Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Rachel Bloomekatz
Nominee to be United States Circuit Judge for the Sixth Circuit
June 29, 2022

1. **Based on a review of your record, you have filed briefs in two cases that were tangentially related to firearms, *Ohio State Conference of the NAACP v. Ohio* and *Gabbard v. Madison Local School District Board of Education*.**

   a. Did either of these cases explicitly involve the Second Amendment or its scope?

   Response: No. Neither the plaintiffs nor defendants argued that the Second Amendment was relevant to the analysis in either case.

   b. If not, what provisions—statutory, constitutional, or otherwise—were implicated in these cases, what arguments did you advance, and how did the relevant reviewing courts rule in the two cases?

   Response: In *Gabbard v. Madison Local School District Board of Education*, I represented a group of parents—including several gun owners—in Butler County, Ohio, who were concerned about their school board's decision to allow teachers at their children's school to be armed in the classroom after completing just 24 hours of training. The parents were concerned that this decision placed their children at risk of tragic accidents. The Ohio Fraternal Order of Police and other law enforcement groups echoed these concerns, opposed the challenged school policy, and filed amicus briefs in the case. The complaint in the case sought declaratory and injunctive relief in the Butler County Court of Common Pleas on the grounds that the school board's decision to allow teachers to be armed while teaching with just 24 hours of training violated the plain text of Ohio Revised Code 109.79(D). The parents also sought a writ of mandamus to produce public records related to the district's policy that they requested under Ohio Revised Code 143.43. While the trial court compelled the school board to produce the requested records, it rejected the statutory claim. No. 2018-09-2028 (Butler Cty. Ct. C.P. 2018) (Pater, J.). On appeal, Ohio's Twelfth District Court of Appeals reversed, holding that the school board's policy was unlawful based on the statute's plain language. 2020-Ohio-1180 (12th Dist. Ct. App. 2020). The Ohio Supreme Court ruled for the parents and affirmed. 2021-Ohio-2067 (2021).

   In *Ohio State Conference of the NAACP v. Ohio*, I filed a complaint on behalf of the plaintiff organizations and state legislators requesting that the Franklin County Court of Common Pleas declare amended Senate Bill 175 invalid. *See* Case No. 21-CV-005692. The complaint and briefing argue that the process by which that bill was enacted by the Ohio Legislature violated Ohio Constitution Art. II, §§ 15(C) and (D), which protects the legislative process in Ohio. The defendants moved to dismiss the complaint, and that motion is currently pending before the trial court.

2. **If confirmed, will you faithfully and fully apply all Second Amendment-related precedents of the Supreme Court?**

   Response: Yes, including the Supreme Court's decisions in *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 and Pistol Association v. Bruen*, 597 U.S. __ (2022).

3. **At your hearing, you were asked about your work on *Ohio v. Moore*.**

   a. **What arguments did you advance on behalf of Mr. Moore?**

      Response: In *Ohio v. Moore*, I represented Mr. Moore, who was convicted of a nonhomicide offense when he was 15 years old. I argued that his sentence violated the Eighth Amendment based on the Supreme Court's decision in *Graham v. Florida*, 560 U.S. 48 (2010), because it did not provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. I argued that Mr. Moore did not have to be guaranteed release, but that his 112-year sentence was equivalent to a life without parole sentence, which was prohibited by *Graham*.

   b. **Did the Ohio Supreme Court agree with your arguments?**

      Response: Yes. The decision appears at 149 Ohio St.3d 557 (2016), 2016-Ohio-8288.

   c. **The Mahoning County Prosecutor's Office sought certiorari in the United States Supreme Court.**

      i. **Did the Court grant certiorari?**

         Response: No. The order denying certiorari is at 138 S. Ct. 62 (Oct. 2, 2017).

      ii. **If not, did any Justices go on record as dissenting from the denial of certiorari?**

         Response: No.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Rachel S. Bloomekatz
Nominee to be United States Circuit Judge for the Sixth Circuit

1. **In 2021, you worked with Everytown for Gun Safety to oppose Ohio's Stand Your Ground law. You urged Ohio courts to invalidate the law "to protect both the democratic process and the rights of our Black neighbors."**

    a. **Please explain how, in your view, a stand your ground law adversely impacts the rights of African Americans.**

    Response: This question appears to reference my press statement on *Ohio Conference of the NAACP v. Ohio*. In that statement, I referred to the fact that the rights of African Americans, including my clients in that case, to participate in the legislative process were violated when the Ohio Legislature enacted the challenged law in violation of the protections for enacting legislation protected by the Ohio Constitution Art. II, §§ 15(C) and (D), which is the basis for the lawsuit in that case.

    b. **Please explain how, in your view, a stand your ground law adversely impacts the democratic process.**

    Response: Please see the response to Question 1(a).

    c. **Please describe in detail all of your litigation and advocacy efforts on behalf of or working alongside of Everytown for Gun Safety.**

    Response: I have never advocated before any public body on behalf of Everytown for Gun Safety or represented Everytown as a party in any case. I have co-counseled two cases with Everytown: (1) *Gabbard v. Madison Local School District*, 2021-Ohio-2067 (2021), and (2) *Ohio State Conference of the NAACP v. Ohio* (Case No. 21-CV-005692, Franklin Cty. Ct. Com. Pls.). I have also consulted for Everytown on questions of state preemption of local firearms-related ordinances.

    d. **Please describe your understanding of Supreme Court and Sixth Circuit precedent relating to Americans' Second Amendment rights.**

    Response: As the Supreme Court stated in *New York State Rifle & Pistol Association v. Bruen*, following the text and original public meaning, the Second Amendment "protect[s] the right of an ordinary, law-abiding citizen to possess a gun in the home for self-defense" and "an individual's right to carry a hand-gun for self-defense outside of the home." 597 U.S. __ (2022), slip op. at 1. The Court stated:

> In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n. 10, 81 S. Ct. 997, 6 L.Ed.2d 105 (1961).

Slip op. at 8. 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 has a particular need greater than the general population to carry a firearm for self-defense. *Id.* at 63 (invalidating New York's "proper-cause" requirement).

2. **In your Senate Judiciary Questionnaire, you note that you represented the Biden-Harris campaign as State Counsel for Ohio. In that capacity, you coordinated election-day litigation and "supported the Campaign's voter protection operation."**

   a. **Please describe any election-day litigation that you coordinated or participated in.**

   Response: I recruited and coordinated a group of lawyers that could appear in court in Ohio on election day if the campaign requested. The campaign did not appear in any election-day litigation in Ohio.

   b. **What did the campaign's voter protection operation entail?**

   Response: The campaign organized poll observers to monitor the polls on election day in Ohio, as is provided for by Ohio law and regulations, and operated a "hotline" where voters could call if they had any voting questions.

   c. **In your view, are voter identification requirements unconstitutional?**

   Response: The Supreme Court held that voter identification laws were not per se unconstitutional in *Crawford v. Marion County*, 553 U.S. 181 (2008), and it upheld the voter identification requirements at issue in that case.

3. **In a 2021 presentation on redistricting, you suggested that states have used "false claims about nonexistent voter fraud as an excuse" to "introduce[e] bills that would make it harder for Americans to vote."**

    a. **Which states have used false claims about voter fraud to make it harder for Americans to vote?**

    Response: In this presentation, I cited research stating that some state leaders had used false claims of voter fraud to support new voting regulations, and that when the underlying claims of voting fraud were investigated, the claimed fraud turned out to be "nonexistent." I did not state that voter fraud was "nonexistent" writ large. The Supreme Court has acknowledged the existence of voter fraud in cases such as *Crawford v. Marion County*, 553 U.S. 181 (2008).

    b. **According to one national database, there have been 1,167 convictions for voter fraud to date, including over 50 criminal convictions in Ohio.[1] Given these statistics, do you still believe that voter fraud is "nonexistent"?**

    Response: Please see the response to Question 3(a).

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

    Response: The Supreme Court has recognized that in addition to the rights expressly listed, the Constitution protects fundamental rights under the due process clause of the Fifth and Fourteenth Amendments when the claimed right is "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks omitted).

5. **Please explain the difference between the original intent of a law and its original public meaning.**

    Response: The "original intent" of the law is how the individuals who drafted the law intended it to be understood. The "original public meaning" refers to how individuals in the public would have understood the law at the time it was enacted or adopted.

    a. **If there is a conflict between a law's original intent and original public meaning, which should a judge rely on to determine how to interpret and apply the law?**

    Response: A judge should rely on Supreme Court and circuit precedent to interpret the law and follow the analysis of binding precedent. The undisclosed intentions of a law's drafters should not supersede the plain text of a law. As

[1] *See A Sampling of Recent Election Fraud Cases From Across the United States*, The Heritage Foundation, https://www.heritage.org/voterfraud.

Justice Holmes wrote: "[w]e do not inquire what the legislature meant; we ask only what the statute means." *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899).

6. **As a judge, what legal framework would you use to evaluate a claim about a violation of the Free Exercise Clause?**

Response: The First Amendment protects the right to free exercise of religion. Because of the Free Exercise Clause, the Supreme Court has held that laws that burden religion must be both neutral and generally applicable—otherwise they are subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). The Supreme Court has several cases clarifying what it means for a law to be both neutral and generally applicable. For instance, a law is not neutral even if it does not mention religion on its face if "the object or purpose of the law is suppression of religion or religious conduct." *Id.* at 533. Enforcement of a law is also not considered neutral if the record demonstrates law's enforcement is motivated by hostility to religion. *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018). A law is not considered generally applicable if it includes discretionary exemptions for secular conduct or if the law prohibits religious activity while permitting secular activity that implicates the same governmental interests. *See Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

The Supreme Court has also recognized a "ministerial exception" to federal employment laws, such as the Americans With Disabilities Act and the Age Discrimination in Employment Act, because the Religion Clauses protect the rights of "religious institutions to decide matters 'of faith and doctrine' without government intrusion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (quoting *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 556 U.S. 171, 186 (2012)).

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

Response: The Supreme Court held that parents have some rights to direct the education of their children under the Fourteenth Amendment. *See Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (acknowledging the right "to direct the education and upbringing of one's children").

8. **When interpreting text you find to be ambiguous, which tools would you use to resolve that ambiguity?**

Response: If fortunate to be confirmed as a circuit judge, I would approach statutory interpretation as follows: I would first research whether the relevant text had been interpreted by the Supreme Court or the Sixth Circuit; if so, I would follow binding precedent. If there were no direct and binding precedent, I would look first to the text of

the statute and construe it according to its plain and ordinary meaning. If there were ambiguity in the text, I would apply the relevant canons of statutory construction, look to analogous statutes, consider persuasive authority from other circuits, and consider legislative history to the extent permitted by Supreme Court and Sixth Circuit precedent (assuming any probative legislative history even exists on the matter).

9. **When interpreting text you find to be ambiguous, how would you handle two competing, contradictory canons of statutory interpretation?**

   Response: I would look to precedent relevant to the particular context at issue and the particular canons at issue.

10. **How do you decide when text is ambiguous?**

    Response: In interpreting a statute, the Sixth Circuit has stated that "[l]anguage is ambiguous when 'to give th[e] phrase meaning requires a specific factual scenario that can give rise to two or more different meanings of the phrase.'" *All. for Cmty. Media v. FCC*, 529 F.3d 763, 777 (6th Cir. 2008) (quoting *Beck v. City of Cleveland, Ohio,* 390 F.3d 912, 920 (6th Cir.2004)).

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

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

       Response: In *Dobbs v. Jackson Women's Health*, the Supreme Court overruled *Roe v. Wade* and *Planned Parenthood v. Casey*. Besides *Roe* and *Casey*, the listed cases are all binding precedents of the Supreme Court and I would faithfully apply them if confirmed as a judge to the Sixth Circuit. As a judicial nominee, it is generally inappropriate for me to comment on the merits of the Supreme Court's binding precedents. The only listed cases that are an exception that general practice, as other nominees have recognized, are for *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), and *Loving v. Virginia*, 388 U.S. 1 (1967), because the issues of de jure school segregation and the constitutionality of anti-miscegenation laws are unlikely to ever come before the Sixth Circuit. For

that reason, I can ethically state that I believe *Brown* and *Loving* were correctly decided.

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

Response: By its language, 18 U.S.C. § 1507 applies to: "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence[.]"

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

Response: As a nominee to the Sixth Circuit, it would be inappropriate for me to offer any opinions on prospective questions of constitutional interpretation and application, especially those that could present before a federal court. If confirmed and confronted with this issue, I would faithfully apply Supreme Court and Sixth Circuit precedent as to both the relevant constitutional provisions and as to the showing necessary to facially challenge a law.

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

Response: On December 14, 2021, I formally expressed my interest in being considered for a position on the United States Court of Appeals for the Sixth Circuit to Senator Sherrod Brown, following Judge R. Guy Cole's announcement of his intent to take senior status. On March 11, 2022, I interviewed with an attorney from the White House Counsel's Office. After that date, I was in contact with officials from the Office of Legal Policy at the Department of Justice who were completing an investigation into my background. On May 25, 2022, President Biden announced his intent to nominate me, and my nomination was submitted to the Senate.

15. **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: On various occasions I spoke with Jeremy Paris—who is a friend living in Ohio that I have known for approximately a decade—about the nomination process. He is affiliated with the Raben Group and the Committee for a Fair Judiciary. He spoke with me in his capacity as a friend.

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

    Response: On a few occasions I spoke with Chris Kang about the nomination process, given his experience working on judicial nominations in the Obama Administration.

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

    Response: On a few occasions I spoke with Jill Dash to get advice on the nomination process. I also briefly met Russ Feingold at a reception during the American Law Institute's Annual Conference. I also spoke with Kyle Strickland, from the Columbus Chapter of the American Constitution Society, and he informed me about local support for my nomination.

18. **During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.**

    Response: No.

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

    Response: No.

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

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

       Response: No.

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

       Response: No.

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

Response: Please see the response to Question 16.

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

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

Response: No.

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

Response: No.

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

Response: I believe this question means to refer to the Alliance for Justice. I spoke to Daniel Goldberg on various occasions to get advice on the nomination process and once to his successor, Jake Faleschini. I met with Nan Aron once during this process and likewise spoke once with Rakim Brooks to make his acquaintance after he became the president of the Alliance for Justice.

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

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

Response: No.

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

   Response: No.

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

   Response: No.

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

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

       Response: No.

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

       Response: No.

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

       Response: No.

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

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

       Response: No.

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

Response: No.

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

Response: Gabe Roth and I were members of the same Jewish youth group during high school in Nashville, Tennessee but have had little contact since 2000. After reading an article mentioning that I was being considered for this nomination, he reached out to me via email to wish me well. We have not had additional communications since my nomination was announced.

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

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

Response: No.

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

Response: Please see the response to Question 15.

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: Please see the response to Question 15.

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

Response: The Office of Legal Policy sent me these questions on the evening of June 29, 2022. I reviewed the questions, researched answers to the questions as needed, and drafted answers based on my recollection, reviewing my personal notes, and conducting legal research. A paralegal that I frequently work with helped check citations and proofread the document. I provided my answers to the attorneys from the Office of Legal Policy who provided feedback. The final answers are my own.

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

Questions for the Record for Rachel S. Bloomekatz, Nominee for the Sixth Circuit

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

   Response: Yes. There are many state and federal laws that make discrimination on the basis of race illegal and, under the Supreme Court's equal protection precedents, any laws involving racial classifications are subject to strict scrutiny. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

2. **In comments you made about the late Justice Ginsburg, you commended her for taking her "lived experience" and "transform[ing] it into change." What does it mean for a judge to take "her lived experience" and "transform it into change?"**

   Response: The late Justice Ginsburg commented that her lived experience, such as having once been a 13-year-old girl, helped her better understand the parties' argument in some cases, such as in the *Safford Unified School District v. Redding*, 557 U.S. 364 (2009). *See* Liptak, Supreme Court Says Child's Rights Violated by Strip Search, NY Times (June 25, 2009), available at https://www.nytimes.com/2009/06/26/us/politics/26scotus.html.

   a. **Do you intend to do the same as a Judge?**

      Response: If confirmed, I will make decisions based on the record in the case and the applicable law and binding precedent.

3. **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: Claims for unenumerated rights are typically brought under the Due Process Clauses of the Fifth and Fourteenth Amendments. The Supreme Court has held that the Due Process Clauses protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and are "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks omitted). I am not aware of any rights satisfying that test that have not already been articulated by the Supreme Court.

4. **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 that I—if fortunate to be confirmed—should approach each case with humility. For each new case, I will not have seen that case before and should approach the case without any assumptions, prejudgments, or a sense that I already know the answer. I will diligently learn the record, thoroughly research the law, listen to all the parties' arguments with an open mind, and work with my colleagues to reach a faithful application of the law to the facts. Because the role of a circuit court judge is very different from that of a Supreme Court Justice, I would not characterize my philosophy as being analogous to any of the Justices listed.

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

Response: According to Black's Law Dictionary, originalism is "[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). Originalism asks how the words of the Constitution or a statute would have been understood at the time the relevant provision was ratified or enacted. I do not characterize myself as adopting any interpretive methodology. If confirmed, I will follow the Supreme Court's precedents as to how to interpret the Constitution, including when it calls for an originalist interpretation, such as in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022).

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

Response: According to Black's Law Dictionary, living constitutionalism is "[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). I do not characterize myself as adopting any interpretive methodology.

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

Response: When presented with issues of first impression, circuit judges are bound by the tests and modes of analysis established by the Supreme Court in considering constitutional issues. Accordingly, even if there is not a precedent directly on point, if confirmed I would still be bound to follow the framework the Supreme Court has set forth for analyzing that area of the Constitution. The Supreme Court has instructed lower courts to follow the original public meaning in cases such as *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022) and *Crawford v. Washington*, 541 U.S. 36 (2004).

8. **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: If confirmed as a Sixth Circuit Judge, I am bound to apply binding Supreme Court precedent, including occasions where the Supreme Court has considered contemporary understandings. *See, e.g., Miller v. California*, 413 U.S. 15 (1973) (regarding obscenity analysis); *Atkins v. Virginia*, 536 U.S. 304 (2002) (regarding excessive punishment claims).

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

Response: No. As other nominees have noted, the Constitution is an enduring document that sets forth the principles and structure that governs our nation. It can only be amended as detailed in Article V.

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

Response: Yes. It is a controlling precedent of the Supreme Court.

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

Response: Yes. It is a controlling precedent of the Supreme Court.

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. Under 18 U.S.C. § 3142(e)(2), persons convicted of offenses listed in § 3142(f)(1)—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, among others—should be presumptively detained if the conviction is less than five years old or the person was released less than five years ago. There is also a presumption of detention under § 3142(e)(3) for people for whom there is probable cause to believe they committed certain drug or firearms offenses. In any case involving pretrial detention, I would consult the applicable statute and binding precedents.

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

Response: This question asks about the policy rationale behind a federal law. If confirmed as a judge, my responsibility would be to interpret the laws as they are written and apply them faithfully based on their text.

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. There are multiple limits on the requirements that a government may impose on both religious institutions and small businesses operated by observant owners.

One key limitation is the First Amendment, which protects the right to free exercise of religion. Interpreting the First Amendment, the Supreme Court has recognized a "ministerial exception" mandated by the Religion Clauses that protects the rights of "religious institutions to decide matters 'of faith and doctrine' without government intrusion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (quoting *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 556 U.S. 171, 186 (2012)).

The Supreme Court has also held that, because of the Free Exercise Clause, any laws that burden religion must be both neutral and generally applicable—otherwise they are subjected to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). The Supreme Court has several cases clarifying what it means for a law to be both neutral and generally applicable. For instance, a law is not neutral even if it does not

mention religion on its face if "the object or purpose of the law is suppression of religion or religious conduct." *Id.* at 533. Enforcement of a law is also not considered neutral if the record demonstrates the law's enforcement is motivated by hostility to religion. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). A law is not considered generally applicable if it includes discretionary exemptions for secular conduct or if the law prohibits religious activity while permitting secular activity that implicates the same governmental interests. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

The Religious Freedom Restoration Act of 1993 (RFRA) also sets limits on what the federal government may impose, and the Supreme Court has also recognized that small businesses operated by observant owners are protected under RFRA. *See Little Sister of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). In RFRA, Congress stated that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless it "demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

I will faithfully apply these precedents and laws, among others protecting religious freedom, to any relevant case that comes before me if I am fortunate to be confirmed.

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

Response: The Supreme Court has held that laws that discriminate on the basis of religion or are not neutral to religion "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

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

Response: The Supreme Court held that the religious organizations were entitled to a preliminary injunction in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). First, the Court determined that the executive order should be reviewed under strict scrutiny because the religious organizations made a "strong showing" that the order was not neutral, as described in Question 14 above. *Id.* Second, applying strict scrutiny, the Court held that the order was not "narrowly tailored." *Id.* at 67. Third, turning to the balance of the equities as required for analyzing requests for preliminary injunctions, the Court held that the order would cause irreparable harm and it had "not been shown" that the public would be harmed by a preliminary injunction. *Id*. at 68.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court considered restrictions that California imposed on at-home religious gatherings to address the COVID-19 pandemic. It held that California's COVID-19 regulations were "not neutral and generally applicable, and therefore triggered struct scrutiny under the Free Exercise Clause" because the regulations treated "comparable secular activity more favorably than religious exercise." *Id.* at 1296. Applying strict scrutiny, the Court held that California had failed to demonstrate that "measures less restrictive of the First Amendment activity could not address its interests in reducing the spread of COVID," especially because it permitted other non-religious activities to proceed with precautions and did not show that "the religious exercise at issue is more dangerous than those [permitted] activities even when the same precautions are applied." *Id.* at 1296–97. Accordingly, it held that the petitioners were entitled to an injunction.

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 petitioner's First Amendment right to free exercise of religion because the record in the case reflected that the Commission's treatment of a bakery that did not want to sell a wedding cake to a same-sex couple had "elements of a clear and impermissible hostility toward the sincere religious beliefs" of the bakery owners. *Id.* at 1729.

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. Under Supreme Court precedent, courts ask whether an individual's religious beliefs are sincerely held, not whether those beliefs match the tenets of any particular religious organization. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834–35 (1989).

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

Response: If I am confirmed and am faced with a case where a party's sincerely held religious belief are challenged, I will follow the precedents of the Supreme Court and the Sixth Circuit. The Supreme Court has held that a sincerely held religious belief must be "rooted in religion" and has also cautioned that individuals receive protection for sincerely held religious beliefs regardless of "disagreement among sect members." *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833–34 (1989).

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

Response: If I am confirmed and am faced with a case where a party's sincerely held religious belief was challenged, I will follow the precedents of the Supreme Court and the Sixth Circuit. The Supreme Court has held that a sincerely held religious belief must be "rooted in religion," and it has also cautioned that individuals receive protection for sincerely held religious beliefs regardless of "disagreement among sect members." *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833–34 (1989).

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

Response: As a judicial nominee to the Sixth Circuit, it is inappropriate for me to opine on the official position of any religious organization.

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

Response: Interpreting the First Amendment, the Supreme Court has recognized a "ministerial exception" mandated by the Religion Clauses that protects the rights of "religious institutions to decide matters 'of faith and doctrine' without government intrusion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (quoting *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 556 U.S. 171, 186 (2012)). In *Our Lady of Guadalupe School*, the Supreme Court held that the ministerial exception barred two teachers from bringing employment discrimination claims against a religious school under the Age Discrimination in Employment Act and the Americans with Disabilities Act. The Court reasoned that whether the ministerial exception applied to any employee's federal statutory claim turned not on the employee's title but instead rested on "what an employee does." *Id*. at 2064. Because these employees performed "vital religious duties," such as instructing children on matters of faith, the exception applied to these employees. *Id.*

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, 1877 (2021), the Supreme Court held that the City's decision not to refer foster children to Catholic Social Services, due to the agency's refusal to certify same-sex couples as foster parents, violated the Free Exercise Clause of the First Amendment. The Supreme Court recognized that the City's foster care contract included a section stating that agencies could not reject foster families based on sexual orientation, but it reasoned that this was not a "law of general applicability" because the City allowed for individual exemptions to the contract for secular reasons, and thus did not fall within the Court's holding in *Employment Division, Department of Human*

Resources of Oregon v. Smith, 494 U.S. 872 (1990). *Fulton*, 141 S. Ct. at 1878. Applying strict scrutiny, the Court held that the City failed to demonstrate a compelling reason for denying an exception to Catholic Social Services.

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: As the question indicates, in *Carson v. Makin*, 596 U.S. __ (2022), the Supreme Court invalidated Maine's tuition assistance program because it violated the Free Exercise Clause of the First Amendment. Under that program, for school districts that do not operate their own secondary schools, parents could designate a private secondary school they would like their children to attend, and the district would direct payments to participating private schools to help defray tuition costs. Because Maine limited tuition assistance payments to "nonsectarian" schools, the Supreme Court concluded that it discriminated against religion in violation of the Free Exercise Clause. Citing its prior decisions 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), the Court explained that the Free Exercise Clause does not permit states to "expressly discriminate against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Carson*, slip op. at 8 (alteration and citation omitted). The Court reasoned that, as in *Trinity Lutheran* and *Espinoza*, Maine's tuition assistance program excluded otherwise eligible schools "solely because they are religious," and therefore triggered strict scrutiny, which it could not survive. *Id.* Specifically, the Court reasoned that Maine did not have a compelling interest in excluding religious schools from its program based on the Establishment Clause because, as it had held in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Carson,* slip op. at 10.

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*, 597 U.S. __ (2022), the Supreme Court held that a school district violated a football coach's First Amendment free speech and religious exercise rights when it fired him because he "knelt at midfield after games to offer a quiet prayer of thanks." Slip op. at 1. The Court first reasoned that the district's actions both targeted religion—because the coach was fired for praying—and retaliated against private speech—because the coach's prayer was private expression that was not part of his role as a school employee. *Id.* at 14 (district's action was not "neutral" toward religion); *id.* at 19 (coach's prayers "represented his own private speech"). Accordingly, the district's decision to terminate the coach triggered heightened scrutiny; the Court did not specify whether strict or intermediate scrutiny applied, as the district's actions failed both standards. *Id.* at 20. Specifically, the Court rejected the district's argument that if it did not prevent the coach's midfield prayers it would be violating the Establishment Clause as construed by the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), because, the district argued, it would appear as though the district endorsed religion. *Id.* at 21. The Supreme Court clarified that the *Lemon* test had been abandoned and that the district's concern with violating the Establishment Clause was unfounded. *Id.* at 23. It also rejected the district's concern that students would feel coerced to join the coach's prayers. *Id.* at 27. The Court

thus held that the district had violated the coach's First Amendment rights.

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: Justice Gorsuch concurred in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), to emphasize the ways in which the state court misapplied the Religious Land Use and Institutionalized Persons Act (RLUIPA). In *Mast*, a group of Amish persons claimed that complying with a county ordinance that required them to install modern septic systems for disposing of gray water violated their religious beliefs and that they were entitled to an exception based on RLUIPA. The Court granted their petition for a writ of certiorari, vacated the judgment below, and remanded to the state court to reconsider the matter in light of *Fulton*, discussed in Question 21. Justice Gorsuch's concurrence stressed that the lower court had misperceived the burden the county must meet under RLUIPA. To pass RLUIPA, the county had the burden of proving that it had a compelling interest in denying the petitioners an exemption; the county's "*general* interest in sanitation regulations . . . without reference to the *specific* application of those rules to *this* community" is insufficient for strict scrutiny under RLUIPA. *Id.* at 2432. Justice Gorsuch further emphasized that the lower court should have given "due weight to exemptions other groups enjoy" from the septic system regulation and that it too quickly dismissed the petitioners' proposed alternative to the modern septic systems. *Id.* at 2432-33.

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: As a judicial nominee, it is improper for me to opine on how I might apply 18 U.S.C. § 1507 or any statute in a particular case, especially given that this particular issue is or may soon be pending in federal court.

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: I am not aware of whether I would have any input into any employee trainings if confirmed. Any trainings must comply with the Constitution and federal law.

27. **Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?**

Response: I am not familiar with any such trainings.

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: If confirmed, I will comply with the Constitution and applicable laws when hiring law clerks and other staff.

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

Response: It is inappropriate for me, as a judicial nominee, to comment on how the Executive Branch makes its nomination decisions. If I am fortunate to be confirmed and a case raising this issue were to come before me, I will follow the binding precedents of the Supreme Court and Sixth Circuit.

30. **Is the criminal justice system systemically racist?**

Response: If I am confirmed, I will ensure that every litigant who appears before me is treated equally and without bias. I will look at each case individually—learn the record in each case, research the applicable law and precedents, and work with my colleagues to reach a faithful application of the law to the record. Questions as to broader systemic issues in the criminal justice system are important questions for policymakers.

31. **President Biden has created a commission to advise him on reforming the U.S. Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.**

Response: The Constitution does not establish a fixed number of Supreme Court Justices; it is within the purview of the political branches to determine. If confirmed to CA6, I would follow SCOTUS precedent regardless of the number of justices on the court.

32. **In 2018, you delivered a presentation that included a picture of the then-sitting Justices with Justice Gorsuch's face crossed out and a picture of Merrick Garland super-imposed. Do you regret including that image in your presentation?**

Response: The 2018 presentation that this question references does not include a picture of Justice Gorsuch's face crossed out. The PDF of the presentation appears that way because the PowerPoint presentation includes several animations on the referenced slide that are superimposed when a PDF was made—but the actual presentation is not as this question describes. The slide contains a picture of the previously sitting Justices. The animations then proceed sequentially as follows: (1) an "X" over Justice Scalia, indicating that after his passing he is no longer on the Court and a picture of Merrick Garland, on the side of the slide, indicating that he was nominated; (2) a photo of Justice Gorsuch replaces Justice Scalia (there is no X over Justice Gorsuch) and Merrick Garland's photo disappears; (3)

Justice Kennedy's photo disappears, indicating his retirement. The next slide includes a photo of then Judge Kavanaugh.

33. **Do you believe that Justice Gorsuch was illegitimately appointed to serve on the Supreme Court of the United States?**

Response: No.

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

Response: No.

34. **The image of Justice Gorsuch's face crossed-out and Merrick Garland's super-imposed was delivered in the section of your presentation entitled "A Look Ahead: Shifting the Balance." Does "shifting the balance," in your view include increasing the number of Justices on the Supreme Court of the United States?**

Response: The phrase "shifting the balance" in that presentation did not refer to increasing the number of Justices on the Supreme Court. The 2018 presentation that this question references does not include a picture of Justice Gorsuch's face crossed out.

35. **Last year, you signed on to lead an effort against Ohio's Stand Your Ground law, which would allow gun owners—of all races—to protect themselves when they reasonable believe it to be necessary to protect themselves from violent crimes. You said that the law would undermine the rights of African- American Ohioans, with no citation to any evidence or statistics whatsoever. Can you elaborate on what you mean by that?**

Response: This question appears to reference my press statement on *Ohio Conference of the NAACP v. Ohio*. In that statement, I referred to the fact that the rights of African Americans, including my clients in that case, to participate in the legislative process were violated when the Ohio Legislature enacted the challenged law in violation of the protections for enacting legislation provided by the Ohio Constitution in Art. II, §§ 15(C) and (D). That is the argument I have advanced on behalf of my clients in that case.

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

Response: As the Supreme Court stated in *New York State Rifle & Pistol Association v. Bruen*, following the text and original public meaning, the Second Amendment "protect[s] the right of an ordinary, law-abiding citizen to possess a gun in the home for self-defense" and "an individual's right to carry a hand-gun for self-defense outside of the home." 597 U.S. __ (2022), slip op. at 1. 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 has a particular need greater than the general population to carry a firearm for self-defense. *Id.* at 63 (invalidating New York's "proper-cause" requirement).

37. **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: As the Supreme Court stated in *New York State Rifle & Pistol Association v. Bruen*, the Second Amendment "protect[s] the right of an ordinary, law-abiding citizen to possess a gun in the home for self-defense" and "an individual's right to carry a hand-gun for self-defense outside of the home." 597 U.S. __ (2022), slip op. at 1. The Court stated:

> In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n. 10, 81 S. Ct. 997, 6 L.Ed.2d 105 (1961).

Slip op. at 8. 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 has a particular need greater than the general population to carry a firearm for self-defense. *Id.* at 63 (invalidating New York's "proper-cause" requirement).

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

Response: Yes. The Supreme Court has explained that the phrase "the people" in the Second Amendment refers to the individual right of "ordinary, law-abiding, adult citizens." *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022), slip op. at 23 (citing *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008)).

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

Response: According to the Supreme Court, the Second and Fourteenth Amendments protect the right to own a firearm as consistent with the original public meaning. *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022), slip op. at 15. The Supreme Court has not said that it receives less protection than any other right.

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

Response: According to the Supreme Court, the Second and Fourteenth Amendments protect the right to own a firearm as consistent with the original public meaning. *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022), slip op. at 15. The Supreme Court has not said that it receives less protection than any other right.

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

Response: Generally speaking, the Executive Branch has wide discretion to decide whether to prosecute an individual case. *See United States v. Nixon*, 418 U.S. 683, 693 (1974). This broad discretion stems from Article II of the Constitution, which vests the President with the "executive Power" and provides that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 3. If confirmed and confronted with a case presenting these issues, I will follow all Supreme Court and Sixth Circuit precedent.

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

Response: Generally speaking, the Executive Branch has wide discretion to decide whether to prosecute an individual case. *See United States v. Nixon*, 418 U.S. 683, 693 (1974). This broad discretion stems from Article II of the Constitution, which vests the President with the "executive Power" and provides that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 3. If confirmed and confronted with a case presenting these issues, I will follow all Supreme Court and Sixth Circuit precedent.

43. **Does the President have the authority to abolish the death penalty?**

Response: No. The death penalty is permitted under federal law by 18 U.S.C. § 3591(a). The President does not have authority to unilaterally abolish legislation. Likewise, the President does not have authority over state death penalty prosecutions and executions.

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

Response: In *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021), the Supreme Court held that the Center for Disease Control did not have the authority under Section 361(a) of the Public Health Service Act, 58 Stat. 703, as amended, 42 U.S.C. § 264(a), to impose a nationwide eviction moratorium for certain residential rental properties.

Senator Josh Hawley
Questions for the Record

Rachel Bloomekatz
Nominee, U.S. Court of Appeals for the Sixth Circuit

1. **During your nomination hearing, I asked you about your representation of violent rapist Brandon Moore.**

   a. **When the Jones Day law firm originally took Moore's case, did you voluntarily choose to represent Moore?**

      Response: Yes.

   b. **If so, please provide a full explanation of your decision and rationale for doing so.**

      Response: Under our system of government, even those who commit heinous crimes are entitled to a sentence that comports with the Constitution. Our adversarial-based judicial system depends on private attorneys and firms, like Jones Day's pro bono practice, to represent indigent criminal defendants—our system does not work without it. That is especially true when, as here, the public defender's office has a conflict and cannot represent a criminal defendant. In this matter, we argued that Mr. Moore's sentence violated the Eighth Amendment as the Supreme Court interpreted in *Graham v. Florida*, 560 U.S. 48 (2010). The Ohio Supreme Court agreed. 149 Ohio St.3d 557 (2016), 2016-Ohio-8288.

   c. **If so, did you subsequently have opportunities to withdraw from the representation of Brandon Moore, and then choose to continue representing him?**

      Response: I withdrew from representing Mr. Moore after the Supreme Court denied certiorari. Subsequently, after Mr. Moore was resentenced, the Ohio Seventh District Court of Appeals appointed me to represent Mr. Moore for the direct appeal of his resentencing.

   d. **As a policy matter, do you believe that all incarcerated individuals, irrespective of their age, are entitled to an opportunity to demonstrate rehabilitation by being released from custody during their lifetimes?**

      Response: In *Graham v. Florida*, the Supreme Court held that a juvenile nonhomicide offender is not guaranteed release but must be provided a

"meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

e. As a policy matter, do you believe that mandatory-minimum sentencing schemes are fundamentally unjust?

Response: If confirmed, I will follow Supreme Court and Sixth Circuit precedent related to sentencing schemes, including mandatory-minimum sentencing schemes. Relevant precedent might include *Wooden v. United States*, 595 U.S. __ (2022) (regarding application of the Armed Career Criminal Act's 15-year mandatory minimum); *Alleyne v. United States*, 570 U.S. 99 (2013) (regarding requirement that jury must generally find facts that increase the mandatory minimum).

f. Of the four recognized purposes of the criminal justice system—retribution, deterrence, incapacitation, and rehabilitation—which most closely approximates your understanding of the system's principal purpose?

Response: The Supreme Court has recognized all four of these purposes of punishment and analyzed all of them in reviewing sentences. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48 (2010). Additionally, 18 U.S.C. § 3553 mandates that district court judges impose a sentence that is "sufficient, but not greater than necessary, to comply with [all four of] the purposes" listed in this question. *See* 18 U.S.C. § 3553(a)(2) (listing the need for the sentence: "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner").

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

a. Do you agree with that philosophy?

Response: No. A judge's decision in each case should be based on the record in the case and the applicable law and binding precedent. It should not be based on the judge's personal views of what is "right."

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

Response: The judicial oath requires each judge to "faithfully and impartially" discharge their duties under "the Constitution and laws of the United States."

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

Response: There are multiple abstention doctrines recognized by the Supreme Court and the Sixth Circuit. To extent that the following list does not encapsulate all of them, if confirmed, I would apply the binding precedent to any party's abstention claim.

Pullman Abstention—When a state law is challenged in federal court as unconstitutional, the *Pullman* abstention doctrine provides that the federal court generally should abstain when "difficult and unsettled questions of state law" must be first resolved and would be dispositive of the case, obviating the for the federal court to resolve the constitutional question. *See Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984) (citing *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498–501 (1941)). *Accord* Hunter v. Hamilton Cty. Bd. of Elections, 635 F.3d 219, 233 (6th Cir. 2011) (*Pullman* abstention "appropriate only where state law is unclear *and* a clarification of that law would preclude the need to adjudicate the federal question.").

Burford Abstention—The *Burford* abstention doctrine, derived from the case *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), instructs that:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) (internal quotations and citation omitted). The Sixth Circuit has clarified that judges evaluating *Burford* abstention should inquire "whether an erroneous federal court decision could impair the state's effort to implement its policy." *Saginaw Housing Comm'n Bannum, Inc.*, 576 F.3d 620, 626–628 (6th Cir. 2009) (citation omitted).

Younger Abstention—The *Younger* abstention doctrine provides that federal courts should abstain from enjoining certain kinds of ongoing state proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). To determine whether *Younger* abstention applies, the Sixth Circuit follows the Supreme Court's test from *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), permitting abstention where: "(1) state proceedings are currently pending; (2) the proceedings involve an important state

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

Colorado River Abstention—The *Colorado River* abstention doctrine provides that federal courts may dismiss or stay a federal case in deference to a pending parallel state court proceeding if doing so would further concerns of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976). Drawing from the Supreme Court's precedents applying the *Colorado River* abstention doctrine, the Sixth Circuit has established factors for a lower court to balance in applying this doctrine, including:

> "(1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; and (4) the order in which jurisdiction was obtained . . . . (5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction."

Romine v. Compuserve Corp., 160 F.3d 337, 340–41 (6th Cir. 1998) (internal quotation marks and citations omitted). These factors are not a "mechanical checklist," but require "careful balancing of the important factors as they apply in a given case depending on the particular facts at hand." *Id.* at 341 (internal quotation marks and citation omitted.)

Rooker-Feldman Doctrine—First formulated in *Rooker v. Fidelity Trust*, 263 U.S. 413 (1923), the *Rooker-Feldman* doctrine bars lower federal courts from conducting appellate review of final state court judgments because 28 U.S.C. § 1257 vests sole jurisdiction to review such claims in the Supreme Court. The Sixth Circuit has explained that the doctrine applies when "a state-court loser initiates an action in federal district court, complaining of injury caused by a state court judgment, and seeks review and rejection of that judgment." *In re Cook*, 551 F.3d 542, 548 (6th Cir. 2009).

Thibodaux Abstention—This doctrine, as explained in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), provides that a federal court hearing a case within its diversity jurisdiction may choose to abstain from deciding issues of state law that are "intimately involved with sovereign prerogative." *Id.* at 28; *see also Superior Beverage Co., Inc. v. Schieffelin & Co.*, 448 F.3d 910, 913 (6th Cir. 2006).

Ecclesiastical Abstention—As articulated in *Watson v. Jones*, 80 U.S. 679, 727 (1871), the ecclesiastical abstention doctrine states that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by . . . church judicatories . . ., the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* at 727; *see also Hutchison v. Thomas*, 789 F.2d 392, 395 (6th Cir. 1986).

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

   Response: No.

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

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

   Response: The Supreme Court has instructed that the original public meaning of the Constitution should be used to guide constitutional interpretation in many areas, including the Second Amendment's protection of the right to keep and bear arms, *see New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022), the Sixth Amendment's protection of the right to confront witnesses, *see Crawford v. Washington*, 541 U.S. 36 (2004), and certain Fourth Amendment issues, *see United States v. Jones*, 565 U.S. 400 (2012). Lower court judges should use the original public meaning of the Constitution's text in areas where the Supreme Court has mandated that analysis.

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

   Response: The Supreme Court has sometimes relied on legislative history in interpreting ambiguous statutory language. It is not appropriate for judges to rely on legislative history when the text of a statute is clear.

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

      Response: The Supreme Court has cautioned against relying upon certain types of legislative history because such history is generally not probative of legislative intent in enacting a statute. For example, the Court reasoned that "failed legislative proposals" are "particularly dangerous" to rely upon, *United States v. Craft*, 535 U.S. 274, 285 (2002) (internal quotation marks and citation omitted). Justice Scalia also famously wrote that "[s]ubsequent legislative history — which presumably means the *post*-enactment history of a statute's consideration and enactment — is a contradiction in terms." *Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring) (internal quotation marks 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: Circuit court judges should consult the text and binding precedent when interpreting the Constitution, not foreign laws. I am not aware of any

case where the Supreme Court, even if it noted the existence of international laws, concluded that international law was integral or dispositive to its analysis in a case involving the interpretation of the Constitution.

7. **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: Under Supreme Court precedent, death row inmates seeking to show that a State's execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment must satisfy two requirements: (1) "establish that the State's method of execution presents a 'substantial risk of serious harm'—severe pain over and above death itself," and (2) "identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]' the risk of harm involved." *Nance v. Ward*, 597 U.S. ___ (2022), slip op. at 3 (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)). The inmate is "not limited to choosing among those [methods] presently authorized by a particular State's law" but can "point to a well-established protocol in another State as a potentially viable option." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1128 (2019). For a court to conclude that the Eighth Amendment has been violated, the government must lack a legitimate penological reason for refusing to adopt the alternative method. *Id.* at 1125 (citing *Baze v. Rees*, 553 U.S. 35 (2008)). *See also Middlebrooks v. Parker*, 15 F.4th 784 (6th Cir. 2021) (applying *Glossip* and *Baze*).

8. **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 the answer to Question 7.

9. **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: No. The Supreme Court rejected a petitioner's request to recognize a "freestanding and far-reaching constitutional right of access" to DNA evidence. *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 56, 72 (2009).

10. **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.

11. 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: Laws that substantially burden religious exercise must be both neutral and generally applicable—otherwise they are subjected to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). The Supreme Court has several cases clarifying what it means for a law to be both neutral and generally applicable. For instance, a law is not neutral even if it does not mention religion on its face if "the object or purpose of the law is suppression of religion or religious conduct." *Id.* at 533. The enforcement of a law is not considered neutral if the record demonstrates the law's enforcement is motivated by hostility to religion. *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018). A law is not considered generally applicable if it includes discretionary exemptions for secular conduct or if the law prohibits religious activity while permitting secular activity that implicates the same governmental interests. *See Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020).

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

Response: Please see the response to Question 11.

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

Response: The Sixth Circuit explained the standard for evaluating whether an individual's religious belief was sincerely held in *Fox v. Washington*, 949 F.3d 270, 277 (6th Cir. 2020). It explained: "Courts are 'to determine whether the line drawn' by the plaintiff between conduct consistent and inconsistent with her or his religious beliefs 'reflects an honest conviction.'" *Id.* at 277 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014)). The Sixth Circuit cautioned that "'it is not within the court's purview to question the reasonableness'" of the plaintiff's beliefs or "'to say that [plaintiffs'] religious beliefs are mistaken or insubstantial.'" *Id.* (quoting *Hobby Lobby*, 573 U.S. at 725). In *Fox*, the plaintiff's individual testimony and reference to religious text "more than satisfie[d]" that standard. *Id.*

14. 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: As the Supreme Court recently stated in *New York State Rifle & Pistol Association v. Bruen*, *Heller* held that the Second Amendment "protect[s] the right of an ordinary, law-abiding citizen to possess a gun in the home for self-defense." 597 U.S. __ (2022), slip op. at 1.

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.

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

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

Response: Dissenting in *Lochner v. New York*, Justice Holmes explained that the "Constitution is not intended to embody a particular economic theory." 198 U.S. 45, 75 (1905). I believe that is the concept to which he was referring in the quotation included in this question.

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

Response: Like all circuit court judges, if confirmed I will be bound to follow governing Supreme Court precedents. The Supreme Court's decision in *Lochner* was largely abrogated by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) and in *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), the Court stated that the "doctrine that prevailed in *Lochner* . . . has long since been discarded."

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

a. If so, what are they?

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

Response: I am aware that there are some decisions, like *Dred Scott v. Sandford*, 60 U.S. 393 (1857), that were overturned via amendment to the Constitution and may not have been "formally overruled" by the Supreme Court itself. Absent amendment to the Constitution, only the Supreme Court

may overrule one of its prior cases as to the interpretation of the Constitution. I commit to faithfully applying all Supreme Court precedents that have not been overruled.

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

a. Do you agree with Judge Learned Hand?

Response: If confirmed, I will follow all Supreme Court and Sixth Circuit precedent as to what constitutes a monopoly. I do not have a personal view on the above-quoted statement by Judge Learned Hand.

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

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

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: The Supreme Court has held that evidence that a party holds more than 80% share of the product market was sufficient to support a finding of monopoly power when there were "no readily available alternatives." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992) (citing cases holding that companies with 87% market share and more than two-thirds of the market share constituted monopolies).

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

Response: The seminal textbook, Hart and Weschler's the Federal Courts and the Federal System, defines federal common law as "federal rules of decision whose content cannot be traced directly by traditional methods of interpretation of federal statutory or constitutional commands" and instead are crafted by federal judges in the course of resolving disputes under Article III of the Constitution. Fallon, et al., The Federal Courts and the Federal System, 635 (7th ed.).

19. 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: With respect to the interpretation of state constitutional provisions, if confirmed to be a federal circuit judge, I will defer to the decision of the highest court of the relevant state. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

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

Response: With respect to the federal constitution, if confirmed I will follow the interpretation mandated by Supreme Court and Sixth Circuit precedent. With respect to state constitutions, I will follow the decision of the highest court of the relevant state.

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

Response: Please see the response to Question 19. A feature of our federalist system of government is that the citizens of a State may provide for more protections in their state constitution and laws than provided in the federal constitution.

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

Response: As a judicial nominee, it is generally inappropriate for me to comment on the merits of the Supreme Court's binding precedents. If confirmed, I will faithfully follow all the Supreme Court's binding precedents. As other nominees have recognized, because the issue of de jure school segregation is unlikely to ever come before the Sixth Circuit, despite the general rule not to comment on the merits Supreme Court cases, I can ethically state that I believe *Brown* was correctly decided.

21. 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: The question of the authority of nationwide injunctions is currently subject to considerable debate both at the Supreme Court and in the Sixth Circuit. *See Arizona v. Biden*, 31 F.4th 469 (6th Cir. 2022) (Sutton, C.J., concurring). It is not appropriate for me, as a nominee to the Sixth Circuit, to comment given the likelihood of this issue coming before the court in the future.

22. 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 the response to Question 21.

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

Response: Federalism is one of the geniuses of our system of government. First, it gives the States the ability to protect individual rights more than the federal

government, therefore enhancing liberty. Second, it recognizes that states and local governments are more proximate to and more accountable to the people they govern. Federalism's protection of state and local power to legislate for the general welfare thus enhances responsiveness to the needs and views of the local constituency. Third, federalism creates laboratories of democracies. One state may adopt a policy and, based on that State's experience, other States or the federal government may choose to adopt or reject that policy.

24. 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 the response to Question 3.

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

Response: The Supreme Court has cautioned that injunctions are an "extraordinary remedy" appropriate when legal remedies would be inadequate. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

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

Response: The Supreme Court recently reiterated that the Due Process Clause of the Fourteenth Amendment "guarantee[s] some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. __ (2022), slip op. at 5 (quoting *Washington v. Glucksberg*, 52 U.S. 702, 721 (1997)).

27. 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 the response to Question 11. In addition, the Supreme Court has recognized a "ministerial exception" mandated by the Free Exercise Clause that protects the rights of "religious institutions to decide matters 'of faith and doctrine' without government intrusion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (quoting *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 556 U.S. 171, 186 (2012)).

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 Clause protects against discrimination based on religious "status" as well as against particular worship practices. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 U.S. 2012, 2021 (2007).

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 the response to Question 11.

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 the response to Question 13.

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

Response: The Religious Freedom Restoration Act of 1993 (RFRA) provides that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless it "demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. As the Supreme Court explained, RFRA "operates as a super statute, displacing the operation of other federal laws." *Bostock v. Clayton County*, 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.

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

a. What do you understand this statement to mean?

Response: I am not familiar with this statement. On its face, it appears to mean that judges must decide cases based on the law and not based on their personal desire for a specific result.

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

Response: Yes.

a. If yes, please provide appropriate citations.

Response: To the best of my recollection, the following cases are responsive to this question:

In *Ohio State Conference of the NAACP v. State of Ohio*, Case No. 21-CV-005692 (Franklin Cty. Ct. Com. Pls.), I represent plaintiffs arguing that Senate Bill 175 was enacted in violation of the legislative process protected by the Ohio Constitution.

In *Rowell v. Pettijohn*, 137 S. Ct. 1431 (2017) and *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), I represented plaintiffs arguing that the state laws at issue violated the First Amendment.

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

Response: No.

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

Response: I am not aware of a consensus definition of systemic racism. I believe that America is a wonderful country that was founded and amended to further democracy, liberty, equality, and justice.

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

Response: Yes.

33. How did you handle the situation?

Response: I followed my duty as an advocate to represent my clients' interest vigorously, within the bounds of the law and the requirements of Federal Rule of Civil Procedure Rule 11, despite any personal views.

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

Response: Yes.

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

Response: Although I have read the Federalist Papers and have reviewed citations to the Federalist Papers in caselaw and for teaching, there is no particular Federalist Paper that has had special influence on my views.

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

Response: The Supreme Court has not determined whether "an unborn child is a human being." It has allowed States to follow different views on this issue. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. __ (2022), slip op. at 3 (Kavanaugh, J. concurring) ("The Constitution neither outlaws abortion nor legalizes abortion.").

37. 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: No.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

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

Response: For over a decade as an appellate advocate, I have helped other attorneys with their briefs, particularly appellate briefs and trial court briefs on dispositive issues. Sometimes I helped attorneys who were part of the same law firm I was associated with, sometimes I helped attorneys outside of the firm. I have also helped clients with their briefs, including briefs drafted by in-house counsel or by another law firm. Because I conducted much of this work on an ad hoc basis, I have no list of such briefs and I do not have access to the information from prior firms that would allow me to construct such a list. Additionally, because much of this work was done within the scope of the attorney-client relationship, it would be improper for me to detail any work that is subject to professional privileges.

41. Have you ever confessed error to a court?

Response: To the best of my recollection, I have not.

a. If so, please describe the circumstances.

42. 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: Judicial nominees swear an oath to tell the truth to this Committee and answer the Committee's questions to the best of their ability. I have upheld that oath.

Questions for the Record
Senator John Kennedy

Rachel Bloomekatz

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

   Response: My judicial philosophy is that I—if fortunate to be confirmed—should approach each case with humility. For each new case, I will have never seen that case before and should approach the case without any assumptions or prejudgments or sense that I know the answer. I will diligently learn the record, thoroughly research the law, listen to all the parties' arguments with an open mind, and work with my colleagues to reach a faithful application of the law to the facts.

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: If the text of a law is clear, then no.

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

   Response: Whether it is appropriate to consider legislative history or presidential statements depends on the particular context; courts do not consider legislative history when the text of the statute is clear. In some instances, the Supreme Court has referenced presidential pronouncements as confirmatory persuasive evidence of the intent of a statute because it is a contemporaneous statement about the meaning of the statute. *See, e.g.*, *S. Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 354 (1998); *Rosebud Sioux Tribe v. Kniep*, 430 U.S. 584, 602–03 (1977).

4. **How does the Major Questions Doctrine relate to *Chevron*?**

   Response: The major questions doctrine refers to the rule of statutory construction providing that courts should not construe an ambiguous statutory grant of power to an agency to authorize the agency to make decisions of vast economic and political significance unless Congress has clearly granted such authority. *See West Virginia v. EPA*, 597 U.S. __ (2022), slip op. at 17–19 (citing *NFIB v. OSHA*, 595 U.S. __ (2022) (per curiam)*, Alabama Ass. of Realtors v. DHHS*, 594 U.S. ___ (2021) (per curiam); *Utility Air Regulatory Group v. EPA,* 573 U.S. 302 (2014); *FDA v. Brown & Williamson* Tobacco Corp., 529 U.S. 120 (2000)). The doctrine stems from the presumption that "Congress intends to make major policy decisions itself, not to leave those decisions to agencies." *Id.* at 19 (internal quotation marks and citation omitted). Accordingly, even if the agency has a "colorable textual basis" that the statute confers authority for its regulation, if the issue constitutes a "major question," the doctrine provides that the agency does not have authority for such a regulation and the agency is not afforded deference under *Chevron* for its interpretation. *See id.* at 18–20. In *West Virginia v. EPA*,

for example, after concluding that it was a "major questions case," and that the government could not "point to clear congressional authorization" for its regulation, the Supreme Court did not apply *Chevron* deference to the agency's interpretation of the governing statute. *Id.* at 28 (internal quotation marks and citation omitted).

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 Supreme Court discussed the meaning of "the people" in the Bill of Rights and in the Constitution in *District of Columbia v. Heller*, 554 U.S. 570 (2008). It explained that the phrase "the people" in the Bill of Rights refers to an "individual right," with perhaps the exception of the Tenth Amendment, which "arguably refer[s] to 'the people' acting collectively." *Id.* at 579–80. *Heller* further explained that "'[t]he people seems to have been a term of art employed in select parts of the Constitution . . . .[that] refers to a class of persons who are part of a national community.'" *Id.* at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)).

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

   Response: The Supreme Court has held that noncitizens in the United States have due process rights. In *Yick Wo v. Hopkins*, the Court concluded that "[t]he 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." 118 U.S. 356, 369 (1886). In *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), the Supreme Court wrote: "[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." The nature of the due process protection, however, "may vary depending upon status and circumstance." *Id.* I would apply all relevant Supreme Court and Sixth Circuit precedents regarding the rights of noncitizens unlawfully present in the United States.

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

   Response: In *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975)—a case where border patrol agents stopped a car in the border area, but not as part of routine inspection for entering the country—the Supreme Court explained that the Fourth Amendment requires border patrol agents to have reasonable suspicion "before stopping or detaining persons for questioning about their citizenship." The Court thus affirmed a lower court's decision to suppress evidence obtained from a border patrol stop that lacked reasonable suspicion, even though the car's occupants were noncitizens unlawfully present in the United States. *Id.* at 875–76. As the Court further clarified, "not only is the expectation of

privacy less at the border than in the interior" but also "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border." *United States v. Montoya de Hernandez*, 473 U.S. 531, 539 (1985). I would apply all relevant Supreme Court and Sixth Circuit precedents regarding the rights of noncitizens unlawfully present in the United States.

8. When does equal protection of the law attach to a human life?

Response: This question appears to require an answer to when human life begins. That question has not been answered by the Supreme Court. It has allowed States to adopt different views on that issue. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. __ (2022), slip op. at 3 (Kavanaugh, J. concurring) ("The Constitution neither outlaws abortion nor legalizes abortion.")

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

Response: The Supreme Court held that voter identification laws were not per se unconstitutional in *Crawford v. Marion County*, 553 U.S. 181 (2008), and it upheld the voter identification requirements at issue in that case.

10. What is the constitutional basis for a federal judge to issue a universal injunction?

Response: The question of the authority of nationwide injunctions is currently subject to considerable debate both at the Supreme Court and in the Sixth Circuit. *See Arizona v. Biden*, 31 F.4th 469 (6th Cir. 2022) (Sutton, C.J., concurring). It would not be appropriate for me, as a nominee to the Sixth Circuit, to comment given the likelihood of this issue coming before the court in the future.

11. Have you ever been formally or informally accused of maintaining an inappropriate workplace relationship?

Response: No.

a. If yes, have you ever been disciplined for maintaining an inappropriate workplace relationship?

12. Have you ever been formally or informally accused of workplace retaliation?

Response: No.

a. If yes, have you ever been disciplined for workplace retaliation?

Senator Mike Lee Questions
for the Record
Rachel Bloomekatz, Nominee to be United States Circuit Judge for the Sixth Circuit

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

Response: My judicial philosophy is that I—if fortunate to be confirmed—should approach each case with humility. For each new case, I will have never seen that case before and should approach the case without any assumptions or prejudgments or sense that I know the answer. I will diligently learn the record, thoroughly research the law, listen to all the parties' arguments with an open mind, and work with my colleagues to reach a faithful application of the law to the facts.

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

Response: In approaching a case that turned on statutory interpretation, if confirmed, I would first determine whether the Supreme Court of the Sixth Circuit had previously interpreted the specific statutory provision at issue. If so, as a circuit judge I would be bound by that precedent. If there were no such precedent, I would start with the text of the statute. The text is always the place to start, and if the statute's text is unambiguous, that textual interpretation prevails. If the text is ambiguous, I would consider any applicable canons of construction or interpretive principles, I would look to the statute's structure, I would look to precedent on analogous statutes if there were any, I would consult any probative legislative history, and I would consider persuasive authority from other courts.

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

Response: If fortunate to be confirmed as a judge on the Sixth Circuit and faced with a case that turned on the interpretation of a constitutional provision, I would first determine whether the Supreme Court or Sixth Circuit had previously interpreted the specific constitutional provision at issue, and if so, I would follow that precedent. Although I believe it would be rare to confront a constitutional issue of true first impression, if such a situation were to arise, I would consider the text of the provision and its plain meaning, as well as the method of interpretation and analysis that the Supreme Court or Sixth Circuit had used in the area or in the most analogous circumstance.

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

Response: The Supreme Court has used the text and original public meaning to interpret constitutional provisions, such as the Second Amendment, *see New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022), and the Sixth Amendment's Confrontation Clause, *see Crawford v. Washington*, 541 U.S. 36 (2004). Whenever Supreme Court or Sixth Circuit precedent directs that a

constitutional provision's analysis should be directed by the original public meaning of the text, I would follow that analysis if confirmed.

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

Response: Please see the response to Question 2.

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

Response: The Supreme Court has directed lower courts to follow the original public understanding of the plain text in cases such as *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022). The Supreme Court also followed "the ordinary public meaning of the statute's language at the time of the law's adoption," in *Bostock v. Clayton County*, but did not limit that plain language reading of the text to the "limits of the drafters' imagination." 140 S.Ct. 1731, 1737, 1741 (2020).

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

Response: The Supreme Court described the three elements that constitute the "irreducible constitutional minimum of standing" as follows: (1) "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical;'" (2) "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court;" and (3) "it must be likely as opposed to merely speculative, that the injury will be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (cleaned up).

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

Response: Congress has the powers that are enumerated in the Constitution, including in Article I, Section 8, and in the Thirteenth, Fourteenth, and Fifteenth Amendments. The Supreme Court has recognized for at least two hundred years that the Necessary and Proper Clause gives Congress the power to enact laws necessary and proper to carry out Congress's other powers or powers vested elsewhere in the federal government. *McCulloch v. Maryland*, 17 U.S. 316 (1819). Such powers have included the power to establish a national bank, *id.* at 425, the power to enact criminal laws, *United States v. Fox*, 95 U.S. 670, 672 (1877), and the power to imprison persons, *United States v. Comstock*, 560 U.S. 126, 129 (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: In *NFIB v. Sebelius*, the Supreme Court stated that the "'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). If confirmed, I would evaluate Congress's power to enact the challenged law under the relevant precedents of the Supreme Court and the Sixth Circuit.

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

Response: The Supreme Court has held that the Constitution—under the Due Process Clauses of the Fifth and Fourteenth Amendments—protects fundamental rights that are not expressly enumerated. The claimed right must be "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks omitted). In *Glucksberg*, the Supreme Court catalogued these rights, including "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, [and] to bodily integrity," and the Court "assumed, and strongly suggested" that there is a "right to refuse unwanted lifesaving medical treatment." *Id*. at 720 (citations omitted). *See also Obergefell v. Hodges*, 576 U.S. 644 (2015) (recognizing a right of same-sex couples to marry); *Saenz v. Roe*, 526 U.S. 489 (1999) (recognizing a right to travel).

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

Response: Please see the response 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: The Supreme Court recently held that substantive due process does not protect a right to abortion. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. __ (2022). If confirmed as a circuit judge, I would be bound to apply the Supreme Court's precedents as to substantive due process related to personal and economic rights.

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

Response: The Commerce Clause of Article I grants Congress the power to regulate "three broad categories of activity": (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

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

Response: The Supreme Court has described the "traditional indicia of suspectedness" as whether a group "immutable characteristic determined solely by the accident of birth," or if the group is "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." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). In *Graham v. Richardson*, the Supreme Court stated that race, national origin, religion, and alienage are suspect classifications. 403 U.S. 365, 371–72 (1971).

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

Response: Our constitutional structure, including separation of powers and checks and balances, protects liberty. As the Supreme Court explained, "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 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) (internal quotation marks and citation omitted). The Framers recognized that it had to protect against abuse of power to preserve liberty; their "solution to governmental power and its perils was simple: divide it." *Seila Law v. CFPB*, 140 S. Ct. 2183, 2202 (2020).

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: In a case presenting a question of whether one branch exceeded its constitutional authority, if confirmed, I would examine the relevant precedents of the Supreme Court and the Sixth Circuit and the constitutional text to determine whether the challenged action exceeded the branch's authority.

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

Response: Judges should treat all parties with respect and listen carefully to their arguments so they can fully understand a party's position. But empathy for a party—such as feelings, sympathies, or biases—should play no role in the decision. A decision in a case must be based on the law and the record in the case, regardless of any personal feelings.

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

Response: Judges must work scrupulously to avoid both outcomes.

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: Because I have not studied these historical trends, I do not have basis for answering these questions. I believe that judges should examine each case individually and apply the law to the facts faithfully. And that is what I would do if fortunate to be confirmed.

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

Response: I understand the term "judicial review" to refer to the doctrine that the judicial branch has the authority to determine the constitutionality of legislative and executive actions in the course of deciding cases or controversies under Article III. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). I understand the term "judicial supremacy" to refer to the idea that Supreme Court should be viewed as the authoritative interpreter of the Constitution and that other branches are bound by the Supreme Court's interpretation.

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: Federal and state legislators are bound by an oath to support the Constitution. *See* U.S. Const., art. VI. The Supreme Court has also stated that lawmakers must follow the decisions of the Supreme Court interpreting the Constitution. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

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

Response: Federalist 78 is important to keep in mind while judging because it emphasizes the limited role that federal judges must abide in our governmental system; that role is limited to "judgment"—deciding cases—not making policy or enforcing laws.

22. **As a circuit 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: Lower court judges must follow binding precedent from both the Supreme Court and their circuit, regardless of whether they agree with it. Whether a particular precedent is binding on a given fact pattern is a context-specific question dependent both on the facts and circumstances of the case at and the decision in the prior case. If confirmed, I will apply all binding precedent regardless of whether I agree with it.

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

Response: None. Judges should look to only the factors and elements specified in the relevant laws when sentencing individuals.

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 do not believe that there is a singular definition of "equity." The Biden Administration's definition as quoted in the question is, for example, different than the definition in Black's Law Dictionary, as recited in the response to Question 25. If fortunate to be confirmed and a case regarding the definition of "equity" were before me, I would look to precedent to interpret it in the context that it arose without relying on any personal views.

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

Response: Black's Law Dictionary defines these two terms differently. It defines equity as "fairness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right." *Equity*, Black's Law Dictionary (11th ed. 2019). It defines equality as "[t]he quality, state, or condition of being equal." *Equality*, Black's Law Dictionary (11th ed. 2019).

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

Response: The protections of the Fourteenth Amendment's Equal Protection Clause are defined by its text and binding precedent. It is not defined by the policy statements of any administration.

27. **How do you define "systemic racism?"**

Response: Although there is much public discussion about systemic racism, I am not aware of any consensus definition of the term "systemic racism," nor do I have a personal definition of "systemic racism." Judges should examine each case individually, applying on the law and record applicable to that case.

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

Response: Though there is great public debate about "critical race theory," I am not aware of any consensus definition of the term. Black's Law Dictionary defines the term as a "reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." *Critical Race Theory*, Black's Law Dictionary (11th ed. 2019).

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

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

Senator Ben Sasse
Questions for the Record for Rachel Bloomekatz
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
June 22, 2022

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

   Response: No.

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

   Response: My judicial philosophy is that I—if fortunate to be confirmed—should approach each case with humility. For each new case, I will not have seen that case before and should approach the case without any assumptions, prejudgments, or a sense that I already know the answer. I will diligently learn the record, thoroughly research the law, listen to all the parties' arguments with an open mind, and work with my colleagues to reach a faithful application of the law to the facts.

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

   Response: Generally speaking, originalism asks how the words of the Constitution or a statute would have been understood at the time the relevant provision was ratified or enacted. I do not characterize myself as adopting any interpretive methodology. If confirmed, I will follow the Supreme Court's and Sixth Circuit's precedents as to how to interpret the Constitution, including when precedent calls for an originalist interpretation, such as in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022).

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

   Response: I do not characterize myself by any label. If confirmed, I would follow the interpretation and interpretive methodology directed by the Supreme Court and the Sixth Circuit. These courts have often stated that the text is the best evidence of a provision's meaning. *See Walton v. Hammons*, 192 F.3d 590, 593 (6th Cir. 1999) (citing *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98, (1991)).

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 and fixed document that cannot be changed without following the amendment process set forth in Article V.

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

   Response: Because the role of a circuit court judge is very different from that of a Supreme Court Justice, I would not characterize the philosophy or jurisprudence I would adopt as being analogous to or reflecting any Justice. Please see the response to Question 2.

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: Lower court judges must follow binding precedent from both the Supreme Court and their circuit, regardless of whether they agree with it. If a circuit court sits en banc to consider whether to overrule its existing precedent, the en banc court must follow the Supreme Court's precedent and the method of analysis proscribed by the Supreme Court.

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

   Response: Please see the response to Question 7.

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

   Response: The Supreme Court has sometimes relied on legislative history in interpreting ambiguous statutory language. But it is not appropriate for judges to rely on legislative history when the plain text of a statute is clear. *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1749 (2020) ("The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.") From the question, it is unclear what "general principles of justice" refers to, but if it refers to notions that are outside of laws and precedent, it would be inappropriate to give them any weight in statutory interpretation.

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: Congress has mandated that district court judges should follow the sentencing factors in 18 U.S.C. § 3553(a), including "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(6). If confirmed, I will follow congressional dictates as to reviewing sentences and applicable precedent from the Supreme Court and Sixth Circuit.

Questions from Senator Thom Tillis
for Rachel S. Bloomekatz
Nominee to be US Circuit Judge for the
Sixth Circuit

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

   Response: Yes.

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

   Response: Judicial activism often refers to judges deciding cases based on their personal beliefs, rather than what the law and record require. I do not believe that is appropriate.

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

   Response: Impartiality is a fundamental duty and obligation of judicial office that judges swear an oath to uphold.

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

   Response: No. Under Article III, judges have the limited role of deciding cases and controversies. Congress and state legislative bodies have the authority to make policy decisions.

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

   Response: Judges must set aside all personal views about a desired outcome when adjudicating cases. As a judge, if confirmed, I would understand my role in the context of our broader system of government, as described in the response to Question 4.

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

   Response: No.

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

   Response: If confirmed, I would faithfully apply the Supreme Court's decisions in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022). *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

   Response: If confirmed, I would evaluate such cases based on the record on appeal, the parties' arguments, and Supreme Court and Sixth Circuit precedents. The Supreme Court has, for example, several precedents relevant to the protection of free exercise rights during a pandemic. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020).

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 explained that there is a two-part inquiry for evaluating an officer's qualified immunity defense. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The first part of the test requires the court to determine whether the facts, viewed in the light most favorable to the plaintiff, demonstrate that the officer's conduct violated a plaintiff's constitutional right. *Id.* The second part of the test requires the court to determine whether that constitutional right was "clearly established." *Id.* The Supreme Court recently described the "clearly established" requirement as follows:

   > A right is clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) (*per curiam*) (internal quotation marks omitted). Although "this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White*, 580 U. S., at ——, 137 S.Ct., at 551 (alterations and internal quotation marks omitted). This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (*per curiam*) (internal quotation marks omitted).

   Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7–8 (2021) (per curiam). A court need not address the two parts in order; it may choose based on considerations such as judicial economy to consider the second part—whether the right was "clearly established"—without considering the first part—whether the conduct violated the constitution. *Pearson v. Callahan*, 555 U.S. 223, 227 (2009). If confirmed, I would follow Supreme Court and Sixth Circuit precedent regarding qualified immunity.

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: If confirmed as a circuit judge, I would faithfully apply the precedents regarding qualified immunity from the Supreme Court and the Sixth Circuit. The existing standards for qualified immunity can only be changed by an act of Congress or by superseding precedent of the Supreme Court.

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

Response: Please see the response to Question 10.

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

a. What experience do you have with copyright law?

Response: In my three years of clerking in state and federal courts, and in over a decade as an appellate litigator, I have not had significant experience with copyright law.

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

Response: In my three years of clerking in state and federal courts, and in over a decade as an appellate litigator, I have not had significant experience with that Act.

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

Response: In my three years of clerking in state and federal courts, and in over a decade as an appellate litigator, I have not had significant experience with 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: I drafted or aided in the drafting of multiple briefs in cases addressing the First Amendment, including briefs in the Supreme Court and briefs in circuit courts of appeal. I also addressed First Amendment free speech issues in my work as a law clerk.

13. 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: In approaching any such issue if confirmed, I would first examine whether there was Supreme Court or Sixth Circuit precedent that resolved the issue. I would be bound to apply such precedent. If there is no applicable precedent, I would look to the statute's plain text and, if that text were unambiguous, I would follow that text in adjudicating the case. Absent clear text, there are a series of interpretive tools courts use to construe ambiguous text, including applying canons of construction, reviewing the construction of analogous statutes, and, in some instances, consulting 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: "[A]dvice and analysis" of the federal agency with expertise and authority to regulate in a particular area—such as interpretations in opinion letters or guidance documents that have not gone through the formal rulemaking process or formal agency adjudicatory process—are generally entitled to *Skidmore* deference, to the extent that such interpretations are persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (holding that "policy statements, agency manuals and enforcement guidelines . . . do not warrant *Chevron*-style deference" from courts interpreting the statute, but instead are "entitled to respect . . . to the extent that those interpretations have the power to persuade") (internal quotations and citations omitted). I would look to see how the Supreme Court and Sixth Circuit had treated the "advice and analysis" of the agency or analogous agency advice and analysis, in adjudicating any such case.

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 confirmed, I would follow Supreme Court and Sixth Circuit precedent as to evaluating any claim that an online service provider was on sufficient notice.

14. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

Response: As with other statutes, if confirmed, I would be bound to construe the Digital Millennium Copyright Act in accordance with existing precedent of the Supreme Court and the Sixth Circuit. Absent binding precedent, I would look to the statute's text and construe it "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

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 the response to Question 14(a).

15. 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: As a judicial nominee, it is inappropriate for me to comment on the propriety of venue rules. If confirmed, I would apply the venue rules and applicable precedents.

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

Response: Please see the response to Question 15(a).

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

Response: All judges have a duty to apply the law impartially and neutrally in all cases that come before them without any bias towards or against any litigant or case. If confirmed, I would not proactively encourage certain types of cases to be filed within the Sixth Circuit.

16. **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: Please see the response to Question 15(a).

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: The question presents an issue for policymakers, and it would be inappropriate for me, as a judicial nominee, to comment.

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? Should such a rule apply only where a single judge sits in a division?**

Response: Please see the response to Question 16(a).

17. **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 not be appropriate for me to opine on the conduct of other judges or nonlegal standards for evaluating judges. Assessment of the fitness or conduct of a judge must be made on an individualized basis and in accordance with the Sixth Circuit's *Rules Governing Complaints of Judicial Misconduct or Disability*.

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

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