Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Jonathan James Canada Grey
Judicial Nominee to the U.S. District Court for the Eastern District of Michigan

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

   Response: To determine whether an unenumerated right receives constitutional protection, the Supreme Court considered whether the right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted). If I were confirmed as a district judge, I would faithfully apply Supreme Court and Sixth Circuit precedent, carefully consider legal arguments, and apply the law to the facts.

2. **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: Judgments issued by judges must be based upon application of precedent to specific facts. As a magistrate judge, I approach each case with an open mind, consider parties' arguments, apply relevant Supreme Court and Sixth Circuit precedent, consider persuasive legal authority in the absence of precedent, weigh relevant facts, and reach a conclusion applying the law to the facts being mindful at all times of a judge's oath to "administer justice without respect to persons."

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

   Response: According to Black's Law Dictionary, a "living constitution" is a "constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." (11th ed. 2019).

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

   Response: I believe the Constitution is an enduring document. I am not familiar with then-Judge Brown Jackson's statement or context surrounding it.

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

Response: Yes. In *Meyer v. Nebraska*, the Supreme Court held that pursuant to the Fourteenth Amendment's Due Process clause, parents have a Constitutional right to direct the education of their children. 262 U.S. 390, 400 (1923).

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

   Response: The appropriate allocation of funds to police departments is a matter for policymakers. As a magistrate judge and judicial nominee, I am unable to express an opinion on the appropriate allocation of funds to police departments.

7. **Are law enforcement partnerships key to preventing acts of terror?**

   Response: The appropriate steps to prevent acts of terror are generally a matter for other actors besides judges. In my prior practice as an Assistant United States Attorney for over nine years, I advocated for, and developed, strong relationships with numerous law enforcement agencies in an effort to prevent a broad range of criminal activity and to support community safety.

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

   Response: As a magistrate judge, I approach each case with an open mind, consider parties' arguments, apply relevant Supreme Court and Sixth Circuit precedent, consider persuasive legal authority in the absence of precedent, weigh relevant facts, and reach a conclusion applying the law to the facts being mindful at all times of a judge's oath to "administer justice without respect to persons." In bond determinations, I consider the facts and applicable law, including the Bail Reform Act passed by Congress, which requires me to impose "the least restrictive further condition or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.SC. § 3142(c)(1)(B). If confirmed as a district judge, I would follow this same approach and at sentencing, consider the 18 U.S.C. § 3553(a) factors which would explicitly require that I "protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(C).

9. **Is the right to petition the government a constitutionally protected right?**

   Response: Yes. The right to petition the government is protected in the First Amendment.

10. **What role should empathy play in sentencing defendants?**

Response: Empathy is not a sentencing factor for a judge to consider. As a magistrate judge, sentencing is governed by the law and the facts, and I consider the 18 U.S.C. 3553(a) factors prior to pronouncing a sentence. I also apply any Supreme Court and Sixth Circuit precedent. If I were confirmed as a district judge, I would follow this same approach.

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

Response: The Constitution does not provide a right to an attorney in civil cases. In exceptional civil cases, an attorney may be appointed by the court. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25-27 (1981).

12. 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 magistrate judge and a federal judicial nominee bound by the Code of Conduct for United States Judges, generally it is inappropriate for me to comment on whether the United States Supreme Court correctly decided a case. However, the issues litigated in *Brown v. Board of Education* are unlikely to be litigated in the future. I view this case as an exception to the general rule preventing me from offering an opinion on Supreme Court decisions. The Court correctly decided the case. As a magistrate judge I faithfully apply all Supreme Court and Sixth Circuit precedent and would continue to do so if confirmed as a district judge.

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

Response: As a magistrate judge and a federal judicial nominee bound by the Code of Conduct for United States Judges, generally it is inappropriate for me to comment on whether the United States Supreme Court correctly decided a case. However, the issues litigated in *Loving v. Virginia* are unlikely to be litigated in the future. I view this case as an exception to the general rule preventing me from offering an opinion on Supreme Court decisions. The Court correctly decided the case. As a magistrate judge I faithfully apply all Supreme Court and Sixth Circuit precedent and would continue to do so if confirmed as a district judge.

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

Response: In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overruled *Roe v. Wade*. As a magistrate judge and a federal judicial nominee bound by the Code of Conduct for United States Judges, generally it is inappropriate for me to comment on whether the United States Supreme Court correctly decided a case. As a magistrate judge I faithfully apply all Supreme Court and Sixth Circuit precedent

and would continue to do so if confirmed as a district judge. I will follow and apply *Dobbs v. Jackson Women's Health Organization* as it is Supreme Court precedence.

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

Response: In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overruled *Planned Parenthood v. Casey*. As a magistrate judge and a federal judicial nominee bound by the Code of Conduct for United States Judges, generally it is inappropriate for me to comment on whether the United States Supreme Court correctly decided a case. As a magistrate judge I faithfully apply all Supreme Court and Sixth Circuit precedent and would continue to do so if confirmed as a district judge. I will follow and apply *Dobbs v. Jackson Women's Health Organization* as it is Supreme Court precedence.

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

Response: The decision of the Supreme Court in *Griswold v. Connecticut is* binding precedent. As a magistrate judge and a federal judicial nominee bound by the Code of Conduct for United States Judges, generally it is inappropriate for me to comment on whether the United States Supreme Court correctly decided a case. As a magistrate judge I faithfully apply all Supreme Court and Sixth Circuit precedent and would continue to do so if confirmed as a district judge.

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

Response: The decision of the Supreme Court in *Gonzales v. Carhart is* binding precedent. As a magistrate judge and a federal judicial nominee bound by the Code of Conduct for United States Judges, generally it is inappropriate for me to comment on whether the United States Supreme Court correctly decided a case. As a magistrate judge I faithfully apply all Supreme Court and Sixth Circuit precedent and would continue to do so if confirmed as a district judge.

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

Response: The decision of the Supreme Court in *McDonald v. City of Chicago is* binding precedent. As a magistrate judge and a federal judicial nominee bound by the Code of Conduct for United States Judges, generally it is inappropriate for me to comment on whether the United States Supreme Court correctly decided a case. As a magistrate judge I faithfully apply all Supreme Court and Sixth Circuit precedent and would continue to do so if confirmed as a district judge.

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

Response: The decisions of the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC are* binding precedent. As a magistrate judge

and a federal judicial nominee bound by the Code of Conduct for United States Judges, generally it is inappropriate for me to comment on whether the United States Supreme Court correctly decided a case. As a magistrate judge I faithfully apply all Supreme Court and Sixth Circuit precedent and would continue to do so if confirmed as a district judge.

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

Response: The decision of the Supreme Court in *New York State Rifle & Pistol Association v. Bruen* is binding precedent. As a magistrate judge and a federal judicial nominee bound by the Code of Conduct for United States Judges, generally it is inappropriate for me to comment on whether the United States Supreme Court correctly decided a case. As a magistrate judge I faithfully apply all Supreme Court and Sixth Circuit precedent and would continue to do so if confirmed as a district judge.

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

Response: The decision of the Supreme Court in *Dobbs v. Jackson Women's Health Organization* is binding precedent. As a magistrate judge and a federal judicial nominee bound by the Code of Conduct for United States Judges, generally it is inappropriate for me to comment on whether the United States Supreme Court correctly decided a case. As a magistrate judge I faithfully apply all Supreme Court and Sixth Circuit precedent and would continue to do so if confirmed as a district judge.

13. Is threatening Supreme Court justices right or wrong?

Response: A threat to a Supreme Court Justice may be a crime. For example, under 18 U.S.C. § 875, it is a crime to transmit in interstate commerce a threat to injure a person.

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

Response: Under 18 U.S.C. 1507, it is a misdemeanor offense if any individual "with the 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."

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

Response: Upon research and belief, no Supreme Court or Sixth Circuit precedent has held that 18 U.S.C. 1507 is unconstitutional. In *Cox v. Louisiana*, the Supreme Court

analyzed a Louisiana statute implemented months before 18 U.S.C. § 1507 and modeled on the draft of § 1507. 85 S.Ct. 476, 479 (1965). The Supreme Court found the Louisiana statute constitutional. *Id.* at 481. If confronted with a case analyzing the constitutionality of 18 U.S.C. § 1507, I would apply Supreme Court and Sixth Circuit precedent, consider the arguments of the parties, and analyze the facts to reach a just conclusion.

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

Response: In *Chaplinsky v. United States*, the Supreme Court held that the government may regulate "fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." 315 U.S. 568, 571-72 (internal quotation marks omitted) (1972). The Supreme Court held that such regulation is permitted by the First Amendment. Id. at 572.

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

Response: In *Virginia v. Black*, the Supreme Court held that true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. 343, 359 (2003). "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 359-60 (internal quotation marks omitted).

18. Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.

Response: As a magistrate judge, I approach each case with an open mind, consider parties' arguments, apply relevant Supreme Court and Sixth Circuit precedent, consider persuasive legal authority in the absence of precedent, weigh relevant facts, and reach a conclusion applying the law to the facts being mindful at all times of a judge's oath to "administer justice without respect to persons." I treat all parties with respect and endeavor to ensure that all parties feel heard. If confirmed as a district judge, I would follow this same approach. I greatly respect all Supreme Court Justices and their decisions. I have not studied every Supreme Court Justice's jurisprudence in exacting detail. As a sitting magistrate judge I follow controlling Supreme Court precedent and if confirmed as a district judge I would continue to do so.

19. Please identify a Sixth Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.

Response: As a magistrate judge, I approach each case with an open mind, consider parties' arguments, apply relevant Supreme Court and Sixth Circuit precedent, consider persuasive legal authority in the absence of precedent, weigh relevant facts, and reach a conclusion applying the law to the facts being mindful at all times of a judge's oath to "administer justice without respect to persons." I treat all parties with respect and endeavor to ensure that all parties feel heard. If confirmed as a district judge, I would follow this same approach. I greatly respect all Sixth Circuit judges and their decisions. I have not studied every Sixth Circuit judicial opinion in exacting detail. As a sitting magistrate judge I follow controlling Supreme Court and Sixth Circuit precedent and if confirmed as a district judge I would continue to do so.

20. Under Supreme Court and Sixth Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?

Response: The Supreme Court has used the term "basic or historical fact" and defined it as "addressing questions of who did what, when or where, how or why." *U.S. Bank Nat. Ass'n v. Vill. at Lakeridge, LLC*, 138 S.Ct. 960, 966 (2018). In *Pullman-Standard v. Swint*, the Supreme Court noted the "vexing nature of the distinction between questions of fact and questions of law." 456 U.S. 273, 288 (1982). In *Singh v. Rosen*, the Sixth Circuit addressed the distinction and noted that appellate courts generally review legal determinations for clear error and factual determinations de novo. 984 F.3d 1142, 1148 (6th Cir. 2021) (citing *U.S. Bank Nat. Ass'n v. Vill. at Lakeridge, LLC*, 138 S.Ct. 960, 965-66 (2018)). Further, the Supreme Court and the Sixth Circuit have held that a case-by-case approach ensues to determine the applicable appellate standard if there is a mixed question of law and fact. *Guerrera-Lasprilla v. Barr*, 140 S.Ct. 1062, 1068-69 (2020); *Singh v. Rosen*, 984 F.3d 1142, 1148 (6th Cir. 2021). "If a question is more fact intensive, they typically review the question with deference; if it is more legal, they typically review it de novo." *Singh v. Rosen*, 984 F.3d 1142, 1148 (6th Cir. 2021). If confirmed, generally I would not have the opportunity to apply these appellate standards of review on the district court, but I would faithfully apply Supreme Court and Sixth Circuit precedence on all legal issues.

21. When you are considering a case, do you have a process for ensuring that you correctly understand how the law should apply, without letting personal preferences shape your view? If so, what is your process or approach?

Response: Personal views play no role in my approach. As a magistrate judge, I approach each case with an open mind, consider parties' arguments, apply relevant Supreme Court and Sixth Circuit precedent, consider persuasive legal authority in the absence of precedent, weigh relevant facts, and reach a conclusion applying the law to the facts. If confirmed as a district judge, I would follow this same approach.

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

Response: No.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

   Response: No.

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

   Response: No.

28. **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.

29. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

30. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Foundations requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    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.

31. **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.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: On March 8, 2022, I applied to be a district judge in the United States District Court for the Eastern District of Michigan. On April 13, 2022, I interviewed with members of the judicial selection committee established by Senator Debbie Stabenow and Senator Gary Peters. On May 26, 2022, officials from the White House Counsel's Office invited me to interview and informed me that Senators Stabenow and Peters had recommended me for potential nomination and. On May 31, 2022, I interviewed with officials from the White House Counsel's Office. Since June 11, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On September 6, 2022, my nomination was submitted to the Senate.

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

Response: On the afternoon of December 7, 2022, the Office of Legal Policy sent these questions to me. I reviewed the questions, conducted research, and drafted answers based on my research and recollections. I sent a draft of my answers to the Office of Legal Policy who provided feedback. After I considered this feedback, I submitted my answers to these questions.

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

Questions for the Record for Jonathan Grey, nominated to be United States District Judge for the Eastern District of Michigan

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

Response: Yes. Congress has explicitly passed laws prohibiting race discrimination. For example, in in the employment context in the Civil Rights Act of 1964 and in the housing context in the Fair Housing Act, race discrimination is outlawed. Further, any legal claims challenging governmental action and discrimination based on race are subject to strict scrutiny.

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: To determine whether an unenumerated right receives Constitutional protection, the Supreme Court considered whether the right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted). As a sitting magistrate judge and a judicial nominee, it is not appropriate for me to provide an opinion on this topic. If I were confirmed as a district judge, I would faithfully apply Supreme Court and Sixth Circuit precedent, carefully consider legal arguments, and apply the law to the facts.

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: As a magistrate judge, I approach each case with an open mind, consider parties' arguments, apply relevant Supreme Court and Sixth Circuit precedent, consider persuasive legal authority in the absence of precedent, weigh relevant facts, and reach a conclusion applying the law to the facts being mindful at all times of a judge's oath to "administer justice without respect to persons." I treat all parties with respect and endeavor to ensure that all parties feel heard. If confirmed as a district judge, I would follow this same approach. I greatly respect all Supreme Court Justices and their decisions. I have not studied every Supreme Court Justice's jurisprudence in exacting detail. As a sitting magistrate judge I follow controlling Supreme Court precedent and if confirmed as a district judge I would continue to do so.

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

Response: According to Black's Law Dictionary, originalism is a "theory that the U.S. Constitution should be interpreted according to the intent of those who drafted and adopted it." (7th ed. 1999). As a magistrate judge, I approach each case with an open mind, consider parties' arguments, apply relevant Supreme Court and Sixth Circuit precedent, consider persuasive legal authority in the absence of precedent, weigh relevant facts, and reach a conclusion applying the law to the facts being mindful at all times of a judge's oath to "administer justice without respect to persons." I treat all parties with respect and endeavor to ensure that all parties feel heard. If confirmed as a district judge, I would follow this same approach.

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

Response: According to Black's Law Dictionary, "living constitutionalism" is a "doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." (11th ed. 2019). As a magistrate judge, I approach each case with an open mind, consider parties' arguments, apply relevant Supreme Court and Sixth Circuit precedent, consider persuasive legal authority in the absence of precedent, weigh relevant facts, and reach a conclusion applying the law to the facts being mindful at all times of a judge's oath to "administer justice without respect to persons." I treat all parties with respect and endeavor to ensure that all parties feel heard. If confirmed as a district judge, I would follow this same approach.

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: Where the text of a law is unambiguous, as a magistrate judge I am required to apply the plain meaning of the text. If confirmed, I would follow this same approach as a district judge.

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: Principles of statutory interpretation are governed by Supreme Court and Sixth Circuit precedent.

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

Response: No.

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

Response: Yes. The decision of the Supreme Court in *Dobbs v. Jackson Women's Health Organization* is binding precedent.

a. Was it correctly decided?

Response: As a magistrate judge and a federal judicial nominee bound by the Code of Conduct for United States Judges, generally it is inappropriate for me to comment on whether the United States Supreme Court correctly decided a case. As a magistrate judge I faithfully apply all Supreme Court and Sixth Circuit precedent and would continue to do so if confirmed as a district judge.

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

Response: Yes. The decision of the Supreme Court in *New York Rifle & Pistol Association v. Bruen* is binding precedent.

a. Was it correctly decided?

Response: As a magistrate judge and a federal judicial nominee bound by the Code of Conduct for United States Judges, generally it is inappropriate for me to comment on whether the United States Supreme Court correctly decided a case. As a magistrate judge I faithfully apply all Supreme Court and Sixth Circuit precedent and would continue to do so if confirmed as a district judge.

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

Response: Yes. The Supreme Court's ruling in *Brown v. Board of Education* is binding precedent.

a. Was it correctly decided?

Response: As a magistrate judge and a federal judicial nominee bound by the Code of Conduct for United States Judges, generally it is inappropriate for me to comment on whether the United States Supreme Court correctly decided a case. However, the issues litigated in *Brown v. Board of Education* are unlikely to be litigated in the future. I view this case as an exception to the general rule preventing me from offering an opinion on Supreme Court decisions. The Court correctly decided the case. As a magistrate judge I faithfully apply all Supreme Court and Sixth Circuit precedent and would continue to do so if confirmed as a district judge.

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

Response: Under the Bail Reform Act passed by Congress, 18 U.S.C. §§ 3142(e)(2), (e)(3), and (f)(1) offenses which trigger a presumption in favor of pretrial detention include those involving narcotics where there is a maximum term of imprisonment of ten years or more; offenses where there is a maximum term of imprisonment of life or death; specific offenses involving minor victims; and specific offenses involving repeat offenders.

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

Response: The Bail Reform Act provides that the presumption applies to assure the defendant's appearance in court proceedings and the safety of any person or the community.

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

Response: Yes. Under the Free Exercise Clause of the First Amendment to the Constitution, governmental laws or restrictions on private institutions that are not neutral or generally applicable are subject to strict scrutiny and may only be upheld if they are

"narrowly tailored" to "meet a compelling interest." *Tandon v. Newsom*, 141 S.Ct. 1294, 1297-98 (2021).

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

Response: Governmental action that burdens the free exercise of religion is subject to strict scrutiny if it is not facially neutral or generally applicable. *Tandon v. Newsom*, 141 S.Ct. 1294, 1297-98 (2021). Such action is subject to strict scrutiny and may only be upheld if it is "narrowly tailored" to "meet a compelling interest." *Id.* Burdens on the free exercise of religion may be further limited by the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act.

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*, the Supreme Court granted preliminary injunctive relief to religious organizations who sued the governor of New York and alleged Constitutional violations. 141 S.Ct. 63 (2020). The religious organizations alleged that the state's COVID-19 pandemic capacity restrictions unlawfully violated their First Amendment right to free exercise of religion. *Id.* After finding that the state's restrictions were not "neutral and of general applicability," the Supreme Court applied strict scrutiny, and noted that the government could succeed if the regulations were "narrowly tailored" to meet a "compelling interest." *Id.* at 67. The Court found the pandemic constituted a compelling interest, but the capacity limits were unnecessarily restrictive and not "narrowly tailored." *Id.* The Court found the risk of irreparable harm existed given the religious traditions at stake. *Id.*

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

Response: In *Tandon v. Newsom*, the Supreme Court granted a preliminary injunction to plaintiffs who alleged that California's restrictions on the size of private gatherings violated their free exercise right to religious worship in their homes. 141 S.Ct. 1294, 1298 (2021). The Court found the restrictions were not neutral and the state could not satisfy strict scrutiny since it "treated some comparable secular activities more favorably than at-home religious exercise." *Id.* at 1296-97.

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

Response: Yes.

18. Explain your understanding of the U.S. Supreme Court's holding in

***Masterpiece Cakeshop v. Colorado Civil Rights Commission*.**

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court held that the Colorado Civil Rights Commission's cease and desist order to a baker who refused to bake a wedding cake for a same-sex couple violated the First Amendment's Free Exercise clause. 138 S.Ct. 1719 (2018). The Court found that the Commission exhibited "clear and impermissible hostility toward the sincerely held religious beliefs" of the bakery owner. *Id.* at 1729. This lack of neutrality violated the First Amendment. *Id.* at 1732.

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

Response: Yes. In *Hernandez v. Commissioner*, the Supreme Court stated that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith or the validity of particular litigants' interpretations of those creeds." 109 S.Ct. 2136, 2148 (1989). Instead, sincerely held religious beliefs invoke protection under the First Amendment. *Frazee v. Ill. Dep't of Empl. Sec.*, 109 S.Ct. 1514, 1517-18 (1989).

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

Response: Sincerely held religious beliefs invoke protection under the First Amendment's Free Exercise clause even if the beliefs are outside the "commands of a particular religious organization." *Frazee v. Ill. Dep't of Empl. Sec.*, 109 S.Ct. 1514, 1517-18 (1989). Citing the Supreme Court, the Sixth Circuit has held that courts must determine whether the plaintiff's conduct reflects "an honest conviction" "consistent . . . with her . . . religious beliefs." *Fox v. Washington*, 949 F.3d 270, 277 (6th Cir. 2020) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014)).

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

Response: According to the Supreme Court, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner*, 109 S.Ct. 2136, 2148 (1989). Thus, the courts do not wade into religious doctrinal disputes.

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

Response: As a sitting magistrate judge and nominee to become a district judge, I cannot comment on the official position of the Catholic Church. I have not studied the official position of the Catholic Church.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Supreme Court analyzed the ministerial exception grounded in the First Amendment religion clauses. 140 S.Ct. 2049 (2020). The Court determined whether the ministerial exception would thwart the employment discrimination claims of two Catholic school teachers. The Court rejected a "rigid formula" to determine whether the ministerial exception applied and examined the employees' duties instead of the employees' title. *Id.* at 2067. The Court held that the teachers bore responsibility "for instructing students in their faith" and they performed "vital religious duties," such that the ministerial exemption applied to bar the discrimination claims. *Id.* at 2066, 2069.

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*, the Supreme Court held that the city's refusal to contract with Catholic Social Services to provide foster care violated the Free Exercise Clause of the First Amendment. 141 S.Ct. 1868 (2021). The Court found that the law was not neutral due to discretionary exceptions that could allow different treatment between secular and religious organizations. *Id.* at 1878-79. Thus, the Court applied strict scrutiny where the lower courts erred. *Id.* The Court found that the city failed to offer a compelling reason why exceptions were available to some entities, but not Catholic Social Services. *Id.* at 1882.

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

Response: In *Carson v. Makin*, the Supreme Court analyzed whether Maine's provision of tuition assistance benefits to only non-religious private schools violated citizens' Free Exercise rights. 142 S.Ct. 1987 (2022). The Court applied "the strictest scrutiny" since the law disqualified some private schools "solely because they are religious." *Id.* at 1996 (additional quotation marks omitted). Maine's disqualification of religious private schools solely due to religion violated Mainers' Free Exercise rights. *Id.*

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

Response: In *Kennedy v. Bremerton School District*, the Supreme Court held that a school district's suspension of a football coach for post-game, on-field prayers violated the coach's First Amendment Free Speech and Free Exercise rights. 142 S.Ct. 2407 (2022). The Court found the district's policy on the coach's prayers were "specifically directed at . . . religious practice"; and, therefore, the policy did not "qualify as neutral." *Id.* at 2422 (internal quotations omitted). The Court applied strict scrutiny and found that the school district failed to establish that its actions were narrowly tailored to achieve a compelling state interest and impermissibly burdened the Free Exercise of religion. *Id.* at 2426.

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

***Fillmore County*.**

Response: Justice Gorsuch wrote a concurrence to provide guidance to the state court on remand as the Supreme Court reversed the Minnesota courts' denial of relief to members of the Amish Community who sought an exception from a county's septic system regulations and installations on religious grounds. *Mast v. Fillmore County*, 141 S.Ct. 2430 (2021). Justice Gorsuch highlighted the application of the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the application of strict scrutiny where the act is appropriately invoked. *Id.* Justice Gorsuch provided that the county and lower courts misapplied strict scrutiny. *Id.* at 2432. Justice Gorsuch wrote that while the county had a general interest in sanitation regulations, it must establish a "compelling" interest with "specific application" to the Amish community and offer a compelling explanation why it refused to grant an exception to a religious claimant but made exceptions available to others. *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: As a magistrate judge and judicial nominee, I cannot offer an opinion on how I would interpret the statute in a specific instance. If confronted with a case addressing this issue, I would apply Supreme Court and Sixth Circuit precedent, the statute, and all relevant law; carefully analyze the facts; consider the parties' arguments; and apply the law to the facts to reach a fair decision.

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 unaware of any such views taught anywhere. I am also aware of any such trainings offered at the United States District Court for the Eastern District of Michigan. I would not support any such trainings.

28. Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?

Response: Yes.

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

Response: As a sitting United States Magistrate Judge and a judicial nominee, I cannot offer an opinion on constitutional considerations for a political appointment. If confronted with a case addressing this issue, I would apply Supreme Court and Sixth Circuit precedent and all relevant law, carefully analyze the facts, consider the parties' arguments, and apply the law to the facts to reach a fair decision.

30. Is the criminal justice system systemically racist?

Response: I have not studied this question in depth and there are many definitions of the phrase "systemically racist." I am aware that members of Congress asserted that racial disparities existed in sentencing of specific narcotics offenses and that Congress sought to address such disparities by reducing the quantity disparity between crack cocaine and powder cocaine from 100:1 to 18:1 in the Fair Sentencing Act. If confirmed as a district judge, I would address any claims of racial discrimination by applying Supreme Court and Sixth Circuit precedent and all relevant law, carefully analyzing the facts, considering the parties' arguments, and applying the law to the facts to reach a fair decision.

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

Response: The appropriate number of Supreme Court Justices is a policy matter appropriate for policymakers. As a magistrate judge and judicial nominee, I am unable to express an opinion on the appropriate number of justices on the Supreme Court.

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

Response: No.

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

Response: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects law abiding citizen's right to bear firearms in their homes and carry handguns outside their homes for self-defense. 128 S.Ct. 2783 (2008).

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

Response: In *New York State Rifle Association, Inc. v. Bruen*, the Supreme Court provided that when the Second Amendment covers an individual's conduct and the government seeks to regulate it, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." 142 S.Ct. 2111, 2126 (2022).

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

Response: Yes. The Supreme Court held in *District of Columbia v. Heller*, that under the Second Amendment individuals have the right hold and use firearms in their homes for self-defense. 128 S.Ct. 2783 (2008). The Supreme Court also held in *McDonald v. City of Chicago*, that the right to bear arms is a fundamental right. 561 U.S. 742 (2010). Further, the Court held in *New York State Rifle Association, Inc. v. Bruen*, that the Second Amendment protects an individual's right to carry a handgun outside the home for self-defense. *New York State Rifle Ass'n v. Bruen*, 142 S.Ct. 2111 (2022).

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

Response: I am unaware of any Supreme Court or Sixth Circuit precedent stating that the right to own a firearm receives less protection than other individual rights enumerated in the Constitution.

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

Response: I am unaware of any Supreme Court or Sixth Circuit precedent stating that the right to own a firearm receives less protection than the right to vote under the Constitution.

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

Response: As a magistrate judge and a judicial nominee, it is not appropriate for me to offer an opinion on this issue as it is currently being litigated in federal courts. If a case arose before me on this legal issue, I would apply Supreme Court and Sixth Circuit precedent, carefully consider the arguments of the parties, and apply the facts to the law to reach a fair result.

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

Response: Black's Law Dictionary defines prosecutorial discretion as a "a prosecutor's power to choose form the options available in a criminal case, such as filing charges, prosecuting, plea-bargaining, and recommending a sentence to the court." (7th ed. 1999). The distinction between an act of prosecutor discretion and substantive administrative rule change is being litigated in federal courts and as such, I cannot offer an opinion on it as a sitting magistrate judge and judicial nominee.

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

Response: No. The death penalty is governed by 18 U.S.C. § 3591(a).

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

Response: In *Alabama Association of Realtors v. HHS*, plaintiffs successfully sought to enjoin the nationwide eviction moratorium of the Centers for Disease Control and Prevention (CDC) during the COVID-19 pandemic. The district court and court of appeals stayed judgment pending appeal. 141 S.Ct. 2485, 2486 (2021). Plaintiffs opposed the stay. *Id.* The Supreme Court agreed with the district court's conclusion to grant the preliminary injunction given the lack of explicit Congressional authority to the CDC on an issue of "vast economic and political significance." *Id.* at 2489. The Court held that the balance of the equities weighed in favor of vacating the stay of judgment. *Id.* at 2489-90.

42. Since taking the bench you have written only about forty opinions. Only some of those opinions concern criminal matters, and only a portion of this subset concerned detention. Despite this small universe, you had four release orders revoked in criminal cases.

a. What do you attribute that to?

Response: As a magistrate judge, I estimate that I have handled over 100 bond determinations in criminal cases. In every bond determination, I consider the facts and applicable law, including the Bail Reform Act passed by Congress, which requires me to impose "the least restrictive further condition or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.SC. § 3142(c)(1)(B). As the question notes, in a small handful of cases, district judges disagreed with my decisions. I accept those decisions and will continue carefully applying the Bail Reform Act based on the specific facts of every case that comes before me.

b. What factors do you weigh to overcome the statutory presumption of detention?

Response: Where there is a statutory presumption of detention under the Bail Reform Act and 18 U.S.C. § 3142 applies, I analyze whether the defendant has come forward with some credible evidence to rebut the presumption "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community[.]" *See* 18 U.S.C. § 3142(e)(3). The Sixth Circuit has held that this burden of production requires the person to provide "some evidence that he does not pose a danger to the community or a risk of flight." *United States v. Stone*, 608 F.3d 939, 945 (6th Cir. 2010) (internal quotation marks and citations omitted). The Sixth Circuit has held that this burden is "not heavy." *Id.* If the defendant rebuts the presumption, the presumption remains as a factor of consideration alongside the four 18 U.S.C. § 3142(g) factors: nature and seriousness of the offense;

weight of the evidence of risk of flight and dangerousness; personal history and characteristics of the defendant; and nature and seriousness of the danger to any person or the community posed by the defendant's release. *Id*.; 18 U.S.C. § 3142(g).

Senator Ben Sasse
Questions for the Record for Jonathan James Canada Grey
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
November 30, 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: As a magistrate judge, I approach each case with an open mind, consider parties' arguments, apply relevant Supreme Court and Sixth Circuit precedent, consider persuasive legal authority in the absence of precedent, weigh relevant facts, and reach a conclusion applying the law to the facts being mindful at all times of a judge's oath to "administer justice without respect to persons." If confirmed as a district judge, I would follow this same approach.

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

   Response: I have never described myself with a particular label such as an originalist. If confirmed, I would apply Supreme Court and Sixth Circuit precedent interpreting the Constitution and laws.

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

   Response: I have never described myself with a particular label such as a textualist. If confirmed, I would apply Supreme Court and Sixth Circuit precedent interpreting the Constitution and laws. As a magistrate judge, where the text of the law is unambiguous, I apply the text and its plain meaning.

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

   Response: I believe the Constitution is an enduring document.

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 greatly respect all Supreme Court Justices. I have not studied every Supreme Court Justice's jurisprudence in exacting detail. As a sitting magistrate judge I follow

controlling Supreme Court precedent and if confirmed as a district judge I would continue to do so.

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: In the absence of controlling Supreme Court precedent, an appellate court is bound by its own precedent until it is overruled by an en banc decision of the appellate court or by the Supreme Court. Federal Rule of Appellate Procedure 35 applies to en banc considerations. As a magistrate judge, I follow controlling Sixth Circuit precedent and if confirmed as a district judge I would continue to do so.

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: As a magistrate judge, I follow controlling Supreme Court and Sixth Circuit precedent and if confirmed as a district judge I would continue to do so. Interpreting a statute requires the consideration of controlling Supreme Court and Sixth Circuit precedent interpreting the statute. In the absence of such controlling precedent, the plain language of the text of the statute applies. If the text of the statute is ambiguous, I would consult Supreme Court and Sixth Circuit cases on analogous statutes as persuasive authority, cases from other circuits, canons of statutory interpretation. Lastly, I would consult legislative history.

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

    Response: No. As a magistrate judge and if confirmed as a district judge, I would follow the sentencing factors set by applicable precedent of the Supreme Court and the Sixth Circuit and Congress in 18 U.S.C. § 3553(a) which requires that a sentence "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

Senator Josh Hawley
Questions for the Record

Jonathan Grey
Nominee, Eastern District of Michigan

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

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

    Response: I am unaware of Justice Ketanji Brown Jackson's sentencing practices as a district judge. If confirmed as a district judge, I would faithfully apply the Federal Sentencing Guidelines and 18 U.S.C. 3553(a) to any specific facts before me. I would also apply any Supreme Court and Sixth Circuit precedent.

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

    Response: Please see my response to Question 1a.

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

    Response: Please see my response to Question 1a.

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

    Response: Please see my response to Question 1a.

2. **Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.**

    a. **Do you agree that the penalties should be aligned?**

Response: As a sitting magistrate judge and a judicial nominee, I cannot comment on this policy issue. I am obligated to apply federal law as it is written.

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

Response: As a sitting magistrate judge and a judicial nominee, I cannot comment on this policy issue. I am obligated to apply federal law as it is written.

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

Response: I cannot provide an opinion on an issue that might arise before me if I were to be confirmed as a district judge. As a magistrate judge, sentencing is governed by the law and the facts, and I consider the 18 U.S.C. § 3553(a) factors prior to pronouncing a sentence. I also apply any Supreme Court and Sixth Circuit precedent. If I were confirmed as a district judge, I would follow this same approach.

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

a. Do you agree with that philosophy?

Response: I am not aware of that statement by Justice Marshall. In each case, I apply the governing law to the facts.

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

Response: I am required to apply Supreme Court and Sixth Circuit precedent and would continue to do so if confirmed.

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

Response: Yes. The decision of the Supreme Court in *Dobbs v. Jackson Women's Health Organization* is binding precedent.

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

Response: Pullman abstention applies where the resolution of a state law issue by the state court would eliminate the need for the federal court to decide a federal constitutional issue. *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). "Pullman abstention instructs courts to avoid exercising jurisdiction in cases involving an ambiguous state statute that may be interpreted by state courts so as to eliminate, or at least alter materially, the constitutional question raised in federal court." *Fowler v. Benson*, 848 F.3d 247, 255 (6th Cir. 2017).

"The Younger abstention doctrine, meanwhile, cautions federal courts against exercising jurisdiction in cases where they are asked to enjoin pending state proceedings." *Fowler v. Benson*, 848 F.3d 247, 255 (6th Cir. 2017) (citing *Younger v. Harris*, 401 U.S. 37 (1977)).

Burford abstention avoids federal involvement where there is a complex state regulatory scheme or an issue of great importance to the state. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). In the Sixth Circuit, "Burford abstention applies only to statewide policy rather than local policy." *Saginaw Housing Comm. v. Bannum, Inc.*, 567 F.23d 620, 628 (6th Cir. 2009).

Under *Colorado River Water Conservation District v. United States*, a federal court may dismiss or stay an action where there are parallel state court proceedings. 424 U.S. 800 (1976). 424 U.S. 800 (1976). The Sixth Circuit provides for the following balancing test based upon the specific facts of the case: "(1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; and (4) the order in which jurisdiction was obtained .... (5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and, (8) the presence or absence of concurrent jurisdiction." *Romine v. Compuserve Corp.*, 160 F.3d 337, 340-41 (6th Cir. 1998).

The *Rooker/Feldman* doctrine requires that lower federal courts abstain from serving as appellate courts after a state's highest court has rendered a decision. *Anderson v. Charter Twp. of Ypsilanti*, 266 F.3d 487, 492 (6th Cir. 2001) (citing *District of Columbia Ct. of Appeals v. Feldman,* 460 U.S. 462, 476 (1983)).

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

   Response: No.

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

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

   Response: I apply Supreme Court and Sixth Circuit precedent as a magistrate judge and would continue to do so if confirmed as a district judge. In the Second Amendment context, the Supreme Court in *District of Columbia v. Heller* directed that the original public meaning of the Constitution's text governs. 128 S. Ct. 2783 (2008). I would apply this precedent and any other precedent governing statutory interpretation of the Constitution.

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

   Response: Where the text of a statute is unambiguous, the plain language governs and legal analysis ends after the text is applied to the relevant facts. If the text is ambiguous, I apply Supreme Court and Sixth Circuit precedent, consult principles of statutory interpretation, review similar statutes in Supreme Court and Sixth Circuit precedent. As a last resort, I consider legislative history.

   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: In *Garcia v. United States*, the Supreme Court identified committee reports on a bill as "the authoritative source for finding the Legislature's intent." 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: It is not appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution.

9. **Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that**

applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

Response: For Eighth Amendment challenges to an execution protocol, the Supreme Court has held that a prisoner "must identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 877, 880 (2015) (internal quotation marks omitted) The Sixth Circuit follows the same standard. *Middlebrooks v. Parker*, 15 F.4th 784, 788 (6th Cir. 2021); *In re Ohio Execution Protocol*, 860 F.3d 881 (6th Cir. 2017).

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

    Response: Yes. *See Glossip v. Gross*, 576 U.S. 877-80 (2015).

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

    Response: No. The Supreme Court held in *District Attorney's Office for the Third Judicial District v. Osborne*, that the Constitution's substantive due process clause does not require DNA analysis for a habeas petitioner. 557 U.S. 52, 73-75 (2009). The Sixth Circuit held the same in *In re Smith*. 349 F. App'x 12, 15 (6th Cir. 2009)

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

    Response: No.

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

    Response: According to Supreme Court precedent, governmental action that burdens the free exercise of religion is subject to strict scrutiny if it is not facially neutral or generally applicable. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297-98; *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *Fulton v.*

City of Philadelphia 141 S. Ct. 1868 (2021). Where discretionary exceptions exist for secular activity rather than religious activity, the governmental action is not neutral and generally applicable. *Id.* To survive strict scrutiny, the restriction must be narrowly tailored to meet a compelling government interest. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

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

Response: Please see my response to Question 13.

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

Response: Sincerely held religious beliefs invoke protection under the First Amendment's Free Exercise clause even if the beliefs are outside the "commands of a particular religious organization." *Frazee v. Ill. Dep't of Empl. Sec.*, 109 S. Ct. 1514, 1517-18 (1989). Citing the Supreme Court, the Sixth Circuit has held that courts must determine whether the plaintiff's conduct reflects "an honest conviction" "consistent . . . with her . . . religious beliefs." *Fox v. Washington*, 949 F.3d 270, 277 (6th Cir. 2020) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014)).
Sincerely held religious beliefs invoke protection under the First Amendment. *Frazee v. Ill. Dep't of Empl. Sec.*, 109 S. Ct. 1514, 1517-18 (1989).

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

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

Response: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects law abiding citizen's right to bear firearms in their homes and carry handguns outside their homes for self-defense. 128 S. Ct. 2783 (2008).

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

Response: No.

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

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

Response: Justice Holmes articulated his view in the dissent to *Lochner v. New York* that the Constitution does not embody any particular economic theory. If confirmed, I would apply all Supreme Court and Sixth Circuit precedent.

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

Response: Upon information and research, *Lochner v. New York*, 198 U.S. 45 (1905) was abrogated by Supreme Court decisions including *West Coast Hotel v. Parrish,* 300 U.S. 379 (1937). If confirmed, I would apply all Supreme Court and Sixth Circuit precedent.

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

Response: Yes, upon research and belief.

a. If so, what are they?

Response: Upon research and belief, *Dred Scott v. Sandford*, 60 U.S. 393 (1857) was never formally overruled by the Supreme Court, but the ratification of the Thirteenth and Fourteenth Amendments made it no longer good law.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: I am unable to express an opinion on Judge Hand's statement. I would apply all Supreme Court and Sixth Circuit precedent to the question of what constitutes a monopoly if confronted with that legal issue. While the Supreme Court has never articulated a specific numerical value of market share that constitutes a monopoly, the Sixth Circuit has noted that "where the market share is 75-80% or greater, this should be regarded as a starting point" to assess whether a monopoly exists. *Byars v. Bluff City News Co.*, 609 F.2d 843, 850 (6th Cir. 1979).

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

Response: Please see my response to Question 19 above.

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 response to Question 19 above.

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

Response: The Supreme Court has not recognized "federal common law" but noted that in limited circumstances, federal courts may "craft the rule of decision" in areas such as admiralty. *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020).

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

Response: A federal court applying state law looks to rules of decisions of the state's highest courts. *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348, 364 (6th Cir. 2018). I would apply all relevant Supreme Court and Sixth Circuit precedent if confronted with this issue.

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

Response: Please see my response to Question 21.

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

Response: Please se my response to Question 21.

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

Response: As a magistrate judge and a federal judicial nominee bound by the Code of Conduct for United States Judges, generally it is inappropriate for me to comment on whether the United States Supreme Court correctly decided a case. However, the issues litigated in *Brown v. Board of Education* are unlikely to be litigated in the future. I view this case as an exception to the general rule preventing me from offering an opinion on Supreme Court decisions. The Court correctly decided the case. As a magistrate judge I faithfully apply all Supreme Court and Sixth Circuit precedent and would continue to do so if confirmed as a district judge.

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

Response: If confirmed, I would apply Federal Rule of Civil Procedure 65 as well as Supreme Court and Sixth Circuit precedent to a request for an injunction. The legal authority to issue nationwide injunctions is being litigated right now, and as a sitting magistrate judge and judicial nominee, I cannot provide an opinion on a case likely to come before me if confirmed.

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

Response: Please see my response to Question 23a.

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

Response: Please see my response to Question 23a.

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

Response: If confirmed, I would apply Federal Rule of Civil Procedure 65 as well as Supreme Court and Sixth Circuit precedent to a request for an injunction. The Sixth Circuit has articulated the following questions to apply to a request for an injunction:

Has the plaintiff established "that he is likely to succeed on the merits"? Would the plaintiff likely suffer "irreparable harm in the absence of preliminary relief"? Does the "balance of equities" tip in the plaintiff's favor? And does "the public interest" favor an injunction? *Arizona v. Biden*, 31 F.4th 375 (6th Cir. 2022).

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

Response: The Constitution provides for a division of powers between the federal government and the states and enumerates limited, specific powers that the federal government possesses.

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

Response: Please see my response to Question 5.

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

Response: If confirmed and faced with a determination of whether to award injunctive relief, I would balance the following four factors the Sixth Circuit has directed district courts to use: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *ACLU of Kentucky v. McCreary County, Kentucky*, 354 F.3d 438, 445 (6th Cir. 2003) (internal quotation marks omitted). I would apply all relevant Supreme Court and Sixth Circuit precedent to determine whether to award damages and/or injunctive relief.

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

Response: In *Washington v. Glucksberg*, the Supreme Court held that substantive due process protects fundamental rights "deeply rooted in this Nation's history and tradition" which are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." 521 U.S. 702, 720-21 (1997) (internal quotation marks and citation omitted). Such fundamental rights include the right to marital privacy and the right to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015), *Loving v. Virginia*, 388 U.S. 1 (1967); the right to bodily integrity, *Rochin v.*

California, 342 U.S. 165 (1952); the right to have children and right to direct children's upbringing, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); and the right to refuse unwanted medical treatment, *Cruzan v. Dir. Missouri Dep't of Health*, 497 U.S. 261 (1990).

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

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

Response: According to Supreme Court precedent, governmental action that burdens the free exercise of religion is subject to strict scrutiny if it is not facially neutral or generally applicable. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297-98; *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018); *Fulton v. City of Philadelphia* 141 S. Ct. 1868 (2021). Where discretionary exceptions exist for secular activity rather than religious activity, the governmental action is not neutral and generally applicable. *Id.* To survive strict scrutiny, the restriction must be narrowly tailored to meet a compelling government interest. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

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

Response: The Free Exercise clause of the First Amendment protects the freedom of worship and to believe or not believe. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014).

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: According to Supreme Court precedent, governmental action that burdens the free exercise of religion is subject to strict scrutiny if it is not facially neutral or generally applicable. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297-98; *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia* 141 S. Ct. 1868 (2021). Where discretionary exceptions exist for secular activity rather than religious

activity, the governmental action is not neutral and generally applicable. *Id.* To survive strict scrutiny, the restriction must be narrowly tailored to meet a compelling government interest. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

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: Sincerely held religious beliefs invoke protection under the First Amendment's Free Exercise clause even if the beliefs are outside the "commands of a particular religious organization." *Frazee v. Ill. Dep't of Empl. Sec.*, 109 S. Ct. 1514, 1517-18 (1989). Citing the Supreme Court, the Sixth Circuit has held that courts must determine whether the plaintiff's conduct reflects "an honest conviction" "consistent . . . with her . . . religious beliefs." *Fox v. Washington*, 949 F.3d 270, 277 (6th Cir. 2020) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014)).

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

Response: The Religious Freedom Restoration Act applies to all federal laws and prevents neutral applications of federal law from substantially burdening the free exercise of religion unless the law is in furtherance of a compelling governmental interest and narrowly tailored. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705 (2014).

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

Response: No.

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

a. What do you understand this statement to mean?

Response: From my understanding, this statement means that a judge should rule based upon the law and facts without regard to the judge's personal feelings.

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

Response: No.

a. If yes, please provide appropriate citations.

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

Response: No.

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

Response: I have not studied this question in depth and there are many definitions of the phrase "systemically racist." If confirmed as a district judge, I would address any claims of racial discrimination by applying Supreme Court and Sixth Circuit precedent and all relevant law, carefully analyzing the facts, considering the parties' arguments, and applying the law to the facts to reach a fair decision.

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

Response: Yes.

35. How did you handle the situation?

Response: I fulfilled my professional and ethical obligations as a legal advocate for clients.

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

Response: Yes.

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

Response: No specific Federalist Paper has particularly shaped my views of the law.

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

Response: As a magistrate judge and a judicial nominee, I cannot provide an opinion on this question.

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

Response: No.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: No.

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

43. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

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

Response: My understanding of the duty of candor in testifying before the Senate Judiciary Committee and answering questions of the committee requires that nominees testify truthfully and provide truthful answers to these questions. I testified truthfully at the hearing under oath and have provided truthful answers to these written questions.

Questions from Senator Thom Tillis
for Jonathan James Canada Grey
Nominee to be United States District Judge for the Eastern District of Michigan

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

   Response: Yes.

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

   Response: According to Black's Law Dictionary, "judicial activism" is "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Black's Law Dictionary (11th ed. 2019). No, I do not consider this approach appropriate, according to the definition of "judicial activism" provided by Black's Law Dictionary (11th ed. 2019). Judgments issued by judges must be based upon application of precedent to specific facts. As a magistrate judge, I approach each case with an open mind, consider parties' arguments, apply relevant Supreme Court and Sixth Circuit precedent, consider persuasive legal authority in the absence of precedent, weigh relevant facts, and reach a conclusion applying the law to the facts being mindful at all times of a judge's oath to "administer justice without respect to persons." If confirmed as a district judge, I would follow this same approach.

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

   Response: I believe impartiality is an expectation for a judge.

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

   Response: No.

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

   Response: Yes. A judge's role is to reach a fair and impartial decision based upon the application of controlling precedent to the applicable facts. This neutral approach does not change based upon the outcome.

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: I will faithfully apply all Supreme Court and Sixth Circuit controlling decisions concerning the Second Amendment, including *District of Columbia v. Heller*, *McDonald v. City of Chicago,* and *New York Rifle Association v. Bruen*.

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

   Response: I would faithfully apply all Supreme Court and Sixth Circuit precedent in such a case, including *District of Columbia v. Heller*, *McDonald v. City of Chicago,* and *New York Rifle Association v. Bruen*. I would determine whether such a policy was "consistent with this Nation's historical tradition of firearm regulation" as the Supreme Court directed in *Bruen*. 142 S.Ct. 2111, 2126 (2022). I would carefully apply all Supreme Court and Sixth Circuit precedent. If confronted with the issue of whether a local official should be able to use a crisis such as COVID-19 to limit someone's constitutional rights, I would apply all Supreme Court and Sixth Circuit precedent, including *Tandon v. Newsom*, 141 S.Ct. 1294 (2021), which analyzed constitutional rights during the COVID-19 pandemic. I would analyze the law and apply it to the specific facts. If confronted with the issue of whether a pandemic limits someone's constitutional rights, I would apply Supreme Court and Sixth Circuit precedent and all relevant law, carefully analyze the facts, consider the parties' arguments, and apply the law to the facts to reach a fair decision.

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

   Response: I would apply Supreme Court and Sixth Circuit precedent, including *Saucier v. Katz*, 533 U.S. 194, 201 (2001) and its two-step test. The first step requires a reviewing court to determine, in the light most favorable to the plaintiff, "whether the facts alleged show the officer's conduct violated a constitutional right." *Id.* If the facts could establish the violation of a constitutional right, "the next, sequential step is to ask whether the right was clearly established." *Id.* "This inquiry turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (internal quotation marks and citation omitted). If the right was not clearly established, the court need not consider the first step and must grant qualified immunity to law enforcement personnel and departments. *Id.* at 242. Qualified immunity does not apply if both steps are resolved in the affirmative. *Id.* at 227.

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: Whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers is a question for policymakers to consider. As a sitting magistrate judge and a judicial nominee, I follow all Supreme Court and Sixth Circuit precedent.

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

Response: As a sitting magistrate judge and judicial nominee, I cannot offer an opinion on the proper scope of qualified immunity protections for law enforcement as it is a question for policymakers.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: As a sitting magistrate judge and a judicial nominee, I am unable to express an opinion on the Supreme Court's patent eligibility jurisprudence. I would faithfully apply all Supreme Court and Sixth Circuit precedent on patent eligibility, including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); *Mayo Collaborative Svs. v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); and *Bilski v. Kappos*, 561 U.S. 593 (2010).

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

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

Response: As a sitting magistrate judge and a judicial nominee, I am unable to opine on this hypothetical. If confirmed, I would apply all Supreme Court and Sixth Circuit jurisprudence to the facts including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); *Mayo Collaborative Svs. v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); and *Bilski v. Kappos*, 561 U.S. 593 (2010).

b. *FinServCo* develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology.

Should *FinServCo's* business method standing alone be eligible? What about the business method as practically applied on a computer?

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

a. What experience do you have with copyright law?

Response: As a sitting magistrate judge I have handled discovery matters in cases involving copyright law.

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

Response: I have not adjudicated any cases involving the Digital Millennium Copyright Act as a sitting magistrate judge. In private practice and government service, I have not had any experience 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: None.

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

Response: I have handled First Amendment and free speech claims in prisoner litigation involving 42 U.S.C. § 1983 claims. I have not handled copyright claims addressing free speech as a magistrate judge and did not practice in this area prior to serving as a magistrate judge.

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

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

Response: When interpreting a statute, I analyze the text of the statute. If there is no ambiguity, then the analysis ends, and I apply the plain meaning of the text of the statute to any relevant facts and reach a just result. If there is ambiguity in the text of the statute, I consult Supreme Court and Sixth Circuit precedent, principles of statutory construction, and precedential authority interpreting similar text. As a last option, I consult legislative history.

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

Response: If confirmed and faced with this issue, I would apply Supreme Court and Sixth Circuit precedent, and consider whether deference applies to the agency's advice and analysis. "*Chevron* [deference] requires a reviewing court to give effect to an agency's reasonable interpretation (offered in the form of an agency regulation) of an ambiguous statute" but "is not required where the interpretation is offered via an informal medium—such as an opinion letter, agency manual, policy statement, or enforcement guideline—that lacks the force of law." *Chao v. OSHA*, 540 F.3d 519, 527 (6th Cir. 2008) (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)). In the absence of "notice-and-comment rulemaking," an agency's advice and analysis receives "limited *Skidmore* deference . . . that 'depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Chao*, 540 F.3d at 526 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

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

Response: As a magistrate judge and judicial nominee, I am unable to opine on this policy question.

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

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

Response: Judges regularly apply laws passed before the advent of new technology and consider new laws passed by policymakers. I would apply all Supreme Court and Sixth Circuit precedent if confirmed.

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 17a.

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

a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

Response: As a sitting magistrate judge, I focus on being fair and impartial and well-prepared. If confirmed, I would continue to do so. I would never engage in any type of effort to encourage "judge shopping" or "forum shopping." I am unable to offer an opinion on this policy question as a sitting magistrate judge and judicial nominee.

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 18a.

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

Response: No.

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

Response: If confirmed, I would not seek to attract a particular type of case or litigant and would apply Supreme Court and Sixth Circuit precedent to any issue that arose before me.

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

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

Response: As a sitting magistrate judge and a judicial nominee, I cannot offer an opinion on this question.

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

Response: Please see my response to Question 19a.

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

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

Response: Please see my response to Question 19a.

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

Response: Please see my response to Question 19a.

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

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

Response: As a magistrate judge and a judicial nominee, it would be inappropriate for me to provide an opinion on a district judge's behavior.

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

Response: Please see my response to Question 21a.