Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Elizabeth Hanes
Nominee to be United States District Judge for the Eastern District of Virginia

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

   Response: As a United States Magistrate Judge and practicing lawyer, I have not personally used the term "super precedent." I am not aware of any Supreme Court or Fourth Circuit precedent that uses the term "super precedent." If confirmed as a United States District Judge I would faithfully apply all precedents of the Supreme Court and Fourth Circuit.

2. **Should law clerks leak draft opinions?**

   Response: No.

3. **Is defacing the building of a religious institution because of that particular religion's beliefs a hate crime?**

   Response: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249, criminalizes acts which attempt to or cause "bodily injury to any person" because of the "actual or perceived race, color, religion, or national origin" of the person. Additionally, 18 U.S.C. § 247 criminalizes, among other things, defacing, damaging, or destroying any religious property because of the religious character of that property, or obstructing—by force or threat of force—any person in the free exercise of their religious beliefs. If a case came before me where the federal government charged individuals with violations of either of these statutes, I would carefully apply these laws and any other relevant statutes to the facts of the case.

4. **Should the Department of Justice and the Federal Bureau of Investigation investigate threats of violence against members of any religion?**

   Response: Congress has made clear that acts that violate federal laws like 18 U.S.C. § 247, are to be taken very seriously and punished accordingly. The decision of which specific crimes to investigate and charge lies with the executive branch and its representatives.

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

   Response: Section 1507 of Title 18 establishes a misdemeanor offense which criminalizes, among other things, the act of picketing or parading in or near a courthouse or residence of a judge, juror, witness, or court officer "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing" the judge, juror, witness, or court officer, in the discharge of his duty.

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

   Response: To the best of my knowledge and based on my research, the Supreme Court and Fourth Circuit have not considered or ruled on whether 18 U.S.C. § 1507 is constitutional. However, a Louisiana statute with similar language was held facially valid and as applied in *Cox v. Louisiana*, 379 U.S. 559 (1965); *see also United States v. Grace*, 461 U.S. 171, 186–87 (1983) (Marshall, J., concurring in part) (explaining that 18 U.S.C. § 1507 was a "far cry" from 40 U.S.C. § 13k, which the Court found unconstitutional as applied to the facts of that case). As a United States Magistrate Judge, it would otherwise not be appropriate for me to opine on whether this statute is constitutional.

7. **Under Supreme Court and Fourth Circuit precedent, what determines a person's biological sex?**

   Response: To the best of my knowledge and research, neither the Supreme Court nor the Fourth Circuit have considered or ruled on what determines a person's biological sex. I am aware that the Supreme Court, in *Bostock v. Clayton County*, 590 U.S. __ (2020), held that discrimination against a person for being transgender is discrimination "on the basis of sex" in violation of Title VII of the Civil Rights Act of 1964. Additionally, the Fourth Circuit, in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), held that a bathroom policy precluding a transgender youth from using the boys' restroom discriminated against him "on the basis of sex" in violation of Title IX of the Education Amendments of 1972. I am aware that the Fourth Circuit in *Grimm* discussed the policy at issue, including its reference to the transgender student's "biological gender," which the school board defined as "the sex marker on his birth certificate." *Id*. at 616. The Fourth Circuit concluded that such a policy "necessarily rests on a sex classification," requiring the application of intermediate scrutiny. *Id*. at 608. The Fourth Circuit found that the school board's "policy is not substantially related to its important interest of protecting students' privacy." *Id*. at 613. The Supreme Court denied certiorari, meaning that the Fourth Circuit's holding in *Grimm* is binding in the Fourth Circuit. 141 S. Ct. 2878 (Mem.) (2021).

8. **Under Supreme Court and Fourth Circuit precedent, can a person change his or her biological sex?**

   Response: To the best of my knowledge and research, neither the Supreme Court nor the Fourth Circuit have considered or ruled on whether a person can change his or her biological sex. I am aware that the Supreme Court, in *Bostock v. Clayton County*, 590 U.S. __ (2020), held that discrimination against a person for being transgender is discrimination "on the basis of sex" in violation of Title VII of the Civil Rights Act of 1964. Additionally, the Fourth Circuit, in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), held that a bathroom policy precluding a transgender youth from using the boys' restroom discriminated against him "on the basis of sex" in violation of Title IX of the Education Amendments of 1972. I am aware that the Fourth Circuit in *Grimm* discussed the policy at issue, including its reference to the transgender

student's "biological gender," which the school board defined as "the sex marker on his birth certificate." *Id*. at 616. The Fourth Circuit concluded that such a policy "necessarily rests on a sex classification," requiring the application of intermediate scrutiny. *Id*. at 608. The Fourth Circuit found that the school board's "policy is not substantially related to its important interest of protecting students' privacy." *Id*. at 613. The Supreme Court denied certiorari, meaning that the Fourth Circuit's holding in *Grimm* is binding in the Fourth Circuit. 141 S. Ct. 2878 (Mem.) (2021).

9. **Under Supreme Court and Fourth Circuit precedent, are schools be permitted to assist minor student in "transitioning" from one sex to the other without the consent of the student's parents?**

   Response: To the best of my knowledge and research, neither the Supreme Court nor the Fourth Circuit have considered or ruled on this question.

10. **Do parents have a right to know what pronouns their son or daughter's teacher is using to refer to their son or daughter?**

    Response: To the best of my knowledge and research, neither the Supreme Court nor the Fourth Circuit have considered or ruled on this question.

11. **Under the Supreme Court's First Amendment jurisprudence, can someone shout "fire" in a crowded theater?**

    Response: Justice Oliver Wendell Holmes, in *Schenck v. United States*, wrote: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic." 249 U.S. 47, 52 (1919). More recent Supreme Court jurisprudence, such as *Brandenburg v. Ohio*, 395 U.S. 444 (1969) and *Stewart v. McCoy*, 537 U.S. 993 (2002), would likely govern this question. Otherwise, as a sitting United States Magistrate Judge and judicial nominee, it is inappropriate for me to comment on whether I believe the conduct described above is constitutional.

12. **Do you agree with the Supreme Court's statement in *Bostock v. Clayton County*, 590 U.S. ___ (2020), that the Free Exercise Clause lies at the heart of a pluralistic society? If so, does that mean that the Free Exercise Clause legally requires that religious organizations and individuals should be free to act consistently with their beliefs in the public square?**

    Response: If confirmed as a United States District Judge, I will faithfully apply all binding Supreme Court and Fourth Circuit precedent, including *Bostock v. Clayton County*.

13. **During your time as a state public defender, did the Government ever employ strategic communications firms in supporting their prosecutions? How would you have reacted if they did?**

Response: I have never served as a state public defender. During my time as an Assistant Federal Public Defender, to my knowledge, I did not participate in any case in which the Government employed a strategic communications firm in supporting its prosecutions. My reaction would have depended on the role of the firm in the specific prosecution and whether such use could be deemed to violate applicable rules of the court or professional conduct.

14. **During your years as a criminal-defense lawyer did you ever raise a Second Amendment defense on behalf of your clients?**

    Response: To the best of my knowledge, no.

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

    Response: According to binding precedent, the Constitution guarantees an individual the right to counsel at all critical stages of criminal proceedings in which incarceration is a possible punishment. The Constitution grants no categorical right to counsel in civil cases.

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

    Response: I have not encountered this issue in my career as a practicing attorney or as a United States Magistrate Judge. I would leave any such decisions to each law firm to decide this question.

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

    Response: No. Such a practice likely would violate an attorney's duty of undivided loyalty and constitute a concurrent conflict of interest.

18. **Is it possible for private parties—like law firms, retired prosecutors, or retired judges—to prosecute federal criminals in the absence of charges being actively pursued by federal authorities?**

    Response: Private citizens do not have the right to institute a criminal prosecution. *Linda R. v. Richard V.*, 410 U.S. 614, 619 (1973) ("In American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."); *see also Ras-Selah: 7 Tafari: El v. Glasser & Glasser PLC*, 434 F. App'x 236 (4th Cir. 2011) (unpublished per curiam opinion) ("A private person may not initiate a criminal action in the federal courts.").

19. Should a judge stay discovery during the pendency of dispositive motions? Why or why not?

Response: A United States District Judge has the discretion to stay discovery pursuant to Federal Rule of Civil Procedure 26(c), which provides that a "Court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). In determining whether a stay is appropriate, the Court should consider the specific factual allegations of harm or prejudice asserted by the moving party, the costs and benefits of a delay, and the objectives of Federal Rule of Civil Procedure 1 to ensure a "just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.

20. 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 United States Magistrate Judge, I am bound to apply all binding Supreme Court and Fourth Circuit precedent. As such, it is generally inappropriate for me to comment on whether any binding Supreme Court precedent was correctly decided. However, there are certain Supreme Court decisions that are so fundamental and widely accepted that they present an exception to this rule. Consistent with the responses of other nominees, I believe *Brown v. Board of Education* was correctly decided.

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

Response: As a United States Magistrate Judge, I am bound to apply all binding Supreme Court and Fourth Circuit precedent. As such, it is generally inappropriate for me to comment on whether any binding Supreme Court precedent was correctly decided. However, there are certain Supreme Court decisions that are so fundamental and widely accepted that they present an exception to this rule. Consistent with the responses of other nominees, I believe *Loving v. Virginia* was correctly decided.

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

Response: If confirmed as a United States District Judge, I will faithfully apply all binding Supreme Court and Fourth Circuit precedent. Otherwise, as a sitting United States Magistrate Judge and judicial nominee, it is inappropriate for me to comment on whether I believe a case is correctly decided.

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

Response: The Supreme Court, in *Dobbs v. Jackson Women's Health*, ___ S. Ct. ___, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022), explicitly overruled *Roe v. Wade*. If confirmed as a United States District Judge, I will faithfully apply

all binding Supreme Court and Fourth Circuit precedent. Otherwise, as a sitting United States Magistrate Judge and judicial nominee, it is inappropriate for me to comment on whether I believe a case is correctly decided.

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

Response: The Supreme Court, in *Dobbs v. Jackson Women's Health*, ___ S. Ct. ___, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022), explicitly overruled *Planned Parenthood v. Casey*. If confirmed as a United States District Judge, I will faithfully apply all binding Supreme Court and Fourth Circuit precedent. Otherwise, as a sitting United States Magistrate Judge and judicial nominee, it is inappropriate for me to comment on whether I believe a case is correctly decided.

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

Response: If confirmed as a United States District Judge, I will faithfully apply all binding Supreme Court and Fourth Circuit precedent. Otherwise, as a sitting United States Magistrate Judge and judicial nominee, it is inappropriate for me to comment on whether I believe a case is correctly decided.

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

Response: If confirmed as a United States District Judge, I will faithfully apply all binding Supreme Court and Fourth Circuit precedent. Otherwise, as a sitting United States Magistrate Judge and judicial nominee, it is inappropriate for me to comment on whether I believe a case is correctly decided.

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

Response: If confirmed as a United States District Judge, I will faithfully apply all binding Supreme Court and Fourth Circuit precedent. Otherwise, as a sitting United States Magistrate Judge and judicial nominee, it is inappropriate for me to comment on whether I believe a case is correctly decided.

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

Response: If confirmed as a United States District Judge, I will faithfully apply all binding Supreme Court and Fourth Circuit precedent. Otherwise, as a sitting United States Magistrate Judge and judicial nominee, it is inappropriate for me to comment on whether I believe a case is correctly decided.

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

Response: If confirmed as a United States District Judge, I will faithfully apply all binding Supreme Court and Fourth Circuit precedent. Otherwise, as a sitting United States Magistrate Judge and judicial nominee, it is inappropriate for me to

comment on whether I believe a case is correctly decided.

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

Response: If confirmed as a United States District Judge, I will faithfully apply all binding Supreme Court and Fourth Circuit precedent. Otherwise, as a sitting United States Magistrate Judge and judicial nominee, it is inappropriate for me to comment on whether I believe a case is correctly decided.

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

Response: No.

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

Response: No.

22. **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, I did not talk with any officials from or anyone directly associated with the organization Demand Justice. To the best of my knowledge, no one did so on my behalf.

23. **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, I did not talk with any officials from or anyone directly associated with the American Constitution Society. To the best of my knowledge, no one did so on my behalf.

24. **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, I did not talk with any officials from or anyone directly associated with Arabella Advisors. To the best of my knowledge, no one did so on my behalf.

25. **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, I did not talk with any officials from or anyone directly associated with the Open Society Foundation. To the best of my knowledge, no one did so on my behalf.

26. **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.

27. **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."**
    d. **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.

    e. **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.

    f. **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.

28. **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."**

    g. **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.

    h. **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.

    i. **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.

    j. **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.

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

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

    Response: No.

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

    Response: No.

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

Response: No.

30. **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."**

    n. **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.

    o. **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.

    p. **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.

31. **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.**

    q. **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.

    r. **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.

    s. **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.

32. **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 June 21, 2021, Senators Mark R. Warner and Timothy M. Kaine announced they were accepting applications for the position of United States District Court Judge for the Eastern District of Virginia to succeed United States District Court Judge John A. Gibney, Jr. On July 19, 2021, I submitted an application to the Senators. On September 17, 2021, I interviewed with the Senators' Committee. Based upon the Committee's recommendation, I was interviewed by Senators Warner and Kaine on October 29, 2021, and October 27, 2021, respectively. On November 8, 2021, I interviewed with attorneys from the White House Counsel's Office. On April 27, 2022, the President announced his intention to nominate me.

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

    Response: I received the questions by email on June 29, 2022, and immediately began preparing my responses. In responding to some questions, I relied on or referred to my Senate Judiciary Questionnaire and legal research of constitutional and statutory provisions, as well as case precedent of the Supreme Court and Fourth Circuit. I shared my responses with employees of the Department of Justice, Office of Legal Policy, Judicial Nominations staff, who offered feedback on some of my responses.

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

Questions for the Record for Judge Elizabeth Hanes, Nominee for the Eastern District of Virginia

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. The Fourteenth Amendment, for example, prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws," which has been interpreted as preventing the government from discriminating between persons on the basis of race. Additionally, there are federal statutes prohibiting racial discrimination in employment, public accommodations, and various other contexts.

2. **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: For the past two years, I have been honored to serve as a United States Magistrate Judge in the United States District Court for the Eastern District of Virginia. As a judge, I am guided by several principles when I consider each case. First, I consider it my role to be fair and impartial in every case while treating the parties and their counsel with respect. I always endeavor to prepare as thoroughly as possible by diligently reviewing the facts and the law applicable to the case. I ensure that I respectfully engage with the parties, which requires that I listen to and consider the facts and arguments both sides present, and to avoid prejudgment before I have had a full chance to do so. I consider the arguments and the facts impartially and practice judicial restraint, which requires that I only decide the issue or case before me based on the facts and the law. Finally, my role requires that I not allow my personal opinions or beliefs to impact my decision or to lead me to a particular result. After I have decided a matter, I seek to render a prompt decision and to explain it in concise "plain English" because I want my decisions to be accessible by all parties and the public at large. And finally, throughout this process, I recognize that I am obligated to follow Supreme Court and Fourth Circuit precedent.

   I have not researched or studied the judicial philosophies of the Supreme Court Justices from the Warren, Burger, Rehnquist, and Roberts Courts. Additionally, I currently serve as a United States Magistrate Judge (and, if confirmed, as a United States District Court Judge)—positions which are both at the trial level rather than the appellate level. Given that the work of these positions is significantly different than that of a Supreme Court Justice, I cannot identify a Supreme Court Justice whose philosophy is most analogous with mine.

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

   Response: Black's Law Dictionary defines "originalism" as a "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). The Supreme Court has applied originalism in certain constitutional contexts, such as adjudicating Second Amendment rights. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). I have never applied a specific label related to a theory of constitutional interpretation to myself. If confirmed, I would faithfully apply all binding precedent.

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

   Response: Black's Law Dictionary defines "living constitutionalism" as a doctrine in which "the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). I have never applied a specific label related to a theory of constitutional interpretation to myself. If confirmed, I would faithfully apply all binding precedent.

5. **In 2021, at a reception and awards ceremony for the Metropolitan Richmond Women's Bar Association, you noted: "often, courts are the impetus to change, but sometimes courts are responsive, they respond to the change in society."**

   a. **What type of societal change were you referring to when you made this statement?**

      Response: In that portion of my speech, I was making a historical observation that the Supreme Court's decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), was a landmark decision that was the impetus of significant social change in our country. In that way, "courts are the impetus to change." Other times, the courts are responsive, in that as society changes the legislative and executive branches change or modify existing laws, and the courts subsequently review or interpret those laws.

   b. **What do you believe is the proper role of the federal court in deciding matters of public policy?**

      Response: Matters of public policy should be decided by the legislative and executive branches. The proper role of a federal court is to leave those matters to the legislative and executive branches.

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: Yes, if such meaning comports with the text of the Constitution itself, which in all events must govern. Where a constitutional or statutory provision is unambiguous, the court should apply the plain meaning of the constitutional or statutory language. *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015).

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: Generally, no. When interpreting a constitutional or statutory provision, judges should be guided by the plain language of the constitutional or statutory provision and applicable precedent. However, one context in which the Supreme Court has considered the

public's understanding is in considering Eighth Amendment issues. *See*, *e.g., Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (explaining that "[a] claim that punishment is excessive is judged not by the standards that prevailed in 1685 . . . but rather by those that currently prevail") If presented with this type of issue, I would consider the public's current understanding only if such an approach is consistent with Supreme Court precedent.

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

   Response: No. The text of the Constitution is fixed unless it is amended. In some contexts, the Supreme Court has explained that "our understanding of" particular constitutional provisions "has evolved over time." *Gonzales v. Raich*, 545 U.S. 1, 15–16 (2005). For instance, the Supreme Court has held that the phrase "cruel and unusual," as used in the Eighth Amendment, "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958). In contrast, in other contexts, the Supreme Court has explained that particular constitutional provisions must be interpreted based on the original meaning of the provision. For example, the Supreme Court has interpreted the Second Amendment as it would "have been known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008). If confirmed, I would strictly follow the guidance set forth by the Supreme Court.

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

   Response: The Supreme Court, in *Dobbs v. Jackson Women's Health Organization*, reiterated that certain substantive rights, although not mentioned in the Constitution, are nevertheless protected by the Due Process Clause where those unenumerated rights are "deeply rooted in [our] history and tradition and whether it is essential to our Nation's scheme of ordered liberty." *Dobbs*, ___ S. Ct. ___, 2022 WL 2276808, at *10 (2022) (internal punctuation and citations omitted). As a United States Magistrate Judge and member of the judicial branch, it would not be appropriate for me to provide an advisory opinion whether there are any yet unarticulated unenumerated rights in the Constitution.

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

    Response: *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent. If confirmed, I would faithfully follow this and all other binding precedent.

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

    Response: *New York Rifle & Pistol Association v. Bruen* is binding Supreme Court precedent. If confirmed, I would faithfully follow this and all other binding precedent.

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

Response: Yes. The Establishment Clause and Free Exercise Clause of the First Amendment generally limit what the government can require or prohibit of religious organizations. For example, strict scrutiny applies where the government shows preference for one religion over another, *Board of Education v. Grumet*, 512 U.S. 687 (1994), or treats any comparable secular activity more favorably than religious exercise. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). The government also cannot impose burdens on a religious belief, require a belief affirmation, or determine whether a religious belief is objectively reasonable. *See United States v. Ballard*, 322 U.S. 78 (1944); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

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

Response: Under the Free Exercise Clause of the First Amendment, the government is only permitted to regulate religious activity in a manner different than comparable secular activity if the discriminatory law or regulation is narrowly tailored to achieve a compelling governmental interest. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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

Response: The Supreme Court held that the church and synagogues were entitled to a preliminary injunction because they had "made a strong showing that the challenged restrictions violate the minimum requirement of neutrality to religion" and that the restrictions could cause irreparable harm if enforced. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66–67 (2020) (citation omitted).

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court found that COVID restrictions imposed by the State of California treated certain religious gatherings less favorably than comparable secular activities, and that the restrictions therefore were not content-neutral, which triggered strict scrutiny review. The Court found that the restrictions violated the petitioners' free exercise rights and issued an injunction against the restrictions pending appeal.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission violated the Free Exercise Clause when members of the Commission demonstrated clear and impermissible hostility towards an individual respondent's religious beliefs during an administrative hearing, which cast doubts on the fairness of the hearing.

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

Response: Yes, if the beliefs are sincerely held. *Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829 (1989).

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

Response: I interpret this question to be asking whether courts recognize the religious freedom rights of persons even if their individualized beliefs are uncommon interpretations of religious doctrine. The court's "narrow function" in such issues is to determine whether the religious belief is sincerely held, and courts are not to determine whether such belief is reasonable. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014). The Supreme Court has suggested, however, that governments can inquire into the sincerity of such beliefs: "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . . ." *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715, (1981); *see also Frazee*, 489 U.S. at 833 ("States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause.").

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

Response: The "narrow function" of a court is to determine whether the religious belief is "an honest conviction." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (quoting *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715 (1981)). Courts do not determine whether the belief is reasonable. *Id.* The Supreme Court has suggested, however, that governments can inquire into the sincerity of such beliefs: "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise

Clause . . ." *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715, (1981); *see also Frazee*, 489 U.S. at 833 ("States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause.").

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

Response: No.

19. **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 held that the First Amendment barred a court from hearing employment discrimination claims brought by two Catholic school teachers whose responsibilities included educating and guiding elementary school students in the Catholic faith. With this decision, the Supreme Court reaffirmed its holding in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), wherein the Court concluded that the "ministerial exception" prohibited the court from entertaining employment-related claims involving individuals holding important positions in churches and other religious institutions. In both cases, the Court reasoned this exemption stems from the freedom of religion clauses of the First Amendment and the protection those clauses provide to churches and religions institutions to determine matters of faith, doctrine, and governance without intrusion by the government.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that the City of Philadelphia's refusal to renew its foster care contract with a Catholic foster care agency due to the agency's refusal to certify same-sex couples to be foster parents based on the agency's religious beliefs was a violation of the Free Exercise Clause of the First Amendment. The City claimed that the agency's practice of refusing to certify same-sex couples violated a provision of the City's standard contract that prohibited discrimination. However, the Court determined that the provision in the contract was not "generally applicable" because the provision allowed the City to make entirely discretionary exemptions. *Id.* at 1879. Because the provision was not generally applicable, the Court applied strict scrutiny and concluded that the City could not offer a sufficiently compelling interest. *Id.* 1881–82. The Court also concluded that the foster care agency was not a "public accommodation" such that the agency would be subject to a City ordinance prohibiting discrimination. *Id.* at 1881.

21. **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: Under Maine's tuition assistance program, the state would defray the cost of tuition for parents in school districts that did not operate a secondary school. Parents were allowed to pick the public or private school they wanted their child to attend. However, the program would not provide funds unless the private school was "nonsectarian." The Court applied strict scrutiny and held that the program violated the Free Exercise Clause of the First Amendment because it excluded qualified private schools from otherwise available public benefits due solely to their religion. In deciding the case, the Court reaffirmed its holdings in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

22. **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 the Bremerton School District violated a high school football coach's free exercise and free speech rights by suspending him for his practice of praying on the fifty-yard line after games. Turning first to the issue of whether the school district violated the coach's free exercise rights, the Court concluded that the coach met his burden of showing that the government burdened a sincere religious practice pursuant to a policy that was not neutral or generally applicable. With respect to his free speech rights, the Court concluded that the coach's prayers were a matter of public concern performed as a private citizen—not as a public employee. Having found that the employee had met his burden as to both the free exercise and free speech claims, the Court considered whether the government could satisfy its burden. The Court concluded that the government could not meet its burden under any of the applicable standards.

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

Response: In his concurrence, Justice Gorsuch explained that the Religious Land Use and Institutionalized Persons Act requires the application of strict scrutiny, requiring the government to bear the burden of proving that its regulations serve a compelling interest and that they are narrowly tailored. In this particular case, Justice Gorsuch concluded that the lower courts had incorrectly treated the County's general interest in sanitation as a compelling interest without considering the interest the County had in denying an exemption to this specific Amish community. Further, Justice Gorsuch explained that the lower courts erred in failing to consider the exemptions granted to other groups, asserting that the County should have provided a compelling explanation as to why the exception was denied to a religious group but available to others.

24. **Is cultural assimilation, as symbolized by the American "melting pot," a good thing or a bad thing in your opinion?**

Response: This is not a topic that I have studied, researched, litigated, or ruled upon as a United States Magistrate Judge.

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

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

   Response: I am not aware of any such training in the Fourth Circuit or Eastern District of Virginia. Any training provided by federal courts should be consistent with the Constitution and laws of the United States.

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

   Response: I am not aware of any such training in the Fourth Circuit or Eastern District of Virginia. Any training provided by federal courts should be consistent with the Constitution and laws of the United States.

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

   Response: I am not aware of any such training in the Fourth Circuit or Eastern District of Virginia. Any training provided by federal courts should be consistent with the Constitution and laws of the United States.

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

   Response: I am not aware of any such training in the Fourth Circuit or Eastern District of Virginia. Any training provided by federal courts should be consistent with the Constitution and laws of the United States.

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

Response: I am not aware of any such training in the Fourth Circuit or Eastern District of Virginia. Any training provided by federal courts should be consistent with the Constitution and laws of the United States.

27. **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.

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

Response: The Constitution gives the President the authority, with the advice and consent of the Senate, to make appointments to political positions. I am not aware of any case that adjudicates the constitutionality of considering skin color or sex when the President exercises this power. Whether considering skin color or sex when making political appointments is otherwise appropriate is a policy decision, and such decisions are the responsibility of the legislative and executive branches. As a United States Magistrate Judge and member of the judicial branch, it would not be appropriate for me to opine on such policy issues.

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

Response: As a United States Magistrate Judge, I have not had a case come before me in which that important policy question has been at issue. However, as a United States Magistrate Judge, I ensure that every person that appears in my courtroom is treated fairly and with respect, regardless of their race. If fortunate enough to be confirmed as a United States District Judge, I would continue to do the same.

30. **The Metropolitan Richmond Women's Bar Association notes on its website that "inherent bias and systemic racism within our justice system must be eradicated."**

    a. **As the organization's former President and Vice President, do you yourself adopt the same position about what the organization designates systemic racism within the criminal justice system, and do you also have the desire for eradication?**

    Response: To the best of my knowledge, the language which appears on the Metropolitan Richmond Women's Bar Association's website was placed on the website after I completed my service on the Board. As a United States Magistrate Judge, I endeavor to treat every person that comes before me fairly and with respect and to provide equal and impartial justice under the law.

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: Whether Congress should reform the number of Supreme Court justices is a policy decision, and such decisions are the responsibility of the legislative branch. As a United States Magistrate Judge and member of the judicial branch, it would not be appropriate for me to opine on such policy issues.

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

Response: The Supreme Court so held in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: As the Supreme Court explained in *New York State Rifle & Pistol Association v. Bruen*, the "Second Amendment standard accords with how we protect other constitutional rights." *New York State Rifle & Pistol Association v. Bruen*, ___ S. Ct. ___, 2022 WL 2251305, at *11 (June 23, 2022).

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

Response: No. The Supreme Court has explained that the "Second Amendment standard accords with how we protect other constitutional rights." *New York State Rifle & Pistol Association v. Bruen*, ___ S. Ct. ___, 2022 WL 2251305, at *11 (June 23, 2022).

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

Response: Consistent with the Supreme Court's decisions in *District of Columbia v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*, the Second Amendment protects "an individual right to keep and bear arms" without regard to service in a militia.

36. **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 *District of Columbia v. Heller*, the Supreme Court held that the District of Columbia was prohibited from banning the possession of handguns for self-protection in the home. In *McDonald v. Chicago*, the Supreme Court held that same prohibition applied to a city government deriving its powers from the state. In *New York State Rifle & Pistol Association v. Bruen*, the Supreme Court held that states may not prohibit the possession of handguns outside of the home for self-protection.

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

Response: The decision to pursue a particular prosecution generally lies with the executive branch and its representatives. Whether such decision is appropriate absent an alleged violation of constitutional or other law is a policy decision, and such decisions are the responsibility of the legislative and executive branches. As a United States Magistrate Judge and member of the judicial branch, it would not be appropriate for me to opine on such policy issues.

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

Response: I am not sure I understand the question precisely, but I assume it generally asks about the ability of a prosecutor to exercise discretion to bring or dismiss a case. The decision to pursue a particular prosecution generally lies with the executive branch and its representatives. In both civil and criminal cases, courts must follow "the principle of party presentation." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). This principle means that courts "rely on the parties to frame the issue for decision," while courts retain "the role of neutral arbiter of matters the parties present." *Id*. Stated differently, courts should not "sally each day looking for wrongs to right"; rather, courts "wait for cases to come to [them]." *Id.* at 244 (citation and internal quotation marks omitted). This principle is "supple, not ironclad," and there are exceptions, such as protecting a *pro se* litigant's rights. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). To the extent that the above question asks whether courts may deviate from this principle when presented with a prosecutor's dismissal of criminal charges, it would be inappropriate for me to opine on such a matter in federal courts, given that I am a sitting United States Magistrate Judge. *See* Code of Conduct for United States Judges, Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

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

Response: No. The President could not abolish the death penalty in federal cases absent Congress amending or repealing 18 U.S.C. § 3591, which authorizes capital punishment for certain offenses.

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

Response: In *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court considered whether the Centers for Disease Control and Prevention ("CDC") had authority under the Public Health Service Act of 1944 to impose a nationwide moratorium on evictions during the COVID-19 pandemic. The Supreme Court, in vacating a stay of an order holding the CDC exceeded its authority, held that the applicants had a substantial likelihood of success on the merits of their claim that the CDC exceeded its authority. The Court held that "[i]t is up to Congress, not the CDC, to decide whether the public interest merits further action here." *Id.* at 2490.

Senator Josh Hawley
Questions for the Record

Elizabeth Hanes
Nominee, U.S. District Court for the Eastern District of Virginia

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

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

    Response: I have not studied Justice Jackson's sentencing practices as a district judge. However, under the applicable sentencing statutes, in determining the appropriate sentence in a case, district judges are required to consider, among other factors, the applicable advisory guideline range. 18 U.S.C. § 3553(a)(4). When sentencing any individual, I would be mindful to follow all of the factors Congress set forth in 18 U.S.C. 3553(a) and sentence individuals on a case-by-case basis, including whether the conduct at issue warranted a particular sentencing enhancement.

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

    Response: I have not studied Justice Jackson's sentencing practices as a district judge. However, under the applicable sentencing statutes, in determining the appropriate sentence in a case, district judges are required to consider, among other factors, the applicable advisory guideline range. 18 U.S.C. § 3553(a)(4). When sentencing any individual, I would be mindful to follow all of the factors Congress set forth in 18 U.S.C. 3553(a) and sentence individuals on a case-by-case basis, including whether the conduct at issue warranted a particular sentencing enhancement.

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

    Response: I have not studied Justice Jackson's sentencing practices as a district judge. However, under the applicable sentencing statutes, in determining the appropriate sentence in a case, district judges are required to consider, among other factors, the applicable advisory guideline range. 18 U.S.C. § 3553(a)(4). When sentencing any individual, I would be mindful to

follow all of the factors Congress set forth in 18 U.S.C. 3553(a) and sentence individuals on a case-by-case basis, including whether the conduct at issue warranted a particular sentencing enhancement.

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

Response: I have not studied Justice Jackson's sentencing practices as a district judge. However, under the applicable sentencing statutes, in determining the appropriate sentence in a case, district judges are required to consider, among other factors, the applicable advisory guideline range. 18 U.S.C. § 3553(a)(4). When sentencing any individual, I would be mindful to follow all of the factors Congress set forth in 18 U.S.C. 3553(a) and sentence individuals on a case-by-case basis, including whether the conduct at issue warranted a particular sentencing enhancement.

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: Policy decisions regarding the penalties for criminal offenses are the responsibility of the legislative branch. As a United States Magistrate Judge and member of the judicial branch, it would not be appropriate for me to opine on such policy issues.

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

Response: Policy decisions regarding the appropriate penalties for criminal offenses are the responsibility of the legislative branch. As a United States Magistrate Judge and member of the judicial branch, it would not be appropriate for me to opine on such policy issues.

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 do not agree with the proposition that courts should "do what [they] think is right" regardless of what the law says. Courts must adjudicate cases and controversies by applying the applicable law to the particular facts of the case.

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

Response: It would not be appropriate for me to offer an opinion on whether a current or former Supreme Court Justice violated a judicial oath.

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

Response: Generally, abstention is a doctrine whereby a federal court refuses to hear a case within its jurisdiction in order to defer to a state court's authority over the case. The Supreme Court has recognized multiple abstention doctrines.

First, under the *Rooker-Feldman* doctrine, a federal district court or court of appeals is not permitted to reverse or modify a state court judgment involving "injuries caused by state-court judgments rendered before [federal] district court proceedings." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp*., 544 U.S. 280, 283–84 (2005). Instead, appellate review of any such judgment is limited to the U.S. Supreme Court. *Id.* at 283. However, the Fourth Circuit has explained that "federal courts may entertain claims previously examined by a state court, so long as those claims do not seek review of the state court decision itself." *Vicks v. Ocwen Loan Servicing, LLC*, 676 Fed. App'x 167, 168 (4th Cir. 2017).

Second, under the *Pullman* doctrine, federal courts should consider abstaining from deciding federal constitutional challenges to a state law if a state court might interpret the law in a way that avoids the federal issue. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

Third, under the *Burford* doctrine, federal courts should consider abstaining "(1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans (NOPSI)*, 491 U.S. 350, 361 (1989).

Fourth, under the *Younger* doctrine, federal courts should abstain from interfering with state criminal proceedings, or civil proceedings akin to a criminal proceeding, "that implicate a State's interest in enforcing the orders and judgments of its courts." *Sprint Comm'ns, Inc. v. Jacobs*, 571 U.S. 69, 72-73 (2013); *see Younger v. Harris*, 401 U.S. 37 (1971). *Younger* abstention is appropriate only in "exceptional" cases. *Jacobs*, 571 U.S. at 73; *see also Air Evac EMS, Inc. v. McVey*, No. 21-1301, 2022 WL 2080320, at *1 (4th Cir. June 10, 2022).

Fifth, under the *Colorado River* doctrine, federal courts should consider abstaining when there is parallel litigation in state court involving the same parties and the same issues. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Such abstention should be exercised when "[w]ise judicial administration, giving regard to the conservation of judicial resources and comprehensive disposition of litigation' clearly favors abstention." *Id*. at 817. However, *Colorado River*

abstention should be exercised only in exceptional circumstances. *VonRosenberg v. Lawrence,* 849 F.3d 163, 168 (4th Cir. 2017).

5. **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.**

      Response: N/A.

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

   Response: I would strictly follow the guidance set forth by the Supreme Court on this issue. In some contexts, the Supreme Court has explained that particular constitutional provisions must be interpreted based on the original meaning of the provision. For example, the Supreme Court has interpreted the Second Amendment as it would "have been known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008).

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

   Response: Yes, if permitted by case precedent. When interpreting a statute or regulation, courts must start with the plain language of the statute or regulation, unless such plain language is ambiguous. *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015). Language is ambiguous if it "lends itself to more than one reasonable interpretation," in light of the language's specific context and the statute or regulation's broader context as a whole. *Id*. (citation omitted). Where statutory text is ambiguous, courts rely on the rules of statutory construction, which look to the statutory scheme, legislative history, and other contextual aspects that demonstrate congressional intent behind the statute. *Mejia v. Sessions*, 866 F.3d 573, 583 (4th Cir. 2017). Thus, legislative history becomes relevant to determine the meaning and application of an ambiguous statutory term or phrase.

   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: Consistent with case precedent from the Supreme Court and the Fourth Circuit, official committee reports that are contemporaneous with a legislative enactment and conference reports are more probative—but not determinative—of legislative intent. *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir. 1986).

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 generally not proper to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution.

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

   Response: An inmate must establish that the method of execution presents a risk that is "sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers." *Baze v. Rees*, 553 U.S. 35, 50 (2008) (citation and internal quotation marks omitted); *accord Emmett v. Johnson*, 532 F.3d 291, 298 (4th Cir. 2008). The inmate must establish that there is an alternative that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Baze*, 553 U.S. at 52; *accord Emmett*, 532 F.3d at 299.

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

   Response: The alternative method, in addition to being known and available, must "significantly reduce[] a substantial risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (internal quotations omitted). The Supreme Court, in *Glossip*, rejected petitioners' argument "that they need not identify a known and available method of execution that presents less risk," explaining that this argument was inconsistent with *Baze v. Rees*, 553 U.S. 35 (2008). *Glossip*, 576 U.S. at 879. "The controlling [*Baze*] opinion summarized the requirements of an Eighth Amendment method-of-execution claim as follows: 'A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. [And] [h]e must show that the risk is substantial when compared to the known and available alternatives.'" *Glossip*, 576 U.S. at 877–78 (quoting *Baze*, 553 U.S. at 61).)

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

    Response: I am not aware of any Supreme Court or Fourth Circuit case reaching such a holding.

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

    Response: No.

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

    Response: In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court observed that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." 508 U.S. 520, 531 (1993). There are exceptions to this rule, however. An action that is facially neutral is evaluated under a strict scrutiny test if it is motivated by hostility to religion. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729–31 (2018). Furthermore, the Supreme Court held in *Tandon v. Newsom* that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

    Response: Under the Free Exercise Clause of the First Amendment, the government is not permitted to discriminate against religious organizations or religious people unless the discriminatory law or regulation is narrowly tailored to achieve a compelling governmental interest. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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

    Response: The Supreme Court has suggested that governments can inquire into the sincerity of such beliefs: "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . ." *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715, (1981); *see also Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 833 (1989) ("States

are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause."). My understanding is that such a determination about a person's subjective religious beliefs would be a factual finding for the court.

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

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

       Response: The Supreme Court, in *District of Columbia v. Heller*, considered the District of Colombia's law which banned the possession of a handgun in the home, and requiring other types of firearms to be unleaded and dissembled or bound by a trigger lock or similar device. The Supreme Court held that such laws unconstitutionally burden an individual's Second Amendment right to keep and bear arms.

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

       Response: No.

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

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

       Response: My understanding of this quote, in its full context, is that Justice Holmes disagreed with the majority opinion in *Lochner*, accusing the justices in the majority of injecting their own economic policy opinions into a court decision. I agree that judges should not inject their own policy preferences, economic or otherwise, into court decisions.

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

       Response: The Supreme Court has effectively overturned *Lochner*. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), and thus I will not follow *Lochner*.

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

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

Response: I cannot identify any Supreme Court opinions that have not been formally overruled but that I believe are no longer good law.

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

Response: Yes.

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

a. **Do you agree with Judge Learned Hand?**

Response: I will follow Supreme Court precedent that has cited favorably to Judge Hand's conclusions. *See United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (citing to *Aluminum Co.* and concluding that 87% market share "leaves no doubt" that monopoly power exists); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (concluding that over two-thirds of a domestic market share constituted a monopoly).

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

Response: N/A.

c. **What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.**

Response: The Supreme Court has defined monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Whether a percentage of market share constitutes a monopoly depends on the specific facts and circumstances of a case. I am not aware of any Supreme Court or Fourth Circuit setting an absolute minimum percentage of market share.

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

Response: Federal common law is generally defined as "[t]he body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern . . . but excluding all cases governed by state law." Black's Law Dictionary (11th ed. 2019). In other words, it is law that exists in "only limited areas [] in which federal judges may appropriately craft the rule of decision." *Rodriguez v. Fed.*

Deposit Ins. Corp., 140 S. Ct. 713, 717 (2020). By contrast, *general* federal common law is "judge-made law developed by federal courts in deciding disputes in diversity-of-citizenship cases." Black's Law Dictionary (11th ed. 2019). Since 1938, the Supreme Court has held that "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

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

Response: I would interpret the scope of the state constitutional right consistent with how it had been interpreted by the state's highest court. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

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

Response: In our system of federalism, state courts are free to interpret identical texts differently than other jurisdictions. However, I believe that a court's interpretation of a text should serve as persuasive authority for any future court tasked with interpreting an identical text.

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

Response: A state court may interpret a state constitutional provision that is identical to the federal constitution in a way that provides more protection for the constitutional right at issue, as long as such interpretation does not infringe on the right protected by the United States Constitution.

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

Response: As a United States Magistrate Judge, I am bound to apply all binding Supreme Court and Fourth Circuit precedent. As such, it is generally inappropriate for me to comment on whether any binding Supreme Court precedent was correctly decided. However, there are certain Supreme Court decisions that are so fundamental and widely accepted that they present an exception to this rule. Consistent with the responses of other nominees, I believe *Brown v. Board of Education* was correctly decided.

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

Response: Federal courts have the authority to issue injunctive relief pursuant to Fed. R. Civ. P. 65. Such authority includes the power to issue injunctive relief that affects conduct nationwide. However, "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v.*

Yamasaki, 442 U.S. 682, 702 (1979). Thus, "systemwide relief" must be justified by "a conclusion of systemwide violation." *Lewis v. Casey*, 518 U.S. 343, 359 (1996). The Supreme Court has further instructed that "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). If confirmed as a United States District Judge, I would faithfully this and related binding precedent of the Supreme Court and the Fourth Circuit.

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

Response: See my answer to Question 22.

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

Response: See my answer to Question 22.

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

Response: See my answer to Question 22.

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

Response: Our system of federalism distributes power between the federal and state governments. The United States Constitution gives only limited powers to the federal government, while it reserves all other powers to the States. Thus, federal law must be supported by a specific constitutional provision, while states have more freedom to enact their own laws without such a limitation. The Supremacy Clause of the United States Constitution, however, provides that the Constitution, federal law, and treaties "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI. Additionally, the Due Process Clause of the Fourteenth Amendment provides that certain constitutional rights are incorporated so that they apply to the states. Thus, although states have more freedom to pass laws than the federal government, such laws may be struck down as inconsistent with federal constitutional or statutory law.

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

Response: See my answer to Question 2.

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

Response: The advantage of injunctive relief is that it provides a remedy to a prevailing plaintiff where a remedy at law, such as money damages, would be inadequate. *See Raub v. Campbell*, 785 F.3d 876, 885 (4th Cir. 2015) (noting that injunctive relief is an extreme remedy that can only be awarded where there is (1) an irreparable injury, (2) there is no adequate remedy at law, (3) the balance of hardships warrants the remedy, and (4) the injunction would not disserve the public interest).

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

Response: The Supreme Court, in *Dobbs v. Jackson Women's Health Organization*, reiterated that certain substantive rights, although not mentioned in the Constitution, are nevertheless protected by the Due Process Clause where those unenumerated rights are "deeply rooted in [our] history and tradition and whether it is essential to our Nation's scheme of ordered liberty." ___ S. Ct. ___, 2022 WL 2276808, at *10 (2022) (internal punctuation and citations omitted). As a United States Magistrate Judge and member of the judicial branch, it would not be appropriate for me to provide an advisory opinion on this issue.

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

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

Response: Under the Free Exercise Clause of the First Amendment, the government is not permitted to discriminate against religious organizations or religious people unless the discriminatory law or regulation is narrowly tailored to achieve a compelling governmental interest. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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 Supreme Court has stated: "The Free Exercise Clause embraces a freedom of conscience and worship . . . ." *Lee v. Weisman*, 505 U.S. 577, 591 (1992). I am not aware of any precedent defining the Free Exercise Clause as exactly synonymous with the freedom of worship.

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: The Supreme Court, in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), concluded that the contraception mandate promulgated under the Patient Protection and Affordable Care Act substantially burdened the exercise of religion because it forced privately-held companies to choose between covering the contraceptives at issue—which they opposed based on their sincerely held beliefs—or not covering the contraceptives at issue, resulting in a $100 per day tax for each affected individual, totaling $475 million per year for Hobby Lobby. The Supreme Court found that these "severe" economic consequences are "surely substantial." *Id*. at 720.

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: The "narrow function" of a court is to determine whether the religious belief is "an honest conviction." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (quoting *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 715 (1981)). Courts do not determine whether the belief is reasonable. *Id.* The Supreme Court has suggested, however, that governments can inquire into the sincerity of such beliefs: "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . ." *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715, (1981); *see also Frazee*, 489 U.S. at 833 ("States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause.").

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 law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a).

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

Response: No.

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that judges should make decisions based on the law, even if they personally disagree with the result that the law warrants.

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

Response: Yes.

a. If yes, please provide appropriate citations.

Response: *United States v. Hill*, No. 3:16-cr-9, 2018 WL 3872315 (E.D. Va. Aug. 15, 2018). *United States v. Hill*, 927 F.3d 188 (4th Cir. 2019), *cert. denied* 141 S. Ct. 272 (Oct. 5, 2020).

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

Response: No.

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

Response: As a United States Magistrate Judge, I have not had a case come before me in which that important policy question has been at issue. However, as a United States Magistrate Judge, I ensure that every person that appears in my courtroom is treated fairly and with respect, regardless of their race. If fortunate enough to be confirmed as a United States District Court Judge, I would continue to do the same.

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

Response: Yes.

34. How did you handle the situation?

Response: In my previous role as a practicing attorney, I recognized that an attorney is duty bound to provide zealous advocacy on behalf of each client regardless of their personal views, as long as such advocacy remains within the bounds of the law. For instance, Model Rule 1.16(a) of the Rules of Professional Conduct requires an attorney to withdraw representation that will result in violation of such rules or other law. Additionally, Model Rule 1.16(b) states, in part, that an attorney may withdraw from representation if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."

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

    Response: Yes.

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

    Response: No single Federalist Paper has shaped my views of the law more than any other Federalist Paper.

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

    Response: As a sitting judge and judicial nominee, any personal belief I have about any issue is not relevant to the decisions I make as a federal judge. If confirmed as a United States District Judge, I will follow all binding Supreme Court and Fourth Circuit precedent.

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

    Response: Yes. On August 12, 2015, I testified in a post-conviction hearing related to my representation of a former client. *United States v. Davis*, No. 3:10-cr-309 (E.D. Va.) (ECF No. 97 (transcript)). On July 23, 2010, I testified in an evidentiary hearing regarding a former client's Motion to Dismiss. No transcript of this hearing exists. *United States v. Thomas*, No. 3:09-cr-57 (E.D. Va.).

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

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

       Response: No.

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

       Response: No.

    c. **Systemic racism?**

       Response: No.

    d. **Critical race theory?**

       Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: No. As a practicing attorney, I would, on occasion, offer comments or suggested changes to other attorneys regarding briefs authored by them. I am not aware of whether those changes were accepted or rejected.

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

Response: No.

42. Have you ever confessed error to a court?

Response: Other than minor matters, which I would have quickly corrected in open court, I am not aware of any material misstatements or errors that I was required to correct in any representation made to a court.

a. If so, please describe the circumstances.

Response: N/A.

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

Response: I am obligated to answer all questions truthfully and to the best of my ability and recollection. I am also obligated to follow judicial and legal ethics when answering these questions. I have followed these obligations when answering these questions to the best of my ability.

Questions for the Record for Elizabeth Wilson Hanes
From Senator Mazie K. Hirono

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

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

      Response: No

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

      Response: No

Questions for the Record
Senator John Kennedy

Elizabeth Hanes

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

   Response: For the past two years, I have been honored to serve as a United States Magistrate Judge in the United States District Court for the Eastern District of Virginia. As a judge, I am guided by several principles when I consider each case. First, I consider it my role to be fair and impartial in every case while treating the parties and their counsel with respect. I always endeavor to prepare as thoroughly as possible by diligently reviewing the facts and the law applicable to the case. I ensure that I respectfully engage with the parties, which requires that I listen to and consider the facts and arguments both sides present, and to avoid prejudgment before I have had a full chance to do so. I consider the arguments and the facts impartially and practice judicial restraint, which requires that I only decide the issue or case before me based on the facts and the law. Finally, my role requires that I not allow my personal opinions or beliefs to impact my decision or to lead me to a particular result. After I have decided a matter, I seek to render a prompt decision and to explain it in concise "plain English" because I want my decisions to be accessible by all parties and the public at large. And finally, throughout this process, I recognize that I am obligated to follow Supreme Court and Fourth Circuit precedent.

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

   Response: When interpreting a statute or regulation, courts must apply the plain language of the statute or regulation, if such language is clear and unambiguous. *See Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015).

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

   Response: As a United States Magistrate Judge and a practicing lawyer, I have not had this particular issue arise in any of my cases. I am aware that the President may issue an executive signing statement at the time that a passed bill is signed into law. I am not aware of any binding precedent that holds that such signing statements are part of the legislative history to be considered by courts when interpreting statutes. Regardless of what is included in such signing statements, the text of the statute is what primarily governs its interpretation. As a sitting United States Magistrate Judge and judicial nominee, it is otherwise inappropriate for me to comment on such issue that may be litigated before me.

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

Response: In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Supreme Court held that private owners of shopping centers do not violate the Constitution by imposing speech restrictions on speech unrelated to the shopping center's operations, such as prohibiting the distribution of handbills on its property. 407 U.S. at 552. As a sitting United States Magistrate Judge and judicial nominee, it is otherwise inappropriate for me to comment on specific restrictions that may or may not be permissible because such issues may be litigated before me.

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

Response: In answering this question, I assume that "*Chevron*" refers to the appropriate deference a court gives to an agency's interpretation of a statute it is charged to administer, as explained in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under the major questions doctrine, a court requires that a congressional statute "speak clearly" in assigning a federal agency authority, where such agency asserts that it can regulate matters of "vast economic and political significance" or otherwise interprets its scope of authority in such a way that represents an "enormous and transformative expansion" of its authority. *Utility Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) (citations and internal quotation marks omitted); *see West Virginia v. Env't Prot. Agency*, ___ S. Ct. ___, 2022 WL 2347278, at *17 (U.S. June 30, 2022) (referring to this concept as the "major questions doctrine"). The major questions doctrine is therefore "distinct" from ordinary statutory interpretation principles because it applies to an agency's transformative assertion of regulatory power based on an ambiguous statutory authorization. *West Virginia*, 2022 WL 2347278, at *13.

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

Response: The Supreme Court has explained that "the people," as referred by the First, Second, Fourth, Ninth, and Tenth Amendments, "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

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

Response: "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Supreme Court has also explained that such rights generally apply "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). I am unaware of any specific Supreme Court or Fourth Circuit precedent

relating specifically to whether non-citizens unlawfully present in the United States are entitled to a right of privacy.

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

   Response: Yes, generally-speaking. *See* Response to Question 7; *see also Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973). The Supreme Court has recognized, however, that "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior. Routine searches of the person and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant . . . ." *United States v. Montoya de Hernandez*, 473 U.S. 531, (1985).

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

   Response: Although the Supreme Court has not decided the question above, the Supreme Court recently noted, in overruling *Roe v. Wade*, that the Court's "opinion [regarding such overruling] is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." *Dobbs v. Jackson Women's Health Org.*, ___ S. Ct. ___, 2022 WL 2276808, at *23 (U.S. June 24, 2022). In light of this statement, and as a United States Magistrate Judge and judicial nominee, it is otherwise inappropriate for me to opine on this issue as it may be litigated before me.

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

    Response: In answering this question, I am assuming that "illegitimate" means "unlawful." The Supreme Court, in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), held that an Indiana law requiring voters to provide photographic identification did not violate the Constitution, based on the facts in that case. Whether state laws that require voters to present identification are considered draconian or racist is a policy issue, and such issues are the responsibility of the legislative branch. As a United States Magistrate Judge and member of the judicial branch, it would not be appropriate for me to opine on such policy issues.

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

    Response: I am not aware of any Supreme Court or Fourth Circuit precedent that explains the constitutional basis, or lack thereof, of a universal injunction. Some Circuit Courts of Appeals point to the Constitutional provision that vests the district courts with "the judicial Power of the United States." U.S. Const. art III, § 1. The Fifth Circuit reasoned, for instance, that such judicial power "is not limited to the district wherein the court sits but extends across the country. It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction." *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015). In immigration cases, courts have also pointed to the Constitution's

requirement that naturalization laws be “uniform” to support nationwide injunctive relief. *See id.* at 187–88.

Senator Mike Lee Questions
for the Record
Elizabeth Hanes, Nominee to be United States District Judge for the Eastern District of Virginia

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

   Response: For the past two years, I have been honored to serve as a United States Magistrate Judge in the United States District Court for the Eastern District of Virginia. As a judge, I am guided by several principles when I consider each case. First, I consider it my role to be fair and impartial in every case while treating the parties and their counsel with respect. I always endeavor to prepare as thoroughly as possible by diligently reviewing the facts and the law applicable to the case. I ensure that I respectfully engage with the parties, which requires that I listen to and consider the facts and arguments both sides present, and to avoid prejudgment before I have had a full chance to do so. I consider the arguments and the facts impartially and practice judicial restraint, which requires that I only decide the issue or case before me based on the facts and the law. Finally, my role requires that I not allow my personal opinions or beliefs to impact my decision or to lead me to a particular result. After I have decided a matter, I seek to render a prompt decision and to explain it in concise "plain English" because I want my decisions to be accessible by all parties and the public at large. And finally, throughout this process, I recognize that I am obligated to follow Supreme Court and Fourth Circuit precedent.

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

   Response: I would start with the plain language of the statute or regulation, unless such plain language is ambiguous. *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015). Language is ambiguous if it "lends itself to more than one reasonable interpretation," in light of the language's specific context and the statute or regulation's broader context as a whole. *Id.* (citation omitted). Where statutory text is ambiguous, courts rely on the rules of statutory construction, which look to the statutory scheme, legislative history, and other contextual aspects that demonstrate congressional intent behind the statute. *Mejia v. Sessions*, 866 F.3d 573, 583 (4th Cir. 2017). I would also research whether any binding Supreme Court or Fourth Circuit precedent existed, and if so, follow that precedent.

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

   Response: Similar to statutory or regulatory interpretation, as described in Question 2, I would start with the text of the constitutional provision at issue and apply the plain language of the constitutional provision, in conjunction with binding Supreme Court or Fourth Circuit precedent. In the rare instance in which such precedent does not exist or the text does not provide a clear answer to the specific issue in dispute, I would also consult decisions within the Eastern District of Virginia, and, if such decisions still did not provide adequate guidance, I would consult persuasive authority from other

jurisdictions within the United States, with an emphasis on Circuit Court of Appeals decisions.

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

Response: The Supreme Court has held that when interpreting constitutional provisions, it is necessary to start with the text of the Constitution. The Supreme Court has applied originalism in many constitutional contexts, such as adjudicating Second Amendment rights. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I would faithfully apply all binding Supreme Court and Fourth Circuit precedent.

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

Response: When interpreting a statute or regulation, I start with the plain language of the statute or regulation, unless such plain language is ambiguous. *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015). Language is ambiguous if it "lends itself to more than one reasonable interpretation," in light of the language's specific context and the statute or regulation's broader context as a whole. *Id.* (citation omitted). Where statutory text is ambiguous, courts rely on the rules of statutory construction, which look to the statutory scheme, legislative history, and other contextual aspects that demonstrate congressional intent behind the statute. *Mejia v. Sessions*, 866 F.3d 573, 583 (4th Cir. 2017).

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

Response: I would strictly follow any guidance set forth by the Supreme Court on this issue. When interpreting a constitutional or statutory provision, judges should be guided by the plain language of the constitutional or statutory provision and applicable precent. Generally, the Supreme Court has held that the public understanding of relevant language at the time of enactment plays an important role in interpreting a statute or constitutional provision. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008). However, the Supreme Court has held that certain provisions, such as the Eighth Amendment, are intended to be interpreted as social or linguistic norms evolve. *See*, *e.g. Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (explaining that "[a] claim that punishment is excessive is judged not by the standards that prevailed in 1685 . . . but rather by those that currently prevail") If presented with this type of issue, I would consider the public's current understanding only if such an approach is consistent with Supreme Court precedent.

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

Response: To establish standing, a plaintiff must have "(1) suffered an injury in fact,

(2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citation and internal quotation marks omitted).

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

   Response: In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that the Necessary and Proper Clause in Article I, Section 8, of the United States Constitution gives Congress certain powers that are not explicitly enumerated in the Constitution in order to carry out duties explicitly granted by the Constitution. Whether Congress has such implied powers "must depend upon how far such limited power is ancillary or incidental to the power granted to Congress[.]" *Marshall v. Gordon*, 243 U.S. 521, 537 (1917).

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

   Response: I would begin by evaluating the scope of Congress's power as set forth in Article I of the Constitution. I would also consult Supreme Court and Fourth Circuit precedent evaluating similar laws to determine the scope of Congress's power within the relevant regulatory area.

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

   Response: Yes. The Supreme Court, in *Dobbs v. Jackson Women's Health Organization*, reiterated that certain substantive rights, although not mentioned in the Constitution, are nevertheless protected by the Due Process Clause of the Fourteenth Amendment where those unenumerated rights are "deeply rooted in [our] history and tradition and whether it is essential to our Nation's scheme of ordered liberty." *Dobbs*, ___ S. Ct. ___, 2022 WL 2276808, at *10 (2022) (internal punctuation and citations omitted). These rights include the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and the right to travel. *Id.*; *see, e.g., Obergefell v. Hodges*, 576 U.S. 644 (2015) (recognizing the right to same-sex marriage); *Saenz v. Roe*, 526 U.S. 489 (1999) (recognizing the right to travel); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing right to marital privacy). These are the unenumerated rights of which I am most aware, but there may be other rights that the Supreme Court has recognized that I did not find in my research for this question.

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

    Response: See my answer to Question 9.

11. **If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v.***

***New York*, on what basis do you distinguish these types of rights for constitutional purposes?**

Response: The rights protected by substantive due process are recognized by the Supreme Court and not by my personal beliefs. As a sitting United States Magistrate Judge, or as a United States District Judge, if confirmed, I will follow all binding precedent of the Supreme Court regarding substantive due process.

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

Response: Under the Commerce Clause, Congress may regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and any activity that substantially affects interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). The Commerce Clause does not permit Congress "to regulate individuals as such, as opposed to their activities[.]" *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557 (2012). The Commerce power can also be limited by other constitutional provisions. *See Ry. Lab. Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468 (1982).

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

Response: Suspect classifications include race, national origin, religion, and alienage. *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

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

Response: The separation of powers is reflected in Articles I, II, and III of the Constitution, which provide governing and mutual oversight powers to the legislative, executive, and judicial branches, respectively. "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. . . . The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011).

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

Response: I would begin with the Constitution's text regarding the branch's grants of authority and the scope of authority of the other branches, in order to provide context for the branch's conduct at issue. I would then consult binding Supreme Court and Fourth Circuit precedent to determine whether the branch had exceeded its authority or unlawfully intruded into another branch's scope of authority.

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

Response: All judges should strive to understand each party's position, treat every litigant fairly and with respect, and make fair and just decisions. A judge's decisions

should be guided by the facts of the case and the applicable law.

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

    Response: Both of these outcomes are improper.

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

    Response: I do not know the reasons for this change, but I believe that there have been more laws passed in the years since 1857 than prior to this date, which may account for the number of instances the Supreme Court has exercised its power of judicial review during these periods. The downside to aggressive judicial constitutional review is the risk that constitutional laws will be struck down, which would harm legitimate public policy interests. The downside to judicial passivity is that it risks upholding laws that are in fact, unconstitutional, which could lead to government entities intruding into individual rights or otherwise acting outside their scope of authority.

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

    Response: Judicial review is the "court's power to review the actions of other branches or levels of government." Black's Law Dictionary (11th ed. 2019). Judicial supremacy is the "doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review . . . are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019).

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

    Response: As a sitting United States Magistrate Judge and judicial nominee, it would not be appropriate for me to offer an opinion on how elected officials should strike this balance.

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

important to keep in mind when judging.

Response: Federalist 78 recognizes that the role of a judge is to interpret and apply the law to present cases and controversies, and not to offer advisory opinions nor invade the policymaking and law enforcement authorities of the legislative and executive branches. The judicial branch is ultimately bound by the legal parameters set by the other two branches, which always retain the power to write and amend the Constitution and federal law in order to set such parameters.

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

Response: A district court must apply binding precedent. The Supreme Court and other appellate courts have previously admonished district courts for issuing decisions that overturn precedent, reminding the district courts that appellate bodies are better equipped to make such decisions.

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

Response: Under the applicable sentencing statutes, district judges are required to consider, in part, the "nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). However, a defendant's race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S. Sent'g Guidelines Manual § 5H1.10 (policy statement) (2018).

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

Response: I am only familiar with the term "equity" as used in the legal context. Depending on the issue in dispute, applying law may also involve applying principles

of “equity,” which, in the legal context, refers to “[f]airness; impartiality” or the “body of principles constituting what is fair and right.” Black’s Law Dictionary (11th ed. 2019). Generally, principles of equity apply to issues where courts have discretion, such as fashioning appropriate injunctive relief. I am otherwise not familiar with principles of “social” equity being applied to adjudicate cases. To the extent the question asks for an opinion how public policy should define “equity,” such a question is the responsibility of the legislative and executive branches. As a United States Magistrate Judge and member of the judicial branch, it would not be appropriate for me to opine on such policy issues.

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

Response: “Equity,” in the legal context, refers to “[f]airness; impartiality” or the “body of principles constituting what is fair and right.” Black’s Law Dictionary (11th ed. 2019). “Equality” is the “quality, state, or condition of being equal; esp., likeness in power or political status.” Black’s Law Dictionary (11th ed. 2019).

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

Response: The Fourteenth Amendment states in part that “[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

27. **How do you define “systemic racism?”**

Response: I was unable to find a legal definition of “systemic racism” in my research. “Racism” is defined as the “belief that some races are inherently superior to other races” or as the “[u]nfair treatment of people, often including violence against them, because they belong to a different race from one’s own.” Black’s Law Dictionary (11th ed. 2019). “Systemic discrimination” means an “ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society or a particular industry, profession, company or geographic location.” Black’s Law Dictionary (11th ed. 2019).

28. **How do you define “critical race theory?”**

Response: Black’s Law Dictionary defines “critical race theory” as a “reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system disempowered racial minorities.” Black’s Law Dictionary (11th ed. 2019).

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

Response: I was unable to find a legal definition of “systemic racism” in my research. “Systemic discrimination” means an “ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society or a particular

industry, profession, company or geographic location." Black's Law Dictionary (11th ed. 2019). "Critical race theory" is a "reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system disempowered racial minorities." Black's Law Dictionary (11th ed. 2019). Given these definitions, it appears the difference between critical race theory and systemic racism is that the former refers to an academic and intellectual movement or school of thought, while the latter refers to the existence of widespread discrimination within a particular industry or organization.

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

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

   Response: No.

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

   Response: For the past two years, I have been honored to serve as a United States Magistrate Judge in the United States District Court for the Eastern District of Virginia. As a judge, I am guided by several principles when I consider each case. First, I consider it my role to be fair and impartial in every case while treating the parties and their counsel with respect. I always endeavor to prepare as thoroughly as possible by diligently reviewing the facts and the law applicable to the case. I ensure that I respectfully engage with the parties, which requires that I listen to and consider the facts and arguments both sides present, and to avoid prejudgment before I have had a full chance to do so. I consider the arguments and the facts impartially and practice judicial restraint, which requires that I only decide the issue or case before me based on the facts and the law. Finally, my role requires that I not allow my personal opinions or beliefs to impact my decision or to lead me to a particular result. After I have decided a matter, I seek to render a prompt decision and to explain it in concise "plain English" because I want my decisions to be accessible by all parties and the public at large. And finally, throughout this process, I recognize that I am obligated to follow Supreme Court and Fourth Circuit precedent.

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

   Response: Black's Law Dictionary defines "originalism" as a "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). The Supreme Court has applied originalism in certain constitutional contexts, such as adjudicating Second Amendment rights. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). I have never applied a specific label related to a theory of constitutional interpretation to myself. If confirmed, I would faithfully apply all Supreme Court and Fourth Circuit binding precedent.

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

   Response: Black's Law Dictionary defines "textualism" as a "[t]he doctrine that the words of a governing text are of paramount concern and that what they fairly convey in

their context is what the text means." Black's Law Dictionary (11th ed. 2019). I have never applied a specific label related to a theory of constitutional interpretation to myself. If confirmed, I would faithfully apply all binding Supreme Court and Fourth Circuit precedent.

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

   Response: Black's Law Dictionary defines "living constitutionalism" as a doctrine in which "the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). I have never applied a specific label related to a theory of constitutional interpretation to myself. If confirmed, I would faithfully apply all binding Supreme Court and Fourth Circuit precedent.

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

   Response: I have not researched or studied the distinct jurisprudence of the Supreme Court Justices appointed since January 20, 1953. Additionally, I currently serve as a United States Magistrate Judge (and, if confirmed, as a United States District Court Judge)—positions which are both at the trial level rather than the appellate level. Given that the work of these positions is significantly different than that of a Supreme Court Justice, I cannot identify a Supreme Court Justice whose jurisprudence I admire the most.

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: As a United States Magistrate Judge (and, if confirmed, a United States District Court Judge), I am obligated to follow binding Fourth Circuit precedent regardless of whether it conflicts with the original public meaning of the Constitution. An appellate court, such as the Fourth Circuit, can only overrule its own precedent through *en banc* proceedings. Fed. R. App. P. 35(a).

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: As a United States Magistrate Judge (and, if confirmed, a United States District Court Judge), I am obligated to follow binding Fourth Circuit precedent regardless of whether it conflicts with the original public meaning of the text of a statute. An appellate court, such as the Fourth Circuit, can only overrule its own precedent through *en banc* proceedings. Fed. R. App. P. 35(a).

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

   Response: If the plain language of the statute or regulation is unambiguous, extrinsic factors have no role in statutory interpretation. *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015).

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: As a United States Magistrate Judge, I currently sentence individuals convicted of misdemeanor offenses. In doing so, I am required to consider the factors set forth in 18 U.S.C. § 3553(a). United States District Court judges are required to consider those same factors. One factor is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *See* 18 U.S.C. § 3553(a)(6). However, the sentencing guidelines also prohibit consideration of a defendant's race, sex, national origin, creed, religion, and socio-economic status, instructing that those factors "are not relevant in the determination of a sentence." U.S. Sent'g Guidelines Manual § 5H1.10 (policy statement) (2018). If confirmed as a United States District Court Judge, I will consider this and all other statutory factors when sentencing an individual defendant.

Questions from Senator Thom Tillis
for Elizabeth Wilson Hanes
Nominee to be US District Judge for the
Eastern District of Virginia

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

   Response: I do.

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

   Response: The term "judicial activism" is the "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Black's Law Dictionary (11th ed. 2019). I do not consider such a practice to be an appropriate method to use in deciding matters that come before me as a United States Magistrate Judge (and, if confirmed, as a United States District Court Judge).

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

   Response: I believe it is an expectation for a judge to be impartial in every decision. It is required under the oath that I have taken as a United States Magistrate Judge, and, if confirmed, the oath I would take as a United States District Court Judge.

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

   Response: No. Our Constitution provides for a separation of powers between the legislative, executive, and judicial branches. Under my understanding of that separation, policy decisions regarding the content and execution of the laws are the province of the legislature and the executive branches of government. The task of the judicial branch is to apply those laws neutrally and impartially in a case properly brought before the court—not to second-guess the policy decisions behind them.

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

   Response: As a United States Magistrate Judge, I have always sought to faithfully apply the law to the facts of the case before me without regard to anyone's desire about 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: If I am fortunate enough to be confirmed as a United States District Court Judge, I will continue to do what I have sought to do as a United States Magistrate Judge, which is to faithfully apply the text and precedent regarding the Second Amendment to any matter brought before me for decision. Those binding precedents include *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Association v. Bruen*, ___ S. Ct. ___, 2022 WL 2251305 (June 23, 2022).

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

   Response: My approach to cases as a United States Magistrate Judge is to carefully study the facts and the applicable constitutional or statutory text and the precedent of the Supreme Court and the Fourth Circuit. If confronted with a lawsuit such as the one described here, I would be bound to apply binding precedent including *Heller*, *McDonald*, and *Bruen*.

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: My approach to cases as a United States Magistrate Judge is to carefully study the facts and the applicable constitutional or statutory text and the precedent of the Supreme Court and the Fourth Circuit. If confronted with a case involving a claim of qualified immunity, I would be bound to apply binding precedent, such as *Pearson v. Callahan*, 555 U.S. 223 (2009) and *Hicks v. Ferreyra*, 965 F.3d 302 (4th Cir. 2020). Under that precedent, a law enforcement defendant is entitled to qualified immunity unless (1) the plaintiff's allegations, if true, substantiate a violation of a federal statutory or constitutional right, and (2) such right was "clearly established" at the time of the alleged violation. *Hicks*, 965 F.3d at 307. If qualified immunity applies, it shields the defendant from suit, as long as "their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

10. **Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?**

    Response: As a United States Magistrate Judge and member of the judicial branch, it would not be appropriate for me to opine on the Supreme Court's or Fourth Circuit's qualified immunity jurisprudence, except to say that I will follow all binding Supreme Court or Fourth Circuit precedent.

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

    Response: As a United States Magistrate Judge and member of the judicial branch, it would not be appropriate for me to opine on the Supreme Court's or Fourth Circuit's qualified immunity jurisprudence, except to say that I will follow all binding Supreme Court or Fourth Circuit precedent.

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 United States Magistrate Judge, I have mediated two patent cases but I have not yet had the occasion to rule on a matter involving patent eligibility. I have not, therefore, closely studied the issue. If I am fortunate enough to be confirmed as a United States District Court Judge, I would endeavor to study the facts of the case and the applicable law. As a United States Magistrate Judge and member of the judicial branch, it would not be appropriate for me to opine on the Supreme Court's patent eligibility jurisprudence, except to say that I will follow all binding Supreme Court precedent.

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

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

       Response: If I am fortunate enough to be confirmed for this position, in any case involving patent eligibility, I would apply all applicable precedent including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014). However, as a United States Magistrate Judge in the Eastern District of Virginia, a district which has a very active patent case docket, it would be inappropriate for me to offer any comment on a hypothetical case that may resemble a now-pending case or a case which could come before me in the future.

    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: See my response to Question 13(a) above.

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: See my response to Question 13(a) above.

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: See my response to Question 13(a) above.

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: See my response to Question 13(a) above.

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: See my response to Question 13(a) above.

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: See my response to Question 13(a) above.

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

Response: As a United States Magistrate Judge and member of the judicial branch, it would not be appropriate for me to opine on the policy question presented in this question.

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: See my response to Question 13(a) above.

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: See my response to Question 13(a) above.

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: See my responses to Question 12 and to Question 13(a) above.

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 United States Magistrate Judge, I have mediated at least one case which involved a copyright claim. To the best of my recollection, I have not been involved in any cases as a lawyer involving copyright law.

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

Response: To the best of my recollection, I have not been involved in any cases as a lawyer or a judge 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: To the best of my recollection, I have not been involved in any cases as a lawyer or a judge that involved intermediary liability for online service providers that host unlawful content posted by users.

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

Response: To the best of my recollection, I have been involved in a handful of cases as a United States Magistrate Judge and as an attorney involving First Amendment and free speech issues.

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: Congressional intent is primarily determined by the text of the statute itself, and if the text is clear and unambiguous courts should apply the meaning of the text without consideration of statements in the legislative history. When the text is unclear or conflicts with other applicable text, the Supreme Court has held that legislative history is one source that courts may resort to in seeking to interpret the text.

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: I am not aware of a binding precedential ruling by the Supreme Court definitively addressing whether the advice and analysis of the U.S. Copyright Office should or should not have any weight in the analysis of a copyright case. Nevertheless, 17 U.S.C. § 410(c), requires that a copyright registration by the U.S. Copyright Office "shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. § 410(c) (presumption of originality extends for five years from date of copyright registration); *see also Universal Furniture Int'l Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 430 (4th Cir. 2010) (noting presumption, but also that it is "fairly easy to rebut").

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 United States Magistrate Judge and member of the judicial branch, it would not be appropriate for me to opine on the policy question presented in this 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: The task for a judge is to interpret and apply the law as written and in conformity with any applicable binding precedent.

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: By interpreting and applying the law as written and in conformity with any applicable binding precedent.

18. **In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges**

engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.

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

   Response: I currently serve as a United States Magistrate Judge in the Eastern District of Virginia, and if confirmed, will continue to serve in the Eastern District of Virginia. Under Rule 3(C) of the Local Rules for the United States District Court for the Eastern District of Virginia, civil actions for which venue is proper in the district are directed to be brought in the proper division, as well. That is, we apply the venue rules stated in 28 U.S.C. § 1391 *et seq.* to determine the proper division in which an action shall be filed. There is no mechanism for parties to request that cases be heard within a particular division when the case is filed. Once filed, cases are assigned by the clerk's office to a judge within the division by neutral criteria. Given this, I have not personally experienced issues involving "judge shopping" or shopping for a particular division of the court.

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

   Response: See response to Question 18(a). Judges have a responsibility to follow the law and to faithfully and neutrally apply the law to the facts of the case before them.

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: See response to Question 18(a). Judges have a responsibility to follow the law and to faithfully and neutrally apply the law to the facts of the case before them.

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

   Response: See response to Question 18(a). As a United States Magistrate Judge (and, if confirmed, as a United States District Court Judge), I take seriously my responsibility to follow the law and to faithfully and neutrally apply the law to the facts of the case before them.

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: This is an issue that should be addressed by the court of appeals in the judge's district. As a United States Magistrate Judge in the Eastern District of Virginia, which is within the Fourth Circuit, matters such as this would be addressed by the Fourth Circuit. The judges of the Eastern District of Virginia have, in my opinion, a strong reputation for faithfully following the law as defined in binding case law, and I am not aware of any instance in which the Fourth Circuit has been required to address a situation as described in this question.

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

   Response: See response to Question No. 19(a).

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

    Response: I have not studied the question of concentration of cases in an isolated number of the judicial districts in the United States or the effect of any concentration on the perception of fair and evenhanded administration of justice. I do know that certain cases may be concentrated in the Eastern District of Virginia by reason of geography, i.e. maritime cases and national security cases. As a United States Magistrate Judge (and, if confirmed, as a United States District Court Judge), my obligation is to decide cases based on the facts and the applicable law. It is by meeting that obligation that I can best ensure a public perception of fairness and evenhanded administration of justice.

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

       Response: As I noted in my answer to Question Number 18(a), I am familiar with the local rule and practices in the Eastern District of Virginia regarding the assignment of cases in a manner that I believe are sufficient to discourage intra-district forum shopping or judge shopping. I have not studied other district's practices or the effectiveness of any procedure or rule changes that might address such instances, and therefore do not have an opinion regarding these issues.

    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: The Eastern District of Virginia has adopted a procedure that assigns patent cases randomly to judges across the district, regardless of division. My understanding is that the rule was adopted for the purpose of allocating the burden of handling patent cases, which can be very time consuming. This procedure may also serve to limit the ability of a patent litigant in the Eastern District of Virginia to engage in judge-shopping or intra-district forum shopping, though I do not believe that was the procedure's intent.

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 sitting United States Magistrate Judge, I have not been reversed on mandamus by the Fourth Circuit and I have not been reversed by the District Court. If I am fortunate enough to be confirmed as a United States District Court Judge, I am committed to faithfully applying binding precedent to the facts of the case before me. As a result, I hope that I would never be reversed on mandamus by a court of appeals.

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

    Response: See response to Question Number 21(a) above.