Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge F. Kay Behm
Nominee to the U.S. District Court for the Eastern District of Michigan

1. **In the context of federal case law, what is super precedent?**

   Response: Black's Law Dictionary defines "superprecedent" as "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation" and "[a] precedent that has become so well established in law by a long line of reaffirmations that it is very difficult to overturn it; specif., a precedent that has been reaffirmed many times and whose rationale has been extended to cover cases in which the facts are dissimilar, even wholly unrelated, to those of the precedent." Precedent, Black's Law Dictionary (11th ed. 2019).

2. **Should law firms undertake the pro bono prosecution of crimes?**

   Response: I do not have an opinion on whether it would be appropriate for a law firm to prosecute criminal matters.

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

   Response: I am not familiar with this statement by Justice Ketanji Brown Jackson nor with the context in which the statement was made. A judge's personal beliefs are not relevant and cannot be considered when deciding a case. If confirmed, I would follow the precedent established by the Supreme Court and the Sixth Circuit.

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

   Response: A judge's decisions should be based on the law and should not take into consideration outside principles unless the law requires such considerations to be taken into account. A judge's personal beliefs and views of social equity are not relevant and should play no role in the decision-making process.

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

   Response: 18 U.S.C. § 115 makes it a crime to threaten, assault, kidnap, or murder federal government officials, including United States judges, with the intent to impede, intimidate, or interfere with their official duties. I would never advocate for violence or threats of violence against any government official.

6. Under what circumstances can federal judges add to the list of fundamental rights the Constitution protects?

Response: In *Washington v. Glucksberg*, the Supreme Court held that unenumerated rights can be recognized under the Due Process Clause of the Fourteenth Amendment if such rights are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). If confirmed, I would follow the precedent established by the Supreme Court and the Sixth Circuit.

7. Should a defendant's personal characteristics influence the punishment he or she receives?

Response: Pursuant to 18 U.S.C. § 3553(a), a court must "impose a sentence sufficient, but not greater than necessary" and when doing so consider the factors set forth in 18 U.S.C. § 3553(a) including "the nature and circumstances of the offense and the history and characteristics of the defendant...." Race, gender, nationality, sexual orientation or gender identity are not factors that may be considered when imposing a sentence under 18 U.S.C. § 3553(a).

8. Please discuss your criminal legal experience, including the number of felony cases that you have personally handled, how many misdemeanor cases you have personally handled, and how many times you have argued before the court in a criminal matter.

Response: As a state court judge for more than thirteen years, I have presided over thousands of adult and juvenile criminal matters. Most of these matters have involved felonies, but have occasionally also involved misdemeanor charges. As a practicing attorney for fifteen years, I did not handle criminal matters.

9. Please discuss your familiarity with the Federal Rules of Criminal Procedure and the United States Sentencing Commission's Advisory Sentencing Guidelines. Specifically:

a. How often have you cited to either of these tomes during the course of your work?

Response: The State of Michigan Court Rules and Sentencing Guidelines are modeled after the Federal Rules of Civil and Criminal Procedure and Federal Advisory Sentencing Guidelines. I have presided over thousands of criminal cases wherein I consulted the Michigan Court Rules regarding criminal procedure

and I have sentenced hundreds of defendants in adult criminal matters during which have considered the Michigan Sentencing Guidelines.

b. How often have you had an opportunity to work within these constructs during the course of your career?

Response: The State of Michigan Court Rules and Sentencing Guidelines are modeled after the Federal Rules of Criminal Procedure and Federal Advisory Sentencing Guidelines. I have presided over thousands of criminal cases wherein I consulted the Michigan Court Rules regarding criminal procedure, and I have sentenced hundreds of defendants in adult criminal matters during which I have considered the Michigan Sentencing Guidelines.

10. What is the legal basis for a nationwide injunction? What considerations would you consider as a district judge when deciding whether to grant one?

Response: Federal Rule of Civil Procedure 65 governs the procedures for issuance of an injunction. Generally, "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Moreover, "the scope of injunctive relief is dictated by the extent of the violation established…" *Id.* If confirmed, I would consider the facts and law of each case and I would follow the precedent established by the Supreme Court and the Sixth Circuit.

11. 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 provided guidance on how to determine the validity of a firearm regulation. Under *Bruen*'s holding, the government must demonstrate that any restriction is consistent with this Nation's historical tradition of firearm regulation. *Id.*

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

Response: Yes. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court held that parents have a right to direct the upbringing and education of their children. *See also Meyer v. Nebraska*, 262 U.S. 390 (1923).

13. Do Blaine Amendments violate the Constitution?

Response: In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the Supreme Court found that a "no-aid" Blaine Amendment provision in the Montana Constitution was subject to strict scrutiny and violated the Free Exercise Clause. The

amendment barred religious schools from receiving public scholarship funds solely because of the religious character of the schools. *Id.*

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

Response: 18 U.S.C. § 1507 makes it unlawful to picket or parade in or near a building, courthouse, or residence occupied or used by a 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 judge, juror, witness, or court officer in the discharge of his duty.

15. Under Supreme Court precedent, is 18 USC § 1507 constitutional on its face?

Response: To my knowledge, the Supreme Court has not issued any opinion on the constitutionality of 18 U.S.C. § 1507. As a judicial nominee, it would generally not be appropriate for me to take a position on this issue.

16. Do you agree with the following statement: "Not everyone deserves a lawyer, there is no civil requirement for legal defense"?

Response: The Constitution guarantees an individual the right to counsel at all critical stages of the criminal process but does not guarantee the same right in civil litigation. My personal beliefs are not relevant and would play no role in my decision-making process. I would follow the precedent established by the Supreme Court and the Sixth Circuit.

17. Do you think law firms should allow their paying clients to influence which pro bono clients they take?

Response: I have no opinion on how law firms should make these types of decisions.

18. Do you think law firms should allow their paying clients to influence the positions they assert on behalf of other clients?

Response: Lawyers have a duty of loyalty to each client. Ann. Mod. Rules Prof. Cond. 1.7. Lawyers cannot represent a client with respect to a matter if the lawyer's professional judgment on behalf of the client would be or reasonably may be adversely affected by the lawyer's responsibility to a third party. Ann. Mod. Rules Prof. Cond. 1.8.

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

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

Response: As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on whether the Supreme Court has correctly decided a case. If confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit. Notwithstanding the foregoing, because this decision is so fundamental and widely accepted, it presents an exception to this rule and is not likely to come before me as a judge. As such, I believe that I can state that *Brown v. Board of Education* was correctly decided.

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

Response: As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on whether the Supreme Court has correctly decided a case. If confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit. Notwithstanding the foregoing, because this decision is so fundamental and widely accepted, it presents an exception to this rule and is not likely to come before me as a judge. As such, I believe that I can state that *Loving v. Virginia* was correctly decided.

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

Response: As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on whether the Supreme Court has correctly decided a case. If confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit.

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

Response: In *Dobbs v. Jackson Women's Health,* the Supreme Court overruled *Roe v. Wade.* As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on whether the Supreme Court has correctly decided a case. If confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit.

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

Response: In *Dobbs v. Jackson Women's Health,* the Supreme Court overruled *Planned Parenthood v. Casey.* As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on whether the Supreme Court has correctly decided a case. If confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit

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

Response: As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on whether the Supreme Court has correctly decided a case. If

confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit.

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

Response: As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on whether the Supreme Court has correctly decided a case. If confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit.

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

Response: As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on whether the Supreme Court has correctly decided a case. If confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit.

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

Response: As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on whether the Supreme Court has correctly decided a case. If confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit

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

Response: As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on whether the Supreme Court has correctly decided a case. If confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit.

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

Response: As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on whether the Supreme Court has correctly decided a case. If confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit.

20. 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: I have spoken with Chris Kang two times regarding the application process. Additionally, as noted in my Senate Judiciary Questionnaire, on April 25, 2021, I

participated in a Zoom seminar organized by Michigan Demand Justice where I answered questions about the process through which I was appointed as a state court judge and about what being a state court judge entails on a day-to-day basis.

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 American Constitution Society, 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 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.

24. **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.

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

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

       Response: On April 25, 2021, I participated in a Zoom seminar on a panel entitled, "Ask a Judge Anything" which was organized by Michigan Demand Justice. I answered questions about the process through which I was appointed as a state court judge and about what being a state court judge entails on a day-to day basis.

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

Response: No

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

Response: I have spoken with Chris Kang two times regarding the application process. I watched a webinar presentation on the application process at which Mr. Kang spoke. Additionally, as noted in my Senate Judiciary Questionnaire, on April 25, 2021, I participated in a Zoom seminar organized by Michigan Demand Justice where I answered questions about the process through which I was appointed as a state court judge and about what being a state court judge entails on a day-to-day basis. I received a thank you email from Brian Fallon for participating in the Zoom seminar. I received a congratulatory email from Mr. Kang regarding my nomination.

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

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

Response: No.

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

Response: No.

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

Response: I believe this question intends to refer to the Alliance for Justice, not Demand Justice. I have not been in contact with anyone associated with Alliance for Justice.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

30. **The Raben Group is "a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the corporate, nonprofit, foundation, and government sectors." It manages the Committee for a Fair Judiciary.**

a. **Has anyone associated with The Raben Group or the Committee for a Fair Judiciary requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

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

Response: No.

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

31. **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 February 9, 2021, I submitted an application to the office of Senator Debbie Stabenow. On March 2, 2021, I received an email from the Chair of the Advisory Committee inviting me to an interview with the Committee, which occurred on March 10, 2021. On April 17, 2021, I received a phone call from Senator Stabenow informing me that my name had been sent to the White House for consideration. On or about April 19, 2021, I received a phone call from Senator Gary Peters who also advised me that I was being considered by the White House. Later that day, I received an email from the White House Counsel's Office scheduling my interview with them, which took place on April 21, 2021. On August 12, 2021, I received an email from Senator Stabenow's office asking if I would like my February 9, 2021, application to be reconsidered for a new vacancy in the Eastern District of Michigan, to which I agreed. On January 26, 2022, I was contacted by the White House Counsel's Office, and since that date I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On June 29, 2022, the President announced his intent to nominate me.

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

Response: On the afternoon of August 3, 2022, the Office of Legal Policy sent me these questions. I reviewed the questions, conducted researched as needed, and drafted answers based on my research and my notes. I submitted a draft of my responses to the Office of Legal Policy who provided feedback. I modified and submitted my final responses.

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

Questions for the Record for Judge Frances Kay Behm, Nominee for the United States District Court for the Eastern District of Michigan

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

Response: Yes. Discrimination on the basis of race is prohibited by several federal and state laws. The Supreme Court has held that race-based government action is subject to strict scrutiny and, as such, is only permissible when narrowly tailored to achieve a compelling government interest.

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: In *Washington v. Glucksberg*, the Supreme Court held that unenumerated rights can be recognized under the Due Process Clause of the Fourteenth Amendment if such rights are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). If confirmed, I would follow the precedent established by the Supreme Court and the Sixth Circuit.

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: Judges should fairly, impartially and diligently apply the facts of each case to the applicable law. A judge should approach each case with an open mind and treat all persons involved with dignity and respect. I do not identify with any Justice's particular philosophy.

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

Response: Black's Law Dictionary defines "originalism" as "the doctrine that words of a legal instrument are to be given the meanings they had when they were adopted, specifically, the canon that that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully-informed observer at the time when the text first took effect." Originalism, Black's Law Dictionary (11th ed. 2019). I have not characterized myself as an "originalist" or used any other such label regarding constitutional interpretation.

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

Response: Black's Law Dictionary defines "living constitutionalism" as a doctrine through which "the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Living

Constitutionalism, Black's Law Dictionary (11th ed. 2019). I have not characterized myself as a "living constitutionalist" or used any other such label regarding constitutional interpretation.

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: Judges have an obligation to apply the unambiguous language of a statutory or constitutional provision. If confirmed, I would follow the precedent established by the Supreme Court and the Sixth Circuit to determine when the original public meaning of the text of the Constitution should be used to interpret its provisions. *See e.g., New York State Rifle & Pistol Association v. Bruen*, 597 U.S. ___ (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

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: A judge's decisions should be based on the law and should not take into consideration the public's current understanding, unless the law requires such considerations to be taken into account.

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

   Response: I believe the Constitution is an enduring document that is fundamental to our system of government. Changes to the Constitution must follow the Article V amendment process.

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: As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on whether the Supreme Court has correctly decided a case. If confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit.

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: As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on whether the Supreme Court has correctly decided a case. If confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit.

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

Response: Yes.

a. Was it correctly decided?

Response: As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on whether the Supreme Court has correctly decided a case. If confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit. Notwithstanding the foregoing, because this decision is so fundamental and widely accepted, it presents an exception to this rule and is not likely to come before me as a judge. As such, I believe that I can state that *Brown v. Board of Education* was correctly decided.

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

Response: A presumption in favor of pretrial detention in the federal criminal system is governed by the Bail Reform Act of 1984. A presumption in favor of pretrial detention will arise for certain statutorily defined offenses, including drug offenses with a statutory maximum term of imprisonment of 10 years or more; crimes of violence; offenses for which the maximum sentence is life imprisonment or death; certain offenses involving a minor; as well as others. 18 U.S.C. § 3142(e)(2), (3).

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

Response: In *United States v. Stone*, the Sixth Circuit acknowledged the policy rationales adopted by other circuits underlying the Bail Reform Act's presumption of pretrial detention. *United States v. Stone*, 608 F.3d 939, 945 (6th Cir. 2010). The presumption favoring detention is "not simply an evidentiary tool designed to be used by courts," but instead reflects congressional findings that "certain offenders…are likely to continue to engage in criminal conduct undeterred either by the pendency of charges against them or by the imposition of monetary bond or other release conditions." *Id.* at 946.

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. For example, in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania,* 140 S. Ct. 2367 (2020), the Supreme Court held that the Affordable Care Act authorized the Health Resources and Services Administration to exempt or accommodate employers' religious or moral objections to providing no-cost contraceptive coverage. Similarly, in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that a law that operates as to make the practice of sincerely held religious beliefs more expensive in the context of business activities imposes an impermissible burden on the free exercise of religion.

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

Response: Under the Free Exercise Clause, laws that burden the free exercise of religion are first analyzed to determine whether they are both neutral and generally applicable. *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). If the law in question is not neutral or generally applicable, it is only constitutional if it survives strict scrutiny, meaning that the law must 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). The Sixth Circuit has generally followed the precedent set forth by the Supreme Court and recently held that a law that is not neutral and generally applicable must undergo "the most rigorous of scrutiny." *Dahl v. Bd. of Trustees of W. Michigan Univ.*, 15 F.4th 728, 733 (6th Cir. 2021). The federal government is subject to additional restrictions under the Religious Freedom Restoration Act (RFRA), and the federal government in certain state actions is subject to the Religious Land Use and Institutionalized Persons Act (RLUIPA).

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court held that the applicants 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. In determining the likelihood of the applicants' success on the merits, the Court looked to whether the challenged restrictions were narrowly tailored to meet a compelling government interest. *Id.* at 67. The Court found that the challenged restrictions were not narrowly tailored, because there were numerous other less restrictive rules that could be adopted to minimize the health risks of attending religious services. *Id.*

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

Response: In *Tandon v. Newsom,* the Court held that the applicants were entitled to a preliminary injunction because they were likely to succeed on the merits of their First Amendment claim, they were likely to suffer an irreparable harm, and there was no evidence that "public health would be imperiled" by granting a preliminary injunction. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). The Court reasoned that regulations trigger strict scrutiny under the Free Exercise Clause whenever they treat *any* comparable secular activity more favorably than religious exercise. *Id*. Under this standard, the Court held that, even though California's COVID rules limited both religious and secular in-home gatherings, they treated other secular activities and businesses – including hair salons, retail stores, movie theaters, and indoor restaurants – more favorably. *Id.* at 1294.

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 when it treated the plaintiff's case with clear and impermissible hostility and failed to neutrally apply a facially neutral public accommodations law where the Commission demonstrated a religious animus against the cakeshop owner's sincerely held religious beliefs.

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. In *Frazee v. Illinois Dept. of Employment Sec.,* 489 U.S. 829, 833 (1989), the Supreme Court held that sincerely held beliefs "rooted in religion" need not be based upon a "tenant, belief or teaching of an established religious body." See also *Thomas v Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981). 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.*

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

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: I am not familiar with the official position of the Catholic Church as to this issue or any other issue.

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

Response: In *Our Lady of Guadalupe Sch. v. Morrisey-Berru,* 140 S. Ct. 2409 (2020), the Supreme Court held that the "ministerial exception" protected the rights of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Although the teachers did not technically have the title of "minister," the Court relied on the fact that the teachers' role was part of the "core" of the school's mission. *Id.* at 2055. As such, the ministerial exception applied, and plaintiff teachers were barred from bringing employment discrimination claims against the school. *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 found that the City's restrictions on religious entities were not generally applicable and, therefore, were subject to strict scrutiny. The Court reasoned that, when dealing with restrictions on Free Exercise, so long as the government can achieve its interests in a manner that does not burden religion, it must do so. *Id.* at 1881. In this case, the Court

found that the City of Philadelphia offered no compelling interest for why it needed to deny an exception to CSS while making exceptions available to others and, therefore, their restrictions violated the Free Exercise Clause. *Id.* at 1882.

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 Court held that Maine's tuition assistance program violated the Free Exercise Clause. Because Maine's "nonsectarian" requirement conditioned the availability of tuition assistance solely on a school's religious character, the law was subject to "the strictest scrutiny." *Id.* at 1997. The Court found that the Government's interest did not meet this heavy burden. *Id.*

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

Response: In *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022), the Court held that the Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in personal religious practices from government discipline. The school district in question justified their conduct on the basis that it was necessary to prevent a violation of the Establishment Clause under the longstanding *Lemon* test. *Id.* at 2427. However, the Court found that Kennedy's private religious exercise did not rise to the level of a violation of 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: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), the Supreme Court remanded the case to the state court to examine the application of the Religious Land Use and Institutionalized Persons Act (RLUIPA). In Justice Gorsuch's concurrence, he explained 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.

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 currently aware of any Supreme Court or Sixth Circuit precedent interpreting 18 U.S.C. § 1507. As a sitting judge and judicial nominee, it is generally not

appropriate for me to comment on this issue.

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;**

      Response: I am not familiar with the manner in which the federal courts train their employees. I would expect that any trainings are conducted in compliance with all laws and regulations.

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

      Response: I am not familiar with the manner in which the federal courts train their employees. I would expect that any trainings are conducted in compliance with all laws and regulations.

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

      Response: I am not familiar with the manner in which the federal courts train their employees. I would expect that any trainings are conducted in compliance with all laws and regulations.

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

      Response: I am not familiar with the manner in which the federal courts train their employees. I would expect that any trainings are conducted in compliance with all 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: I am not familiar with the manner in which the federal courts train their employees. I would expect that any trainings are conducted in compliance with all laws and regulations.

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 judge and judicial nominee, it is generally not appropriate for me to comment on decisions made by the Executive Branch or the constitutionality thereof.

30. Is the criminal justice system systemically racist?

Response: As a state court judge who has presided over thousands of adult and juvenile criminal matters, it has been my goal in every case to treat each litigant fairly and without any form of bias. I do not have an opinion on racism within the broader criminal justice system.

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: The Constitution explicitly leaves questions regarding the composition of the Supreme Court to Congress. I would not offer a view on a question that is better left to policymakers.

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

Response: No.

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

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

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

Response: In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court provided guidance on how to determine the validity of a firearm regulation. Under *Bruen*'s holding, the government must demonstrate that any restriction is consistent with this Nation's historical tradition of firearm regulation. *Id.*

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 Supreme Court precedent that has held that the right to own a firearm receives less protection than the other individual rights specifically enumerated in the Constitution.

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

Response: I am not aware of any Supreme Court precedent that has held that the right to own a firearm receives less protection than the right to vote under the Constitution.

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

Response: As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on this issue.

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

Response: As a state court judge for more than thirteen years, I have not had the opportunity to encounter this issue. If confirmed, I would follow the precedent established by the Supreme Court and the Sixth Circuit.

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: In *Alabama Association of Realtors v. HHS,* 141 S. Ct. 2485 (2021), the Supreme Court held that the Centers for Disease Control and Prevention (CDC) exceeded its authority when it imposed a nationwide moratorium on evictions. The Court clarified that it expects Congress to speak clearly and provide explicit authorization to an agency when it seeks to exercise powers of "vast economic and political significance." *Id.* at 2489.

42. What professional experience do you have that qualifies you to serve as a federal judge?

Response: As a state trial court judge for more than thirteen years, I have had the opportunity to handle several types of dockets including domestic, child protective proceedings, juvenile crime, probate, general civil (including the business court docket)

and adult criminal. Across these dockets, I have handled more than 13,750 cases and a wide range of judicial proceedings. Each time that I have taken on a new docket, I have quickly learned new areas of law.

As part of my current criminal docket, as well as when I presided over a juvenile crime docket, I regularly decided motions involving issues of federal and constitutional law, including motions to suppress under the Fourth Amendment, *Daubert* evidentiary hearings, (*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)), *Brady* motions (*Brady v. Maryland*, 373 U.S. 83 (1963)), and questions of double jeopardy under the Fifth Amendment. Further, I work with the Michigan Sentencing Guidelines and Michigan Rules of Civil and Criminal Procedure on a daily basis, which closely mirror the Federal Sentencing Guidelines and Federal Rules of Civil and Criminal Procedure.

As part of my current civil docket, I preside over a wide range of matters including disputes including complex business transactions, medical malpractice claims, general negligence claims, contract disputes, and products liability claims. I have also heard and decided numerous motions for preliminary injunctions, as well as presided over a matter requesting class action certification.

I have extensive experience managing a court docket and a busy courtroom. Despite having handled thousands of matters, my decisions have been reversed on appeal only three times. Prior to serving as a state court judge, I practiced law for fifteen years representing individuals and businesses in business litigation and probate matters.

43. What is the "dormant" commerce clause? Please explain your understanding of the legal doctrine.

Response: Under the Commerce Clause, Congress has the power to regulate commerce "among the several states." U.S. Const. art. I, §8, cl. 3. The dormant commerce clause, implied within Congress's Commerce Clause powers, provides that States do not have the power to unjustifiably discriminate against or burden interstate commerce. If a State's law or regulation is discriminatory, it is invalid unless it advances a legitimate local purpose that cannot be adequately served by "reasonably nondiscriminatory alternatives." *Dep't. of Revenue of Ky v. Davis*, 553 U.S. 328, 338 (2008). If a State's law or regulation is not discriminatory on its face, it will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to its benefits. *Id*.

44. You are currently serving as a judge on the Genesee County probate court, where you are assigned to the family court docket. According to the numbers you provided this committee, over the nine years you have served as a judge, only 14 matters you handled were actually published. You have not issued any significant opinions on federal or state constitutional issues and do not have notable experience in federal law or complex constitutional cases. As a practicing attorney, over 99% of your cases involved state or local-level civil issues. What professional

experience do you have that qualifies you to serve as a federal judge?

Response: As a state trial court judge for more than thirteen years, I have had the opportunity to handle several types of dockets including domestic, child protective proceedings, juvenile crime, probate, general civil (including the business court docket) and adult criminal. Across these dockets, I have handled more than 13,750 cases and a wide range of judicial proceedings. Each time I have taken on a new docket, I have quickly learned new areas of law. I am currently serving on the criminal and civil docket. Because of the case volume and limited resources in state courts, it is my longstanding practice to issue a significant portion of my opinions from the bench, rather than publishing written orders. Generally, in Michigan, written orders by trial court judges are not published but instead kept in the court clerk's office as part of the court record.

As part of my current criminal docket, as well as when I presided over a juvenile crime docket, I regularly decided motions involving issues of federal and constitutional law, including motions to suppress under the Fourth Amendment, *Daubert* evidentiary hearings, (*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)), *Brady* motions (*Brady v. Maryland*, 373 U.S. 83 (1963)), and questions of double jeopardy under the Fifth Amendment. Further, I work with the Michigan Sentencing Guidelines and Michigan Rules of Civil and Criminal Procedure on a daily basis, which closely mirror the Federal Sentencing Guidelines and Federal Rules of Civil and Criminal Procedure.

As part of my current civil docket, I preside over a wide range of matters including disputes including complex business transactions, medical malpractice claims, general negligence claims, contract disputes, and products liability claims. I have also heard and decided numerous motions for preliminary injunctions, as well as presided over a matter requesting class action certification.

I have extensive experience managing a court docket and a busy courtroom. Despite having handled thousands of matters, my decisions have been reversed on appeal only three times. Prior to serving as a state court judge, I practiced law for fifteen years representing individuals and businesses in business litigation and probate matters.

Senator Josh Hawley
Questions for the Record

Frances Behm
Nominee, Eastern District of Michigan

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.**

        Response: I am not familiar with the prior sentencing practices of Justice Ketanji Brown Jackson. If confirmed, I would scrupulously follow the factors Congress has set forth in 18 U.S.C. § 3553(a) and the Federal Sentencing Guidelines, including any relevant enhancements. In addition to the precedent established by the Supreme Court and the Sixth Circuit, I will apply the law to the facts of each matter before me.

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

        Response: Please see my response to Question 1a.

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

        Response: Please see my response to Question 1a.

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

        Response: Please see my response to Question 1a.

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 question is an important issue for policymakers to consider. As a sitting judge and judicial nominee, it would generally not be appropriate for me to comment on this policy issue.

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

Response: This question is an important issue for policymakers to consider. As a sitting judge and judicial nominee, it would generally not be appropriate for me to comment on this policy issue.

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?**

Response: No.

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

Response: A judge has an obligation to follow the law and the precedent established by the Supreme Court and the circuit in which she sits.

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: Under the *Pullman* abstention doctrine, federal courts may abstain from hearing a case when a difficult and unsettled question of state law should be resolved before a substantial federal constitutional question can be decided. *R.R. Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496 (1941). A district court must ask whether the state statute is subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question. *Jones v. Coleman,* 848 F.3d. 744, 752 (6th Cir. 2017).

The *Younger* abstention doctrine reflects the longstanding public policy that state courts must be able to try state cases free from interference by federal courts. *Younger v. Harris,* 401 U.S. 37, 43 (1971). The doctrine applies when three criteria are met: (1) there are currently pending state proceedings, (2) the proceedings involve an important

state interest, and (3) the state proceedings will provide the federal plaintiff with an adequate opportunity to raise their constitutional claims. *Doe v. Univ. of Kentucky,* 860 F.3d. 365, 369 (6th Cir. 2017).

Under the *Burford* abstention doctrine, a federal court must abstain from reviewing certain decisions of state administrative agencies when there are difficult questions of state law bearing on policy problems of substantial public import or where the exercise of federal review would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943). The Sixth Circuit has held that *Burford* abstention applies only to statewide policies, rather than local policies. *Saginaw Hous. Comm'n v. Bannum, Inc.*, 567 F.3d 620, 628 (6th Cir. 2009).

The *Colorado River* abstention doctrine applies when the other doctrines of abstention may not apply, but abstention is nevertheless necessary for reasons of "wise judicial administration." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The Sixth Circuit held that district courts should consider: (1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; and (4) the order in which jurisdiction was obtained. *Romine v. Compuserve Corp.*, 160 F.3d 337, 340-41 (6th Cir. 1998).

Finally, under the *Rooker-Feldman* doctrine, lower federal courts are precluded from exercising appellate jurisdiction over final state court judgments. *Lance v. Dennis*, 546 U.S. 459, 463 (2006). Generally, final judgments or decrees rendered by the highest court of a state may then be reviewed by the United States Supreme Court by a writ of certiorari. *Id.* at 476. Thus, when a district court is presented with claims that are inextricably intertwined with the judgment of a state court, the federal court does not have jurisdiction over these elements of the complaints. *Anderson v. Charter Twp. of Ypsilanti,* 266 F.3d 487, 492 (6th Cir. 2001).

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

Response: No.

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

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

Response: If confirmed, I would be obligated to follow Supreme Court and Sixth Circuit precedent regarding the interpretation of particular constitutional provisions. For example, I would follow the precedent established by the Supreme Court and the Sixth Circuit to determine when the original public meaning of the text of the Constitution should be used to interpret its provisions. See *e.g., New York State Rifle & Pistol Association v. Bruen*, 597 U.S. ___ (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

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

Response: If confirmed, I would be obligated to follow Supreme Court and Sixth Circuit precedent regarding interpreting statutory provisions. In a case of first impression, my analysis would start with the text of the statute and if the text is unambiguous, my analysis would end there. However, if the statutory text was ambiguous, I would next consider canons of construction, persuasive precedent from other circuits, and finally, legislative history that provides clear evidence of congressional intent. *Milner v. Department of Navy*, 562 U.S. 562 (2011).

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: Not all legislative history is the same. The Supreme Court has explained that certain types of legislative history should not be relied upon. Specifically, the Court has noted that Committee Reports are "more authoritative than comments from the floor" and has expressed a preference for Committee Reports over "the passing comments of one Member and casual statements from floor debates." *Garcia v. U.S.*, 469 U.S. 70, 76 (1984). If confirmed, I would follow the precedent established by the Supreme Court and the Sixth Circuit.

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

Response: If confirmed, I would follow the precedent established by the Supreme Court and the Sixth Circuit to interpret the provisions of the U.S. Constitution. I would not consult the laws of foreign nations.

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: The Eighth Amendment generally forbids "cruel and unusual" methods of capital punishment, but it has not been understood to guarantee a painless death. *Glossip v. Gross*, 567 U.S. 863, 869 (2015). Under the *Baze-Gossip* test, an individual bringing a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment must first show that the protocol is "sure or very likely" to cause serious pain. *In re Ohio Execution Protocol*, 860 F.3d 881, 890 (6th Cir. 2017). An individual must then show that a feasible and readily implemented alternative method is available that would significantly reduce a substantial risk of severe pain. *Id. Baze* and *Glossip* have not been interpreted to render a traditionally accepted method of execution unconstitutional as soon as an arguably more humane method becomes available. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019).

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

Response: Yes.

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

Response: In *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), the Supreme Court held that there was no substantive due process right to DNA testing for a habeas petitioner post-conviction. The Sixth Circuit adopted this holding in *In re Smith,* 349 F. App'x 12, 15 (6th Cir. 2009).

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 that burden the free exercise of religion are first analyzed to determine whether they are both neutral and generally applicable. *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). If the law in question is not neutral or generally applicable, it is only constitutional if it survives strict scrutiny, meaning that the law must 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). The Sixth Circuit has generally followed the precedent set forth by the Supreme Court and recently held that a law that is not neutral and generally applicable must undergo "the most rigorous of scrutiny." *Dahl v. Bd. of Trustees of W. Michigan Univ.*, 15 F.4th 728, 733 (6th Cir. 2021).

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

Response: Please see my response to Question 13.

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: In *Frazee v. Illinois Dept. of Employment Sec.,* 489 U.S. 829, 833 (1989), the Supreme Court held that sincerely held beliefs "rooted in religion" need not be based upon a "tenant, belief or teaching of an established religious body." *See also Thomas v Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981). 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: In *Heller*, the Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."

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: Justice Holmes explained in his dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905), 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: As a sitting judge and a judicial nominee, it would generally not be appropriate for me to comment on this issue. Further, *Lochner v. New York* has been abrogated by a number of Supreme Court cases. *See e.g., West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

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: My personal opinion of any Supreme Court decision is not relevant and would not play a role in my decision-making process. If confirmed, I would follow the precedent established by the Supreme Court and the Sixth Circuit.

a. **If so, what are they?**

Response: Please see my response to Question 18.

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

Response: Please see my response to Question 18.

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: "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). In *Eastman Kodak Co v. Image Technical Services, Inc.*, 504 U.S. 541, 481 (1992) the Supreme Court indicated that Kodak's control of "nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitution" was sufficient to demonstrate that it had monopoly power. Thereafter, the Supreme Court noted that 87% of the market constituted a monopoly in *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) and that over two-thirds of the market was sufficient to demonstrate a monopoly in *American Tobacco Co v. United States*, 328 U.S. 781, 797 (1946). If confirmed, I would follow the precedent established by the Supreme Court and the Sixth Circuit.

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

Response: Please see my response to Question 19a.

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: As a state court judge for the past thirteen years, I have not encountered this issue. If confirmed, I would follow the precedent established by the Supreme Court and the Sixth Circuit.

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

Response: "Federal common law" is a limited area of law created by the federal courts absent a controlling federal statute. "Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative powers' in Congress and reserves most other

regulatory authority to the States. See Art. I, § 1; Amdt. 10. As the Supreme Court has put it, there is 'no federal general common law.' *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Instead, 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 R. 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) (internal citations modified).

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: The interpretation of a state constitutional provision is a matter of state law. Federal courts must defer to the state court's interpretations of a state constitutional provision. See *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

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

Response: Please see my response to Question 21.

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

Response: A state constitution may provide greater protections than its federal counterpart.

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

Response: As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on whether the Supreme Court has correctly decided a case. If confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit. Notwithstanding the foregoing, because this decision is so fundamental and widely accepted, it presents an exception to this rule and is not likely to come before me as a judge. As such, I believe that I can state that *Brown v. Board of Education* was correctly decided.

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

Response: Federal Rule of Civil Procedure 65 governs the procedures for issuance of an injunction. Generally, "injunctive relief should be no more burdensome to the defendant

than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Moreover, "the scope of injunctive relief is dictated by the extent of the violation established…" *Id.* If confirmed, I would consider the facts and law of each case and I would follow the precedent established by the Supreme Court and the Sixth Circuit.

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

Response: Please see my response to Question 23.

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

Response: Please see my response to Question 23.

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 and division of power between the federal government and the States. The Constitution divides these powers by enumerating a specific set of powers that the federal government may exercise. Further, as provided in the Tenth Amendment, the Constitution reserves the "powers not delegated to the United States by the Constitution, nor prohibited by it…" to the States "or to the people." As such, the federal government is a government of limited powers and may only exercise those powers specifically enumerated in the Constitution.

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: Injunctive relief, generally, seeks to prevent a future harm while an award of damages, generally, compensates for past harms. See *TransUnion LLC v Ramirez*, 141 S. Ct. 2190 (2021).

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

Response: In *Washington v. Glucksberg*, the Supreme Court held that unenumerated rights can be recognized under the Due Process Clause of the Fourteenth Amendment if such rights are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). If confirmed, I would follow the precedent established by the Supreme Court and the Sixth Circuit.

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 First Amendment right to free exercise of religion is a fundamental right. I will follow the precedent established by the Supreme Court and the Sixth Circuit as to the scope of that right.

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 freedom to worship generally refers to a person's right to participate in religious services. The First Amendment protects both the freedom to believe and freedom to act, including the freedom to live out one's their faith in daily life. *Cantwell v. State of Connecticut,* 310 U.S. 296, 303-04 (1940).

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: Please see my response to Question 13.

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: In *Frazee v. Illinois Dept. of Employment Sec.,* 489 U.S. 829, 833 (1989), the Supreme Court held that sincerely held beliefs "rooted in religion"

need not be based upon a "tenant, belief or teaching of an established religious body." *See also Thomas v Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981). 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.*

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: Under the Religious Freedom Restoration Act (RFRA), the federal government is restricted "from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. 682, 705 (2014). The Supreme Court has held that RFRA applies to all federal law. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: No.

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

a. What do you understand this statement to mean?

Response: I am not familiar with the context in which Justice Scalia made this remark. A judge has an obligation to follow the law and precedent regardless of her personal beliefs.

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

Response: No.

a. **If yes, please provide appropriate citations.**

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

Response: No.

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

Response: As a state court judge who has presided over thousands of adult and juvenile criminal matters, it has been my goal in every case to treat each litigant fairly and without any bias. I do not have an opinion on racism within the broader criminal justice system.

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

Response: Yes.

35. How did you handle the situation?

Response: I fulfilled my ethical and professional obligation as an advocate and zealously represented my client's interests.

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: There is not any particular Federalist Paper that has significantly shaped my views of the law.

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

Response: In *Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228 (2022), the Supreme Court declined to express a "view about if and when prenatal life is entitled to any of the rights enjoyed after birth." As a sitting judge and judicial nominee, it would generally not be appropriate for me to comment on this issue.

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 before the State of Michigan House Judiciary Committee on two occasions. I testified on behalf of the Michigan Probate Judge Association on October 13, 2015, regarding proposed legislation, HB 4107 - "family law; marriage and divorce; veteran disability compensation; exclude from martial estate." I testified prior to that time regarding the general duties and jurisdiction of the probate court. The specific hearing date was not available in the records of the Michigan House of Representatives. No transcript or other record is available.

Several years ago, while still practicing law, I served as a guardian ad litem for a minor in a wrongful death action. I provided in-court testimony in that regard. I am not aware of the particular case name or date and I do not know if any record is available.

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: The only shares I hold are through my employment 401(k) and 457 plans. I do not manage those investments and do not currently know what specific shares are held.

b. Amazon?

Response: Please see my response to Question 41a.

c. Google?

Response: Please see my response to Question 41a.

d. Facebook?

Response: Please see my response to Question 41a.

e. Twitter?

Response: Please see my response to Question 41a.

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

Response: No.

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

43. Have you ever confessed error to a court?

Response: To the best of my recollection, no.

a. If so, please describe the circumstances.

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

Response: Nominees take an oath to tell the whole truth and have an obligation to abide by and fulfill that oath.

Questions for the Record for Frances Kay Behm
From Senator Mazie K. Hirono

1. **As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:**

   a. **Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

      Response: No.

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

      Response: No.

Senator John Kennedy
Questions for the Record

Frances Kay Behm
Nominee, Eastern District of Michigan

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

   Response: Judges should fairly, impartially and diligently apply the facts of each case to the applicable law. A judge should approach each case with an open mind and treat all persons involved with dignity and respect.

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

   Response: Absent controlling Supreme Court or Sixth Circuit precedent on the particular statutory provision at issue, judges have an obligation to apply the unambiguous language of a statutory provision, and I would do so if confirmed.

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

   Response: No. Please see response to Question 2.

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

   Response: In *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551, 570 (1972), the Supreme Court held that a privately-owned shopping center could restrict the distribution of anti-war leaflets without violating the First Amendment where the property owner had not dedicated a portion of its shopping center to public use. However, States can provide broader rights in their constitutions to limit a shopping center owner's ability to restrict free speech on the property, so long as those right do not infringe on any federal constitutional rights. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

5. **What does the repeated reference to "the people" mean within the Bill of Rights? Is the meaning consistent throughout each amendment that contains reference to the term?**

   Response: In *District of Columbia v. Heller,* the Supreme Court discussed the places and manners in which the Constitution refers to "the people" and states that "the people ...refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with his country to be considered part of that community." 554 U.S. 570, 580 (2009).

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

   Response: In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-71 (1990), the Supreme Court recognized that non-citizens "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country," citing *Plyler v. Doe*, 457 U.S. 202, 211-212 (1982) (the provisions of the Fourteenth Amendment are universal in their application, to all persons within the territorial jurisdiction).

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

   Response: The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized." *See also U.S. v. Martizez-Fuerte*, 428 U.S. 543 (1976) (Border Patrol may operate checkpoints and stop vehicles, without a warrant, for brief questioning on immigration status without suspicion of unlawful activity or immigration status); *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (Congress' power to protect the Nation is qualitatively different at the international border than in the interior).

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

   Response: In *Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2261 (2022), the Supreme Court declined to express a "view about if and when prenatal life is entitled to any of the rights enjoyed after birth." As a sitting judge and judicial nominee, it would generally not be appropriate for me to comment further on this issue.

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

   Response: *In Crawford v. Marion County*, 553 U.S. 181 (2008), the Supreme Court upheld a voter identification requirement in Indiana and held that voter identification laws were not per se unconstitutional. If confirmed, I would apply *Crawford* and all other Supreme Court and Sixth Circuit precedent.

Senator Mike Lee
Questions for the Record
Frances Kay Behm, Nominee to the United States District Court for the Eastern District of Michigan

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

   Response: Judges should fairly, impartially, and diligently apply the facts of each case to the applicable law. A judge should approach each case with an open mind and treat all persons involved with dignity and respect.

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

   Response: If confirmed, I would be obligated to follow Supreme Court and Sixth Circuit precedent regarding interpreting statutory provisions. In a case of first impression, my analysis would start with the text of the statute and if the text is unambiguous, my analysis would end there. However, if the statutory text was ambiguous, I would next consider canons of construction, persuasive precedent from other circuits, and finally, legislative history that provides clear evidence of congressional intent. *Milner v. Department of Navy*, 562 U.S. 562 (2011).

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

   Response: When interpreting a constitutional provision, I would start by looking to the precedent established by the Supreme Court and the Sixth Circuit. I would then look to the plain meaning and express language of the relevant provision. If there was no binding precedent, I would look to persuasive authority from other circuits.

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

   Response: Judges have an obligation to apply the unambiguous language of a statutory or constitutional provision. If confirmed, I would follow the precedent established by the Supreme Court and the Sixth Circuit to determine when the original public meaning of the text of the Constitution should be used to interpret its provisions. *See e.g., New York State Rifle & Pistol Association v. Bruen*, 597 U.S. ___ (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

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

   Response: Please see my response to Question 2.

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

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

6. **What are the constitutional requirements for standing?**

   Response: Pursuant to *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the elements of Article III standing are: (1) the plaintiff must have suffered an injury that is "concrete and particularized" and "actual and imminent"; (2) there is a causal connection between that injury and the conduct complained of; and (3) it must be likely, not merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

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

   Response: The Supreme Court has recognized that Congress has implied powers beyond those enumerated in the Constitution. *McCulloch v. Maryland*, 17 U.S. 316 (1819). For example, Congress, under the Necessary and Proper Clause, has the implied power to act in order to carry out its enumerated powers.

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

   Response: If confirmed, I would follow the precedent established by the Supreme Court and the Sixth Circuit to evaluate the constitutionality of the law.

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

   Response: In *Washington v. Glucksberg*, the Supreme Court held that unenumerated rights can be recognized under the Due Process Clause of the Fourteenth Amendment if such rights are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). If confirmed, I would follow the precedent established by the Supreme Court and the Sixth Circuit.

10. **What rights are protected under substantive due process?**

    Response: "[T]he Due Process clause specifically protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty.'" *Washington v.*

Glucksberg, 521 U.S. 702, 720-21 (1997). The Supreme Court has recognized a number of rights that exist within the Due Process clause, including: the right to marital privacy and the use of contraceptives, *Griswold v. Connecticut*, 318 U.S. 479 (1965); the right to interracial marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to engage in intimate sexual conduct, *Lawrence v. Texas*, 539 U.S. 558 (2003); and the right of same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

11. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?

Response: My personal beliefs are not relevant and would play no role in my decision-making process. *Lochner v. New York* has been abrogated by a number of Supreme Court cases, including *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). Further, *Roe v. Wade* and *Planned Parenthood v. Casey* were overruled by the Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228 (2022).

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

Response: The Commerce Clause authorizes Congress to regulate: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons, or things in interstate commerce; and (3) those activities having a substantial relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzales v. Raich*, 545 U.S. 1 (2005).

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

Response: The Supreme Court has stated that race, religion, national origin, and alienage are suspect classes that must survive strict scrutiny.

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

Response: Checks and balances and the separation of powers prevents power from being concentrated in any one branch of government. This structure is designed to protect against tyranny and abuse of power.

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

Response: If confirmed, I would evaluate the text of the Constitution to determine the scope of authority granted to that branch of government. I would follow the

precedent established by the Supreme Court and the Sixth Circuit to determine whether a branch of government has exceeded the scope of its constitutional authority.

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

Response: Empathy should play no role in how a judge decides a case.

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

Response: Both circumstances are equally unfavorable and should be avoided.

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

Response: I have not researched this issue and, as such, I do not have an opinion regarding this issue. If confirmed, I would follow precedent established by the Supreme Court and the Sixth Circuit when considering the constitutionality of federal statutes.

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

Response: "Judicial review" refers to the constitutional authority of the judicial branch to determine the constitutionality of actions taken by the other branches of government. Judicial Review, Black's Law Dictionary (11th ed. 2019). "Judicial Supremacy" refers to the Supreme Court's authority as a final interpreter of the meaning of the Constitution which is binding on the other branches of federal government and the states. Judicial Supremacy, Black's Law Dictionary (11th ed. 2019).

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

Response: State and federal legislative and executive officers take an oath to uphold the Constitution. Legislators, executive officers, and judicial offers are bound to follow decisions of the Supreme Court interpreting the Constitution.

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

Response: The role of the judiciary is limited to deciding cases by applying the facts of each case to the applicable law. Judges should not consider their own personal beliefs when deciding a case.

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

Response: As a judicial nominee, it is not my role to question the precedent established by higher courts. If confirmed, I would follow the precedent established by the Supreme Court and the Sixth Circuit.

23. **When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?**

Response: None.

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

Response: I am not familiar with these statements. Black's Law Dictionary defines equity as "[f]airness; impartiality; evenhanded dealings." Equity, Black's Law Dictionary (11th ed. 2019). I do not have an opinion with respect to this definition of equity or any other.

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

Response: Black's Law Dictionary defines "equality" as "[t]he quality, state, or condition of being equal." Equality, Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines "equity" and "equality" differently.

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

Response: The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . .deny to any person within its jurisdiction the equal protection of the laws."

27. How do you define "systemic racism?"

Response: I do not have a personal definition of "systemic racism."

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

Response: I do not have a personal definition of "critical race theory."

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

Response: I have not researched this issue and therefore do not have an opinion on this topic.

Senator Ben Sasse
Questions for the Record for Frances Kay Behm
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
July 27, 2022

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

   Response: No.

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

   Response: Judges should fairly, impartially and diligently apply the facts of each case to the applicable law. A judge should approach each case with an open mind and treat all persons involved with dignity and respect.

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

   Response: Black's Law Dictionary defines "originalism" as "the doctrine that words of a legal instrument are to be given the meanings they had when they were adopted, specifically, the canon that that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully-informed observer at the time when the text first took effect." Originalism, Black's Law Dictionary (11th ed. 2019). I have not characterized myself as an "originalist" or used any other such label regarding constitutional interpretation.

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

   Response: Black's Law Dictionary defines "textualism" as "the doctrine that words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means." Textualism, Black's Law Dictionary (11th ed. 2019). I have not characterized myself as a textualist or used any such label regarding constitutional interpretation. However, I do believe that the text of the provision in question is critically important to consider when engaging in constitutional and statutory interpretation.

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

   Response: Black's Law Dictionary defines "living constitutionalism" as a doctrine through which "the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Living Constitutionalism, Black's Law Dictionary (11th ed. 2019). My personal beliefs are not

relevant and would play no role in my decision-making process. If confirmed, I would follow precedent established by the Supreme Court and the Sixth Circuit.

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

   Response: I have not deeply studied the judicial philosophy of any particular Justices. If confirmed, I will decide each case fairly, impartially, and diligently by applying the facts of each case to the applicable law. Further, I will approach each case with an open mind and treat all persons with dignity and respect.

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

   Response: An appellate court follows its own precedent unless a Supreme Court decision or an *en banc* holding of the appellate court overrules the prior decision. An *en banc* hearing is not favored and originally will not be ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decision; or (2) the proceeding involves a question of exception importance. Fed. R. App. 35(a)(1)-(2).

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

   Response: Please see my response to Question 7.

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

   Response: If confirmed, I would be obligated to follow Supreme Court and Sixth Circuit precedent regarding interpreting statutory provisions. In a case of first impression, my analysis would start with the text of the statute and if the text is unambiguous, my analysis would end there. However, if the statutory text was ambiguous, I would next consider canons of construction, persuasive precedent from other circuits, and finally, legislative history that provides clear evidence of congressional intent. *Milner v. Department of Navy*, 562 U.S. 562 (2011).

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

    Response: No. Pursuant to 18 U.S.C. § 3553(a), a court must "impose a sentence sufficient, but not greater than necessary" and when doing so consider the factors set forth in 18 U.S.C. § 3553(a) including "the nature and circumstances of the offense and the history and characteristics of the defendant...." Race, gender, nationality, sexual

orientation or gender identity are not factors that may be considered when imposing a sentence under 18 U.S.C. § 3553(a).

Questions from Senator Thom Tillis
for Frances Kay Behm
Nominee to be United States District Judge for the Eastern District of Michigan

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

   Response: Yes.

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

   Response: Judicial activism generally refers to a judge allowing her personal view to influence her decisions. A judge's personal beliefs are not relevant and should not play a role in decision making.

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

   Response: Impartiality is an expectation for a judge.

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

   Response: A judge should apply the law as written to the facts of each case before her.

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

   Response: Judges must fairly and impartially apply precedent to the facts of each case without regard to their personal views.

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

   Response: No.

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

   Response: If confirmed, I will follow the precedent established by the Supreme Court and the Sixth Circuit including *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. ___ (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, I would evaluate the facts of the case and the applicable precedent established by the Supreme Court and the Sixth Circuit including *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. ___ (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), *United States v. Greeno*, 679 F.3d 510 (6th Cir. 2010), and *Tyler v. Hillsdale County Sheriff's Dep't*, 837 F.3d 6787 (6th Cir. 2016).

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

Response: I would apply the analysis dictated by Supreme Court precedent on the issue, imploring a two-party inquiry to determine: (1) whether the facts, taken in the light most favorable to the plaintiff, show that the officer violated a constitutional right; and (2) whether that constitutional right was clearly established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If both parts of the qualified immunity test are resolved in the affirmative, then the doctrine of qualified immunity does not apply, and the case can proceed. *Person v Callahan*, 555 U.S. 223, 227 (2009).

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 best left to policymakers. If confirmed, I would apply Supreme Court and Sixth Circuit precedent on this issue.

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

Response: This question is best left to policymakers. If confirmed, I would apply Supreme Court and Sixth Circuit precedent on this issue.

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, I would evaluate the facts of the cases and the applicable precedent established by the Supreme Court and the Sixth Circuit. As a sitting judge and judicial nominee, it is generally not appropriate for me to comment on or criticize current jurisprudence because litigants must be able to trust that I would fairly apply those cases as precedent.

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?**

Response: As a judicial nominee, it would not be appropriate for me to comment on such a hypothetical scenario. If confirmed, I would evaluate the facts of the cases and the applicable precedent established by the Supreme Court and the Sixth Circuit.

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?**

Response: As a judicial nominee, it would not be appropriate for me to comment on such a hypothetical scenario. If confirmed, I would evaluate the facts of the cases and the applicable precedent established by the Supreme Court and the Sixth Circuit.

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?**

Response: As a judicial nominee, it would not be appropriate for me to comment on such a hypothetical scenario. If confirmed, I would evaluate the facts of the cases and the applicable precedent established by the Supreme Court and the Sixth Circuit.

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?

Response: As a judicial nominee, it would not be appropriate for me to comment on such a hypothetical scenario. If confirmed, I would evaluate the facts of the cases and the applicable precedent established by the Supreme Court and the Sixth Circuit.

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?**

Response: As a judicial nominee, it would not be appropriate for me to comment on such a hypothetical scenario. If confirmed, I would evaluate the facts of the cases and the applicable precedent established by the Supreme Court and the Sixth Circuit.

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?**

Response: As a judicial nominee, it would not be appropriate for me to comment on such a hypothetical scenario. If confirmed, I would evaluate the facts of the cases and the applicable precedent established by the Supreme Court and the Sixth Circuit.

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?**

Response: As a judicial nominee, it would not be appropriate for me to comment on such a hypothetical scenario. If confirmed, I would evaluate the facts of the cases and the applicable precedent established by the Supreme Court and the Sixth Circuit.

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?

Response: As a judicial nominee, it would not be appropriate for me to comment on such a hypothetical scenario. If confirmed, I would evaluate the facts of the cases and the applicable precedent established by the Supreme Court and the Sixth Circuit.

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?

Response: As a judicial nominee, it would not be appropriate for me to comment on such a hypothetical scenario. If confirmed, I would evaluate the facts of the cases and the applicable precedent established by the Supreme Court and the Sixth Circuit.

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: As a judicial nominee, it would not be appropriate for me to comment on such a hypothetical scenario. If confirmed, I would evaluate the facts of the cases and the applicable precedent established by the Supreme Court and the Sixth Circuit.

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: If confirmed, I would evaluate the facts of the cases and the applicable precedent established by the Supreme Court and the Sixth Circuit. As a judicial nominee, it would not be appropriate for me to further comment on the application of the law.

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: Although I practiced law for fifteen years and have served as a state court trial judge for more than thirteen years, to the best of my recollection, I have not had the opportunity to handle any matters involving copyright law.

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

    Response: Although I practiced law for fifteen years and have served as a state court trial judge for more than thirteen years, to the best of my recollection, I have not had the opportunity to handle any matters involving the Digital Millennium Copyright Act.

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

    Response: Although I practiced law for fifteen years and have served as a state court trial judge for more than thirteen years, to the best of my recollection, I have not had the opportunity to handle any matters involving intermediary liability for online service provides that host unlawful content posted by users.

    d. **What experience do you have with First Amendment and free speech issues? Do you have experience addressing free speech and intellectual property issues, including copyright?**

    Response: Although I practiced law for fifteen years and have severed as a state court trial judge for more than thirteen years, to the best of my recollection, I have not had the opportunity to handle any matters involving free speech and intellectual property issues, including copyright.

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, I would be obligated to follow Supreme Court and Sixth Circuit precedent regarding interpreting statutory provisions. In a case of first impression, my analysis would start with the text of the statute and if the text is unambiguous, my analysis would end there. However, if the statutory text was ambiguous, I would next consider canons of construction, persuasive precedent from other circuits, and finally, legislative history that provides clear evidence of congressional intent. *Milner v. Department of Navy*, 562 U.S. 562 (2011). Regarding legislative history, the Supreme Court has explained that Committee Reports are "more authoritative than comments from the floor" and has expressed a preference for Committee Reports over "the passing comments of one Member and casual statements from floor debates." *Garcia v. U.S.*, 469 U.S. 70, 76 (1984).

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

Response: If I am confirmed and confronted with a question of how a federal agency's "advice and analysis" should be applied, I would follow the precedent of the Supreme Court and the Sixth Circuit. Generally speaking, while opinion letters, policy statements, agency manuals, and enforcement guidelines are not controlling or binding, they may be provided deference if they are persuasive. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); see also *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

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: This question is best left to policymakers. If confirmed, I would apply Supreme Court and Sixth Circuit precedent to issues of copyright infringement.

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: Judges are obligated to follow precedent of the Supreme Court and relevant circuit courts regarding specific statutes unless policymakers change the underlying laws at issue.

    b. **How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?**

    Response: Please see my response to Question 17(a).

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 litigation?**

    Response: I have not conducted my own research regarding the issue of "judge shopping" or "forum shopping" and, as such, I do not have an opinion on this issue.

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

    Response: Please see my response to Question 18(a).

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

    Response: No.

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

I do commit to not engage in any type of behavior intended to attract a particular type of case or litigant.

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: As a judicial nominee, it would generally not be appropriate for me to comment on this policy issue.

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 Question 19(a).

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?**

Response: As a judicial nominee, it would generally not be appropriate for me to comment on this policy issue.

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

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?

Response: As a judicial nominee, it would generally not be appropriate for me to comment on this issue.

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

Response: Please see my response to Question 21(a).