Senator Chuck Grassley, Ranking Member
Questions for the Record

Jerry W. Blackwell
Nominee, District of Minnesota

1. **You served as a presenter for the "Denver Law Firm Coalition for Racial Equity" in Colorado on February 17, 2022. The article summarizing the event states that you said that you went into civil litigation because "[you] thought being a criminal lawyer would be 'too heavy a load' to carry. You didn't want to be responsible for whether a person walked free or was sent away to prison."**

   You have been nominated to serve as a district judge, where you would be responsible for both civil and criminal dockets. You made these comments about sentencing barely five months ago. If confirmed, how do believe your view that the responsibility involved in criminal cases is "too heavy a load" will affect your ability to oversee criminal cases?

Response: Respectfully, the referenced quote at the Denver program was not an expression of present views but related back to the time when I was a 24-year-old law student first contemplating a career as an attorney more than 35 years ago, never having practiced law and not certain what kind of law I wanted to practice initially. It does not reflect my views today or over the years as demonstrated by my role as a Special Prosecutor in the Chauvin trial where the overarching objective of that criminal prosecution was to uphold the rule of law, seeking accountability and an appropriate jail sentence under the criminal laws for Defendant Chauvin.

2. **In October 2021, you participated on a panel where you stated that:**

> **[J]udges are not what I would call protoplasmic Autobots who simply objectively apply legal principles to the lives of individuals and bring about a single, inevitable ruling. The judges are people too, but they are to bring their life experiences to bear in how they make judgments, and it has to do with the sensitivities you have or what do they even see.**

Response: The referenced quote is in response to a question on the importance of diversity in the judiciary. The unique legal experiences and backgrounds of judges can contribute to improving the thoroughness and thoughtfulness of fair and impartial decision making. I consider deciding

any case on the basis of predetermined views or personal opinions to be inappropriate and detrimental to the rule of law.

a. Please define the term "judicial activism."

Response: I do not believe there is a legal definition of judicial activism and I have not personally defined it. According to Merriam-Webster, judicial activism is "the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent." I consider judicial activism to be inappropriate and detrimental to the rule of law.

.

b. In your opinion, what types or kinds of actions constitute "judicial activism"?

Please see my answer to subpart a.

3. Who should respond to a domestic violence call where there is an allegation that the aggressor is armed—the police or a social worker?

Response: Whether the police or a social worker should respond under this is an important question for policymakers. If I am confirmed, in any case before me raising the issue of the proper responder to a domestic violence call, I will fairly and impartially evaluate the specific legal claim asserted and the evidence in the record based on the precedent of the Supreme Court and the Eighth Circuit.

4. In what situation does qualified immunity not apply to a law enforcement officer in Minnesota?

Response: The Supreme Court has stated "[t]he doctrine of qualified immunity shields officers from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021) (per curiam) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). In determining whether to grant qualified immunity in a particular case, I would apply binding authority from the Supreme Court and Eighth Circuit and examine the record to determine whether the plaintiff had alleged, or a reasonable jury could find, a violation of clearly established law.

5. Please define the term "justice."

Response: Black's Law Dictionary defines "justice" as "[t]he fair treatment of people" and "[t]he fair and proper administration of laws." Black's Law Dictionary (11th ed. 2019).

6. Does your definition of "justice" take into consideration principles of social "equity"?

Response: What social equity means is a subject of social and political debate. The definition referred to in Question 5 is not influenced by that debate.

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

Response: Judicial decisions should be based upon the submissions and evidence of record in the case or controversy before the court and the impartial application of the pertinent legal authority; in my case, authority from the Supreme Court or Eighth Circuit.

8. What is implicit bias?

Response: I do not know of a legal definition of implicit bias. Merriam-Webster defines implicit bias as "a bias or prejudice that is present but not consciously held or recognized."

9. Is the federal judiciary affected by implicit bias?

Response: If confirmed as a district judge, I would avoid trespassing into the roles of policymakers or entering public debates on current societal issues. Whether certain policies or practices within the United States criminal justice system reflect implicit bias is an important question for policymakers. If I am confirmed, in any case before me making a claim rooted in some form of bias in the criminal justice system, I will carefully evaluate the specific legal claim asserted and the evidence in the record based on the precedent of the Supreme Court and the Eighth Circuit.

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

Response: The size of the Supreme Court is a matter for Congress to determine consistent with its authority under the Constitution. If I am confirmed, I will follow the Supreme Court's precedent regardless of its size or composition.

11. Do you believe that we should defund police departments? Please explain.

Response: Questions about defunding the police are important ones for policymakers. Mindful of the limited role of the federal courts to adjudge cases and controversies brought to the courts under Article III, as a judicial nominee I should not comment on current political or policy issues in deference to the legislative branch and elected representatives to address these issues.

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

Response: Please see my answer to Question 11.

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

Response: In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court recognized that substantive due process protects "the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35.

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

Response: Acts or threats of violence against Supreme Court Justices are patently wrong.

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

Response: Fundamental rights are protected by the Constitution and ultimately interpreted by the Supreme Court, which in *Washington v. Glucksberg*, 521 U.S. 702 (1997) stated that courts must "exercise the utmost care" when asked to expand the concept of substantive due process. *Id.* at 720 (quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502 (1977) (plurality opinion)). There must be a "careful description" of the "asserted fundamental liberty interest" and analysis of whether that interest is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720–21 (citations omitted).

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

Response: A person's immutable characteristics should not influence the punishment he or she receives.

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

Response: If I am confirmed as a district court judge, I would faithfully apply the text and precedent regarding the Second Amendment to any matter brought before me for decision. Those binding precedents include *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022).

18. Is gun violence a public-health crisis?

Response: Please see answer to Question 9.

19. Is racism a public-health crisis?

Response: Please see answer to Question 9

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

Response: Please see answer to Question 9. Generally speaking, this is an important debate for policymakers and elected representatives. To the extent this question implicates sentencing decisions, I can commit that my sentencing decisions would be guided by the factors set forth by Congress in 18 USC 3553(a), notably one of the factors to be considered is "the need for the sentence imposed to…to protect the public from further crime of the defendant" in the specific facts of the criminal case before me.

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

Response: Yes.

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

Response: This provision establishes a misdemeanor offense criminalizing, among other things, the act of picketing or parading in or near a courthouse or residence of 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" the judge, juror, witness, or court officer, in the discharge of his duty.

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

Response: I am not aware of any binding Supreme court or Eighth Circuit precedent that has directly spoken to the constitutionality of this provision. Therefore, as a judicial nominee, it is not appropriate for me to opine on whether this statute is constitutional, as it may be an issue that comes before me.

24. When is rioting justified?

Response: Please see my answer to Question 9. If a case came before me where a defendant was alleged to have violated 18 USC § 2101 or any other federal statute related to rioting, I would carefully consider the facts of the case, the text of the relevant statute, and relevant Supreme Court and Eighth Circuit precedent.

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

Response: Fighting words are words which "by their very utterance, inflict injury or tend to incite an immediate breach of the peace," and more specifically, words that are "a direct personal insult or an invitation to exchange fisticuffs." *Chaplinsky v New Hampshire*, 315 U.S. 568 (1942); *Texas v. Johnson*, 491 U.S. 397 (1989*)*. An incitement of a riot that creates a clear and present danger is akin to fighting words and is also not protected speech. *Feiner v. State of New York,* 340 U.S. 315 (1951).

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

Response: The Supreme Court has defined true threats as follows: "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . .. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Virginia v. Black*, 538 U.S. 343 (2003).

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

a. Was *Brown v. Board of Education* correctly decided?
b. Was *Loving v. Virginia* correctly decided?
c. Was *Griswold v. Connecticut* correctly decided?
d. Was *Roe v. Wade* correctly decided?
e. Was *Planned Parenthood v. Casey* correctly decided?
f. Was *Gonzales v. Carhart* correctly decided?
g. Was *District of Columbia v. Heller* correctly decided?
h. Was *McDonald v. City of Chicago* correctly decided?
i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?

Response: If I am confirmed as a district court judge, I would be bound by and would faithfully apply all Supreme Court and Eighth Circuit precedent. As a judicial nominee, it is improper for me to opine on the Supreme Court's holding in any particular case, given that application of these precedents may come before me. However, consistent with the position of previous nominees and because the legality of segregated schools or interracial marriage is so unlikely to be relitigated, I will answer that I agree *Brown* and *Loving* were correctly decided.

28. During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: To the best of my knowledge, no.

29. 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: To the best of my knowledge, no.

30. 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: To the best of my knowledge, no.

31. 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: To the best of my knowledge, no.

32. 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: To the best of my knowledge, no.

33. 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: To the best of my knowledge, no.

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

Response: To the best of my knowledge, 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: To the best of my knowledge, no.

34. 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: To the best of my knowledge, 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: To the best of my knowledge, 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: To the best of my knowledge, no.

35. 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: To the best of my knowledge, 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: To the best of my knowledge, 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: To the best of my knowledge, 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: To the best of my knowledge, no.

36. 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: To the best of my knowledge, no.

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

Response: To the best of my knowledge, no.

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

Response: To the best of my knowledge, no.

37. 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: To the best of my knowledge, 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: To the best of my knowledge, 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: To the best of my knowledge, no.

38. 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: To the best of my knowledge, 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: To the best of my knowledge, no.

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

Response: To the best of my knowledge, no.

39. 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 or about June 29, 2021, I expressed to Senator Amy Klobuchar an interest in being considered for a judgeship at the U.S. District Court for the District of Minnesota. On July 7, 2021, I spoke to Senator Klobuchar about the position. On October 6, 2021, I interviewed with the Selection Committee established by Senators Klobuchar and Tina Smith to evaluate and recommend candidates for the judicial opening. On October 19, 2021, I was

interviewed by Senator Smith. On October 22, 2021, I interviewed with attorneys from the White House Counsel's Office. On June 15, 2022, my nomination was submitted to the Senate.

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

Response: I received these questions from the Office of Legal Policy (OLP) on August 3, 2022. I submitted draft answers to OLP for feedback on August 8, 2022. I finalized my answers on August 11, 2022.

Senator Marsha Blackburn
Questions for the Record

Jerry W. Blackwell
Nominee, District of Minnesota

1. **You have received an Award from the American Constitution Society, which states on its website that it interprets the Constitution "based on its text and against the backdrop of history and lived experience." What is most important to you when interpreting the Constitution: the history, the text, or lived experience?**

Response: As a district judge, I would be bound to follow the precedents of the Supreme Court and Eighth Circuit on matters of constitutional interpretation and those precedents will be most important in interpreting the Constitution. In the absence of binding precedent to resolve the issue before me, I would follow the approach set forth by the Supreme Court regarding the specific constitutional provision. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Lange v. California*, 141 S. Ct. 2011 (2021) (Fourth Amendment); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (substantive due process).

2. **Do you think lived experiences should take precedence over the text, history, or legislative intent of the law?**

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

Senator Ted Cruz

Questions for the Record

Jerry W. Blackwell
Nominee, District of Minnesota

1. Is racial discrimination wrong?

Response: Discrimination violative of constitutional or statutory protections is unlawful.

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: District courts adjudicate present cases and controversies under the Constitution, and if confirmed as a district judge, I would follow Eighth Circuit and Supreme Court precedent, including on questions pertaining to unenumerated rights. If a case came before me where a party argued for the recognition of an unenumerated right that had not been articulated by the Supreme Court, I would follow the Supreme Court's analysis in *Washington v. Glucksberg* and related cases.

3. How would you characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.

Response: My judicial philosophy is as follows: First, federal courts are courts of limited jurisdiction, and a district court judge should exercise care to rule only on the questions necessary to the specific case or controversy before the court. Second, decisions should be based on a fair and impartial application of the law to the actual evidence in the record. Third, judges should be mindful not to stray into the roles of the legislature, the executive branch or the jury. I am not sufficiently familiar with the judicial philosophies of the referenced Supreme Court justices to know which are most analogous to mine.

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

Response: I have never characterized myself as an 'originalist' or according to any other theory of constitutional interpretation. Black's Law Dictionary describes "originalism" as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." *Originalism*, Black's Law Dictionary (11th ed. 2019). If confirmed, I would be committed in my decisions to following Supreme Court and Eighth Circuit precedent, including the interpretive methodology

the Supreme Court used with respect to particular provisions. The Supreme Court has said in Fourth Amendment cases, for example, that the "common law in place at the Constitution's founding . . . may be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable." *Lange v. California*, 141 S. Ct. 2011, 2022 (2021) (internal quotation marks and citations omitted).

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

Response: I have never characterized myself as an 'living constitutionalist' or according to any other theory of constitutional interpretation. Black's Law Dictionary describes "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living Constitutionalism*, Black's Law Dictionary (11th ed. 2019). If confirmed, I would be committed in my decisions to following Supreme Court and Eighth Circuit precedent, including the interpretive methodology the Supreme Court used with respect to particular provisions.

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

Response: Yes. If I am confirmed as a district court judge, I will be bound by Supreme Court and Eighth Circuit precedent, and in the unlikely event that a constitutional issue comes before me with no applicable precedent, my analysis would begin with the text of the constitutional provision, and if the plain text resolves the issue, my inquiry would end.

7. Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?

Response: The Supreme Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). However, the Supreme Court has considered contemporary community standards in assessing some constitutional questions. *See, e.g. Miller v. California,* 413 U.S. 15, 24 (1973) (considering contemporary community standards in analyzing free speech defense in obscenity cases.)

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

Response: The Constitution is an enduring document which sets forth the principles that govern our nation. It remains the same even though its principles must be applied to contemporary society and "adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

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

Response: Yes. As with all Supreme Court rulings, it is a controlling precedent.

a. Was it correctly decided?

Response: As a judicial nominee, it is improper for me to opine on the Supreme Court's holding in any particular case. If I am appointed, I will fairly and impartially apply the precedents of the Supreme Court and the Eighth Circuit.

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

Response: Yes. As with all Supreme Court rulings, it is a controlling precedent.

a. Was it correctly decided?

Response: As a judicial nominee, it is improper for me to opine on the Supreme Court's holding in any particular case. If I am appointed, I will fairly and impartially apply the precedents of the Supreme Court and the Eighth Circuit. To any case that comes before me.

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

Response: Yes. As with all Supreme Court rulings, it is a controlling precedent.

a. Was it correctly decided?

Response: Consistent with the position of previous nominees and because the legality of segregated schools is unlikely to be relitigated, I answer that I agree *Brown* was correctly decided.

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

Response: Several statutes mandate that particular offenses trigger a presumption in favor of pretrial detention. 18 U.S.C. § 3142 is one of several statutes under which persons convicted of certain offenses, including crimes of violence, offenses for which the maximum sentence is life imprisonment or death, offenses where the sentence is more than ten years under the Controlled Substances Act, and a felony that involves a minor victim, should be presumptively detained if the conviction is less than five years old or the person was released less than five years ago. A presumption of detention also exists when there is probable cause to believe a person committed certain drug or firearms offenses. 18 U.S.C. § 3142(e)(3).

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

Response: The policy rationales behind this and all federal laws is a question for policymakers. If confirmed, my responsibility would be to fairly and impartially apply the precedents of the Supreme Court and the Eighth Circuit to the facts of any case before me.

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. The power of the government to act is not plenary, but must be rooted in an express or enumerated Congressional power. Additionally, neither state nor federal regulations may violate the protections contained in the Bill of Rights that have been selectively incorporated and made applicable to the States through the 5th and 14th Amendments. Congress has also created other limitations on state and federal regulation via statute; for example, the Religious Freedom Restoration Act and Religious Land Use and Institutionalized Persons Act both require that federal and certain state actions not substantially burden the free exercise of religion unless doing so furthers a compelling governmental interest and is the least restrictive means of furthering that governmental interest.

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

Response: The Supreme Court's Establishment Clause cases "have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993). Under the Religious Land Use and Institutionalized Persons Act (RLUIPA), if the action substantially burdens the free exercise of a sincerely held religious belief, even a neutral and generally applicable action must be (1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling

governmental interest. *See, e.g.*, *Ramirez v. Collier*, 142 S. Ct. 1264, 1277 (2022). Action by the federal government, as opposed to state governmental action, is subject to the same standard under the Religious Freedom Restoration Act (RFRA). Similarly, "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.*

For state governmental action falling outside RLUIPA and governed by the First Amendment, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). But "[f]acial neutrality is not determinative." *Id*. at 534 Other relevant precedents in this area include: *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

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, 66–67 (2020), the Supreme Court held that the plaintiff church and synagogue were likely to succeed on the merits of their free exercise claim because the challenged COVID-19 restrictions "single[d] out houses of worship for especially harsh treatment," and thus, the restrictions were subject to a strict scrutiny analysis under *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). Applying strict scrutiny, the Court concluded that it was "hard to see how the challenged regulations [could] be regarded as narrowly tailored." *Id.* at 66-67(brackets added). The Court also held that the restrictions caused irreparable harm because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). The Court further held "the State has not shown that public health would be imperiled if less restrictive measures were imposed." *Id.* at 68.

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

Response: The Supreme Court's held in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam), that plaintiffs, who wished to gather at home for religious exercise, were entitled to an

injunction pending appeal of California's restrictions on private gatherings during the COVID-19 pandemic. The rationale was that California's restrictions treated "some comparable secular activities more favorably than at-home religious exercise." *Id*. at 1297. The Supreme Court stated: "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id*. at 1296.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission violated the Free Exercise Clause of the First Amendment when it adjudicated a complaint against a shop owner who refused to sell a wedding cake to a same-sex couple under the Colorado Anti-Discrimination Act without complying with "the religious neutrality that the [Free Exercise Clause of the] Constitution requires." *Id.* at 1724. The Court held that the "neutral and respectful consideration to which [the shop owner] was entitled was compromised . . ." and that the Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. *Id.* at 1729. Religious objections are likewise protected views under the First Amendment.

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, if those beliefs are held sincerely. *Frazee v. Illinois Department of Employment Security,* 489 U.S. 829 (1989).

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

Response: "[O]nly beliefs rooted in religion" are protected. *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 714 (1981). The Supreme Court has said in First Amendment cases, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (quoting *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 714 (1981)). The role of the Court is to evaluate whether an asserted religious belief is sincerely held, but "[i]n

considering the circumstances of any given case, courts must take care to avoid 'resolving underlying controversies over religious doctrine.'" *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2063 n.10 (2020) (quoting *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969)).

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

Response: Please see subpart a.

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

Response: I am not aware of the current official position of the Catholic Church.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court found, pursuant to the "ministerial exception," that the First Amendment protects the rights of religious institutions to decide matters of church governance, faith, and doctrine for themselves. *Id.* at 2055. The First Amendment does not permit "courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith." *Id.* In applying the "ministerial exception" the Supreme Court found that it is "what an employee does" and not the employee's formal title that impacts its analysis. Employees who perform "vital religious duties" such as "[e]ducating and forming students in the Catholic faith," are subject to the ministerial exception. *Id.* at 2066.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that the City of Philadelphia's policy requiring foster care agencies to certify same-sex couples to be foster parents was not generally applicable and was thus subject to strict scrutiny pursuant to *Employment Division v. Smith*, 494 U.S. 872 (1990). *Fulton*, 141 S. Ct. at

1878–1879. Applying strict scrutiny, the Court found that the City's interests were not compelling nor was the governmental action narrowly tailored. *Id.* The Supreme Court held that the contract violated the Free Exercise Clause of the First Amendment due to "the inclusion of a formal system of entirely discretionary exceptions" some of which had been made available to other foster care providers. *Id.* at 1878-82.

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

Response: The Supreme Court reaffirmed its holdings in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020). Maine provided a public benefit to parents in the form of a tuition assistance program to assist parents in school districts that operated no secondary school by defraying the parent's tuition costs of sending their children to an alternative school, provided the alternative school was designated "nonsectarian." Applying strict scrutiny, the Supreme Court concluded the program violated the Free Exercise Clause of the First Amendment by limiting its payments to "nonsectarian" schools and excluding religious schools with no compelling reason to do so.

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

Response: In *Kennedy v. Bremerton School District*, 143 S. Ct. 2407 (2022), the Supreme Court held that a school district violated a football coach's First Amendment rights under the Free Exercise and Free Speech Clauses, when it fired him based solely on his kneeling at midfield after games to offer a prayer in accordance with his sincerely held religious beliefs. Viewing the case through either the Free Exercise or Free Speech Clause, once infringement was determined, the burden shifted to the school district to demonstrate that its policy was neutral and generally applicable. *Id.* at 2426. Failing either of these tests triggered strict scrutiny under which the district was required to show that its policy was justified by a compelling state interest and narrowly tailored to achieve that interest. *Id.* at 2421-22. The Court found that the district's policy was not neutral toward religion nor did the policy pass the general applicability test, as it was not applied in an even-handed way but was only applied to the coach. *Id.* at 2423.

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), Justice Gorsuch expressed his view that the County respondents and lower courts "misapprehended [Religious Land Use

and Institutionalized Persons Act] RLUIPA's demands" in a dispute regarding whether certain Amish communities should receive an exemption from County regulations addressing the disposal of gray water at their homes. *Id*. at 2432. More specifically, Justice Gorsuch explained that the County and courts had misapplied strict scrutiny by "treating the County's *general* interest in sanitation regulations as 'compelling' without reference to the *specific* application of those rules to this community" and failing to scrutinize whether the County had a compelling interest in denying an exemption "to the Swartzentruber Amish *specifically*," particularly considering "exemptions other groups enjoy." *Id.*

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: It is a misdemeanor offense under Title 18, Section 1507 to picket or parade at or near a courthouse or residence of 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" the judge, juror, witness, or court officer, in the discharge of duties. It is improper for me, as a judicial nominee, to comment on how I might apply 18 U.S.C. § 1507 in a particular case. If I am confirmed and a case came before me presenting this issue, I will carefully read the briefs and submissions or record, and fairly and impartially apply the precedents of the Supreme Court and the Eighth Circuit to the evidence of the case.

26. Would it be appropriate for the court to provide its employees trainings which include the following:

a. One race or sex is inherently superior to another race or sex;

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

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

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

Response to all subparts: No. I am not aware of any trainings in the District of Minnesota that fit these descriptions.

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 aware of any training in the District of Minnesota that fits this description, nor do I know the role that judges may have in providing employee training.

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: Under the Appointments Clause of the Constitution, the President is delegated the authority, with the advice and consent of the Senate, to make appointments to political positions. Constitution, Article II, Section 2, Clause 2. As a judicial nominee, I must avoid commenting on the propriety of political appointments, as issues pertaining to political appointments may come before me. If confirmed, I would apply the law to the facts in a specific case fairly and impartially based on Supreme Court and Eighth Circuit precedent.

30. Is the criminal justice system systemically racist?

Response: Whether certain policies or practices within the United States criminal justice system are deemed by some to be systemically racist is an important question for policymakers. If I am confirmed, in any case before me making a claim of racial discrimination in the criminal justice system, I will carefully evaluate the specific legal claim asserted and apply the precedent of the Supreme Court and the Eighth Circuit to the facts of the case fairly and impartially.

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: Issues concerning the size of the Supreme Court are policy questions for Congress to address, consistent with its authority under the Constitution. If I am confirmed, I will follow the Supreme Court's precedent regardless of its size or composition.

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 *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that the Second Amendment protects the right of a law-abiding citizen with ordinary self-defense needs to possess a gun in the home for self-defense, and also an individual's right to carry a hand-gun for self-defense outside of the home with no requirement that it be tied to service in a militia.

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

Response: The Second Amendment protects the right of a law-abiding citizen with ordinary self-defense needs to possess a gun in the home for self-defense and also an individual's right to carry a hand-gun for self-defense outside of the home. *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022). Thus, for the government to regulate such conduct, it is not enough that the regulation promotes an important interest. "Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."" *Id* at 2126. In accordance with the Second Amendment's original public meaning, the government may not subject "an individual's right to carry a hand-gun for self-defense outside of the home" to the determination of a government official that such individual must show a particular need greater than the general population in order to carry a firearm for self-defense. *Id*. at 2122 (New York's "proper-cause" requirement invalidated).

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 or Eighth Circuit precedent holding that the right secured by the Second Amendment receives less protection than the right to vote.

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 or Eighth Circuit precedent holding that the Second Amendment right to bear arms receives less protection than other enumerated rights.

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

Response: Article II of the Constitution states that, the President "shall take Care that the Laws be faithfully executed." Regarding criminal cases, the Supreme Court has recognized that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nelson*, 418 U.S. 683, 693 (1974). As a judicial nominee, it would be improper for me to opine on whether an exercise of prosecutorial discretion is or is not appropriate. If a case regarding the legality of an executive official's refusal to enforce a law came before me, I would carefully evaluate the specific legal claim asserted and apply the precedent of the Supreme Court and the Eighth Circuit to the facts of the case fairly and impartially.

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

Response: I understand prosecutorial discretion to encompass both decisions as to whether prosecution should occur given the facts and circumstances of a particular case as well as enforcement priorities that guide the allocation of limited resources.

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

Response: No. The President does not have the authority to repeal a statute. Abolishing the death penalty would require legislation passed by Congress and signed into law by the President.

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. Department of Health & Human Services*, 141 S. Ct. 2485 (2021) (per curiam), the Supreme Court vacated "a nationwide moratorium on evictions of any tenants who live in a county that is experiencing substantial or high levels of COVID-19 transmission and who make certain declarations of financial need." *Id.* at 2486. The Court explained that the applicant real estate associations were likely to succeed on the merits of their claim that the Centers for Disease Control and Prevention lacked statutory authority to impose a nationwide moratorium during the COVID-19 pandemic. It also found that the moratorium put the applicants "at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery." *Id.* at 2486–2490.

42. Over the years, you have been a substantial contributor to Democrat candidates and Democrat causes. According to OpenSecrets.com, you have contributed over $23,000 to Democratic candidates. Your donations are more than the donations of the past 13 judicial nominees combined. Do you believe your donations would

make a member of the public question whether you could be fair in cases involving the Democratic party or liberal interest groups?

Response: I am not familiar with OpenSecrets.com or with what it reports as my total contributions over my 35 years as an attorney. If confirmed, I will take very seriously my oath to "administer justice without respect to persons and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." 28 U.S.C. § 453. I will follow the precedent of the Supreme Court and the Eighth Circuit as applied to the specific facts and legal claims before me, without regard to political affiliations.

43. Just this year you received an award from the American Constitution Society. This group has recently said the following: "Racism is baked into our laws, and even into our institutions that interpret and apply those laws. History will play on repeat until this legal infrastructure is not just modified but dismantled and then built anew with the goal of lived equality." Do you agree or disagree with that statement?

Response: Questions regarding race and the law are important ones for policymakers. If confirmed, I will be mindful of the limited jurisdiction of federal courts under the Constitution to decide only specific cases and controversies and not to assume the role of policymakers. In any case before me making a claim of racial discrimination in the criminal justice system, I will carefully evaluate the specific legal claim asserted and apply the precedent of the Supreme Court and the Eighth Circuit to the facts of the case fairly and impartially.

.

44. In its 2021 annual report, ACS stated that the Supreme Court is "now a direct threat to the guardrails of our democracy" and cannot be trusted to uphold constitutional rights.

a. Do you think that the Supreme Court is a direct threat to the guardrails of our democracy?

Response: Please see response to Question 43. I am not familiar with this quote, and it does not reflect a characterization I have made of the Supreme Court. If confirmed as a district judge, I would be bound to follow Supreme Court precedent.

b. Would you have accepted your award from them knowing this was the position of the organization?

Response: Please see my answer to Question 44(a).

45. Mr. Blackwell, you once said that judges are not "autobots [sic] who simply objectively apply legal principles…[but that] they are to bring their life experiences to bear in how they make judgments."

Response: The referenced quote is in response to a question on the importance of diversity in the judiciary. The unique legal experiences and backgrounds of judges can contribute to improving the thoroughness and thoughtfulness of fair and impartial decision making. I consider deciding any case on the basis of predetermined views or personal opinions to be inappropriate and detrimental to the rule of law.

a. How would you define "judicial activism?"

Response: I do not believe there is a legal definition of judicial activism and I have not personally defined it. According to Merriam-Webster, judicial activism is "the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent." I consider judicial activism to be inappropriate and detrimental to the rule of law.

.

b. If confirmed, do you plan to bring your life experiences and opinions to bear in your judicial rulings?

Response: If confirmed as a district judge, I will take an oath "to faithfully and impartially discharge and perform all the duties incumbent upon me." This means to me, if confirmed, that I will render decisions based only on the record presented and applicable law without interjecting personal opinions or beliefs.

Senator Josh Hawley
Questions for the Record

Jerry W. Blackwell
Nominee, District of Minnesota

1. **Attorney General Keith Ellison appointed you a special prosecutor for the prosecution of Derek Chauvin. Reports state that you had no prior experience as a prosecutor or public defender.**

    a. **Did Attorney General Ellison tell you why he was appointing you despite your lack of experience in criminal law?**

    Response: Yes.

    b. **If so, what did he say?**

    Response: Attorney General Ellison asked if I would serve the State of Minnesota as a Special Prosecutor in the Chauvin case because of my 35 years of experience in state and federal courts throughout the country mostly serving as national trial counsel for Fortune 500 companies, and my reputation for obtaining successful outcomes in litigation and at trial.

2. **Earlier this year, you gave a talk in Denver, saying that you decided to practice civil law because you thought criminal law would be "too heavy a load to carry." You said you "didn't want to be responsible for whether a person walked free or was sent away to prison." If you are confirmed as a district court judge, sending people to prison will be a substantial part of your job. Why are you interested in becoming a district court judge given your general reticence, which you expressed just months ago, to send criminals "away to prison"?**

Response: Respectfully, the referenced quote at the Denver program was not an expression of present views but related back to the time when I was a 24-year-old law student first contemplating a career as an attorney more than 35 years ago, never having practiced law and not certain what kind of law I wanted to practice initially. It does not reflect my views presently or over the years as demonstrated by my role as a Special Prosecutor in the Chauvin trial where the overarching objective of that criminal prosecution was to uphold the rule of law, seeking accountability and an appropriate jail sentence under the criminal laws for Defendant Chauvin.

3. **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 have not studied, nor can I characterize Justice Ketanji Brown Jackson's prior applications of the Sentencing Guidelines. If a case involving child pornography offenders came before me as a district judge, I would be careful not to prejudge it but to evaluate every case on its own facts and applicable law, including following the sentencing factors Congress set forth in 18 USC 3553(a) and the U.S. Sentencing Guidelines. This includes determining whether the particular conduct at issue warrants a sentencing enhancement.

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

Response: Please see my answer to subpart a.

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

Response: Please see my answer to subpart a.

d. The enhancements for the number of images involved

Response: Please see my answer to subpart a.

4. 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?

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

Response to all subparts: As a district judge, I am mindful of the limited jurisdiction of federal courts under the Constitution to decide only cases and controversies that come before the court, and to avoid trespassing upon the roles of the legislative and executive branches of federal government. Policy decisions assessing proper penalties for criminal

offenses are the province of the legislative branch, and it would not be appropriate for me as a judicial nominee to opine on this role of the legislative branch.

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

a. Do you agree with that philosophy?

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

Response to all subparts: I am not familiar with the context of this quote. As a district judge, I would be bound to apply the law fairly and impartially as set forth by the Eighth Circuit and Supreme Court. It would not be proper for me to offer an opinion on whether a Supreme Court Justice, whether past or present, has violated a judicial oath.

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

Response: I consider *Dobbs* to be binding precedent.

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

Response: Generally, abstention is a doctrine whereby a federal court refuses to hear a case within its jurisdiction in order to defer to a state court's authority over the case. While federal courts have a "virtually unflagging obligation" to exercise jurisdiction over proper cases, *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817(1976), the Eighth Circuit has held that courts may abstain from deciding certain issues to preserve "traditional principles of equity, comity, and federalism." *Alleghany v. McCartney,* 896 F.2d 1138, 1142 (8th Cir.1990).

Federal court abstention may be compartmentalized into several more limited doctrines, all of which are encompassed within binding Supreme Court precedent: *See generally Railroad Comm'n v. Pullman Co.,* 312 U.S. 496 (1941) (abstention appropriate where a challenged state statute is susceptible of a construction by the state court that would modify or avoid a federal constitutional question ("*Pullman* abstention")); *Younger v. Harris,* 401 U.S. 37 (1971) (abstention appropriate to avoid intrusion on state enforcement of state laws in state courts ("*Younger* abstention")); *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943) (abstention appropriate to avoid needless conflict in administration of state affairs ("*Burford* abstention")); *Colorado River Water Conservation,* 424 U.S. at 817–820 (1976)(abstention appropriate to avoid duplicative litigation ("*Colorado River* abstention")); *Phelps-Roper v. Heineman,* 710 F. Supp. 890, 901 (D. Neb. 2010). As binding precedent,

each of these forms of federal abstention has been recognized and applied by the federal courts of the Eighth Circuit.

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

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

Response: To the best of my recollection, no.

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

Response: In matters of constitutional interpretation, the Supreme Court is "guided by the principle that 'the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).

10. Do you consider legislative history when interpreting legal texts?

Response: The Supreme Court "has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). My review of legal text would begin with any binding precedent from the Supreme Court and the Eighth Circuit and the plain language. If the meaning of the text remains ambiguous after examining those sources, only then would I consult persuasive authority from other courts, canons of statutory construction, or legislative history as a last resort.

One exception to this general approach would be instances where the Supreme Court has instructed that legislative history should be considered in determining the purpose of a government action. *See, e.g.*, *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("Factors relevant to the assessment of government neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision making body'" (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (plurality opinion)).

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: Certain forms of legislative history are more persuasive than others. For example, the Supreme Court has stated that "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *United States v. Craft*, 535 U.S. 274, 285 (2002) (internal quotation marks and citation omitted).

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

Response: The Constitution is a domestic document. While it is generally not proper to consult the laws of foreign nations when interpreting our Constitution, the Supreme Court has held that federal courts may consult English "common law in place at the Constitution's founding," which can be instructive in determining the Framers' understanding of certain constitutional provisions, such as the Fourth Amendment prohibition on unreasonable searches and seizures. *Lange v. California*, 141 S. Ct. 2011, 2022 (2021).

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

Response: An inmate must show that the method of execution presents a risk that is "sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers," and must further identify a "feasible, readily implemented" alternative procedure that would "significantly reduce a substantial risk of severe pain." *Baze v. Rees*, 553 U.S. 35, 50-52 (2008) (citation and internal quotation marks omitted); *accord Williams v. Kelley,* 854 F.3d 998 (8th Cir. 2017).

12. 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; please see my answer to Question 11.

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

Response: The Supreme Court has held that there is no "freestanding right to DNA evidence" under the doctrine of substantive due process. *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 72 (2009).

14. 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.

15. 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 incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id*. at 1877. "A law is not generally applicable if," *inter alia*, "it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id.* (internal quotation marks, brackets, and citation omitted). "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id*.; *see also Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam) (addressing COVID gathering restrictions).

16. 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: The Supreme Court has stated that "the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citation omitted). "Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling

interest and is narrowly tailored to advance that interest." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

17. 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 the Eighth Circuit, generally whether or not an asserted belief constitutes "a sincerely held religious belief is a factual determination." *Murphy v. Missouri Dept. of Corrections,* 372 F.3d 979, 983 (8th Cir. 2004).

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

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

Response: The Supreme Court, in *District of Columbia v. Heller*, analyzed the District of Colombia's law banning the possession of a handgun in the home, and requiring other types of firearms to be unloaded and dissembled or bound by a trigger lock or similar device. The Supreme Court held that such laws unconstitutionally burden an individual's Second Amendment right to keep and bear arms. The Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. 570, 635 (2008).

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

Response: No.

19. 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?

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

Response to all subparts: The *Lochner* decision has essentially been overturned and I would not adopt its holding as binding precedent. *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). Justice Holmes in the referenced dissent believed the majority justices had interjected their own subjective extrajudicial policy preferences into the court decision. I agree that judges should not interject their own personal opinions or beliefs into their decisions but should decide cases only the basis of the record presented and applicable law.

20. 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: No.

a. If so, what are they?

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

21. 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?

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

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 to all subparts: If confirmed as a district judge, I will follow Supreme Court and Eighth Circuit precedent. The Eighth Circuit has stated that "[a]n eighty percent market share is within the permissible range from which an inference of monopoly power can be drawn." *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 n.3 (8th Cir. 1994). Generally, a plaintiff must show that the defendant "(1) possessed monopoly power in the relevant market and (2) willfully acquired or maintained that power as opposed to gaining that power as a result 'of a superior product, business acumen, or historical accident.'" *Amerinet, Inc. v. Xerox Corp.,* 972 F.2d 1483, 1490 (8th Cir.1992).

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

Response: Federal common law refers to the body of decisional law from the cases and controversies adjudicated by federal courts under Article III. The Supreme Court stated that "[t]here is no federal general common law." *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 78 (1938). However, the Court has also recognized some instances when a "federal common law" might be a viable claim in the absence of a statute. *Atherton v. F.D.I.C.*, 519 U.S. 213, 218 (1997).

23. 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: I would interpret the state constitutional right in accordance with the treatment by the state's highest court. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

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

Response: No federal law mandates that identical texts should be interpreted identically, and states have freedom, which is not unfettered, to render their own interpretations.

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

Response: A state court is "free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Florida v. Powell*, 559 U.S. 50, 59 (2010). The protections of the U.S. Constitution are binding on the states (except for those portions of the Bill of Rights that have not been selectively incorporated against the states). Thus, states can provide greater freedoms than guaranteed under the Equal Protection Clause of the Constitution, but they may not provide less.

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

Response: Consistent with the position of previous nominees and because the legality of segregated schools is so unlikely to be relitigated, I will answer that I agree *Brown* was correctly decided.

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

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

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

Response to all subparts: I am not aware of Supreme Court or Eighth Circuit precedent directly addressing the constitutional authority for a nationwide injunction, meaning an injunction binding upon person or entities who are not parties to the litigation. Rather, the crafting of any injunction "is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). Under Eighth Circuit precedent, the "principles of equity jurisprudence" are that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Rodgers v. Bryant,* 942 F.3d 451, 458 (8th Cir. 2019) (*citing Califano v. Yamasaki,* 442 U.S. 682, 702 (1979)).

26. 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 answer to Question 25.

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

Response: Federalism promotes both individual liberties and protections in the distribution of powers and protections between the federal and state governments. Through the Supremacy Clause of the United States Constitution, the Constitution, federal law, and treaties "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. Art. VI. Under the Due Process Clause of the Fourteenth Amendment, provisions within the Bill of Rights selectively incorporated and made applicable to the states provide a floor of federal civil liberties and protections to all citizens. Our system of federalism, however, permits the states under their respective constitutions to provide even greater protection and liberties than those guaranteed under the U.S. Constitution.

28. 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 answer to Question 7.

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

Response: Money damages versus injunctive relief are meant to address two different forms of relief, with injunctive relief representing an equitable remedy. I have no preconceived judgments about comparative advantages or disadvantages between the remedies, but if confirmed as a district judge, I would carefully evaluate the claim for relief in each specific case or controversy and apply the applicable legal authority from the Eighth Circuit and Supreme Court.

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

Response: The Supreme Court stated in *Washington v. Glucksberg* that "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." 521 U.S. 702, 719 (1997). The Due Process Clause "also provides heightened protection against government interference with certain fundamental rights and liberty interests," *id.* at 720, that 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," *id.* at 720–21 (internal quotation marks and citations omitted). The Court explained that "a long line of cases" have held that, "in addition to the specific freedoms protected by the Bill of Rights," substantive due process protects:

> the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952).

Id. at 720. In later cases, the Supreme Court has held that substantive due process also encompasses the right to consensual sexual conduct between adults in their homes, *Lawrence v. Texas*, 539 U.S. 558 (2003), and the right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

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

Response: Please see my answer to Questions 15 and 16.

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 free exercise of religion is not necessarily synonymous and coextensive with freedom of worship. The free exercise of religion under the First Amendment includes freedom of religious belief, and the right to a religious belief free from undue government regulation. The government cannot compel, coerce, or punish religious belief, nor can it lend governmental authority to either side in a dispute over religious authority. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

The concept of "freedom of worship" may also include what the Supreme Court has recognized as "not only belief and profession but the performance of (or abstention from) physical acts." *Id.* at 877. Please see my answer to Question 15 addressing whether government action that burdens the exercise of religion violates the First Amendment.

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 answer to Question 15.

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: Please see my answer to Question 17.

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: In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania,* the Supreme Court held that the Religious Freedom Restoration Act (RFRA) "applies to all Federal law, and the implementation of that law, whether statutory or otherwise. RFRA also permits Congress to exclude statutes from RFRA's protections." 140 S. Ct. 2367, 2383 (2020). RFRA operates as a kind of "super statute," displacing the normal operation of other federal laws. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1754 (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.

32. 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: In my interpretation, it means that in adjudicating matters the judge should be guided by a fair and impartial application of the law and not by his or her personal feelings, views, likes or dislikes.

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

Response: To best of my recollection, I have never taken the position in litigation or a publication that a federal or state statute was unconstitutional.

a. If yes, please provide appropriate citations.

34. 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: I have not deleted or attempted to delete social media since inception of the nomination process.

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

Response: Whether certain policies or practices within our justice system are deemed by some to be systemically racist is an important question for policymakers. If I am confirmed, in any case before me making a claim of racial discrimination in the criminal justice system, I will carefully evaluate the specific legal claim asserted and apply the precedent of the Supreme Court and the Eighth Circuit to the facts of the case fairly and impartially.

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

Response: Yes.

37. How did you handle the situation?

Response: Honoring my professional and ethical obligations to represent my client's interest zealously, I did so without permitting my personal views to adversely impact or diminish the representation.

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

Response: Yes.

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

Response: If confirmed as a district judge, my views on the law will be most shaped by the Supreme Court and Eighth Circuit precedent. No specific Federalist Paper has most shaped my views of the law.

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

Response: As a judicial nominee, it would not be appropriate for me to answer this question, as cases related to this subject may come before me, if confirmed.

41. 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: To my best recollection, approximately 20 ago, I served as the outside general counsel for Paisley Park Enterprises and Prince (the artist). In that capacity, I was deposed once as a corporate representative for the company in Los Angeles County, California in a civil matter. I do not recall the name of the matter and do not have a record or transcript of the deposition.

42. 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)?

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

c. Systemic racism?

d. Critical race theory?

Response to all subparts: No.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response to all subparts: I currently hold only Apple stock from this list.

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

Response: I cannot recall doing so.

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

45. Have you ever confessed error to a court?

Response: I have not had occasion to confess error to a court.

a. If so, please describe the circumstances.

46. 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: The duty of candor for judicial nominees encompasses answering all questions truthfully and to the nominee's best ability. I have taken that duty seriously.

Senator Mazie K. Hirono
Questions for the Record

Jerry W. Blackwell
Nominee, District of Minnesota

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

Jerry W. Blackwell
Nominee, District of Minnesota

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

Response: My judicial philosophy is as follows: First, federal courts are courts of limited jurisdiction, and a district court judge should exercise care to rule only on the questions necessary to the specific case or controversy before the court. Second, decisions should be based on a fair and impartial application of the law to the actual evidence in the record. Third, judges should be mindful not to stray into the roles of the legislature, the executive branch or the jury. I am not sufficiently familiar with the judicial philosophies of the referenced Supreme Court justices to know which are most analogous to mine.

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: No. If the text of a law is clear, the inquiry ends there. The Supreme Court has instructed that "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020). When interpreting a statute or regulation, courts must apply the plain language of the statute or regulation, if such language is clear and unambiguous.

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

Response: As a practicing lawyer for 35 years, I have not had this issue arise in any of my cases. Statutes are written by Congress—not the President—so even in the exceptional circumstance where it was necessary to consider legislative history in construing the meaning of a statute, statements by the President generally would not carry substantial weight. The Supreme Court has held that certain presidential statements may be persuasive evidence of the intent of a Presidential Proclamation. In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court considered Presidential statements when deciding whether a facially neutral presidential proclamation "was issued for the unconstitutional purpose of excluding Muslims." *Id.* at 2415–2420.

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

Response: Generally, a claim for violation of the First Amendment will not lie against a private actor, including a shopping center, with very limited exceptions. "It is, of course, a

commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." *Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976). The Supreme Court has held that private owners of shopping centers do not violate the Constitution by restricting speech unrelated to the shopping center's operations, such as prohibiting the distribution of handbills on its property. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 552 (1972). The propriety of specific restrictions will depend on the evidence in a specific case before the court.

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: The phrase, "the people", is referenced in the First, Second, Fourth, Ninth, and Tenth Amendments. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that "the people . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 580 (brackets added). The Supreme Court has further stated that the term "people" "unambiguously refers to all members of the political community, and not an unspecified subset." *Id.*

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

Response: In general, the Supreme Court has consistently held that because the Fourteenth Amendment due process clause refers to "persons," its protections apply to citizens and non-citizens. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (explaining that "the Fourteenth Amendment to the Constitution is not confined to the protection of citizens" but rather applies "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality"); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (explaining that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"). "[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598 n.5 (1953) (quotation marks and citation omitted) (emphasis added). The Supreme Court has held: "The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

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: Please see response to Question 6. The Supreme Court has recognized, however, that "the Fourth Amendment's balance of reasonableness is qualitatively different at the

international border than in the interior. Routine searches of the person and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant..." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985).

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

Response: This is an issue that may come before me if I am confirmed, and it would not be appropriate for me to express an opinion. Pursuant to Canon 3(A)(6) of the Canons of Judicial Conduct, a judge is prohibited from making "public comment on the merits of a matter pending or impending in any court." Neither the Supreme Court nor the Eighth Circuit has decided this question.

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 Election Bd.*, 553 U.S. 181 (2008), the Supreme Court held that Indiana's statute requiring citizens to present photo identification to cast a ballot did not violate the Equal Protection Clause of the Fourteenth Amendment, based on the facts of the case. The Supreme Court held in *Crawford* that Voter ID laws can be constitutional if the requirements are rational and not unrelated to voter qualifications. Whether state laws that require voters to present identification are considered draconian or racist apart from constitutional parameters is a question for policymakers and the legislative branch. It would not be appropriate for me to opine on such a policy issue.

Senator Mike Lee
Questions for the Record

Jerry W. Blackwell
Nominee, District of Minnesota

1. How would you describe your judicial philosophy?

Response: My judicial philosophy is as follows: First, federal courts are courts of limited jurisdiction, and a district court judge should exercise care to rule only on the questions necessary to the specific case or controversy before the court. Second, decisions should be based on a fair and impartial application of the law to the actual evidence in the record. Third, judges should be mindful not to stray into the roles of the legislature, the executive branch, or the jury.

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

Response: When interpreting a statute, I would begin by applying any Supreme Court or Eighth Circuit precedent interpreting the provision. In the absence of binding precedent, I would then examine the plain text of the statute, "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). If that analysis does not resolve the question, I would then look to extrinsic sources such as the canons of statutory construction, analogous Supreme Court or Eighth Circuit precedent, or persuasive authority from other courts addressing a similar issue of interpretation or legislative history.

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

Response: If confirmed as a district court judge, I would apply any Supreme Court or Eighth Circuit precedent interpreting the constitutional provision. If binding precedent did not resolve the specific question before me, I would follow the analytical method set forth by Supreme Court precedent regarding the specific constitutional provision. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Lange v. California*, 141 S. Ct. 2011 (2021) (Fourth Amendment); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (substantive due process).

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

Response: When interpreting the Constitution, the Supreme Court is "guided by the principle that 'the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).

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

Response: The Supreme Court "has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law." *Id.* at 1737.

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 County*, 140 S. Ct. 1731, 1738 (2020).

6. What are the constitutional requirements for standing?

Response: The "irreducible constitutional minimum of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (internal quotation marks and citations omitted).

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

Response: In *McCullough v. Maryland*, 17 U.S. 316, 344 (1819), the Supreme Court held that, through the Necessary and Proper Clause, Congress has the implied power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States." "[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 560 U.S. 126, 134 (2010).

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

Response: I would examine the arguments of the parties and apply Supreme Court and Eighth Circuit precedent regarding the scope of those powers to determine whether the source of Congressional power for the challenged law fell within one of the enumerated powers of Congress. "If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 535 (2012).

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

Response: Yes. In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court defined unenumerated rights as those fundamental rights and liberties which are deeply rooted in this Nation's history and tradition, and are implicit in the concept of ordered liberty. These rights and liberties include, among others, the right: (1) to direct the upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); (2) to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); (3) to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S 535 (1942); (4) to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); (5) to marital privacy and use of contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and (6) to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999).

More recently, the Supreme Court has held that the right to consensual sexual conduct between adults in their homes, *Lawrence v. Texas*, 539 U.S. 558 (2003), and the right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015), is also protected under substantive due process.

10. What rights are protected under substantive due process?

Please see my answer to Question 9.

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

Response: In *Dobbs v. Jackson Women's Health Organization,* 142 S. Ct. 2228 (2022), the Supreme Court held that the Constitution of the United States does not confer a right to abortion, returning the authority to regulate abortion to the people and their elected representatives. Additionally, the Supreme Court has held that "[t]he doctrine that prevailed in *Lochner* . . . has long been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *see also West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

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

Response: Under the Commerce Clause, Congress has the power to regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 536 (2012) (quoting *United States v. Morrison*, 529 U.S. 598, 609 (2000)).

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

Response: "[A] suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973)). The Supreme Court has held that classification by race, alienage, ancestry, or religion is inherently suspect. *Id.* at 312 n.4; *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: The Supreme Court has found that the checks and balances and separation of powers represent "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Morrison v. Olson*, 487 U.S. 654, 693 (1988). "Separation-of -powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011).

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

Response: I would carefully examine the arguments and submissions of the parties, and I would apply relevant precedent from the Supreme Court and Eighth Circuit to decide the question.

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

Response: A judge should treat all litigants with dignity and respect while faithfully applying the law to the facts before the court fairly and impartially. Empathy should play no role in the judge's analysis of the case or controversy.

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

Response: Both are undesirable outcomes, and which is better or worse is a subjective determination.

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 studied this issue and do not have a sufficient basis to provide an informed opinion.

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

Response: Judicial review is the power of the judicial branch to review actions by the legislative or executive branch, or by the States, and determine whether they conflict with the Constitution. *See Marbury v. Madison*, 1 Cranch 137 (1803). Black's Law Dictionary defines "judicial supremacy" as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." 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: This is a discussion for policymakers, empowered under Article I of the Constitution to create legislation. In *Cooper v. Aaron*, 358 U.S. 1, 4 (1958), the Supreme Court considered "a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution." The Supreme Court rejected that claim, explaining that legislators must abide by the decisions of the Supreme Court: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." *Id*. at 18 (quoting *United States v. Peters*, 9 U.S. 115, 136 (1809) (Marshall, C.J.)).

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: I understand that passage of Federalist 78 to describe the concept of judicial restraint through the limited role of the judiciary in addressing particular cases and controversies and to remind judges that they neither make nor enforce law, but rather they interpret the laws.

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

Response: If I am confirmed as a district court judge, my obligation is to follow Supreme Court and Eighth Circuit precedent where it applies and not to disregard or undermine it. District court judges must evaluate each case on its own merits and apply the applicable precedent.

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: Pursuant to 18 USC § 3553(a)(6), a federal judge must determine the appropriate sentence for each defendant individually. A factor to be considered in imposing a sentence includes "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.*

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 the Biden Administration's definition of "equity" or the context in which it was made. Black's Law Dictionary defines "equity" as "[f]airness; impartiality; evenhanded dealing." *Equity*, Black's Law Dictionary (11th ed. 2019). I do not

have a personal definition of equity, and if relevant to a case or controversy, I would follow the appropriate definition set forth by Eighth Circuit and Supreme Court precedent.

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

Response: Black's Law Dictionary distinguishes between the two terms, defining "equality" as the "quality, state, or condition of being equal," and defining "equity" as "fairness; impartiality; evenhanded dealing." Please see answer to Question 24.

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

Response: The Fourteenth Amendment prohibits a State from denying "any person within its jurisdiction the equal protection of the laws." If I am confirmed and a question involving the 14th Amendment's Equal Protection Clause came before me, I will carefully consider the specific claim and evidence in the record before me and apply the text of the 14th Amendment as well as precedent of the Supreme Court and the Eighth Circuit.

27. How do you define "systemic racism?"

Response: I know of no legal definition of systemic racism, and I do not have a personal definition of it. Black's Law Dictionary describes "systemic discrimination" to mean "ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society or a particular industry, profession, company or geographic location." Black's Law Dictionary (11th ed. 2019).

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

Response: I have never defined critical race theory. Black's Law Dictionary describes it as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Black's Law Dictionary (11th ed. 2019).

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

Response: Please see answers to Questions 27 and 28.

Senator Ben Sasse
Questions for the Record

Jerry W. Blackwell
Nominee, District of Minnesota

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: My judicial philosophy is as follows: First, federal courts are courts of limited jurisdiction, and a district court judge should exercise care to rule only on the questions necessary to the specific case or controversy before the court. Second, decisions should be based on a fair and impartial application of the law to the actual evidence in the record. Third, judges should be mindful not to stray into the roles of the legislature, the executive branch or the jury.

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

Response: I have never described myself as an originalist nor have I identified myself with any other philosophy or approach to interpreting the Constitution. If confirmed, I would be committed in my decisions to following Supreme Court and Eighth Circuit precedent, which in some instances may require an assessment of the original intent of a constitutional provision. The Supreme Court has said in Fourth Amendment cases, for example, that the "common law in place at the Constitution's founding . . . may be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable." *Lange v. California*, 141 S. Ct. 2011, 2022 (2021) (internal quotation marks and citations omitted).

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

Response: I have never characterized myself as a textualist but do believe that judges are obligated to begin with the text of a constitutional or statutory provision, and if the text alone resolves the issue, the inquiry ends.

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

Response: The Constitution is an enduring document, meaning that it is meant to be applied to our contemporary society, but the principles of the Constitution do not change except through the formal constitutional amendment process.

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 carefully studied the jurisprudence of the Supreme Court Justices since 1953 and cannot single out any ones I would most admire.

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: Under this scenario, as a district court judge I would be required to follow the precedent set by the Eighth Circuit irrespective of any perceived conflict with the original public meaning of the Constitution.

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: Under this scenario, as a district court judge I would be required to follow the precedent set by the Eighth Circuit irrespective of any perceived conflict with the original public meaning of a statute.

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

Response: When interpreting a statute, I would begin by applying any Supreme Court or Eighth Circuit precedent interpreting the provision. In the absence of binding precedent, I would then examine the plain text of the statute, "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). If that analysis does not resolve the question, I would then look to extrinsic sources such as the canons of statutory construction, analogous Supreme Court or Eighth Circuit precedent, or persuasive authority from other courts addressing a similar issue of interpretation or legislative history.

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: If confirmed as a district court judge, I would be bound to follow Eighth Circuit and Supreme Court precedent on matters of sentencing. Congress has identified "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" as one of the factors judges must consider at sentencing. 18 USC § 3553(a)(6). If confirmed, in any sentencing decision I made, I would apply precedent and all of the factors Congress set forth in 18 USC § 3553(a) as well as the Sentencing Guidelines.

Senator Thom Tillis
Questions for the Record

Jerry W. Blackwell
Nominee, District of Minnesota

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: I do not believe there is a legal definition of judicial activism and I have not personally defined it. According to Merriam-Webster, judicial activism is "the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent." I consider judicial activism to be inappropriate and detrimental to the rule of law.

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: No.

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

Response: Justice Scalia once said, "The judge who always likes the result he reaches is a bad judge." Faithfully interpreting the law sometimes results in an outcome that may be seen as undesirable by a party before the court, members of the public or by the judge personally. The legitimacy of the judicial branch depends on public confidence that judges apply the law fairly, impartially, and without bias or regard for their personal beliefs or preferred outcomes.

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 I am confirmed as a district court judge, I would be bound by and would faithfully apply all Supreme Court and Eighth Circuit Second Amendment precedent to the specific facts of any case or controversy that comes before me. Such precedents include *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022).

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

Response: I am not aware of any Supreme Court or Eighth Circuit precedent limiting Second Amendment rights due to the COVID-19 pandemic. If presented with the scenario in question, I would carefully review the pleadings of the parties, the evidence in the record, and I would follow Supreme Court and Eighth Circuit precedence.

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

Response: The Supreme Court has stated "[t]he doctrine of qualified immunity shields officers from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021) (per curiam) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). In determining whether to grant qualified immunity in a particular case, I would apply binding authority from the Supreme Court and Eighth Circuit and examine the record to determine whether the plaintiff had alleged, or a reasonable jury could find, a violation of clearly established law.

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: The question of whether qualified immunity jurisprudence provides sufficient protection for law enforcement is a question for policymakers, not the judicial branch. My limited role would be to apply the qualified immunity precedent of the Supreme Court and the Eighth Circuit, without regard for my personal beliefs related to the specific case before me.

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

Response: Please see my answer to Question 10.

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 I am confirmed as a district court judge I would be bound by and would faithfully apply all Supreme Court and Eighth Circuit patent eligibility precedent to the specific facts of any case or controversy that comes before me. As a judicial nominee, it would not be appropriate for me to comment on or critique the Supreme Court's patent eligibility jurisprudence as its application may come before me.

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

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

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

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

d. *BetterThanTesla ElectricCo* develops a system for billing customers for charging electric cars. The system employs conventional charging technology and

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

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

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

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

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

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

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

What about the space applications of superconductivity that benefit from this effect?

Response to all subparts: As a judicial nominee, it would be improper for me to comment on hypotheticals involving questions that could come before me. If I am confirmed as a district court judge, I would be bound by and would faithfully apply all Supreme Court and Eighth Circuit patent eligibility precedent to the specific facts of any case or controversy that comes before me.

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: Questions regarding whether current jurisprudence provides the clarity and consistency needing to incentivize innovation are best left to the policymakers to consider, and if policymakers so choose, they can amend federal statutes related to patent eligibility. I would strive to apply the Supreme Court ineligibility tests as faithfully as possible to the facts of any case that came before me raising ineligibility test issues.

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?

b. Please describe any particular experiences you have had 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?

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 to all subparts: From my 35 years as a civil litigator handling complex litigation matters, I have a broad range of intellectual property experience, including in the trademark, trade secret, Lanham Act, and Digital Millennium Copyright Act (DMCA) arenas. Specifically, regarding DMCA experience, between approximately 2001 and 2004 when representing the artist Prince, I likely served over one hundred DMCA takedown notices upon online service

providers and drafted multiple complaints for digital copyright infringement. All matters involved either online infringement or piracy of Prince's music and did not involve First Amendment issues. If I am confirmed as a district court judge, I would be bound by and would follow Supreme Court and Eighth Circuit precedent on intellectual property law to the specific facts of any case or controversy that comes before me.

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: The Supreme Court "has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). Under this direction, if the text is clear and unambiguous, the inquiry ends there. If I am confirmed, I will begin analysis of a legal text with the plain language and any binding precedent from the Supreme Court and the Eighth Circuit. Only if the meaning of the statute is ambiguous after examining those sources would I consult persuasive authority from other courts, canons of statutory construction, or legislative history**.**

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 as a district court judge, I will be bound by the precedent of the Supreme Court and the Eighth Circuit. The Supreme Court, for example, has instructed that the amount of deference shown to the analysis of the Copyright Office depends on the source of that analysis. In *Georgia v. Public Resource Org, Inc.*, 140 S. Ct. 1498 (2020), the Supreme Court noted that the "Compendium of U.S. Copyright Office Practices . . . is a non-binding administrative manual that at most merits deference under *Skidmore* . . . That means we must follow it only to the extent it has the 'power to persuade.'" *Id.* at 1510 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

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: If I am confirmed as a district court judge and presented with this question, I will work diligently to determine the applicable Supreme Court and Eighth Circuit precedent and apply it fairly and impartially to the specific facts of the case or controversy before me. As a judicial nominee, it would be improper for me to state any personal beliefs.

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: In such a circumstance, a judge must apply the law as written to the contemporary facts presented. Whether or not federal law should be amended in light of changed factual circumstances is the province of policymakers under Article I of the Constitution.

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 answer to subpart 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 studied the issue of "judge shopping" or "forum shopping" within a judicial district, and I do not have a basis upon which to opine on this topic. In the District of Minnesota, where I am nominated to serve, cases are randomly assigned.

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

Response: If confirmed, I will make decisions based on the faithful application of Supreme Court and Eighth Circuit precedent, and not out of any effort to attract a particular type of case or litigant. Again, I would note that in the District of Minnesota, cases are assigned randomly.

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: Please see my answer to subpart a.

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

Response: Please see my answer to subpart a.

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 be improper for me to opine on this question. This question is more appropriate for redress by policymakers or the Judicial Conference.

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

Response: As a judicial nominee, it would be improper for me to opine on this question. This question is more appropriate for redress by policymakers or the Judicial Conference.

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?

Response: As a judicial nominee, it would be improper for me to opine on this question. I know of no data, polls or research on this question pertaining to the judicial districts.

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 be improper for me to opine on this question. This question is more appropriate for redress by policymakers or the Judicial Conference.

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: I have not studied the issue of "judge shopping" or "forum shopping" within a judicial district, and I do not have a basis upon which to opine on this topic.

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 be improper for me to opine on this question.

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

Response: As a judicial nominee, it would be improper for me to opine on this question.