Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Bradley Garcia
Nominee to the Court of Appeals for the D.C. Circuit
August 3, 2022

1. **The Committee received a number of letters of support for your nomination from those with diverse political and ideological viewpoints. One letter from Judge Thomas Griffith, appointed to the D.C. Circuit by President George W. Bush and for whom you clerked, reads, "Brad knew that I am a judicial conservative, and he played well his role of helping me be that type of judge regardless of his views. Brad's integrity in this regard coupled with his brilliance gave me complete confidence in his work."**

   How do you think your time clerking for Judge Griffith will help inform your approach to deciding cases on the D.C. Circuit?

   Response: I believe my experience clerking for Judge Griffith will be a tremendous aid if I am confirmed as a judge on the D.C. Circuit. In my year clerking for Judge Griffith we worked to help him decide cases based purely on the record and the law, putting aside extraneous considerations including personal or political views. Judge Griffith was also a model of collegiality. He engaged respectfully both with his colleagues and with advocates, to sharpen his own thinking and to help reach the right result in each case. Finally, the experience gave me a deep appreciation for the importance of the D.C. Circuit and judges dedicated to the rule of law. All of those aspects of my experience clerking on the D.C. Circuit would inform my approach to deciding cases.

2. **In three cases, the Fourth Circuit appointed you to serve either as amicus counsel or as counsel to indigent criminal defendants. In one of those cases, when the Fourth Circuit issued its opinion, the court specifically lauded your efforts as amicus counsel, writing that you had, "ably discharged [your] duties."**

   a. **Why do you think the Fourth Circuit appointed you as counsel in these three cases?**

      Response: I hope that my former law firm and I were appointed in those cases because of our litigation skills, and a reputation for dedication and forceful but respectful advocacy. It was a privilege to assist the court in each case.

   b. **What do you think those appointments indicate about your ability to remain impartial?**

      Response: In two of the cases this question references, I was appointed to represent an indigent individual, which is typical of appellate court appointments—in one case the client was an incarcerated individual challenging the legality of his sentence, and in the other the client was a criminal defendant who had been deported from the country after he had pled guilty to a crime without being properly informed of the

immigration consequences of doing so. In the third case, however, I was appointed as an amicus to the Fourth Circuit to argue in favor of the district court's ruling after the government decided not to defend that government-friendly position on appeal. As a result, I was essentially arguing for the government's former position in a criminal case. In each of those three cases, I accepted the appointment and argued zealously for the position I was appointed to argue. And in each case the Fourth Circuit adopted that position. I hope the fact that I accepted each of those appointments despite the differing positions I was asked to advocate for—much like my track record of representing clients and working with attorneys in a wide range of cases regardless of partisan affiliation throughout my career—speaks to my integrity, dedication to the rule of law, and impartiality.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Mr. Bradley N. Garcia
Nominee to be United States Circuit Judge for the D.C. Circuit

1. **While in private practice, you litigated against Catholic elementary schools, arguing, among other things, that federal courts have the power to intervene in employment decisions involving teachers at religious schools.**

    a. **Please describe your understanding of Supreme Court and D.C. Circuit precedent concerning the "ministerial exception."**

    Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court addressed the scope of the "ministerial exception," which prohibits courts from intervening in employment disputes between religious institutions and certain employees. The doctrine was first recognized by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), and is based in the principle that the First Amendment protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Our Lady of Guadalupe*, 140 S. Ct. at 2055. The *Our Lady of Guadalupe* decision addressed whether two elementary school teachers at Catholic schools fell within the scope of the ministerial exception, meaning that their claims that they had been fired for discriminatory reasons could not be heard in court. The Supreme Court held that the teachers were covered by the exception because they performed "vital religious duties." *Id.* at 2066. The Court explained, for example, that as "teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith." *Id.* Based on my research, the D.C. Circuit has not considered a case involving the ministerial exception since *Our Lady of Guadalupe* was decided.

    b. **Based on existing precedent, under what circumstances would judicial review of selection and supervision decisions at private religious schools be appropriate?**

    Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court explained that "a variety of factors may be important" in determining whether an individual is subject to the ministerial exception, but that what "matters, at bottom, is what an employee does." *Id.* at 2063-64. If confirmed, I would faithfully apply the holding and rationale of that case to determine whether other individuals are subject to the ministerial exception.

2. **While in private practice, you also presented New York City in *New York State Rifle & Pistol Association, Inc. v. The City of New York*. You argued that the Second**

Amendment right to keep and bear arms does not "describe[] a right to engage in training" to use those arms.

a. **Please describe your understanding of Supreme Court and D.C. Circuit precedent concerning the scope of the right to keep and bear arms.**

Response: The Supreme Court has addressed the scope of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *New York Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). In *Bruen*, the Court stated that, based on its interpretation of the Second Amendment's text and original public meaning, the Amendment protects "the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense" and "to carry a handgun for self-defense outside the home." *Id.* at 2122. In *Bruen*, the Supreme Court also identified the proper mode of analyzing whether other firearm regulations are consistent with the Second Amendment: "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.'" *Id.* at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

b. **As a judge, how would you analyze a claim that the freedom to train by using guns at a gun range of a gun owner's choice is a core component of the right to keep and bear arms?**

Response: If confirmed, I would analyze any claim that a regulation infringes Second Amendment rights according to the holdings and methodology used by the Supreme Court in addressing the Second Amendment, including the holding and instructions from the *Bruen* decision described in my answer to Question 2(a).

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

Response: I am not familiar with the full context of now-Justice Jackson's statement, and I know that the term "living constitution" has different meanings to different people. I do not believe the meaning of the Constitution changes over time absent changes to the Constitution through the Article V amendment process. The Constitution does set out certain enduring principles that must be applied to new facts and circumstances over time in properly presented cases or controversies, but the meaning of those principles does not change.

4. **Please explain whether you agree or disagree with the following statement: "The judgments about the Constitution are value judgments. Judges exercise their own independent value judgments. You reach the answer that essentially your values tell you to reach."**

   Response: I do not agree with that statement. In each case, a judge's duty is to apply the law to the facts fairly and impartially.

5. **Judge Stephen Reinhardt once explained that, because the Supreme Court hears a limited number of cases each year, part of his judicial mantra was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

   Response: Although I am not familiar with the context of Judge Reinhardt's statement, if confirmed I would apply all Supreme Court and D.C. Circuit precedents fully and faithfully.

6. **How would you evaluate a claim that a previously un-enumerated "fundamental" right is protected by the Due Process Clause? In your answer, please cite any relevant Supreme Court and D.C. Circuit precedent that you would consider.**

   Response: The Supreme Court has set forth a test for identifying whether a right is protected as fundamental by the Due Process Clauses of the Fifth and Fourteenth Amendments. Specifically, such rights are those that are "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, 721 (1997) (citations and internal quotation marks omitted). If confirmed, I would use that test to evaluate any future claim to a fundamental right that has not been previously articulated by the Supreme Court. Among other precedents that would bear on that analysis, I would consider the relevance of the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

7. **Assume that the original public meaning of a statutory or constitutional provision is clear. Under what circumstances would it be appropriate for a federal judge to decline to apply the original public meaning of that provision?**

   Response: As a circuit judge, I would be bound by Supreme Court and D.C. Circuit precedent regarding how to interpret the relevant constitutional provision. Even if there were not binding precedent on the particular constitutional issue at hand, I would be bound by the interpretive methodologies the Supreme Court and D.C. Circuit have employed in interpreting that or analogous provisions. For example, the Supreme Court has instructed that certain First Amendment cases require an assessment of "contemporary community standards." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574-75 (2002).

8. **Under existing federal law, may a small business owner decline to provide customers with service on the basis of a sincerely held religious belief? Please explain your answer, citing any relevant statutes or Supreme Court precedent.**

Response: The answer to that question would depend on the facts and circumstances of the case. For example, the Supreme Court has held that the Religious Freedom Restoration Act of 1993 (RFRA) covers both religious organizations and small businesses operated by observant owners. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Under RFRA, if any federal law places a substantial burden on a person's exercise of religion, the government must show the burden "(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; *see City of Boerne v. Flores*, 521 U.S. 507 (1997).

The First Amendment also imposes limits on what government may impose on or require of small businesses owners. Generally, laws that burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. *Empl. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872 (1990). Several Supreme Court decisions explain what it means for a law to be neutral and generally applicable. The Supreme Court has held, for example, that a law is not neutral and generally applicable if the circumstances show that "the object or purpose of the law is suppression of religion or religious conduct," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), if the record shows a facially neutral law has been applied in a particular way out of hostility to religion, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), if the law is subject to discretionary individualized exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021), or if the law treats any "comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

Moreover, the Supreme Court may provide additional guidance on how to address questions of this nature in a case it will hear in the upcoming Supreme Court term. *See 303 Creative LLC v. Elenis*, 142 S. Ct. 1006 (Mem) (granting petition for writ of certiorari).

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

Response: The Supreme Court has held that parents have a constitutional right "to direct the education and upbringing of [their] children." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

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

Response: Statutory text is ambiguous when, "after exhausting ordinary tools of the judicial craft," a court determines that "the intent of Congress" on the question at issue is

not "clear." *Mozilla Corp. v. FCC*, 904 F.3d 1, 19-20 (D.C. Cir. 2019); *see Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

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?**

    Response: As a judicial nominee, it is generally inappropriate for me to comment on the merits of the Supreme Court's binding precedents when it is conceivable that related issues could come before the courts. *Brown v. Board of Education* and its holding that de jure racial segregation in schools violates the Fourteenth Amendment is one of the few Supreme Court decisions for which I am sufficiently confident related issues will not come before the D.C. Circuit or other courts. I can therefore state that I do believe *Brown* was correctly decided.

    b. **Was *Loving v. Virginia* 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 when it is conceivable that related issues could come before the courts. *Loving v. Virginia* is one of the few Supreme Court decisions for which I am sufficiently confident related issues will not come before the D.C. Circuit or other courts. I can therefore state that I do believe *Loving* was correctly decided.

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

    Response: The decision is a binding precedent of the Supreme Court and I would faithfully apply it if confirmed as a judge on the D.C. Circuit. As a judicial nominee, it is generally inappropriate for me to comment on the merits of the Supreme Court's binding precedents if it is conceivable that related issues could come before the courts.

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

    Response: The Supreme Court overruled that decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

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

    Response: The Supreme Court overruled that decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

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

    Response: Please see my answer to Question 11(c).

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

Response: Please see my answer to Question 11(c).

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

Response: Please see my answer to Question 11(c).

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

Response: Please see my answer to Question 11(c).

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

Response: Please see my answer to Question 11(c).

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

Response: Please see my answer to Question 11(c).

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

Response: That statute provides: "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, shall be fined under this title or imprisoned not more than one year, or both."

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

Response: The Supreme Court has not addressed whether 18 U.S.C. § 1507 is constitutional on its face. As a judicial nominee, I am not able to comment on the merits of issues that may come before the courts. If confirmed, and called upon to do so, I would faithfully apply Supreme Court and D.C. Circuit precedent to resolve this issue.

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 27, 2021, I expressed to the White House Counsel's Office my interest in being considered for a federal appellate judgeship. On April 22, 2022, I

interviewed with attorneys from the White House Counsel's Office. Since that date, I was in contact with officials from the Office of Legal Policy at the Department of Justice. On June 15, 2022, 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: Robert Raben, President of the Raben Group, is the Chair of the Hispanic National Bar Association's Judicial Endorsements Committee. During the selection process, I spoke with him in that context. I am very grateful for the Hispanic National Bar Association's support of my nomination.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

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

Response: No.

b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, 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: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? 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: No.

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

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

Response: No.

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

Response: Robert Raben, President of the Raben Group, is the Chair of the Hispanic National Bar Association's Judicial Endorsements Committee. I have spoken with him in that context. I am very grateful for the Hispanic National Bar Association's support of my nomination.

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 my response to Question 25(b).

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

Response: On August 3, 2022, the Office of Legal Policy provided these questions to me. I drafted my responses. The Office of Legal Policy provided limited feedback before I finalized them. The answers are my own.

Senator Mike Lee
Questions for the Record
Bradley N. Garcia, Nominee to be United States Circuit Judge for the District of Columbia Circuit

1. How would you describe your judicial philosophy?

Response: My judicial philosophy would be informed not only by my career in private practice but by my experiences clerking on the D.C. Circuit and Supreme Court. I would approach each case by setting aside any personal views or preconceptions about how the case should be resolved and instead resolve the case impartially based on the record and binding precedent. I would also engage respectfully with, and listen carefully to, my colleagues and the advocates in each case. And I would carry a deep respect for and awareness of the fact that per Article III of the Constitution a judge's role is limited to resolving properly presented cases or controversies.

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

Response: In interpreting any statute I would first research whether there was Supreme Court or D.C. Circuit precedent that resolved the issue presented in the case. If there were no applicable precedent, I would look to the statute's text, and if that text had a clear meaning, I would apply that meaning to resolve the case. If the text were unclear, I would then look to the structure of the statute, other canons of interpretation, relevant authority from other courts, and appropriate forms of legislative history to resolve the ambiguity.

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

Response: In interpreting a constitutional provision I would first research whether there was Supreme Court or D.C. Circuit precedent that resolved the issue presented in the case. I would then look to the applicable frameworks, tests, or interpretive methodologies the Supreme Court and D.C. Circuit have used for the constitutional provision at issue or the most analogous provisions.

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

Response: The text and original meaning of a constitutional provision always play an important role in interpreting the Constitution, absent contrary precedent from the Supreme Court or D.C. Circuit interpreting the specific constitutional provision at issue. For example, the Supreme Court has placed particular emphasis on the text and original meaning in interpreting the Second Amendment. *See, e.g.*, *New York State*

Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111 (2022); *McDonald v. Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: Please see my response to Question 2.

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

Response: The text of a statute or constitutional provision should generally be construed "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); *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022). The Supreme Court has also held that certain statutes or constitutional provisions set forth enduring principles that require reference to social norms or other factors as they evolve. *See, e.g.*, *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574-75 (2002).

6. What are the constitutional requirements for standing?

Response: To establish Article III standing, a plaintiff must demonstrate "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

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

Response: The Supreme Court has recognized since *McCulloch v. Maryland*, 17 U.S. 316 (1819), that the Necessary and Proper Clause gives Congress authority to enact laws necessary and proper to carrying out Congress's enumerated powers; the Court has not provided an exhaustive list of the types of authority the Necessary and Proper Clause provides. *See also United States v. Comstock*, 560 U.S. 126 (2010) (holding that the Necessary and Proper Clause provided Congress authority to allow district courts to order civil commitment of certain individuals).

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

Response: If confirmed, I would evaluate the constitutionality of a law enacted without specific reference to a source of authority based on the submissions of the parties to the case and applicable Supreme Court and D.C. Circuit precedent. The

Supreme Court has held that Congress's authority to act does not "depend on recitals of the power which it undertakes to exercise." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 570 (2012).

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—through the Due Process Clauses of the Fifth and Fourteenth Amendments—protects various rights that are not expressly enumerated in the Constitution. These are rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Those rights include, among others, the right to marry, to have children, and to direct the education and upbringing of one's children. *Id.* at 720; *see also Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

10. What rights are protected under substantive due process?

Response: Please see my 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 in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), that the Constitution does not protect a right to abortion. The Supreme Court has held that the economic rights at stake in *Lochner v. New York* are not protected by the Constitution. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). If confirmed, any personal beliefs or opinions about the proper scope of substantive due process would play no role in my approach to judging.

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

Response: The Supreme Court has held that the Commerce Clause grants Congress authority 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). The Supreme Court has also held that Congress does not have the power to "compel[] individuals to *become* active in commerce by purchasing a product." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 552 (2012). The Court has held that whether the activity regulated is "noneconomic" is an important, but not dispositive, factor in assessing whether Congress has exceeded its authority under the Commerce Clause. *See United States v. Morrison*, 529 U.S. 598, 613 (2000).

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

Response: To determine whether a particular group is a "suspect class" the Supreme Court has asked whether the group shares "traditional indicia of suspectedness," which include whether the group has an "immutable characteristic determined solely by the accident of birth" or 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) (citations and internal quotation marks omitted). The Supreme Court has determined that race, religion, national origin, and alienage are suspect classes such that laws based on those characteristics are subject to strict scrutiny. *See Graham v. Richardson*, 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: Checks and balances and separation of powers are important structural features of the Constitution that protect liberty by preventing any one branch of government from accumulating excessive power. *See, e.g.*, *Seila Law LLC v. Consumer Financial Protection Bureau*, 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: If confirmed, I would apply Supreme Court and D.C. Circuit precedent, as well as the text of the Constitution and other appropriate interpretive tools, to resolve such a case. For example, in *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015), the Supreme Court held that Congress had impermissibly encroached upon the President's exclusive power to recognize foreign nations and governments.

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

Response: A judge should resolve each case based upon the record and the governing law. A judge's personal views, beliefs, or feelings should play no role in considering any particular case. I do believe that judges should be respectful of parties, advocates, and colleagues in the course of attempting to reach the proper outcome under the law in each case.

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

Response: I believe that both are equally undesirable outcomes that judges should endeavor to avoid.

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: In my career as a law clerk, appellate litigator, and Justice Department employee, I have not had occasion to study these historical trends. At a general level, one factor is likely that Congress has passed many more statutes since 1857. I do not believe that judges should be either "aggressive" or "passive" in reviewing federal statutes; judges should endeavor to fairly and impartially apply the law to the facts in each case, and neither shrink from nor exceed their obligations as judges.

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

Response: I understand judicial review to refer to the judicial branch's authority to determine the constitutionality of governmental actions in the course of deciding properly presented cases and controversies. I understand judicial supremacy to refer to the concept that the Supreme Court is the ultimate arbiter of the meaning of the Constitution, and that not only lower courts but other federal and state governmental actors are bound by its holdings interpreting the Constitution. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958).

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: Article VI of the Constitution requires all federal and state legislative and executive officials to take an oath to support the Constitution. The concept of judicial supremacy requires such officials to respect the Supreme Court's interpretation of the Constitution. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1 (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: That articulation is an important reminder of the fact that the role of Article III judges in the Constitution's scheme of separation of powers is limited. Judges are bound to fairly and impartially apply the law to the facts of each case, and

to decide only properly presented cases and controversies within the meaning of Article III.

22. 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: In all cases, a lower court judge must follow the holdings of the Supreme Court and their circuit, without regard to any personal views about the correctness of that precedent. Whether a particular precedent is binding in any given case is a fact- and context-dependent inquiry, and a judge should seek to faithfully apply the principles of analogous binding precedent that bear on an issue of first impression.

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

Response: None.

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

Response: I am not familiar with the full context of the quote referenced above, but different dictionaries contain a variety of definitions of "equity." Black's Law Dictionary defines "equity" as "fairness; impartiality; evenhanded dealing," or "the body of principles constituting what is fair and right." Black's Law Dictionary (11th ed. 2019).

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

Response: Different dictionaries contain a variety of definitions of both terms. For example, Black's Law Dictionary defines equity as described in my answer to Question 24, but defines "equality" as "the quality, state, or condition of being equal" or "likeness in power or political status." 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 afforded by the Fourteenth Amendment's Equal Protection Clause are defined by binding precedent and its text, which provides that "No State shall … deny to any person within its jurisdiction the equal protection of the laws." I do not believe the Supreme Court or D.C. Circuit has considered how the Equal Protection Clause would apply to the definition of "equity" referenced above.

27. How do you define "systemic racism?"

Response: I do not have a precise personal definition of the term "systemic racism" and I understand the term means different things to different people. If confirmed, I would decide every case by fairly and impartially applying the law to the facts.

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

Response: Black's Law Dictionary defines "critical race theory" 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 my responses to Questions 27 and 28.

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

Questions for the Record for Bradley Garcia, Nominee for the United States Circuit Court for the District of Columbia 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: Congress has enacted various statutes that prohibit racial discrimination in different circumstances, such as Title VI and Title VII of the Civil Rights Act of 1964. Moreover, all race-based classifications by governmental actors are subject to strict scrutiny under the Supreme Court's equal protection precedents. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

2. **Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?**

Response: The Supreme Court has set forth a test for identifying whether a right is protected as fundamental by the Due Process Clauses of the Fifth and Fourteenth Amendments. Specifically, such rights are those that are "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, 721 (1997) (citations and internal quotation marks omitted). If confirmed, I would use that test—along with any other binding precedent from the Supreme Court and D.C. Circuit—to evaluate any future claim to a fundamental right that has not been previously articulated by the Supreme Court.

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

Response: My judicial philosophy would be informed not only by my career in private practice but by my experiences clerking on the D.C. Circuit and Supreme Court. I would approach each case by setting aside any personal views or preconceptions about how the case should be resolved and instead resolve the case impartially based on the record and binding precedent. I would also engage respectfully with, and listen carefully to, my colleagues and the advocates in each case. And I would carry a deep respect for and awareness of the fact that per Article III of the Constitution a judge's role is limited to resolving properly presented cases or controversies. I believe this philosophy is likely shared by many Justices.

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

Response: Generally, originalism is the view that the Constitution should be interpreted in the way the relevant text would have been understood at the time it was adopted. I would not ascribe to any particular label in describing the approach I would take to judging. I would be guided by and follow Supreme Court precedent with respect to the proper interpretive method to use with respect to any constitutional provision. For example, the Supreme Court has held that "public understanding of a legal text in the period after its enactment or ratification … is a critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

5. **Please briefly describe the interpretive method often referred to as living**

constitutionalism. Would you characterize yourself as a 'living constitutionalist'?

Response: Living constitutionalism is a term that has different meanings to different people, but has been defined as a doctrine suggesting "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 would not ascribe to any particular label in describing the approach I would take to judging. I would be guided by and follow Supreme Court precedent with respect to the proper interpretive method to use with respect to any constitutional provision.

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

Response: As a circuit judge, I would be bound by Supreme Court and D.C. Circuit precedent regarding how to interpret the relevant constitutional provision. That is, even if there were not binding precedent on the particular constitutional issue at hand, I would be bound by the interpretive methodologies the Supreme Court and D.C. Circuit have employed in interpreting that or analogous provisions. For example, the Supreme Court has instructed that certain First Amendment cases require an assessment of "contemporary community standards." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574-75 (2002).

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

Response: In most cases the public's current understanding of the Constitution or of a statute would not be relevant to determining the meaning of the provision at issue. In some circumstances, the Supreme Court has instructed courts to consider contemporary understandings in interpreting and applying constitutional provisions. *See, e.g.*, *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574-75 (2002).

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

Response: No. I do not believe the meaning of the Constitution changes over time absent changes to the Constitution through the Article V amendment process. The Constitution does set out certain enduring principles that must be applied to new facts and circumstances over time in properly presented cases or controversies, but the meaning of those principles does not change.

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

Response: Yes, it is a binding precedent of the Supreme Court.

a. **Was it correctly decided?**

Response: The decision is a binding precedent of the Supreme Court and I would faithfully apply it if confirmed as a judge on the D.C. Circuit. As a judicial nominee, it

is generally inappropriate for me to comment on the merits of the Supreme Court's binding precedents when it is possible that related issues will come before me if confirmed as a judge.

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

Response: Yes, it is a binding precedent of the Supreme Court.

a. **Was it correctly decided?**

Response: The decision is a binding precedent of the Supreme Court and I would faithfully apply it if confirmed as a judge on the D.C. Circuit. As a judicial nominee, it is generally inappropriate for me to comment on the merits of the Supreme Court's binding precedents if it is conceivable that related issues could come before the courts.

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

Response: Yes, it is a binding precedent of the Supreme Court.

a. **Was it 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 when it is conceivable that related issues could come before the courts. *Brown v. Board of Education* and its holding that de jure racial segregation in schools violates the Fourteenth Amendment is one of the few Supreme Court decisions for which I am sufficiently confident related issues will not come before the D.C. Circuit or other courts. I can therefore state that I do believe *Brown* was correctly decided.

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

Response: Under 18 U.S.C. § 3142(e)(2), a presumption in favor of pretrial detention is triggered if the person was previously convicted of certain specified offenses—including offenses for which the maximum sentence is life imprisonment or death, a drug offense for which the maximum sentence is 10 years or more, and others—and the conviction is less than five years old or the person was released from prison for that offense less than five years ago. Section 3142(e)(3) also triggers such a presumption if "the judicial officer finds that there is probable cause to believe that the person committed" a drug offense carrying a maximum term of imprisonment of ten years or more, or certain offenses involving firearms or minor victims, among others. In any case involving pretrial detention, I would follow the applicable statutes and any relevant precedents.

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

Response: If confirmed, I would be obligated to apply the laws as written. I am not aware of Supreme Court or D.C. Circuit precedent addressing the policy rationales underlying the presumption specified by this statute.

13. **Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be a religious organization like Little Sisters of the Poor or small businesses operated by observant owners?**

Response: Yes. For example, the Supreme Court has held that the Religious Freedom Restoration Act of 1993 (RFRA) covers both religious organizations and small businesses operated by observant owners. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Under RFRA, if any federal law places a substantial burden on a person's exercise of religion, the government must show the burden "(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; *see City of Boerne v. Flores*, 521 U.S. 507 (1997).

The First Amendment also imposes limits on what government may impose on or require of religious organizations and small businesses operated by observant owners. Generally, laws that burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. *Empl. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872 (1990). Several Supreme Court decisions explain what it means for a law to be neutral and generally applicable. The Supreme Court has held, for example, that a law is not neutral and generally applicable if the circumstances show that "the object or purpose of the law is suppression of religion or religious conduct," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), if the record shows a facially neutral law has been applied in a particular way out of hostility to religion, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), if the law is subject to discretionary individualized exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021), or if the law treats any "comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

Response: Any governmental policy or law that discriminates on the basis of religion is subject to strict scrutiny under the First Amendment. Such a law "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: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court held that the religious organizations were entitled to a preliminary injunction on enforcement of the executive order pending appeal and the disposition of

any petition for a writ of certiorari. The Supreme Court held that each of the requirements for such relief had been satisfied: (1) the religious organizations had made a "strong showing" that the order was not neutral towards religion and could not satisfy strict scrutiny; (2) the religious organizations demonstrated they would suffer irreparable harm if the restrictions were enforced; and (3) it had "not been shown that granting the applications [would] harm the public." *Id.* at 67-68.

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 held that plaintiffs challenging California's restrictions on private gatherings during the COVID-19 pandemic were entitled to injunctive relief pending appeal and the disposition of any petition for a writ of certiorari. The Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296. The Court reasoned that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* The Court determined that the California restrictions triggered strict scrutiny under that test, because California treated "some comparable secular activities more favorably than at-home religious exercise." *Id.* at 1297. The Court then determined that the plaintiffs were likely to succeed on the merits of their free exercise claim and that the other requirements for injunctive relief were satisfied. *Id.*

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), a baker refused to design and create a custom cake for a same-sex couple's wedding on the basis that doing so would violate his religious beliefs. The Colorado Civil Rights Commission concluded that Colorado's anti-discrimination law required him to design and create the cake. The Supreme Court held that the Commission violated the baker's rights under the First Amendment's Free Exercise Clause. The Court emphasized that the Commission had not applied the state's anti-discrimination law in a "neutral and respectful" manner towards religion and instead had showed "clear and impermissible hostility" towards the baker's sincere religious beliefs. *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: The Supreme Court has held that an individual's religious beliefs are protected even if they are contrary to the teaching of the faith tradition to which they belong. *See Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 834 (1989) ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); *Fulton v. City of*

Philadelphia, 141 S. Ct. 1868, 1876 (2021) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

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

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: As a judicial nominee, I am not able to comment on the official position of a religion.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court addressed the scope of the "ministerial exception," which prohibits courts from intervening in employment disputes between religious institutions and certain employees. The doctrine is based in the principle that the First Amendment protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 2055. The consolidated cases addressed whether two elementary school teachers at Catholic schools fell within the scope of the ministerial exception, meaning that their claims that they had been fired for discriminatory reasons could not be heard in court. The Supreme Court held that the teachers were covered by the exception because they performed "vital religious duties." *Id.* at 2066. The Court explained, for example, that as "teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith." *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 (2020), Philadelphia had refused, on the basis of an anti-discrimination policy, to work with a Catholic organization in its foster care program because the organization refused to work with same-sex couples as potential foster parents. The Supreme Court held that Philadelphia's policy was not neutral and generally applicable because it included a provision allowing for discretionary,

individualized exemptions. As a result, the Court subjected Philadelphia's policy to strict scrutiny under *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). And the Court held that the City could not show that its refusal to contract with the organization was narrowly tailored to advancing a compelling governmental interest, such that the City's actions had violated the organization's rights under the Free Exercise Clause.

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

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that a Maine program providing tuition subsidies for private schools in certain circumstances but barring religious schools from the program solely because they are religious violated the Free Exercise Clause. The Court reasoned that the Free Exercise Clause prohibits states from excluding "religious observers from otherwise available public benefits," and that Maine's program could not satisfy strict scrutiny. *Id.* at 1996.

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*, 142 S. Ct. 2407 (2022), the Supreme Court held that a school district violated the free speech and free exercise rights of a high school football coach when it fired him for praying after football games. For purposes of the Free Speech Clause, the Court reasoned that the coach's speech was not government speech but rather private expression protected by the First Amendment, because, based on the facts of the case, his prayers were not "within the scope" of his duties as a coach. *Id.* at 2424. For purposes of the Free Exercise Clause, the Court explained that the district admitted it was motivated "at least in part because of" the "religious character" of the coach's actions. *Id.* at 2422.

The Court therefore applied heightened scrutiny to the school district's actions, and concluded that the district could not meet its burden under any form of heightened scrutiny. *Id.* at 2426. The school district had argued that it was required to act to avoid a violation of the Establishment Clause. The Court rejected that argument, holding that the school district had not shown that allowing the coach to pray would have "coerc[ed] students to pray" and that the district's other arguments were based on a misunderstanding of the Establishment Clause. *Id.* at 2428-29.

24. **Explain your understanding of Justice Gorsuch's concurrence in the U.S. Supreme Court's decision to grant certiorari and vacate the lower court's decision in *Mast v. Fillmore County*.**

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), the Supreme Court vacated a state court decision in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). Justice Gorsuch wrote separately to emphasize the ways in which, in his view, the state court had misapplied the Religious Land Use and Institutionalized Persons Act (RLUIPA). In particular, Justice Gorsuch criticized the state court's mode of applying strict scrutiny under RLUIPA to a county sanitation ordinance that burdened a group's religious beliefs. For example, Justice Gorsuch explained that the "courts below erred by treating the County's *general* interest in sanitation regulations as 'compelling'

without reference to the *specific* application of those rules to *this* community," as the analysis in *Fulton* would demand. *Id.* at 2422. Similarly, Justice Gorsuch explained that the state court had not given "due weight to exemptions other groups enjoy" but which had been denied to the religious group at issue. *Id.*

25. **Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?**

Response: If confirmed, I would address such a case based on the record and binding Supreme Court and D.C. Circuit precedent. As a judicial nominee, it would not be appropriate for me to comment further on an issue that might come before the courts.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: I am not aware that any such trainings exist, but would not support the provision of trainings fitting that description.

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 would select law clerks based on their full records and comply with the Constitution and all applicable laws when hiring law clerks and any other staff.

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

Response: I am not aware of Supreme Court or D.C. Circuit precedent addressing the factors that a President may consider in making political appointments under the Constitution. If I am confirmed and such a case were to come before me, I would resolve the case based on the record and the governing law.

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

Response: I believe that questions of whether certain laws impact different racial groups differently are important questions for Congress and policymakers to consider. *See also, e.g.*, *Dorsey v. United States*, 567 U.S. 260, 268-69 (2012) (citing Sentencing Commission reports for the proposition that a particular law reflected "unjustified race-based differences" and explaining that Congress amended that law). If I am confirmed, I will resolve each case impartially, based on the facts and the law, and without any bias towards any party.

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: That is a question for the political branches to consider, as the Constitution does not establish a fixed number of Supreme Court justices. As a judicial nominee, it would not be appropriate for me to comment on whether the number of Justices should be increased or decreased. If confirmed, I would follow all precedents of the Supreme Court faithfully.

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

Response: No. All sitting members of the U.S. Supreme Court have been nominated by a President and confirmed by the Senate.

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

Response: The Supreme Court has addressed the original public meaning of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *New York Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). In *Bruen*, the Court stated that, based on its interpretation of the Second Amendment's text and original public meaning, the Amendment protects "the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense" and "to carry a handgun for self-defense outside the home." *Id.* at 2122.

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

Response: The Supreme Court set forth a test for analyzing firearm regulations in *New York Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). Under that test, "[i]n keeping with *Heller*" the Court held 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.'" *Id.* at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

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

Response: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Constitution protects an individual right to keep and bear arms.

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

Response: The protections afforded to the Second Amendment were most recently articulated in *New York Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). The Supreme Court has articulated various tests for applying the different rights enumerated in the Constitution; I am not aware of case law specifically comparing the level of protection afforded to different rights.

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

Response: Please see my response to Question 36.

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

Response: The Supreme Court has held that the Executive Branch generally has "absolute discretion" to decide whether to initiate civil or criminal enforcement proceedings. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *United States v. Nixon*, 418 U.S. 683, 693 (1974). Questions regarding the extent to which the Executive Branch can determine enforcement priorities are currently pending before the courts.

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

Response: As a general matter, prosecutorial discretion refers to the individual decisions the Executive Branch makes regarding whether to initiate cases. As a general matter, a substantive administrative rule is one that has the "force and effect of law," as distinguished from "interpretive rules," which merely "advise the public of the agency's construction of the statutes and rules which it administers." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1811 (2019) (quoting *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96-97 (2015)). This question appears to relate to matters currently pending in the courts, so it would be inappropriate for me to comment further as a judicial nominee.

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

Response: Most death penalty cases arise under state law, and the President has no authority to abolish state laws authorizing the death penalty. Under federal law, the death penalty is authorized by 18 U.S.C. § 228. The President cannot unilaterally change statutes.

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

Response: *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021) concerned a nationwide eviction moratorium imposed by the Centers for Disease Control and Prevention (CDC). A district court had vacated the moratorium but stayed its judgment pending the government's appeal. The Supreme Court vacated that stay after applying the test from *Nken v. Holder*, 556 U.S. 418 (2009). The Court explained that the applicants were "virtually certain to succeed on the merits of their argument that the CDC [had] exceeded its authority" and that the "equities do not justify depriving the applicants of the District Court's judgment in their favor." 141 S. Ct. at 2486, 2489.

42. **Please, with specificity, describe the nature of your work advising any executive agency on the repeal of Title 42.**

Response: I can confirm that I provided legal advice in connection with the Center for Disease Control and Prevention's April 1, 2022 Order relating to 42 U.S.C. §§ 265, 268. Consistent with my duties of confidentiality as an attorney, and the approach taken by past nominees who were Executive Branch lawyers, I am not able to comment on the content of my advice on that or any other matter.

43. **Please, with specificity, described the nature of you work advising any executive agency on the recent Notice of Proposed Rulemaking regarding Title IX.**

Response: I can confirm that I provided legal advice in connection with the Department of Education's recent Notice of Proposed Rulemaking regarding Title IX. Consistent with my duties of confidentiality as an attorney, and the approach taken by past nominees who were Executive Branch lawyers, I am not able to comment on the content of my advice on that or any other matter.

44. **Based on your experience in the Office of Legal Counsel in the Biden Administration, if confirmed, what subject matters would you plan on recusing yourself from, and for how long?**

Response: Based on my review of 28 U.S.C. § 455, and my current understanding of the approach taken by prior judicial nominees, I would recuse myself from any case in which I had advised on "the particular case in controversy" while in government service. For example, if confirmed, I would plan to recuse myself from any direct challenges to the CDC's April 1, 2022 Order relating to Title 42 and from any direct challenges to any final rule that may be promulgated by the Department of Education pursuant to the pending Notice of Proposed Rulemaking regarding Title IX. It may be appropriate for me to recuse myself from other cases related to these or other subject matters, and I can commit that with respect to any recusal question, I would carefully evaluate the need for my recusal on a case-by-case basis by reference to 28 U.S.C. § 455, the Code of Conduct for United States Judges, the Published Advisory Opinions issued by the Committee on Codes of Conduct, any relevant judicial decisions and opinions that address what constitutes a conflict or the appearance of a conflict, and after conversations with colleagues on the D.C. Circuit who also previously served as Executive Branch lawyers and navigated these

questions themselves.

Senator Ben Sasse
Questions for the Record for Bradley N. Garcia
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
July 27, 2022

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

   Response: No.

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

   Response: My judicial philosophy would be informed not only by my career in private practice but by my experiences clerking on the D.C. Circuit and Supreme Court. I would approach each case by setting aside any personal views or preconceptions about how the case should be resolved and instead resolve the case impartially based on the record and binding precedent. I would also engage respectfully with, and listen carefully to, my colleagues and the advocates in each case. And I would carry a deep respect for and awareness of the fact that per Article III of the Constitution a judge's role is limited to resolving properly presented cases or controversies.

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

   Response: I would not characterize my approach to constitutional interpretation by any particular label. If confirmed as a circuit court judge, I would be bound to follow the methods of interpretation employed in Supreme Court and D.C. Circuit precedent.

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

   Response: I would not characterize my approach to constitutional or statutory interpretation by any particular label. If confirmed as a circuit court judge, I would be bound to follow the methods of interpretation employed in Supreme Court and D.C. Circuit precedent. Binding precedent makes clear that the text of the Constitution or a statute is the starting point for any interpretive analysis. *See, e.g.*, *Ross v. Blake*, 578 U.S. 632, 638 (2016) ("Statutory interpretation, as we always say, begins with the text.").

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

   Response: I do not believe that the meaning of the Constitution changes over time absent changes to the Constitution through the Article V amendment process. The Constitution does set out certain enduring principles that must be applied to new facts and

circumstances over time in properly presented cases or controversies, but the meaning of those principles does not change.

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

   Response: I admire many Justices of the Supreme Court. I would not say, however, that I admire the totality of the jurisprudence of any particular Justice more than all others. If confirmed to serve as a circuit court judge, I would faithfully apply all Supreme Court precedents.

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

   Response: An appellate court may overturn its own precedent when sitting en banc. The D.C. Circuit has addressed the substantive factors that should guide the decision whether to set aside prior circuit precedent in several decisions; those factors include whether "the panel's holding on an important question of law was fundamentally flawed" and whether intervening legal developments have "removed or weakened the conceptual underpinnings from the prior decision." *Allegheny Defense Project v. Federal Energy Regulatory Comm'n*, 964 F.3d 1, 18 (D.C. Cir. 2020) (en banc) (quoting *Critical Mass Energy v. Nuclear Regulatory Comm'n*, 964 F.3d 1, 876 (D.C. Cir. 1992) (en banc) and *United States v. Burwell*, 690 F.3d 500, 504 (D.C. Cir. 2012) (en banc)).

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

   Response: Please see my response to Question 7.

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

   Response: Statutory interpretation always begins with the text. *See, e.g.*, *Ross v. Blake*, 578 U.S. 632, 638 (2016). If the meaning of the text of a statute is clear, that meaning governs. In cases where the meaning of the text is ambiguous, other indications of the statute's meaning, including legislative history, may be considered to resolve the ambiguity. *See, e.g.*, *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020); *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011). General principles of justice should not play a role 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: No. The proper factors to consider in sentencing an individual defendant are prescribed by 18 U.S.C. § 3553(a), and those factors do not include whether defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups.

Senator Josh Hawley
Questions for the Record

Bradley Garcia
Nominee, D.C. Circuit

1. **Please list every case in which you filed documents in the Supreme Court and indicate whether the filing was on behalf of a paying client.**

   Response: For context, in my time at O'Melveny & Myers LLP my compensation was not dependent in any direct way on whether the work I performed was on behalf of a paying client or another client of the firm. In other words, the firm counted hours worked on matters undertaken by the firm on a pro bono basis the same as any other client work for purposes of evaluating and compensating attorneys.

   To the best of my knowledge, the following cases in which I contributed to documents filed in the Supreme Court were not undertaken by my former law firm on a pro bono basis:

   - *China Agritech v. Resh*, 138 S. Ct. 1800 (2018).
   - *CBX Resources, LLC v. ACE Am. Ins. Co.*, No. 20-478 (cert. denied).
   - *EVE-USA, Inc. v. Mentor Graphics Corp.*, No. 17-804 (petition dismissed voluntarily).
   - *Coachella Valley Water Dist. v. Agua Caliente Band of Cahuilla Indians* (cert. denied).
   - *Sample v. United States*, No. 18-759 (cert. denied).

   To the best of my knowledge, the following cases in which I contributed to documents filed in the Supreme Court were undertaken by my former law firm on a pro bono basis:

   - *Concepcion v. United States*, 142 S. Ct. 2389 (2022).
   - *United States v. Palomar-Santiago*, 141 S. Ct. 1615 (2021).
   - *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020).
   - *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).
   - *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525 (2020).
   - *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).
   - *United States v. Sims*, 139 S. Ct. 399 (2018).
   - *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).
   - *Gill v. Whitford*, 138 S. Ct. 1916 (2018).
   - *Evenwel v. Abbott*, 578 U.S. 54 (2016).

- *El Paso County v. Trump*, No. 20-298 (cert. denied).
- *Knights v. United States*, No. 21-198 (cert. denied).
- *Croft v. United States*, No. 21-197 (cert. denied).
- *Lester v. United States*, No. 17-1366 (cert. denied).

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: I do not agree with the philosophy set out in this particular quote. A judge's duty is to fairly and impartially apply the law to the facts.

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

    Response: The judicial oath requires judges to "faithfully and impartially discharge and perform all the duties incumbent upon" them "under the Constitution and laws of the United States." 28 U.S.C. § 453. If confirmed, I would follow that oath.

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

    Response: Yes, it is a binding precedent of the Supreme Court.

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

    Response: There are several different abstention doctrines. Among the most common are:

    Under the *Pullman* abstention doctrine, "when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question." *JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1124 (D.C. Cir. 2004).

    Under *Younger* abstention, federal courts should refrain from deciding a case when (1) "there are ongoing state proceedings that are judicial in nature," (2) "the state proceedings … implicate important state interests," and (3) "the proceedings … afford an adequate opportunity in which to raise the federal claims." *Eisenberg v. W.*

Va. Office of Disciplinary Counsel, 856 F. App'x 314, 315 (D.C. Cir. 2021) (quoting *Hoai v. Sun Ref. & Mktg. Co.*, 866 F.2d 1515, 1518-19 (D.C. Cir. 1989); *see also Sprint Comm'cns, Inc. v. Jacobs*, 571 U.S. 69, 72-73 (2013).

Under *Burford* abstention, abstention is "appropriate where there have been presented 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.'" *Silverman v. Barry*, 727 F.2d 1121, 1123 n.4 (D.C. Cir. 1984) (quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814-15 (1976)).

Colorado River abstention "permits discretionary abstention in light of parallel proceedings in another court." *JMM Corp.*, 378 F.3d at 1125 (citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976)). The D.C. Circuit and Supreme Court have identified factors to balance under this doctrine, including "which court first assumed jurisdiction over property involved in the case; the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums." *Sheptock v. Fenty*, 707 F.3d 326, 3332 (D.C. Cir. 2013) (internal quotation marks and alterations omitted)).

Thibodaux abstention applies when the issues in a case are "'intimately involved with [a State's] sovereign prerogative,' the proper adjudication of which might be impaired by unsettled questions of state law." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996) (quoting *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959)).

Finally, the *Rooker-Feldman* doctrine precludes lower federal courts from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005).

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

Response: In one case, I represented clients who raised antidiscrimination claims that the opposing parties defended on the basis of a doctrine based in the First Amendment's religion clauses. In a different matter, I represented plaintiffs raising religious liberty claims under the Religious Freedom Restoration Act of 1993.

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

Response: My former law firm represented the respondents in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). My former law firm's, and my, involvement consisted of representing the respondents in the Supreme Court proceedings after the Court granted certiorari. As mentioned above, I also represented plaintiffs raising religious liberty claims under the Religious Freedom Restoration Act of 1993. In that case, I represented four Muslim inmates seeking the provision of religiously appropriate meals from the Federal Bureau of Prisons; the suit ended with a favorable court-ordered settlement. *See Carr v. Inch*, No. 2:14-cv-00001, 2021 WL 3774288 (S.D. Ind. Aug. 31, 2021).

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

Response: The text and original meaning of a constitutional provision always play an important role in interpreting the Constitution, absent contrary precedent from the Supreme Court or D.C. Circuit interpreting the specific constitutional provision at issue. For example, the Supreme Court has placed particular emphasis on the text and original meaning in interpreting the Second Amendment. *See, e.g.*, *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: In interpreting any statute, I would first research whether there was Supreme Court or D.C. Circuit precedent that resolved the issue presented in the case. If there were no applicable precedent, I would look to the statute's text, and if that text had a clear meaning, I would apply that meaning to resolve the case. When the text is unclear, the Supreme Court and D.C. Circuit have held that other indications of legislative intent, including the structure of the statute, other canons of interpretation, and appropriate forms of legislative history may be considered in resolving the ambiguity. *See, e.g.*, *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020); *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011).

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

Response: The Supreme Court has explained that, as a general matter, committee reports are more probative of legislative intent than, for example, "passing comments of one Member" or "casual statements from the floor debates." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: The U.S. Constitution is a domestic document and should be interpreted according to domestic law and authorities. If confirmed, I would look to Supreme Court and D.C. Circuit precedent in interpreting the Constitution.

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

Response: The Supreme Court has held that to prevail on such a claim a petitioner must (1) demonstrate that the method of execution presents a "substantial risk of serious harm" 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*, 142 S. Ct. 2214, 2220 (2022) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)) (alterations in original).

9. 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.

10. 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.

11. 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.

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 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: The Supreme Court has held that neutral and generally applicable state laws that burden religious exercise are subject to rational basis review, but that strict scrutiny applies if the law or policy at issue is not in fact neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). Several Supreme Court decisions provide guidance on how to conduct that analysis. The Supreme Court has held, for example, that a law is not neutral and generally applicable if the circumstances show that "the object or purpose of the law is suppression of religion or religious conduct," *id.* at 533, if the record shows a facially neutral law has been applied in a particular way out of hostility to religion, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), if the law is subject to discretionary individualized exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021), or if the law treats any "comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

Response: Please see my answer to Question 12.

14. 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 Supreme Court has held that a court's only function "in this context is to determine" whether the person's religious belief reflects "an honest conviction"; courts may not assess whether the person's religious beliefs "are flawed." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724-25 (2014); *see also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms for self-defense in the home.

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.

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

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

Response: The thrust of Justice Holmes' dissent in *Lochner* was that "a Constitution is not intended to embody a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (1905). I understand that Mr. Herbert Spencer's Social Statics was an economic treatise, and Justice Holmes was illustrating that the Constitution did not codify the theories in that work nor any other.

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

Response: *Lochner* was rejected in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and is no longer controlling. If confirmed, I would follow all controlling Supreme Court precedents.

17. 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?

Response: Only the Supreme Court can overrule one of its prior cases, and if confirmed I will faithfully apply all Supreme Court precedents as decided. I note, however, that the Supreme Court has stated that its decision in *Korematsu v. United States*, 323 U.S. 214 (1944), "has been overruled in the court of history, and—to be clear—has no place in law under the Constitution." *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (quotation omitted).

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

Response: Yes.

18. 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 would follow all Supreme Court and D.C. Circuit precedent as to what constitutes a monopoly. For example, the Supreme Court has held that showing control of "80% to 95%" of a market, "with no readily available substitutes," is sufficient to survive summary judgment under § 2 of the Sherman Act. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992). In that case, the Supreme Court described a prior decision as holding that "over two-thirds of the market is a monopoly." *Id.* (describing *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)). And, more generally, "a firm is a monopolist if it can profitably raise prices substantially above the competitive level." *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc). Any personal view that I had on the above-quoted statement from Judge Learned Hand would have no impact on my approach to judging.

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

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

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

Response: Federal common law generally refers to the rules of decision federal courts have formulated as part of their Article III authority to resolve cases and controversies that come before them involving certain areas of federal law. The Supreme Court made clear in *Erie v. Tompkins*, 304 U.S. 64 (1938) that there is no federal general common law, and federal common law exists instead only in certain "limited enclaves in which federal courts may derive some substantive law in a common law way," such as in admiralty cases. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

20. 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: As a general matter, when federal courts are required to decide a question of state law in a properly presented case or controversy, they should resolve the question as the highest court of the state at issue would. *See, e.g.*, *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). If confirmed, I would therefore look to decisions of the state's highest court in resolving questions of state law.

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

Response: Although it is certainly relevant when one statutory provision is identical to another that has already been definitively interpreted, the Supreme Court has repeatedly held "that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, 574 U.S. 528, 537 (2015) (collecting cases).

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

Response: A federal constitutional provision would be binding on state courts regardless of what protections a state constitutional provision provides, so in that sense the federal constitutional provision would, per the Supremacy Clause, provide a floor. Whether a state provision provides greater protection than an identical or similarly worded provision in the federal constitution would be a question of state law.

21. 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 when it is conceivable that related issues could come before the courts. *Brown v. Board of Education* and its holding that de jure racial segregation in schools violates the Fourteenth Amendment is one of the few Supreme Court decisions for which I am sufficiently confident related issues will not come before the D.C. Circuit or other courts. I can therefore state that I do believe *Brown* was correctly decided.

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

Response: Whether and in what circumstances federal courts have legal authority to issue nationwide injunctions is a subject of active litigation and debate in the courts. *See, e.g.*, *Arizona v. Biden*, 31 F.4th 469, 483-85 (6th Cir. 2022) (Sutton, C.J., concurring) (questioning the legal authority for such injunctions). The D.C. Circuit has affirmed the issuance of nationwide injunctions in cases involving federal agency action. *See, e.g.*, *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1339, 1409 (D.C. Cir. 1998). The D.C. Circuit has relied in part on the Administrative Procedure Act's conferral of authority on federal courts to "set aside" unlawful agency action. *Id.* at 1409-10. If confirmed and presented with the question of whether a nationwide injunction was properly issued, I would study the relevant Supreme Court and D.C. Circuit precedents and apply them impartially.

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

Response: Please see my answer to Question 22.

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

Response: Please see my answer to Question 22.

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

Response: Please see my answer to Question 22.

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

Response: Federalism is an important structural check on the authority of the federal government. It also allows states to provide greater or different protections than the federal government does. In both ways federalism protects liberty. Federalism also

allows for what many refer to as "laboratories of democracy," allowing the States to experiment with different approaches to policy issues so that other States or the federal government may learn from their experience.

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

Response: Please see my answer to Question 4.

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

Response: As a general matter, damages are meant to compensate a party for past harm, whereas injunctive relief is intended to prevent ongoing or future harm. Whether each type of relief is appropriate in a particular case is a highly context-specific inquiry.

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

Response: The Supreme Court has held that the Constitution—through the Due Process Clauses of the Fifth and Fourteenth Amendments—protects various rights that are not expressly enumerated in the Constitution. These are rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Those rights include, among others, the right to marry, to have children, and to direct the education and upbringing of one's children. *Id.* at 720; *see also Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

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

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

Response: The First Amendment's right to free exercise of religion is a foundational protection in our Constitution. For a summary of the Supreme Court's holdings on the scope of that right, please see my answer to Question 12.

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

Response: I am not aware of case law distinguishing between the "free exercise of religion" and "freedom of worship." Generally, the Supreme Court has held that the Free Exercise Clause does prohibit discrimination based on religious status, in addition to ensuring the freedom to engage in worship practices. *See, e.g.*, *Carson v. Makin*, 142 S. Ct. 1987 (2022).

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

Response: Please see my answer to Question 12.

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

Response: Please see my answer to Question 14.

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 if any federal law places a substantial burden on a person's exercise of religion, the government must show the burden "(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; *see City of Boerne v. Flores*, 521 U.S. 507 (1997). Where RFRA is implicated, it "displac[es] the operation of other federal laws," such as those governing areas like employment and education. *Bostock v. Clayton Cnty.*, 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.

29. 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 understand this statement to refer to the proposition that a judge that faithfully interprets the law is likely to sometimes reach a result that is, in the judge's personal opinion, an undesirable outcome. Every judge takes an oath to "faithfully and impartially discharge" their duties, 28 U.S.C. § 453, and that oath is essential to the proper role of judges in our constitutional scheme.

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

a. If yes, please provide appropriate citations.

Response: To the best of my recollection, the only cases in which I represented a client making an argument that a federal or state statute was unconstitutional are *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020), *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), and *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

31. 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: In advance of my nomination, after reviewing the Administrative Office of the U.S. Courts' guidance on social media use by judges and discussing with my family, I decided that for privacy reasons I would no longer maintain a LinkedIn profile, a long-private Facebook account, or a Twitter account (on which I had never posted). Please note that I have previously submitted all information and documents required by the Judiciary Committee's Questionnaire for Judicial Nominees.

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

Response: I believe that America is a great country, and that my family and I are fortunate to live here. Different people have different understandings of the term "systemic racism," and this question implicates policy questions for policymakers, not the judicial branch. If confirmed as an Article III judge, I would fairly and impartially apply all laws in the cases that properly came before me, including in cases involving claims of racial discrimination.

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

Response: Yes, I have advocated positions on behalf of clients that conflicted with my personal views.

34. How did you handle the situation?

Response: As an attorney I was bound to zealously advocate for each of my clients and generate the best possible arguments in favor of their position, within the bounds of the law and my ethical obligations, regardless of any personal views.

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

Response: Yes.

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

Response: Federalist No. 78, which addresses the proper role of the judiciary in the Constitution's scheme of separation of powers, would inform my view of the judicial role.

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

Response: The Supreme Court has not yet addressed that question, and because it is an issue that could come before the courts it would be improper for me to do so as a judicial nominee. In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court did explain that states have a legitimate interest in "respect for and preservation of prenatal life at all stages of development," and that its decision was "not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests" nor "on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." *Id.* at 2256, 2262, 2284.

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

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

39. 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.

40. 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.

41. 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: In my career in private practice I have worked on a large number of briefs filed in trial and appellate courts. The vast majority of these would have had my name on the brief. Sometimes I helped teams of attorneys within my former law firm, or counsel from other law firms, by reviewing or offering comments on briefs that I would not have signed. I do not have a list of such briefs or access to information that would allow me to compile such a list. Moreover, because this work would have been done for clients of my former law firm it would potentially be improper for me to disclose information or work that was confidential or subject to attorney-client privilege.

42. Have you ever confessed error to a court?

Response: To the best of my recollection, no.

a. If so, please describe the circumstances.

43. 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: I believe that nominees have a duty to answer the Committee's questions to the best of their ability, consistent with their ethical and professional obligations.

Senator John Kennedy
Questions for the Record

Bradley N. Garcia
Nominee, District of Columbia Circuit

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

   Response: My judicial philosophy would be informed not only by my career in private practice but by my experiences clerking on the D.C. Circuit and Supreme Court. I would approach each case by setting aside any personal views or preconceptions about how the case should be resolved and instead resolve the case impartially based on the record and binding precedent. I would also engage respectfully with, and listen carefully to, my colleagues and the advocates in each case. And I would carry a deep respect for and awareness of the fact that per Article III of the Constitution a judge's role is limited to resolving properly presented cases or controversies.

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

   Response: No. If the text of a law is clear, then the text governs.

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

   Response: I am not aware of any Supreme Court or D.C. Circuit case considering statements by a president to be part of a statute's legislative history. If confirmed and presented with an argument relating to that issue, I would further research potentially relevant case law and carefully consider the parties' arguments.

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

   As a general matter, the "Free Speech Clause does not prohibit *private* abridgement of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). The Supreme Court has held, however, that state law may limit a private shopping center owner's ability to restrict speech on its own property. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

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

   Response: The Supreme Court has addressed the meaning of the phrase "the people" in the Bill of Rights in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). The Court has stated that the phrase

"refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265. And in *Heller* the Court stated that where the Constitution refers to "the people," "the term unambiguously refers to all members of the political community, not an unspecified subset." 554 U.S. at 580. The Court made those statements in the course of concluding that the Second Amendment protects an individual right to bear arms. *Id.* at 581.

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

Response: The Supreme Court has held that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (holding that the due process clauses of both the Fifth and Fourteenth Amendments apply to all persons present in the United States). I am not aware of a Supreme Court or D.C. Circuit precedent specifically addressing whether noncitizens unlawfully present in the United States are entitled to a right of privacy. If presented with that question as a judge, I would apply binding Supreme Court and D.C. Circuit precedent.

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 *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971), the D.C. Circuit held that non-citizens without lawful status "are sheltered by the Fourth Amendment in common with citizens." *Id.* at 223. The Supreme Court to my knowledge has not directly addressed that question, though it has held that the Fourth Amendment does not "restrain the actions of the Federal Government against aliens outside of the United States territory." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990).

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

Response: The Supreme Court has not yet addressed that question, and because it is an issue that could come before the courts it would be improper for me to do so as a judicial nominee. In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court did explain that states have a legitimate interest in "respect for and preservation of prenatal life at all stages of development," and that its decision was "not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests" nor "on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." *Id.* at 2256, 2262, 2284.

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

Response: The Supreme Court rejected a facial challenge to a law requiring voters to present identification to vote in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), concluding that such laws can be constitutional. Such laws may still be subject to legal challenges in other circumstances, and I would follow all binding Supreme Court and D.C. Circuit precedent in considering any such challenge.

10. **In 2001, a staff memo from now-Chairman Dick Durbin allegedly described Mr. Miguel Estrada, then a conservative nominee to the U.S. Court of Appeals for District of Columbia, as "especially dangerous, because he has a minimal paper trail, he is Latino and the White House seems to be grooming him for a Supreme Court appointment." Senate Democrats then filibustered judges for the first time in the country's history, which ultimately ended Estrada's nomination and permanently altered the Senate's confirmation process.**

    a. **As a nominee who may become the same court's first Latino judge two decades later, do you condemn this non-meritorious assessment of Miguel Estrada's nomination?**

    Response: As a judicial nominee, I can speak only to the circumstances of my own nomination. I am humbled by the honor of this nomination, and grateful for the Committee's consideration. I would hope that the Committee and the Senate would assess my nomination based on my own record and qualifications. I would also note that, having had the privilege of serving as a law clerk to Justice Kagan, I am aware of her personal relationship with Mr. Estrada and the high esteem in which she held him.

Questions from Senator Thom Tillis
for Bradley N. Garcia
Nominee to be United States Circuit Judge for the District of Columbia 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: I consider judicial activism to refer to judges that decide cases based on their personal views or consciously reach out to decide issues that are not properly before their court. Judicial activism is not appropriate.

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

   Response: I believe that impartiality is a requirement for any judge.

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

   Response: No.

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

   Response: A judge who faithfully interprets the law is likely to sometimes reach a result that is, in the judge's personal opinion, an undesirable outcome. Every judge takes an oath to "faithfully and impartially discharge" their duties, 28 U.S.C. § 453, and that oath is essential to the proper role of judges in our constitutional scheme.

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 follow the oath that I would take to faithfully and impartially apply all binding Supreme Court precedent, including those precedents addressing the Second Amendment. *See, e.g.*, *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. Chicago*, 561 U.S. 742 (2010); *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 cases of that type based on the record and on the relevant precedents of the Supreme Court and D.C. Circuit. The Supreme Court has issued several decisions, for example, addressing challenges to restrictions related to COVID-19 that burden individuals' constitutional rights. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam).

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: If confirmed as a judge, I would follow Supreme Court and D.C. Circuit precedent concerning the doctrine of qualified immunity. The Supreme Court has held that the doctrine of qualified immunity shields officials from civil liability whenever their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). A right is "clearly established" if it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Id.* (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

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: As a judicial nominee, I am not able to comment on whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers. If I am confirmed, I would follow all relevant precedents of the Supreme Court and D.C. Circuit, including those referenced in my response to Question 9.

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

Response: As a judicial nominee, I am not able to comment on the proper scope of qualified immunity protections for law enforcement. If I am confirmed, I would follow all relevant precedents of the Supreme Court and D.C. Circuit, including those referenced in my response to Question 9.

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: I have served as a moot court judge helping attorneys prepare for arguments in various cases involving copyright law. Apart from those experiences, in my career as a law clerk, as a litigator in private practice, and at the Justice Department, I have not had occasion to engage in particular depth with copyright law issues.

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

Response: In my career I have not had occasion to work on issues involving the Digital Millennium Copyright Act.

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

Response: In my career I have not had occasion to work on those issues.

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: In my career I have represented clients in cases involving various First Amendment issues and many intellectual property (namely, patent) issues, but not, to the best of my recollection, free speech issues.

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 interpreting any statute, I would first research whether there was Supreme Court or D.C. Circuit precedent that resolved the issue presented in the case. If there were no applicable precedent, I would look to the statute's text, and if that text had a clear meaning, I would apply that meaning to resolve the case. When the text is unclear, the Supreme Court and D.C. Circuit have held that other indications of legislative intent, including the structure of the statute, other canons of

interpretation, and appropriate forms of legislative history may be considered in resolving the ambiguity. *See, e.g.*, *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020); *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011).

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: Under Supreme Court and D.C. Circuit precedent, if the U.S. Copyright Office issued an interpretation of a statute it administers through a sufficiently formal process such as notice-and-comment rulemaking, that interpretation would be entitled to deference under the *Chevron* doctrine. *See, e.g.*, *SoundExchange, Inc. v. Copyright Royalty Board*, 904 F.3d 41, 55 (D.C. Cir. 2018). Under the Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), an agency's interpretation of its own regulations would also be entitled to deference in certain circumstances. When those doctrines do not apply, an agency's interpretation of a statute or regulation it administers is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which means courts "must follow it only to the extent it has the 'power to persuade.'" *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1510 (2020) (quoting *Skidmore*, 323 U.S. at 140).

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

Response: As a judicial nominee, I am not able to comment on how issues that might come before the courts should be resolved. If confirmed, I would follow applicable Supreme Court and D.C. Circuit precedent in evaluating any claim of this type.

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: In interpreting the DMCA and any other statute, judges should first look to applicable precedent and the text of the statute. The statute's text should generally be construed "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). If necessary, judges should then look to other indications of legislative intent, including the structure of the statute and other canons of interpretation.

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

Response: Please see my response to Question 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: I very much appreciate that these are important issues for policymakers to consider. As a judicial nominee, it would be inappropriate for me to comment. I can commit that I would apply the venue rules and applicable precedents fully and faithfully.

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

Response: Please see my response to question 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: If confirmed, I would certainly not take proactive steps to attract a particular type of case or litigant to file cases within the jurisdiction of the D.C. Circuit. I believe all judges have a duty to fairly and impartially apply the law in every case.

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: I very much appreciate that these are important issues for policymakers to consider. As a judicial nominee, it would be inappropriate for me to comment. I can commit that I would apply the venue rules and applicable precedents fully and faithfully. In the abstract, it is possible that fair and impartial application of the venue rules, which often allow some optionality for plaintiffs in choosing where to file suit, could result in the type of concentration of litigation this question posits.

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: Please see my response to Question 16.

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 my response to Question 16.

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, I am not able to comment on the propriety of the conduct of other judges or how that conduct should be perceived. I do believe that all lower court judges have a duty to follow binding precedent from a supervising court, regardless of any personal views about what the law should require.

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

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