federal court only when asserted in a petition for a writ of habeas corpus under 28 U.S.C. § 2254." *See also LaMar v. Ebert*, 681 F. App'x 279 (4th Cir. 2017) (discussing that *Osborne* recognized a liberty interest protected by procedural due process to post-conviction DNA evidence).

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

Response: No.

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

Response: Under the Free Exercise Clause, laws which are facially neutral and generally applicable, but which place a burden on the free exercise of religion are subject to rational basis review. In contrast, laws which are not neutral and generally applicable are analyzed under a strict scrutiny standard. *See e.g., Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). This requires the law to be narrowly tailored to meet a compelling government interest. *See, e.g., Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Ramirez v. Collier*, 142 S. Ct. 1264 (2022); *Church of the Lukumi Babalu Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, also trigger strict scrutiny under the Free Exercise Clause. *Trinity Lutheran Church of Colombia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

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

Response: Please see response to Question 13. Generally, governmental action which discriminates against a religious group or persons under a law or regulation which is not neutral or generally applicable is subject to strict scrutiny. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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

Response: The courts generally have a limited role in determining whether a person's religious beliefs are sincere or genuinely held. In fact, the Supreme Court held in *Frazee v. Illinois Department of Employment Security,* 489 U.S. 829, 833 (1989), that sincerely held beliefs "rooted in religion" need not be based upon a "tenet, belief, or teaching of an established religious body." *See also Thomas v. Review Bd. of the Indiana Emp't Sec. Div.*, 450 U.S. 707 (1981). The Court cautioned that the determination of what is a "religious belief or practice" is not to turn upon a "judicial perception of the particular belief or practice in question." *Id.* at 713-14. "Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.*

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

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

Response: The Supreme Court held in *District of Columbia v. Heller,* 554 U.S. 570, 635 (2008), that laws that banned the possession of a handgun in a home, or that required "rendering any lawful firearm in the home [in]operable for the purpose of immediate self-defense" were an unconstitutional burden on an individual's Second Amendment right to keep and bear arms.

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

Response: No.

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

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

Response: The dissent in *Lochner v. New York,* 198 U.S. 45, 75 (1905), explained that the "Constitution is not intended to embody a particular economic theory."

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

Response: The Supreme Court has abrogated *Lochner v. New York*, 198 U.S. 45 (1905). *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in *Lochner* . . . has long since been discarded."). As a sitting United States Magistrate Judge and judicial nominee, it would generally not be appropriate for me to comment on this issue.

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

Response: I am not aware of any Supreme Court opinions which have not been formally overruled, but which I believe are no longer good law.

a. If so, what are they?

Response: Not applicable

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: I will follow all Supreme Court precedent, including those cases which have favorably cited to Judge Hand. *See United States v E.I du Pont de Nemours & Co*, 351 U.S. 377, 391 (1956); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992); *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946).

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

Response: Not applicable.

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

Response: Monopoly power is "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). I am not aware of a minimum percentage of market share required to establish monopoly power.

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

Response: There is no general federal common law, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), but "federal common law" exists in a limited area of law created by the federal courts absent a controlling federal statute. Only limited areas exist in which federal judges may appropriately craft the rule of decision. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004). These areas have included admiralty disputes and certain controversies between states. *See, e.g., Norfolk Southern Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23 (2004); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938); *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713 (2020).

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

Response: A state constitutional right is interpreted consistent with the decisions of the state's highest court. *See Erie R. Co. v. Tomkins*, 304 U.S. 64, 78 (1938); *see also Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("The views of the state's highest court with respect to state law are binding on the federal courts.").

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

Response: Please see my response to the previous question.

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

Response: The highest court of a state may interpret a state constitutional provision that is identical to the federal constitution in a manner which provides greater protection, but not less than that provided under the United States Constitution.

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

Response: Canon 3A(6) of the Code of Conduct for United States Judges provides that a judge should not speak publicly regarding the correctness or incorrectness of any judicial opinion, including Supreme Court precedent when such issues could come before me as a district judge. I may comment, however, that *Brown v. Board of Education* was correctly decided as the unconstitutionality of *de jure* segregation is settled law and not likely to come before me.

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

Response: Article III of the Constitution does not specifically define "the Judicial Power," but it includes the power to issue equitable remedies for legal violations. The procedure for issuing injunctions in Federal Court is governed by Rule 65 of the Federal Rules of Civil Procedure. Further, the Administrative Procedure Act requires courts to "set aside" unlawful agency action. The Fourth Circuit held in *HIAS, Inc. v. Trump*, 985 F.3d 309, 326 (4th Cir. 2021), that a district court may issue a nationwide injunction so long as the court '"mold[s] its decree to meet the exigencies of the particular case.'" (quoting *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017)). A nationwide injunction may be appropriate when the government relies on a "categorical policy," and when the facts would not require different relief for others similarly situated to the plaintiffs. *Id.* at 326. Whether a district court has the authority to issue a nationwide injunction is an issue subject to debate, and thus, Canon 3A(6) of the Code of Conduct for United States Judges prohibits me commenting on an issue which may come before me if I am confirmed as a district judge. I will follow all applicable Supreme Court and Fourth Circuit precedent on this issue.

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

Response: Please see my response to the previous question.

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

Response: Please see my response to the previous question.

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

Response: Please see my response to Question 23.

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

Response: Federalism represents the relationship between the federal government and the state governments. The Constitution provides specific enumerated powers to the federal government, and reserves to the states "or to the people" under the Tenth Amendment the "powers not delegated to the United States by the Constitution, nor prohibited by it . . . ." U.S. Const. art. X. While the federal government is that of limited powers, the Supremacy Clause provides that the Constitution, federal law and treaties "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2.

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

Response: Please see my response to Question 5.

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

Response: There is no "advantage or disadvantage" in the award of injunctive relief versus general damages. The focus of granting relief to the prevailing party in a legal action is on the harm at issue. Injunctive relief seeks to avoid future harm, while an award of damages seeks to compensate for past harms. *See TransUnion LLC v Ramirez*, 141 S. Ct. 2190 (2021). The relief a court provides should address the harm or injury suffered.

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

Response: The Supreme Court in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), reaffirmed that the Due Process Clause protects certain substantive rights not otherwise enumerated in the Constitution which are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id*. at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted)). The discussion of this issue in *Dobbs* cited to a number of its cases holding that particular substantive rights are protected under the Due Process Clause. *Id*. at 2257–58.

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

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

Response: The Free Exercise Clause of the First Amendment is a fundamental right, and any law or regulation which infringes upon that right must be narrowly tailored to achieve a compelling governmental interest. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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

Response: The Supreme Court has held that the Free Exercise Clause of the First Amendment embraces not only a freedom of worship but also a freedom of conscience. *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

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

Response: Under the Free Exercise Clause, laws which are facially neutral and generally applicable, but which place a burden on the free exercise of religion are subject to rational basis review. In contrast, laws which are not neutral and generally applicable are analyzed under a strict scrutiny standard. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). This requires the law to be narrowly tailored to meet a compelling government interest. *See, e.g., Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Ramirez v. Collier,* 142 S. Ct. 1264 (2022); *Church of the Lukumi Babalu Inc. v. City of Hialeah,* 508 U.S. 520 (1993). Indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, also trigger strict scrutiny under the Free Exercise Clause. *Trinity Lutheran Church of Colombia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

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

Response: The courts generally have a limited role in determining whether a person's religious beliefs are sincere or genuinely held. The Supreme Court held in *Frazee v. Illinois Department of Employment Security,* 489 U.S. 829, 833 (1989), that sincerely held beliefs "rooted in religion" need not be based

upon a "tenet, belief or teaching of an established religious body." *See also Thomas v Rev. Bd. of the Indiana Emp. Sec. Div.*, 450 U.S. 707 (1981). The Court cautioned that the determination of what is a "religious belief or practice" is not to turn upon a "judicial perception of the particular belief or practice in question." *Id.* at 713–14. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714.

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

Response: The Religious Freedom Restoration Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a).

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

Response: Yes. I issued the following opinions involving the Religious Land Use and Institutionalized Persons Act: *Peterson v. Barksdale*, No. 7:16cv146, 2017 WL 1207848, at *1 (W.D. Va. Mar. 31, 2017); *Peterson v. Barksdale*, No. 7:16cv146, 2017 WL 782939, at *1 (W.D. Va. Feb. 28, 2017); *Rountree v. Clarke*, No. 7:11cv572, 2014 WL 4923964, at *1 (W.D. Va. Mar. 24, 2014), *report and recommendation adopted in part, rejected in part sub nom.* 2014 WL 4923163 (W.D. Va. Sept. 30, 2014); *Blount v. Tate*, No. 7:11cv91, 2012 WL 4341083, at *1 (W.D. Va. Aug. 24, 2012), *report and recommendation adopted in part, rejected in part*, 2012 WL 4341744 (W.D. Va. Sept. 21, 2012).

I issued the following opinions involving the Free Exercise Clause: *Cartagena v. Lovell*, No. 7:21cv539, 2022 WL 4593100 (W.D. Va. Sept. 29, 2022); *Peterson v. Barksdale*, No. 7:16cv146, 2017 WL 1207848 (W.D. Va. Mar. 31, 2017); *Rountree v. Clarke*, No. 7:11cv572, 2014 WL 4923964 (W.D. Va. Mar. 24, 2014), *report and recommendation adopted in part, rejected in part sub nom.* 2014 WL 4923163 (W.D. Va. Sept. 30, 2014); *Blount v. Tate*, No. 7:11cv91, 2012 WL 4341083 (W.D. Va. Aug. 24, 2012) *report and recommendation adopted in part, rejected in part*, 2012 WL 4341744 (W.D. Va. Sept. 21, 2012).

To the best of my knowledge, I have not issued any opinions, orders, or decisions involving the Religious Freedom Restoration Act or the Establishment Clause.

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

a. What do you understand this statement to mean?

Response: I do not know the context in which Justice Scalia gave this remark. However, a judge is bound to follow the law and established precedent regardless of whether the outcome is consistent with the judge's personal beliefs or likes.

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

Response: No.

a. If yes, please provide appropriate citations.

Response: Not applicable.

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

Response: No.

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

Response: As a sitting United States Magistrate Judge, I am committed to ensuring that all parties who appear before me receive a fair hearing without any prejudice or bias. Our foundational documents teach that "all men are created equal" and that all citizens ("We the People") play a role to achieve the ideals captured in the Preamble of the Constitution to build a more perfect union, to promote the general Welfare, and to secure the Blessings of Liberty for all.

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

Response: No.

35. How did you handle the situation?

Response: Please see my response to Question 34.

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

Response: Yes.

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

Response: No particular Federalist Paper has shaped my view of the law.

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

Response: Canon 3A(6) of the Code of Conduct for United States Judges prohibits me providing my personal opinion regarding any issue which potentially could come before me either as a sitting United States Magistrate Judge or a district judge. In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Court returned the question of abortion regulation to the people and their elected representatives. Neither the Supreme Court nor the Fourth Circuit has addressed the question of whether an unborn child is a human being.

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

Response: I testified in the criminal prosecution of William A. White. *See United States v. William A. White,* 7:08cr54 (W.D. Va.) (ECF 205) (transcript).

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: No. However, as a practicing attorney, I would frequently offer comment or suggestions when consulted on briefs or legal issues by partners of my firm.

a. If so, please identify those cases with appropriate citation.

Response: Not applicable.

43. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

Response: Not applicable.

44. Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when

testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.

Response: Nominees take an oath to answer questions truthfully and have an obligation to fulfill that oath consistent with their ethical obligations including Canon 3A(6) of the Code of Conduct for United States Judges that a sitting judge or nominee "should not make public comment on the merits of a matter pending or impending in any court."

Questions from Senator Thom Tillis
for Robert Stewart Ballou
Nominee to be United States District Judge for the Western District of Virginia

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

   Response: Yes.

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

   Response: Judicial activism refers to a judge deciding a case based upon personal views or reaching an issue not presented by the parties. The role of a judge is to resolve the question presented based upon the facts and law regardless of any personally held views.

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

   Response: Impartiality is an expectation.

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

   Response: The role of a judge is to interpret and apply the law to the facts and not to second guess the policy decisions of the legislative body.

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

   Response: A judge should faithfully interpret and apply the law without regard to personal views and without regard to any desired outcome.

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

   Response: A judge should faithfully interpret and apply the law without regard to any personal political or policy preferences.

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

   Response: If confirmed as a district judge, I will follow all Supreme Court and Fourth Circuit precedent regarding the Second Amendment, including *New York Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

   Response: If confirmed as a district judge, I would evaluate the issues raised based upon the facts and law, including applicable Supreme Court and Fourth Circuit precedent regarding laws or regulations which implicate the Second Amendment and relating to restrictions imposed during the COVID-19 pandemic which affected constitutional rights. *See, e.g., New York Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), *McDonald v. City of Chicago,* 561 U.S. 742 (2010), *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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: The Supreme Court has established a two-part test to determine whether a law enforcement officer acting under the color of law in an action arising under 42 U.S.C. § 1983 is entitled to qualified immunity. The court must determine (1) whether the officer violated a constitutional right, and (2) whether the constitutional right was clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The court may address these inquiries in either order, but must find that the officer is entitled to qualified immunity if either there was no constitutional violation or the constitutional right was not clearly established at the time of the alleged violation.

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: This question is a policy issue left to the legislature. Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting on this issue, but if confirmed as a district judge, I will apply all applicable Supreme Court and Fourth Circuit precedent.

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

    Response: This question is a policy issue left to the legislature. Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting on this issue, but if confirmed as a district judge, I will apply all applicable Supreme Court and Fourth Circuit precedent.

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: If confirmed to be a district judge, I would address any case involving patent eligibility by applying the Patent Act, 35 U.S.C. § 101, along with the applicable precedent from the Supreme Court and Federal Circuit, including *Alice Corporation Pty. Ltd. v. CLS Bank International*, 573 U.S. 208 (2014), and *Mayo Collaborative Services. v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012). This analysis requires careful consideration of the evidence, the allegations of the patent owner, and any other intrinsic record evidence. I do not have any personal thoughts as to the state of the Supreme Court's patent eligibility jurisprudence, and as both a current United States Magistrate Judge and judicial nominee, it would be inappropriate to comment on an issue that could come before me. *See* Canon 3A(6) of the Code of Conduct for United States Judges.

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

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

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

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

    d. ***BetterThanTesla ElectricCo*** **develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla's* billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?**

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

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

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

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

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

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

Response to subparts (a) – (j): If confirmed as a district judge, I would approach these hypothetical situations by applying applicable Supreme Court and Federal Circuit

precedent. The Supreme Court follows a two-step approach as set out in *Alice Corporation Pty. Ltd. v. CLS Bank International*, 573 U.S. 208 (2014) and *Mayo Collaborative Services v. Prometheus Laboratories, Inc.,* 566 U.S. 66 (2012), and requires first a determination of whether the subject claim is directed to something the Supreme Court has indicated is unpatentable, such as an abstract idea. If so, the court evaluates whether the claim, taken as an ordered combination, nonetheless contains an inventive concept sufficient to render the claim eligible. The outcome of cases of this nature are fact specific and require a careful analysis of the exact wording of the claim, the record evidence, and applicable precedent.

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

Response: Please refer to my responses to Questions 12 and 13. Whether the current law achieves any particular goal is a question for policy makers, and it would be inappropriate for me to comment on this issue as a sitting United States Magistrate Judge and judicial nominee.

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

a. What experience do you have with copyright law?

Response: As a United States Magistrate Judge, I have handled the pre-trial discovery and case management for several copyright cases. I have also served as a mediator in several copyright cases.

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

Response: While serving as a United States Magistrate Judge, I have been involved in the discovery aspects and mediation of several cases brought under the Copyright Act, but I do not believe I have had any cases under the Digital Millennium Copyright Act of 1998.

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

Response: To the best of my knowledge, I have not had any matters either as a sitting United States Magistrate Judge or practicing attorney which involved 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: While I was a practicing attorney, my practice did not include advising clients on First Amendment and intellectual property issues. Since I became a United States Magistrate Judge in 2011, I have handled the pre-trial discovery and case management or served as a mediator in several cases involving First Amendment free speech issues, intellectual property, and copyright law.

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

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

Response: If confirmed as a district judge, I would first look to Supreme Court and Fourth Circuit precedent when interpreting statutory provisions. I would next consider the specific text of the statute and interpret it in light of the plain and unambiguous language. Additionally, the rules of statutory construction include considering the statutory scheme and "other indicia of congressional intent such as the legislative history to interpret the statute." *Id*. (quoting *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 53 (4th Cir. 2011) (internal quotation marks omitted)).

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: Presently, the applicable Supreme Court precedent may require that a court give *Chevron* deference to the agency interpretation and analysis of an issue. The nature of the agency action, however, may implicate the major questions doctrine as discussed in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), that an agency may act only with the regulatory authority specifically delegated by Congress.

c. **Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?**

Response: As a sitting United States Magistrate Judge and judicial nominee, Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from speaking on the policy issues raised in this question.

17. **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: If confirmed as a district judge, my obligation is to apply the statutory law as written and as interpreted by applicable Supreme Court and Fourth Circuit precedent.

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: If confirmed as a district judge, my obligation is to apply the statutory law as written and as interpreted by applicable Supreme Court and Fourth Circuit precedent.

18. **In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.**

a. **Do you see "judge shopping" and "forum shopping" as a problem in litigatio**n?

Response: Local Rule 2(b) of the Local Rules of the Western District of Virginia requires that an action be brought in the proper division of the district and that the venue rules for the United States district courts apply to division selection. Thus, a litigant may not "request" that a case be heard in a particular division of the court as posited by this question. If confirmed as a district court judge, I would apply the

statutes and rules of the United States district courts and the local rules of the Western District of Virginia.

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

Response: Please see my response to the previous question.

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. If confirmed as a district judge, I will apply the law neutrally in each case and not proactively seek to attract a particular type of case or litigant. This is what I have done for 11 years as a United States Magistrate Judge and will continue to do if confirmed as a district judge.

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

Response: Please see my response to the previous question.

19. In just three years, the Court of Appeals for the Federal Circuit has granted no fewer than 19 mandamus petitions ordering a particular sitting district court judge to transfer cases to a different judicial district. The need for the Federal Circuit to intervene using this extraordinary remedy so many times in such a short period of time gives me grave concerns.

a. What should be done if a judge continues to flaunt binding case law despite numerous mandamus orders?

Response: I am not familiar with the particular issues raised in this question. It would be inappropriate as a sitting United States Magistrate Judge and judicial nominee to give any opinion on these issues. The judges of the Federal Circuit or the litigants in the cases may file a complaint regarding a district judge's conduct as provided by the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351–364.

b. Do you believe that some corrective measure beyond intervention by an appellate court is appropriate in such a circumstance?

Response: Please see my response to the previous question.

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

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

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

Response to Question 20 and subparts (a) and (b): I have not studied the issues raised in this question (and subparts). The issue of assignment of patent cases has not been raised in the Western District of Virginia, to the best of my knowledge. Any changes to the local rules in the Western District of Virginia are first studied by the Local Rules Committee, and I will give fair consideration to any changes recommended to the local rules. Canon 3A(6) of the Code of Conduct for United States Judges prohibits me providing my opinion beyond these general comments.

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

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

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

Response to Question 21 and subparts (a) and (b): Each case is based on its individual merits, and as a sitting United States Magistrate Judge and current judicial nominee, the Code of Conduct for United States Judges prevents me from commenting on the issues raised in this question.