Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Kelley B. Hodge
Nominee to be United States District Judge for the Eastern District of Pennsylvania

1. **You served as the University of Virginia's Title IX Coordinator shortly after the defamatory and discredited *Rolling Stone* article about an alleged sexual assault of a student. You suggested that the use of a "clear and convincing" evidentiary standard in campus sexual assault cases would be "concerning." In your view, what standard of review and due process protections should be applied in campus sexual assault cases?**

   Response: I do not have an independent recollection of the context in which I made that statement. At the time when I was Title IX Coordinator, the standard of proof that was provided by the Office of Civil Rights for the U.S. Department of Education in its guidance to schools, colleges and universities was preponderance of the evidence. Presently, the regulations enacted in 2020 by the Office of Civil Rights for the U.S. Department of Education permit schools to select either the clear and convincing standard or the preponderance of the evidence standard as the level of proof. I do not have a preference as to which standard should be applied but respect and adhere to the option given to schools as provided in the Code of Federal Regulations.

2. **After President Trump issued an Executive Order instructing federal agencies to cease trainings that focused on Critical Race Theory, you wrote an article in which you suggested that the Order had "pronounced steep and detrimental consequences" that created a "chilling effect" on federal agencies.**

   a. **Please describe your understanding of the term "Critical Race Theory."**

   Response: My understanding is that the term Critical Race Theory has differing definitions. According to Merriam-Webster's Dictionary, "Critical Race Theory" is defined as "[A] group of concepts (such as the idea that race is a sociological rather than biological designation, and that racism pervades society and is fostered and perpetuated by the legal system) used for examining the relationship between race and the laws and legal institutions of a county and especially the United States."

   b. **In your view, why did the President's Executive Order have detrimental consequences for federal agencies?**

   Response: The rapid nature of the enactment of the Executive Order was the basis for stating its "chilling" effect on the agencies which were previously training or seeking to training on the subject matter that was no longer permitted by the order. In that context, the term "chilling" meant that the order stopped or chilled agencies or entities that received federal funding and were subject to the Executive Order from engaging in a training activity that they were currently using or intending to use.

3. **In 2020, you testified before the Joint Hearing of the Pennsylvania Senate Judiciary and Law and Justice Committee on "Ensuring Accountability and Equality in Law Enforcement and the Criminal Justice System." You told the committee: "I will offer my recommendations and presume that they are not unique but complement or restate what you may have heard or will hear from others," then offered several recommendations.**

    a. **You recommended that the Commonwealth "[i]ncentivize accountability by dismantling barriers to taking timely and appropriate action to address police misconduct." In your view, is qualified immunity a barrier to taking timely and appropriate action to address police misconduct? If not, please describe the barriers your recommendation contemplated.**

    Response: In my statement to the Committee, I was not referring to qualified immunity. I was speaking as a private citizen who was asked to provide testimony based on my experience. In that capacity, the recommendations I offered were to promote increased collaboration and confidence between the community and law enforcement. A barrier that has been identified as an impediment is when the investigation is conducted into an incident involving law enforcement by internal law enforcement personnel or body. There have been recommendations for a skilled third-party independent entity to conduct the investigation to avoid any appearance of a conflict of interest or impropriety. Another barrier is policies or procedures that may require review and revision to ensure timely and comprehensive responsiveness by the investigating entities.

    b. **You also recommended that the Commonwealth "[c]reate a concrete plan to develop relationships within the community and/or adopt a community policing model." Please describe what you meant by a "community policing model."**

    Response: When I referenced community policing model in my statement, I was referring to the following definition as provided by the United States Department of Justice Office of Justice Programs which states: "Community policing is defined as a philosophy that promotes organizational strategies which support the systematic use of partnerships and problem-solving techniques, to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime. Community policing relies on collaborative partnerships between the law enforcement agency and the individuals and organizations they serve to develop solutions to problems and increase trust in police; the alignment of organization management, structure, personnel, and information systems to support community partnerships and proactive problem-solving efforts must be achieved. It is important that the organizational structure of the agency ensures that local patrol officers have

decision-making authority and are accountable for their actions. This can be achieved through long-term assignments, the development of officers who are generalists and using special units appropriately. Community policing emphasizes proactive problem solving in a systematic and routine fashion. A major conceptual vehicle for helping officers to think about problem-solving in a structured and disciplined way is the Scanning, Analysis, Response, and Assessment (SARA) problem-solving model. Finally, police organizations should focus on factors that are within their reach, such as limiting criminal opportunities and access to victims, increasing guardianship, and associating risk with unwanted behavior."

4. **In an article for *Bloomberg Law*, you wrote that "[w]hile the Supreme Court in *Grutter* articulated a lofty expectation that, in 25 years, racial preferences would not be necessary to achieve a diverse student body, that has not come to pass." Given your disagreement with the Court, when, if ever, do you believe that colleges should stop using racial preferences to make admissions decisions, and what factors would guide your assessment?**

   Response: I do not disagree with the Supreme Court but noted the aspirational nature of the Court's statement when *Grutter* was decided in 2003. As a judicial nominee, it would not be appropriate for me to comment on cases that could come before me. If confirmed, I would follow Supreme Court and Third Circuit precedent in deciding all matters before me.

5. **As interim District Attorney for Philadelphia, your office prosecuted four officials for election fraud that benefitted a Democratic candidate for the Pennsylvania House's 197th District. According to reports of the case, the officials intentionally failed to count Republican votes and told at least one voter that voting machines were "broken" despite being operational. Please describe your role in the case and whether you prosecuted or investigated any other instances of election fraud during your tenure as the District Attorney.**

   Response: I did not have a role in the case and did not personally, as interim District Attorney, prosecute or investigate any other instances of election fraud.

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

   Response: I am not familiar with the statement made by then-Judge Ketanji Brown Jackson or the context within which the statement was made. As a nominee, if confirmed, I would follow the text of the Constitution as well as Supreme Court and Third Circuit precedent.

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

   Response: I am not familiar with the context of the statement. The oath of a judge states, in part, that a judge "will faithfully and impartially discharge and perform all the duties incumbent upon [them] under the Constitution and laws of the United States." This is what judges are expected to adhere to in fulfilling their oath and role as judges. The oath a judge takes does not contemplate value judgments. A judge should impartially apply the law to the facts.

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

   Response: I am not familiar with the statement by Judge Stephen Reinhardt or the context within which the statement was made. As a judicial nominee, it would be inappropriate for me to comment or express a personal opinion.

9. **Please identify a Supreme Court decision from the last 50 years that exemplifies your judicial philosophy and explain why.**

   Response: I am not familiar with all of the decisions issued by the Supreme Court in the last 50 years. The Supreme Court adheres to upholding the Constitution of the United States and the rule of law. If I were confirmed, I would approach each case by faithfully and impartially applying the law to the facts without fear or favor following the precedent set by the Supreme Court and the Third Circuit.

10. **Please identify a Third Circuit decision from the last 50 years that exemplifies your judicial philosophy and explain why.**

    Response: I am not familiar with all of the decisions issued by the Third Circuit in the last 50 years. The Third Circuit adheres to upholding the Constitution of the United States, the rule of law and Supreme Court precedent. If I were confirmed, I would approach each case by faithfully and impartially applying the law to the facts without fear or favor following the precedent set by the Supreme Court and the Third Circuit.

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

    Response: If I am fortunate enough to be confirmed, I would follow the Supreme Court precedent in *Washington v. Glucksberg*, 521 U.S. 702 (1997) which held that a right is fundamental under the due process clause when it is deeply rooted in the nation's history

and tradition and implicit in the concept of ordered liberty. In *Washington v. Glucksberg*, the Supreme Court held that "respondents' asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Supreme Court stated that "Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," *Moore v. East Cleveland,* 431 U.S. 494, 503 (1977) (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty." Such that "neither liberty nor justice would exist if they were sacrified," *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Second, we have required substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. *Reno v. Flores,* 507 U.S. 292, 301-302 (1993); *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992); *Cruzan* v. *Director, Mo. Dept. of Health,* 497 U.S. 261, at 277 (1990). Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," *Collins, supra* at 125, that direct and restrain our exposition of the Due Process Clause. As the Court stated in its statement in *Flores,* the Fourteenth Amendment "forbids the government to infringe . . . `fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." 507 U.S., at 302.

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

Response: A judge should follow their oath which is to faithfully and impartially discharge their duties under the Constitution and the laws of the United States. If the text of a constitutional provision or statute is clear then the plain meaning of the text governs.

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

Response: The Supreme Court has held in favor of a small business owner who declined to provide customers with a service based on a sincerely held religious belief. In the case of *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) a gay couple alleged discrimination and challenged the refusal of a cake shop owner to bake a cake for their wedding due to the owner's sincerely held religious belief.

The Supreme Court held that "When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires. Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside." *Id.* at 1724. In its opinion, the Court in *Masterpiece Cakeshop* cited to its observation in *Obergefell v.*

Hodges, 135 S. Ct. 2584 (2015), that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Id.* at 1727; *see also Newman v. Piggie Park Enterprises, Inc*., 390 U.S. 400, 402, n. 5 (1968) (per curiam); *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*., 515 U.S. 557, 572 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments").

The Supreme Court found that "The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." *Id.* at 1729. Thus, as stated by the Court "[F]or the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993), the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 534 (1993).

In *Masterpiece Cakeshop* the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 547 (1993). Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 540 (1993). The Court concluded that "The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." *See Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1732 (2018).

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

Response: In *Meyer v. Nebraska,* 262 U.S. 390, 400 (1923), the Supreme Court held that parents have the right to direct the education of their children. The Court stated in *Meyer* that the "[R]ight thus to teach and the rights of parents to engage so to instruct their children on are within the liberty of the [Fourteenth] amendment." *Id.* at 400. The right of parents to "direct the education and upbringing of their children," is also stated by the Court in its opinion in *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997) citing to *Meyer*.

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

Response: If I encountered text that is ambiguous, I would review the plain language of the statute and, if it remains unclear, I would look to the rules of statutory construction to determine its meaning. I would look to Supreme Court and Third Circuit precedent to see if the interpretation has been addressed. If not, then I would look to other Circuit Courts to see if they have made an analogous determination that serves a persuasive authority. Next, I would apply tools of statutory construction to help with interpreting the provision. Finally, I would consider legislative history, as a last resort, if all other steps taken to clarify ambiguous text were unsuccessful.

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

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

Response: For each of the subheading's 16(c-k) noted above, the Supreme Court decided each case based on the facts presented in the record, the arguments of counsel, the Constitution, and the law. As a judicial nominee, I am limited in my ability to comment on any matter that may come before me and it would be inappropriate for me to comment on the correctness of any Supreme Court opinion. If confirmed, I would faithfully and impartially apply Supreme Court precedent.

For subheadings 16(a) and 16(b), because the issues of *de jure* segregation and interracial marriage are unlikely to ever be re-litigated and because these cases are so widely accepted, I am comfortable saying that *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided.

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

Response: 18 U.S.C. § 1507 is titled Picketing or Parading and states, "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both." The statute states that if a person pickets or parade in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness or court officer, or with such intent uses a sound-truck or similar device or resorts to any other demonstration in or near any such building or residence and does so with the intent of interfering with, obstructing or impeding the administration of justice or with the intent of influencing any judge, juror, witness or court officer shall be fined or imprisoned. The text of the statute states my understanding.

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

Response: I am not aware of Supreme Court precedent that has determined that 18 U.S.C. § 1507 or a state analog statute is not constitutional on its face. If confirmed, I would follow Supreme Court and Third Circuit precedent in the interpretation and application of this law or a state analog statute.

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

Response: The Commonwealth of Pennsylvania has a judicial selection committee to assist in the judicial selection process. Senators Casey and Toomey engaged a bipartisan advisory panel to screen and interview candidates. I submitted my application on February 6, 2021. I was contacted by the judicial advisory panel on May 17, 2021, and was interviewed by the committee on May 19, 2021. I was contacted by Senator Casey's office on June 18, 2021, and interviewed with his executive team on June 21, 2021. I subsequently interviewed with Senator Casey on July 21, 2021. I was contacted by Senator Toomey's office on December 3, 2021, and met with his executive team on

December 9, 2021. I subsequently interviewed with Senator Toomey on December 13, 2021. On January 14, 2022, I provided answers to supplemental questions from Senator Toomey's office. On February 11, 2022, I was contacted by the White House Counsel's Office to schedule an interview. I subsequently interviewed with attorneys from the White House Counsel's Office on February 14, 2022. Since February 17, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On July 12, 2022, the President announced me as a judicial nominee for the U.S. District Court for the Eastern District of Pennsylvania.

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

    Response: No.

21. **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.

22. **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.

23. **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.

24. **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.

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

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

Response: No.

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

Response: No.

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

Response: No.

26. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: No.

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

    Response: No.

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

Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.

Response: No.

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

Response: No.

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

Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

29. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**
    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: I received the questions on September 14, 2022 from the Office of Legal Policy. I drafted my response to each question after reviewing the questions and conducting research. On September 16, 2022, I provided my draft responses to the Office

of Legal Policy. The Office of Legal Policy provided input on my draft responses, which I considered. I finalized and submitted my responses on September 19, 2022.

Questions for the Record for Kelley Brisbon Hodge
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.

Senator Mike Lee
Questions for the Record
Kelley Hodge, Nominee to be U.S. District Judge for the Eastern District of Pennsylvania

1. How would you describe your judicial philosophy?

Response: If confirmed, my judicial philosophy would be to adhere to the oath of a federal judge which is to "[A]dminister justice without respect to persons, and do equal right to the poor and to the rich, and that I [would] faithfully and impartially discharge and perform all the duties incumbent upon me [_] under the Constitution and laws of the United States." I would respect the law and every person who would appear before me and would approach each case with an open mind. I would decide matters without fear or favor by focusing on the facts presented, the arguments of the parties, applying the law and following binding precedent. I would research and render well-reasoned decisions and exercise judicial restraint by only deciding the issue that is presented in the case or controversy that is before me.

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

Response: If confirmed, in deciding a case that turned on the interpretation of a federal statute, I would follow and apply the Supreme Court and Third Circuit precedent. If there was no binding Supreme Court or Third Circuit precedent and the text of the statute is clear then I would adhere to the plain meaning of the statute. If the statute is ambiguous then I would look to other Circuit Courts for analogous decisions that provide persuasive authority and apply the canons of statutory construction. If there none of the preceding options provided the answer, I would consider the legislative history.

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

Response: If confirmed, in deciding a case that turned on the interpretation of a constitutional provision, I would follow and apply the Supreme Court and Third Circuit precedent. If there was no binding Supreme Court or Third Circuit precedent and the text of the constitutional provision is clear I would adhere to the plain meaning of the constitutional provision. If the constitutional provision is ambiguous then I would look to other Circuit Courts for analogous decisions that provide persuasive authority and apply the canons of construction.

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

Response: If confirmed, I would apply the interpretive analysis that the Supreme Court described in cases where the Court was asked to analyze a constitutional provision (See *District of Columbia v. Heller,* 554 U.S. 570 (2008)).

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

Response: Please see response to Question 2 above. I would give full deference and faithfully apply Supreme Court and Third Circuit precedent.

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

Response: The "plain meaning" of a statute or constitutional provision refers to the public understanding of the relevant language at the time of enactment.

6. What are the constitutional requirements for standing?

Response: Standing requires an injury in fact which means that the plaintiff suffered an invasion of a legally protected interest. The injury is concrete and particularized and is actual or imminent. Standing also requires causation which means the plaintiff's injury is fairly traceable to conduct which is the subject of the suit. Standing also requires the likelihood of redress meaning a decision in the plaintiff's favor must be likely, not merely speculative, to provide adequate remedy for injuries. *Lujan v Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992).

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

Response: Yes. In Article I, Section 8 of the Constitution, the framers stated in the final clause that Congress has the authority "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." This clause permits Congress to enact laws that grant implied powers that meet what has been stated as "Powers vested by the Constitution." One of the earliest examples of the application of the Necessary and Proper Clause was in the case of *McCulloch v. Maryland,* 17 U.S. 316 (1819) where the Court held that Congress had the authority to establish a federal bank, and that the financial institution could not be taxed by the states.

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 look for and follow Supreme Court and Third Circuit precedent. If no Supreme Court or Third Court precedent existed, I would follow the steps stated in my response to Question 3 above.

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

Response: Yes. The Constitution does include protection for rights that are not expressly enumerated in the Constitution. The Supreme Court provided a substantive due process analysis in *Washington v. Glucksberg*, 521 U.S. 702 (1997) which held that the Fifth and Fourteenth Amendments to the Constitution protects fundamental rights which are objectively, deeply rooted in the nation's history and tradition and are implicit in the concept of ordered liberty. *Id.* at 721. The Court stated that there must be a "careful description" of the fundamental liberty interest. *Id.* at 721. Alternatively, there have been other times where the court has found an unenumerated right that is protected under the Constitution, such as the right of parents to determine the education of their children recognized in *Meyer v. Nebraska,* 262 U.S. 390 (1923); right to marry recognized in *Loving v. Virginia,* 388 U.S. 1 (1967) and *Obergefell v. Hodges,* 576 U.S. 644 (2015) and the right to marital privacy as stated in *Griswold v. Connecticut,* 381 U.S. 479 (1965).

10. What rights are protected under substantive due process?

Response: Please see response to Question 9 above.

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

Response: In light of the Supreme Court's decision on *Dobbs v. Jackson Women's Health Organization,* 597 U.S. ___ (2022), there is no fundamental right to abortion. If I am confirmed as a U.S. District Court Judge, my beliefs or personal opinions are irrelevant to any decision that I would make. Each case and controversy that would come before me would be decided based on the facts, the arguments of the litigants and applying the law. I would follow Supreme Court and Third Circuit precedent in deciding any case.

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

Response: The Commerce Clause (Article I, Section 8) of the Constitution states that Congress has the authority to regulate Commerce with foreign Nations and among the several States and with Indian Tribes. The Commerce Clause allows Congress to regulate: (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce or persons or things in interstate commerce; and (3) those activities having a substantial relation to interstate commerce. *Gonzales v. Raich,* 545 U.S. 1 (2005).

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

Response: A "suspect class" is a class of individuals marked by immutable characteristics (such as race or national origin) and entitled to equal protection of the

law by means of judicial scrutiny of a classification that discriminates against or otherwise burdens or affects them. (Merriam-Webster's Legal Dictionary 2022). Race, national origin, alienage and religion have been identified by the Supreme Court as suspect classifications that require a strict scrutiny level of review. *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

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

Response: The Constitution set forth in Article I, Article II and Article III the three co-equal branches of government: Legislative, Executive and Judicial. The purpose of a government rooted in a system of checks and balances is to ensure that exclusive power to govern does not rest in the hands of one branch, person or body. The system of checks and balances is to maintain the foundation of democracy which is defined by the will of the people.

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 review the facts of the case, the authority assumed by the one branch and apply Supreme Court and Third Circuit precedent in order to determine whether or not the one branch of government exceeds the scope of it authority in violation of the Constitution.

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

Response: Empathy does not play a role in a judge's consideration of a case. The court should faithfully and impartially apply the law to the facts in reaching a decision in any case or controversy before them.

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

Response: Both are equally problematic and outcomes that should be avoided.

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 am not intimately familiar with this issue presented in the question above. Thus, I do not have a detailed response to provide and would not want to offer a speculative answer. I do believe that our system of democracy with the separation of powers as well as level of appellate review afforded to litigants in the

administration of justice provides what was intended, which is an ability for a decision to be re-examined to ensure that the just result was reached.

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

Response: Judicial review is defined by Black's Law Dictionary as "1. A court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional. 2**.** The constitutional doctrine providing for this power. 3. A court's review of a lower court's or an administrative body's factual or legal findings" (11th ed. 2019).

Judicial supremacy is defined as "The doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states," (11th ed. 2019). Judicial review is the action taken by the court to review the decision of the lower court to determine if there was an error in the court's ruling. Judicial supremacy, as defined, is the doctrine that the decisions that are made through judicial review, especially the Supreme Court, are supreme and binding on the other branches of government and the states.

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: Elected officials, as are all citizens, are expected to respect and follow the law. Elected officials have a higher duty by virtue of their taking an oath of office to abide by the Constitution of the United States. Thus, an elected officer would be expected to respect a duly rendered judicial decision regardless of their personal opinion for or against the decision.

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: The importance of the statement made by Hamilton in Federalist 78 is to maintain the focus of the judiciary on the impartial application of the law and judging matters solely based on the facts and the law and not on any other external factors. Judges are to ensure fairness and that every person who comes before them has a right to due process and equal justice under the law. The statement also underscores

the separation of powers as well by reminding judges that they do not make the law but they interpret and apply the law. It is important to maintain that focus in order to ensure the fair administration of justice and confidence in our judiciary.

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

Response: If confirmed, I would apply Supreme Court and Third Circuit precedent to any matter that may come before me. As an inferior court, I am bound to do so. If there is precedent that is not applicable to the issue presented then it should not be applied and I would exercise judicial restraint in making sure that I applied the law to the issue presented would not extend the scope of my decision to an issue that is not before me.

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: Race and other identity characteristics should play no role in sentencing. 18 U.S.C §3553(a) lists seven factors that are to be considered in imposing a sentence on a defendant convicted of a crime. One of the factors that a judge shall consider 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)).

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: Equity is defined in Black's Law Dictionary as "fairness, impartiality; evenhanded dealing" (11th ed. 2019). I am not familiar with the context of the statement made by the Biden Administration and have no comment regarding the definition or statement.

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

Response: Equity is defined in Black's Law Dictionary as "fairness, impartiality; evenhanded dealing" (11th ed. 2019). Equality is defined in Black's Law Dictionary as the "[q]uality, state or condition of being equal."

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

Response: The 14th Amendment's equal protection clause states, in part, "[N]o State shall deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

27. How do you define "systemic racism?"

Response: Systemic racism is defined by Merriam-Webster's Dictionary as "discrimination or unequal treatment on the basis of membership in a particular ethnic group (typically one that is a minority or marginalized), arising from systems, structures, or expectations that have become established within society or an institution."

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

Response: The term "critical race theory" has differing definitions. According to Merriam-Webster's Dictionary, "critical race theory" is defined "as a group of concepts (such as the idea that race is a sociological rather than biological designation, and that racism pervades society and is fostered and perpetuated by the legal system) used for examining the relationship between race and the laws and legal institutions of a county and especially the United States; a movement advocating the examination of this relationship."

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

Response: I have not personally distinguished or opined on the difference between systemic racism and critical race theory. The definition for each term speaks for itself.

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

Questions for the Record for Kelley B. Hodge, Nominee for the Eastern District of Pennsylvania

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: Racial discrimination is illegal. Race is a suspect classification that is protected under the Constitution.

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

Response: As a judicial nominee, it would not be appropriate for me to comment on cases that could come before me. If confirmed, I would follow Supreme Court and Third Circuit precedent in deciding all matters before me.

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

Response: If confirmed, my judicial philosophy would be to adhere to the oath of a federal judge which is to "[A]dminister justice without respect to persons, and do equal right to the poor and to the rich, and that I [would] faithfully and impartially discharge and perform all the duties incumbent upon me [_] under the Constitution and laws of the United States." I would respect the law and every person who would appear before me and would approach each case with an open mind. I would decide matters without fear or favor by focusing on the facts presented, the arguments of the parties, applying the law and following binding precedent. I would research and render well-reasoned decisions and exercise judicial restraint by only deciding the issue that is presented in the case or controversy that is before me. I do not feel that I have sufficient knowledge of each philosophy of the Justices of the Courts that are stated in the question to respond.

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

Response: Black's Law Dictionary defines originalism as "[T]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect (11th ed. 2019)." I would not define myself by any label. If I were to be confirmed, I would focus on the facts, listen to the arguments of the litigants and apply the law. I would follow Supreme Court and Third Circuit precedent.

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

Response: Living constitutionalism is defined as the doctrine that "[T]he 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 would not define myself by any label.

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: If confirmed and I was presented with a constitutional issue of first impression and the resolution of such issue was not controlled by binding precedent and the original public meaning of the Constitution were clear, I would follow the clear and plain meaning of the provision.

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: There have been instances where the Court has determined that contemporary community standards or understandings are used in assessing certain constitutional questions such as in a freedom of speech versus hate speech or obscenities case. See *Miller v. California,* 413 U.S. 15 (1973). Otherwise, the public's current understanding of the Constitution or of a statute is not relevant when determining the meaning of the Constitution. If confirmed, I would follow Supreme Court and Third Circuit precedent in deciding any case or controversy that would come before me.

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

Response: The Constitution is a document that has endured for over 200 years. The Constitution has only been changed when amended pursuant to Article V. The Supreme Court interprets the Constitution and sets forth its opinion which serves as binding precedent on inferior Courts.

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

Response: The holding in *Dobbs v. Jackson Women's Health Organization* is the precedent on the issue.

a. **Was it correctly decided?**

Response: Please see response to Question 9 above. As a judicial nominee, it would be inappropriate for me to comment or opine any decision issued by the Supreme Court. The Supreme Court issues rulings interpreting the Constitution which becomes the law of the land and, as precedent, it is to be followed and applied. If confirmed to be a U.S. District Court Judge, I would faithfully and impartially discharge my duties as a judge, apply the law to the facts in every case, follow precedent and render a decision without fear or favor.

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

Response: The holding in *New York Rifle & Pistol Association v. Bruen* is the precedent on the issue.

a. **Was it correctly decided?**

Response: Please see response to Question 10 above. As a judicial nominee, it would be inappropriate for me to comment or opine any decision issued by the Supreme Court. The Supreme Court issues rulings interpreting the Constitution which becomes the law of the land and, as precedent, it is to be followed and applied. If confirmed to be a U.S. District Court Judge, I would faithfully and impartially discharge my duties as a judge, apply the law to the facts in every case, follow precedent and render a decision without fear or favor.

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

Response: The holding in *Brown v. Board of Education* is the precedent on the issue.

a. **Was it correctly decided?**

Response: Please see response to Question 11 above. As a judicial nominee, it would be generally inappropriate for me to comment or opine any decision issued by the Supreme Court. However, because the issue of *de jure* segregation is unlikely to ever be re-litigated and because the ruling in the case is widely accepted, I am comfortable stating that *Brown v. Board of Education* was correctly decided.

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

Response: 18 U.S.C. §3142 addresses pre-trial detention and 18 U.S.C. §3142 (f)(1) lists the offenses or criterion that create a presumption in favor of pre-trial detention, noted below.

A judicial officer shall hold a hearing to determine whether any condition or combination of conditions will reasonably assure the appearance of such person as required and the safety of any other person and the community—
(1) upon motion of the attorney for the Government, in a case that involves—
(A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;
(B) an offense for which the maximum sentence is life imprisonment or death;
(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;
(D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or
(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code; or
(2)upon motion of the attorney for the Government or upon the judicial officer's own motion in a case, that involves—
(A) a serious risk that such person will flee; or
(B)a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance.

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

Response: The general rationale associated with each of the listed criterion that prompts a detention hearing and creates a presumption is the risk that the defendant

may flee and/ or the serious nature of the offense as well as the risk of harm to another person or the community.

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

Response: Yes. The Supreme Court has ruled on multiple occasions that federal courts must find that a law violates the Religion Clauses of the First Amendment if the laws burden on the free exercise of religion is not neutral or generally applicable and if the law is not narrowly tailored to meet a compelling government interest. *See generally, Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Commission,* 138 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021); *Tandon v. Newsom,* 141 S. Ct. 1294 (2021). Additionally, the Religious Freedom Restoration Act (RFRA) and Religious Land Use and Institutionalized Persons Act (RLUIPA) both require that federal and certain state actions not substantially burden the free exercise of religion unless doing so further a compelling government interest and is the least restrictive means of furthering that government interest.

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

Response: No.

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63 (2020), the Supreme Court held that the plaintiffs were entitled to a preliminary injunction enjoining the enforcement of a New York executive order which restricted capacity of certain worship services. The Court found that the applicants "clearly established their entitlement to relief pending appellate review. They showed that their First Amendment claims were likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." The Court also noted that on the *Likelihood of success on the merits*, the applicants have made a strong showing that the challenged restrictions violate "the minimum requirement of neutrality" to religion. *See Roman Catholic*, 141 S. Ct. 63, 66 (2020); *See also Church of*

Lukumi Babalu Aye, Inc. v. *Hialeah*, 508 U.S. 520, 533 (1993). The Court in *Church of Lukumi* stated "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order'" and must be "narrowly tailored in pursuit of those interests." *See Church of Lukumi*, 508 U.S. 520, 546 (1993); *McDaniel* v. *Paty,* 435 U. S., at 628, quoting *Wisconsin* v. *Yoder,* 406 U.S. 205, 215 (1972). Because the challenged restrictions are not "neutral" and of "general applicability," they must satisfy "strict scrutiny," and this means that they must be "narrowly tailored" to serve a "compelling" state interest. *Church of Lukumi*, 508 U.S. 520, 546 (1993). The Court in Roman Catholic added that "[S]temming the spread of COVID-19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as "narrowly tailored. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure." *See Roman Catholic,* 141 S. Ct. 63, 68 (2020).

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that the Ninth Circuit erred in not granting an injunction pending appeal. The Court stated, "[F]irst, 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. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020) (per curiam). It is no answer that a state treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Id.* at 66-67. The Court explained that "whether two activities are comparable . . . must be judged against the asserted government interest that justifies the regulation at issue." In the context of restrictions to prevent the spread of COVID-19, the Court said comparability was "concerned with the risks various activities pose." Third, the government has the burden to establish that the challenged law satisfies strict scrutiny. To do so in this context, it must do more than assert that certain risk factors "are always present in worship, or always absent from the other secular activities" the government may allow. Instead, narrow tailoring requires "[t]the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID." *Id.* at 69-70. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too. Applying these principles to the challenged restrictions, the opinion held that the state did treat "some comparable

secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time." The Court further held that the challengers were likely to prevail under a strict scrutiny analysis because the state had "not shown that 'public health would be imperiled' by employing less restrictive measures."

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

Response: The First Amendment of the Constitution states that 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. Yes, people have a right to their religious beliefs outside the walls of their houses of worship and homes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court set aside state administrative proceedings enforcing Colorado's anti-discrimination laws against a baker who had, in the view of the state, violated those laws by refusing to make a cake for a same-sex wedding. The Court held that the state had violated the Free Exercise Clause because the Colorado Civil Rights Commission had not considered the baker's case "with the religious neutrality that the Constitution requires." As a general rule, the Court announced that "the delicate question of when the free exercise of [the baker's] religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach." The Court highlighted two aspects of the state proceedings that had, in its view, demonstrated impermissible religious hostility: first, certain statements by some of the Commissioners during the proceedings before the Commission; and second, "the difference in treatment between [the petitioner's] case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission."

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

Response: Yes. In *Frazee v. Illinois Department of Employment*, 489 U.S. 829, 834 (1989), the Supreme Court held that an individual's sincerely held beliefs are protected even if the belief is not "the command of a particular religious organization." An individual's religious belief need not be logical, consistent and comprehensible to

others," in order to be protected. *Thomas v. Review Board of Indiana Employment Security Division,* 450 U.S. 707, 715 (1981). The Court's perception of a particular belief or practice should not factor into the determination of what constitutes a "religious belief or practice." *Id.* at 713-714.

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

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: As a judicial nominee, I do not possess the knowledge, expertise nor am I in the position to answer this question.

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

Response: The Supreme Court held *in Our Lady of Guadalupe School v. Morrissey-Berru,* 140 S. Ct. 2049 (2020) that the "ministerial exception" applied to the employment discrimination lawsuits brought by employees of religious institutions who are not "ministers". The Court reasoned that although the teachers in this case were not "ministers", their roles educating students in their faith were at the "core" of the school's mission. *Id*. at 2055. Thus, they were barred from bringing their employment discrimination claim pursuant to the "ministerial exception."

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

Response: In *Fulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021), the Supreme Court held that a Catholic foster care agency was entitled to a constitutional exception from a city's nondiscrimination policy. The city had refused to sign a contract with the agency unless it agreed to a provision prohibiting discrimination on the basis of certain protected classes, including sexual orientation, in the provision of services. The agency argued that this would impermissibly require it to certify same-sex foster parents in violation of its religious beliefs, and the Supreme Court agreed. The Supreme Court said that the contract's nondiscrimination provision was not generally applicable under *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990). because it allowed a city official to grant exceptions, in the official's "sole discretion." The Court held that the nondiscrimination provision "incorporate[d] a system of individual exemptions," and that the city could not "refuse to extend that [exemption] system to cases of religious hardship without compelling reason." The Supreme Court concluded that the city failed to meet this standard, because it had offered "no compelling reason why it has a particular interest in denying an exception to [the religious agency] while making them available to others." *Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1877-82 (2021).

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

Response: In *Carson v. Makin*, 596 U.S. __ (2022), the Supreme Court held that Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments to parents who live in school districts that do not operate a secondary school of their own violates the Free Exercise Clause of the First Amendment. Relying on previous precedent in *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012 (2017) and *Espinoza v. Montana,* 140 S. Ct. 2246 (2020), the Supreme Court stated in its opinion that "[t]here is nothing neutral about Maine's program. [T]he State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion." The Court held that "[a] State need not subsidize private education, but once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Carson v. Makin,* 596 U.S. __ (2022). A law that operates in that manner, the Court held, must be subjected to "the strictest scrutiny."

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

Response: In *Kennedy v. Bremerton School District*, 597 U.S. __ (2022), a high school football coach engaged in prayer with a number of students during and after school games. His employer, asked that he discontinue the practice in order to protect the school from a lawsuit based on violation of the Establishment Clause, ultimately disciplining

and firing the coach Kennedy sued the school district for violating his rights under the First Amendment and Title VII of the Civil Rights Act of 1964. The Supreme Court held that the school district violated the Free Exercise and Free Speech Clauses of the First Amendment by firing the coach. The Supreme Court ruled that the school district could not show that their decision served a compelling purpose and was narrowly tailored to achieving that purpose.

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

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), an Amish community in Fillmore County Minnesota claimed that the county's septic system mandate violated the RLUPA. The Supreme Court vacated the lower court's judgment and remanded the case to the Court of Appeals of Minnesota for further consideration in light of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). Justice Gorsuch wrote in his concurrence that the County and courts below erred by treating the County's *general* interest in sanitation regulations as "compelling" without reference to the specific application of those rules to this community. Thus, the question in this case "is not whether the [County] has a compelling interest in enforcing its [septic system requirement] *generally*, but whether it has such an interest in denying an exception from that requirement to the Amish community *specifically*. Under strict scrutiny doctrine, the County must offer a compelling explanation why the same flexibility extended to others cannot be extended to the Amish. As stated in *Fulton*, the government must offer a "compelling reason why it has a particular interest in denying an exception to [a religious claimant] while making [exceptions] available to others." *Fulton v. Philadelphia,* 141 S. Ct. at 1882.

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

Response: 18 U.S.C. § 1507 is titled Picketing or Parading and states "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both." If confirmed, while I am precluded by the Code of Conduct for United States Judges from commenting on a matter that may

come before me, I would apply Supreme Court and Third Circuit precent in interpreting the statute.

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

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

       Response: No.

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

       Response: No.

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

       Response: No.

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

       Response: No.

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

    Response: I do not know what training is offered or required by the Court nor do I know its content, how the content is defined or if I would have any say in its contents. However, if confirmed, I will commit to adhering to the oath of Judges that seeks justice by ensuring everyone who comes into the Courtroom is heard and that the law will be applied faithfully and impartially as well as following the Code of Conduct for United States Judges.

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

    Response: Yes.

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

Response: The Appointments Clause of the Constitution states that the President is given the authority, which the advice and consent of the Senate, to make appointments to political positions. U.S. Constitution, Art. II, §2, cl. 2. As a judicial nominee, it is not appropriate for me to comment on what the President and the Senate can or cannot take into consideration in evaluating candidates for appointed positions.

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

Response: Systemic racism is defined in by Merriam Webster's Dictionary as "[D]iscrimination or unequal treatment on the basis of membership in a particular ethnic group (typically one that is a minority or marginalized), arising from systems, structures, or expectations that have become established within society or an institution." As a judicial nominee, I believe it would be inappropriate for me to comment on any issue or subject matter that may appear in cases before me if I am fortunate enough to be confirmed. Additionally, as a judicial nominee, I am also bound by the Code of Judicial Conduct which precludes me from commenting on matters that could appear before me. If any case of discrimination based on race, gender, religion comes before me, I will apply Supreme Court and Third Circuit precedent to the facts of the case.

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: As a judicial nominee, I am bound by the Code of Conduct for United States Judges which precludes me from commenting on matters that could appear before me. Also, this subject matter addresses a legislative discussion that would rest with Congress.

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

Response: No, and if confirmed, I will faithfully follow all precedent created by the Supreme Court.

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

Response: The Supreme Court in *District of Columbia v. Heller,* 128 S. Ct. 2783 (2008), looked at the original public meaning of the Second Amendment. Following its

interpretive analysis, the Court held that the Second Amendment grants "the individual right to possess and carry weapons in case of confrontation." *Id.* at 2793.

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

Response: In *New York State Rifle and Pistol v. Bruen,* the Supreme Court held that a firearm restriction violates the Second Amendment if the restriction is inconsistent with the nation's historical tradition of firearm regulation. 142 S. Ct. 2111, 2126 (2022).

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

Response: Yes. The right to own firearm is protected individual right under the Second Amendment to the Constitution. See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: No.

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

Response: No.

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

Response: Article II of the Constitution establishes the Executive branch and states the role and responsibilities of the President. Article II states, in part, that the President shall take care that "the laws be faithfully executed." As a judicial nominee it would be inappropriate for me to comment further on the responsibilities of the President to faithfully execute the laws because that issue could come before me if I am confirmed.

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

Response: Black's Law dictionary defines prosecutorial discretion as a prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court. (11th ed. 2019). I am not familiar with the definition, if any, for substantive

administrative rule change. I would conclude based on context that substantive administrative rule change would involve a process with a level or levels of review that would lead to a vote for approval by a body that is entrusted with that responsibility. Prosecutorial discretion is possessed by the one individual, the Prosecutor. They can unilaterally elect to use their discretion.

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

Response: Congress possesses the power to propose legislation to abolish the death penalty that would require the President's signature to be enacted. The President has the authority to "grant reprieves and pardons for offenses against the United States" in individual cases. This authority is found in Article II of the Constitution.

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

Response: In *Alabama Association of Realtors v. HHS,* 594 U.S. ____, 141 S. Ct. 2320 (2021), the Supreme Court vacated a stay on eviction moratorium that had been enacted by the Center for Disease Control "CDC" due to the Covid-19 pandemic. The Court stated that it is Congress's responsibility to speak clearly and provide explicit authority to an agency in order for the agency to exercise powers of "vast economic and political significance." *Id.* at ___ (Per Curiam) citing to *Utility Air Regulatory Group v. EPA,* 573 U. S. 302, 324 (2014).

42. **Is America a systematically racist country?**

Response: No.

43. **Is "systematic racism" the root cause of the killing of Black people in America, as you have previously stated?**

Response: I believe the question is referring to the statement I wrote in a June 2020 Alert that is published in my firm following the killing of George Floyd on that focused on collaboration regarding suggested reforms that were being proposed at the national, state and local level. When asked about this statement during the hearing, I noted that I would revise the sentence to state that systemic racism is *one* of the root causes of the killing of Black people in America.

44. **Do you believe in defunding the police?**

Response: No. I have worked with and along law enforcement for numerous years. I understand the complex nature of their work which is one of the reasons why I was

appointed by the Governor of Pennsylvania to serve as an at-large member of the Pennsylvania Law Enforcement Citizen's Advisory Commission.

45. **Is Philadelphia District Attorney Larry Krasner's soft on crime approach contributing to the rising violent crime rate in Philadelphia?**

Response: As the former interim District Attorney of Philadelphia that preceded the current District Attorney in office as well as a judicial nominee, I do not believe it is appropriate for me to comment on District Attorney Krasner's approach to crime. If I am confirmed, it is possible that I could have a matter come before me that involves District Attorney Krasner and/or his office.

46. **Do you support the use of race as a factor in university admission decisions?**

Response: As a judicial nominee, I do not believe it is appropriate for me to comment on any matter that could potentially come before me as a judge if I were confirmed. I would faithfully adhere to following Supreme Court and Third Circuit precedent for any case or controversy that would come before me.

47. **I am proud to be leading an amicus brief in *Students for Fair Admissions v. Harvard College*, which challenges the constitutionality of race-based admissions. If the Supreme Court agrees with me and my colleagues, and overturns *Grutter*, will you faithfully apply the Supreme Court's decision?**

Response: If I am confirmed as a U.S. District Court Judge, I will adhere to the judicial oath and would faithfully and impartially conduct my duties as a judge. Thus, I would follow binding precedent as decided by the Supreme Court and the Third Circuit Court of Appeals.

48. **During a 2021 panel on diversity, you stated "you need to look at everything with a diversity lens. You need to take a moment to put on those glasses and to look at every aspect from hiring, to promotion, to business development, to marketing, to strategy, to front-facing clients, to everything, and you need to have that lens . . ." Is it your belief that race should play a role in every facet of the business world?**

Response: The context of that statement was during a professional conference that was focused on how to increase and promote all levels of diversity in the workplace and, thereby improve workplace productivity. The statement was not focused solely on race. The comments were to suggest that seeing things from a different perspective or "lens" may go to improving overall work productivity and workplace culture by acknowledging diverse perspective, backgrounds and experiences.

49. **What role should race play in the courtroom?**

Response: Race should not play a role in the courtroom. The only time race would be considered in a courtroom is if it is an element of a charge, case or motion (i.e. *Batson*) that is asserted by the litigants or defendant.

50. **How would a litigant have confidence in your courtroom of fairness and equal protection of law given your comments on looking at everything with a diversity lens?**

Response: Please see response to Question 48 above. Additionally, if I were confirmed as U.S. District Court Judge, I would ensure respect for the law and respect for the people who would come before me. Adhering to the oath for Judges, I would "administer justice without respect to persons, and do equal right to the poor and to the rich, and that I [would] faithfully and impartially discharge and perform all the duties incumbent upon me as [___] under the Constitution and laws of the United States." I would see and hear each litigant and listen to their argument. I would do so with an open-mind and a commitment to being diligent and thoughtful while focusing on the facts of their case and applying the law. I have exhibited the same approach and methodology at every phase of my career: to serving on the Pennsylvania State Bar Disciplinary Board Hearing Committee, in serving as District Attorney and in serving as an Assistant Public Defender along with various other roles I have had. I always lead with fairness and impartiality never pre-judging the person who is meeting me during a time of crisis and fear. As an advocate, I have always done so and would continue as a judge to do so if I am confirmed.

51. **Since 2019, you have served on the board of the Women's Law Project, a public interest law firm in Pennsylvania. On its website, Women's Law Project stated that the religious and moral exemption regulations to the contraceptive mandate "violate the Establishment Clause of the First Amendment by imposing the religious beliefs of employers on their employees." Do you agree that granting religious exemptions to contraceptive mandate violates the First Amendment?**

Response: As a judicial nominee, it would be inappropriate for me to comment or share my opinion on a subject matter that could come before me if I am confirmed. I will add that, if confirmed, I would follow Supreme Court and Third Circuit precedent in any matter that would come before me.

a. **If yes, how?**

Response: Please see response to Question 51 above.

52. **The Women's Law Project, as part of The Alliance: State Advocates for Women's Rights and Gender Equality, issued a report advocating to "[s]top funding crisis pregnancy centers with public dollars," and "[p]ass legislation disallowing CPCs from teaching "sexuality education" in public schools." Do you agree that crisis pregnancy centers should be defunded and prevented from teaching about preventing teen pregnancy in public schools?**

Response: I am not familiar with the report that you have referenced so I am not able to comment. In addition, as a judicial nominee, it would be inappropriate for me to comment or share my opinion on a subject matter that could come before me if I am confirmed. I would follow Supreme Court and Third Circuit precedents in any matter that would come before me.

53. **The Women's Law Project sued Pennsylvania Department of Human Services, along with Planned Parenthood, seeking taxpayer-funded coverage of abortion through Medicaid. The brief stated that that there is a "constitutional right to terminate a pregnancy" in Pennsylvania and that abortion providers have the right to sue on behalf of patients, even if there is no evidence they "even want this assistance." Do you agree?**

Response: I am not familiar with the litigation or the brief and its arguments. Thus, I am not able to comment further. Additionally, as a judicial nominee, it would be inappropriate for me to comment or share my opinion or a subject matter that could come before me if I am confirmed. If confirmed, I would follow Supreme Court and Third Circuit precedent in any matter that would come before me.

Senator Ben Sasse
Questions for the Record for Kelley Brisbon Hodge
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
September 7, 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: If confirmed, my judicial philosophy would be to adhere to the oath of a federal judge which is to "[A]dminister justice without respect to persons, and do equal right to the poor and to the rich, and that I [would] faithfully and impartially discharge and perform all the duties incumbent upon me [_] under the Constitution and laws of the United States." I would respect the law and every person who would appear before me and would approach each case with an open mind. I would decide matters without fear or favor by focusing on the facts presented, the arguments of the parties, applying the law and following binding precedent. I would research and render well-reasoned decisions and exercise judicial restraint by only deciding the issue that is presented in the case or controversy that is before me.

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

   Response: Black's Law Dictionary defines originalism as "[T]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." (11th ed. 2019). I would not define myself by any label. If I were to be confirmed, I would focus on the facts, listen to the arguments of the litigants and apply the law. I would follow Supreme Court and Third Circuit precedent.

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

   Response: Black's Law Dictionary defines textualism as "[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." (11th ed. 2019). I would not define myself by any label. If I were to be confirmed, I would focus on the facts, listen to the arguments of the litigants and apply the law. I would follow Supreme Court and Third Circuit precedent in interpreting any statute or Constitutional provision.

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

   Response: The Constitution is a document that has endured for over 200 years. The Constitution has only been changed when amended pursuant to Article V. The Supreme Court interprets the Constitution and sets forth its opinion which serves as binding precedent on inferior courts.

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 do not possess an intimate knowledge of all of the Supreme Court Justices that have been appointed since January 20, 1953 in order to comment on the jurisprudence of those I would most admire. I admire the collegial nature of the Supreme Court Justices and the manner in which they conference, deliberate, respect their differences of opinion and render their opinions. If I were confirmed, I would follow the oath taken by all federal judges to faithfully and impartially discharge and perform all the duties that would be incumbent upon me as judge.

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

   Response: In the absence of controlling Supreme Court precedent, Circuit Court precedents are binding on that Circuit Court unless a majority of active judges in the circuit overturn a decision in an *en banc* proceeding.

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

   Response: Please see response to Question 7.

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

   Response: If confirmed, in interpreting a statute, I would look to find and apply Supreme Court and Third Circuit precedent. If there was no Supreme Court or Third Circuit precedent on point, then I would look to the text of the statute. If the text is clear my analysis would stop there. If the text was ambiguous, I would continue my analysis to see if any other Circuit Court has interpreted the statute and provides persuasive authority. If there is no guidance or interpretation found in any of the above stated areas, as a matter of last resort, I would look to legislative history (i.e. legislative committee reports) to see if there is direction contained in the history on statutory interpretation.

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

Response: Race or ethnicity should not be a factor in sentencing. 18 U.S.C. §3553(a) lists seven factors that are to be considered in imposing a sentence on a defendant convicted of a crime. One of the factors that a Judge shall consider is "[T]he 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)).

Senator Josh Hawley
Questions for the Record

Kelley Hodge
Nominee, Eastern District of Pennsylvania

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

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

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

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

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

    Response: For subsections 1(a-d) above, if confirmed, in all criminal sentencing matters, I would follow 18 U.S.C. §3553 and the enumerated factors that shall be considered in the sentencing of a defendant for any offense in which they have been found guilty.

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

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

    Response: As a judicial nominee, it would be inappropriate for me to comment on legislative matters.

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

    Response: As a judicial nominee, it would be inappropriate for me to comment on legislative matters.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on matters that may come before me. If confirmed, I would faithfully and impartially apply the law to the facts and consider all relevant information as outlined in 18 U.S.C. §3553.

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: The oath taken by a judge, in part, is to "faithfully and impartially discharge and perform all the duties incumbent upon [them] as [__] under the Constitution and laws of the United States." A judge should apply the law to the facts and follow Supreme Court and Circuit Court precedent.

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

Response: A judge should apply the law to the facts and follow Supreme Court and Circuit Court precedent. This is what I intend to do should I be confirmed.

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

Response: The holding in *Dobbs v. Jackson Women's Health Organization* is the Supreme Court precedent on the issue.

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

Response: Under the doctrine of abstention, a federal court may decline to exercise or postpone the exercise of its jurisdiction in certain exceptional circumstances where repair to the state court would clearly serve an important countervailing interest to the obligations of a district court to adjudicate cases properly before it. "Abstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases

can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 813-817 (1976). The *Colorado River* abstention doctrine addressed the issue of whether a federal court should exercise its jurisdiction where there is a parallel litigation in both federal and state courts. See *Colorado River Conservation Dist. v. United States,* 424 U.S. 800, 817-820 (1976); *Nationwide Mutual Fire Insurance Company v. George V. Hamilton, Inc.,* 571 F.3d 299, 307 (3d Cir. 2009).

In *Colorado River*, the Supreme Court articulated the three types of abstention applicable to the federal courts. The first of these three types of abstention stems from *Railroad Commission of Texas v. Pullman,* 312 U.S. 496 (1941). Under the *Pullman* doctrine, a federal court should abstain in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.

The second type of abstention arises out of *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943). *Burford* type abstention is appropriate where exercise of federal review of difficult state law questions would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

The third type of abstention is based upon *Younger v. Harris,* 401 U.S. 37 (1971). Abstention is appropriate under *Younger* where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings.

The *Rooker-Feldman* abstention doctrine states that the federal courts should abstain from hearing "cases brough by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corporation v. Saudi Basic Industries Corp.,* 544 U.S. 280, 284 (2005); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman,* 460 U.S. 462 (1983).

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

   Response: No.

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

   Response: Not applicable.

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

Response: If I were confirmed as a district judge, I would follow Supreme Court and Third Circuit precedent on matters of constitutional interpretation. Where the Supreme Court or the Third Circuit has determined that the original meaning of the text is appropriate in the interpretation of its provisions, I will adhere to precedent and apply the original public meaning of the text.

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

   Response: Legislative history would only be considered as a final option when there is an absence of Supreme Court or Third Circuit binding precedent, there is no analogous interpretation from another Circuit as persuasive authority and there remains ambiguity after applying the canons of statutory construction.

   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: I would follow the direction provided by the Supreme Court on legislative history as stated in *Garcia v. United States*, 469 U.S. 70, 76 (1984) where the court stated that committee reports are the most reliable source of legislative history.

   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 never appropriate to do so.

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

   Response: *Bucklew v. Precythe* 139 S. Ct. 1112 (2019) describes the standard for determining whether an execution protocol violates the Eighth Amendment. In *Bucklew*, the test states that a defendant must show (1) a feasible and readily implemented alternative method that would significantly reduce a substantial risk of severe pain and (2) that the state refused to adopt the method without a legitimate penological reason.

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

Response: Yes.

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

Response: The Supreme Court has held that a habeas corpus petitioner does not have a substantive due process right to DNA analysis of evidence to prove innocence. See *District Attorney's Office for Third Judicial District v. Osborne,* 557 U.S. 52 (2009). The Third Circuit Court of Appeals applied the standard stated by the Supreme Court in *Osborne* in the case of *Bonner v. Montgomery County,* 458 Fed. Appx. 135 (3d Cir. 2012).

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

Response: No.

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

Response: The Supreme Court held in *Church of Lukumi Bablau Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531 (1993) 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." If the law is not neutral and of general applicability then the law is subject to a strict scrutiny standard of review. Other Supreme Court cases that have addressed the issue of First Amendment freedom of religion and would serve as binding precedent are *Tandon v. Newsom,* 141 S. Ct. 1294 (2021), *Fulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021) and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* 138 S. Ct. 1719 (2018).

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

Response: Please see response to Question 13 above.

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

Response: The standard in the Third Circuit Court of Appeals is whether the plaintiff's sincerely held views were sufficiently rooted in religion to merit First Amendment protection. See *Sutton v. Rasheed,* 323 F. 3d 236 (3d Cir. 2003).

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

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

Response: In *District of Columbia v. Heller,* 128 S. Ct. 2783, (2008) the Supreme Court stated "The Second Amendment provides: '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.' In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague,* 282 U.S. 716, 731 (1931); See also *Gibbons v. Ogden,* 6 S. Ct. 23 (1824). The Supreme Court held that "[T]he District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." *District of Columbia v. Heller,* 128 S. Ct. 2783 at 2821 (2008). The court went on to explain in its opinion that "[T]he [Second] Amendment's prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause. The operative clause's text and history demonstrate that it connotes an individual right to keep and bear arms." The Court also stated in its holding that "Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld under the Amendment or state analogues. The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by

felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 2816-2817.

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

Response: No.

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

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

Response: Justice Holmes seemed to suggest that the majority based its decision on a desired outcome "to embody a particular economic theory" which he stated was antithetical to the Constitution. *See Lochner v. New York,* 198 U.S. 45, 75-76 (1905).

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 abrogated *Lochner* in subsequent decisions *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Williamson v. Lee Optimal of Oklahoma, Inc.,* 348 U.S. 483 (1955) As a judicial nominee, it would be inappropriate for me to comment on my personal opinion regarding the decision of the Supreme Court. If confirmed to the U.S. District Court, I would follow current Supreme Court precedent on a similar issue and question presented.

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

a. If so, what are they?

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

Response: To subsections 18(a) and 18(b), I am not aware of Supreme Court opinions that have not been formally overruled by the Supreme Court that are not good law. Yes, I do commit to faithfully applying all Supreme Court precedent as decided.

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

a. Do you agree with Judge Learned Hand?

Response: I am not intimately familiar with the case wherein Judge Learned Hand stated the above quote. As a judicial nominee, it would be inappropriate for me to comment on my personal opinion regarding a comment made by a judge in another Circuit. I would apply Supreme Court and Third Circuit precedent in rendering a decision on any case regarding monopolies that came before me..

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

Response: Please see response to Question 19(a) above.

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

Response: It is my understanding that, pursuant to the holding of the Supreme Court in *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 481 (1992), "[E]vidence greater than 80% of market share was 'sufficient to survive summary judgment' under the standard of finding of monopoly power."

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

Response: Federal common law are rules created and applied by federal courts absent any controlling federal statute. In *Rodriguez v. FDIC,* 140 S. Ct. 713 (2020) the court stated that federal "common lawmaking must be 'necessary to protect uniquely federal interests.'"

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

Response: A state constitutional provision should be interpreted by the state court applying state law. The Erie Doctrine is a binding principle that states where federal courts exercising diversity jurisdiction shall apply federal procedural law of the Federal Rules of Civil Procedure but must defer to state courts in the interpretation and application of state laws and, therefore, apply state substantive law.

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

Response: Generally, the identical texts should be interpreted identically if the law that governs, state or federal, also provides identical application. A divergence in the applicable law used to interpret the text may result in differing interpretations.

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

Response: The Constitution is the supreme law of the land and various doctrines and clauses that are mentioned in or identified with the Constitution exist to ensure that states cannot create laws that infringe or take away the constitutional rights of citizens. A state constitution may provide broader protection for its citizens than the U.S. Constitution.

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

Response: As a judicial nominee, it would be generally inappropriate for me to comment on or provide a personal opinion regarding the Supreme Court's decision in *Brown v. Board of Education*. However, because the issue of *de jure* segregation is unlikely to ever be re-litigated and because this case is widely accepted, I am comfortable saying that *Brown v. Board of Education* was correctly decided.

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

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

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

Response: To subparts 23(a) and 23(b), Federal rule 65 governs injunctive relief. The Federal court's ability and authority to issue nationwide injunctions is based the application of a four-part test that determines preliminary injunctive relief shall be granted. The prongs are: (1) likelihood of success on the merits; (2) the plaintiff will suffer irreparable harm; (3)

granting the preliminary relief will not result in even greater harm to the non-moving party; and (4) the public interests favors such relief. And while the courts have issued injunctive relief that has had nationwide application, there are arguments in favor and against nationwide injunctive relief. The Supreme court has upheld nationwide injunctions when they are necessary to grant relief to parties (See *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080 (2017)). However, there is no federal statute that grants courts the power to issue nationwide injunctions and there has not been a majority of Justices on the Supreme Court who have expressly ruled on the legality of nationwide injunctions.

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

Response: Please see response to Question 23 above. Also, the Supreme Court stated in its opinion in *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139 (2010) that an "injunction is a drastic and extraordinary remedy which should not be granted as a matter of course."

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

Response: Federalism is defined in Black's Law Dictionary as "the legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and the state government." (11th ed. 2019). Under this principle of government, power and authority is allocated between the national and local governmental units, such that each unit is delegated a sphere of power and authority only it can exercise, while other powers must be shared. The sharing or separation of powers is to ensure that through a system of checks and balances, one person or entity does not control all of the power and to provide a "healthy balance of power between the States and the Federal government." *See Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991).

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

Response: Please see response to Question 5 above.

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

Response: As a judicial nominee, it would be inappropriate for me to comment or offer my personal opinion on a subject matter that, if confirmed, could appear before me.

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

Response: Substantive due process is a principle in United States Constitutional law that allows courts to establish and protect certain fundamental rights from governmental interference. Substantive due process is based on the premise that the Constitution protects the public from unwarranted government intrusion from infringing upon a person's fundamental rights, thereby protecting liberty interests. The Supreme Court in the case of *Washington v. Glucksberg,* 521 U.S. 702, 720-721 (1997), held that the Fifth and Fourteenth Amendments protect those fundamental rights and liberties which are objectively, "deeply rooted in this Nation's history and tradition" and are implicit in the concept of ordered liberty. The rights that are included are the right to marry, right to determine the education and upbringing of your children, right to marital privacy. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). See also, *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015); *Griswold v. Connecticut,* 381 U.S. 479 (1965).

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

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

Response: The First Amendment is clear in its text as to the fundamental right to the free exercise of religion. This has been supported by the Supreme Court in its interpretation of various cases and controversies regarding the free exercise clause and the binding precedent that has been established by the Court.

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 right to free exercise of religion encompasses the freedom to worship. The Supreme Court mentioned the subject of freedom to worship and attend services in *Lee v. Weisman,* 505 U.S. 577 (1992) ("The First Amendment's Religion Clauses mean that religious beliefs and religious

expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission.") and *Tandon v. Newsom,*141 S. Ct. 1294, 1296 (2021) which stated 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."

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

Response: Please see response to Question 15 above.

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 standard of review to be applied on the question of the sincerity of a religiously held belief is whether the belief is sufficiently rooted in religion to merit First Amendment protections and not so bizarre, so clearly non-religious in motivation as to not be entitled to protection under the Free Exercise Clause. The Supreme Court held in *Thomas v. Review Board of Ind. Employment Sec. Div.,* 450 U.S. 707 (1981) that "religious beliefs need not be acceptable, logical, consistent or comprehensible to others to merit First Amendment protection." The Court in *Thomas* cites to *Sherbert v. Verner,* 374 U.S. 398, 402-403 (1963) wherein it stated that "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities" (Internal cites omitted). The Court in *Sherbert* stated "[T]to withstand appellant's constitutional challenge, it must be either because [appellant's] disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate…'" *Id.* at 403.

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 (RFRA) was designed by Congress to provide broad protection for religious liberty. RFRA is applicable to all federal law but permits "Congress to exclude statutes from RFRA's protections." See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania,* 140 S. Ct. 2367 (2020).

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

Response: No.

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

a. What do you understand this statement to mean?

Response: I am unfamiliar with the context within which Justice Scalia made this comment. As a judicial nominee, it would not be appropriate for me to comment on the statement of a current or former Supreme Court Justice. I will state that, if confirmed, I would faithfully and impartially apply the law to the facts and follow Supreme Court and Third Circuit precedent on deciding any case that would come before me.

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

Response: No.

a. If yes, please provide appropriate citations.

Response: Not Applicable.

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

Response: No.

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

Response: No.

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

Response: Yes. In the course of my career, I have served as a zealous advocate for my clients and argued cases and motions to represent their constitutionally protected rights and interests. My personal views or opinion were irrelevant to my serving as my client's advocate.

35. How did you handle the situation?

Response: Please see response to Question 34 above.

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

Response: Yes.

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

Response: I have not studied the Federalist Papers and therefore do not have an opinion as to which of them have shaped my views of the law. If I were confirmed as a U.S. District Court Judge, my view of the law would be shaped by Supreme Court and Third Circuit precedent and I would adhere to apply binding precedent in deciding cases and controversies.

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

Response: As a judicial nominee, it would be inappropriate for me to comment or express any views on an issue that could come before me as a judge if I were confirmed. If confirmed, I would adhere to and apply Supreme Court and Third Circuit precedent to any cases that would come before me.

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

Response: Yes, I have been asked to testify under oath. The circumstances vary. I testified in a deposition for a civil personal injury matter that was filed against me and my spouse which was dismissed. I have been sworn to testify before the Pennsylvania House and Senate Committees at separate times on issues of School Safety and Law Enforcement. I have been called to testify as a witness in criminal

and civil matters arising following cases I handled as a prosecutor. Any video, transcript or statement of my testimony, if available, has been provided in my SJQ.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response: In response to all subparts 41(a-e), I do not own any shares in any of the above companies.

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

Response: No, to the best of my recollection I do not recall editing or authoring a brief that was filed in court without my name on the brief.

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

43. Have you ever confessed error to a court?

Response: No, I do not recall ever confessing an error to the court.

a. If so, please describe the circumstances.

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

Response: My understanding is that as a nominee I swore an oath prior to testifying before the Senate Judiciary Committee to tell the truth and answer all questions honestly and to the best of my knowledge and ability.

Questions for the Record
Senator John Kennedy

Kelley Hodge

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

   Response: If confirmed, my judicial philosophy would be to adhere to the oath of a federal judge which is to "[A]dminister justice without respect to persons, and do equal right to the poor and to the rich, and that I [would] faithfully and impartially discharge and perform all the duties incumbent upon me [_] under the Constitution and laws of the United States." I would respect the law and every person who would appear before me and would approach each case with an open mind. I would decide matters without fear or favor by focusing on the facts presented, the arguments of the parties, applying the law and following binding precedent. I would research and render well-reasoned decisions and exercise judicial restraint by only deciding the issue that is presented in the case or controversy that is before me.

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

   Response: No. A Judge should base their ruling on the facts, arguments of the parties, applying the law to the facts and following the binding precedent.

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

   Response: No. A review of legislative history in interpreting the meaning of a statute, which is a last resort in seeking to interpret an ambiguous statute, would rest with Congress as the legislative branch.

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

   Response: In the case of *PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74 (1980), a shopping center owner appealed from a judgment of the California Supreme Court holding that the California Constitution protects speech and petitioning, reasonably exercised, in privately owned shopping centers. The Supreme Court held that state constitutional provisions, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which public is invited, did not violate the shopping center owner's rights under the Fifth and Fourteenth Amendments, or his free speech rights under the First and Fourteenth Amendments.

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

Response: The conclusion on what the term "the people" means within the Bill of Rights varies. The Supreme Court cases of *United States v. Verdugo-Urquidez,* 494 U.S. 259 (1990) and *District of Columbia v. Heller,* 554 U.S. 570, 128 S. Ct. 2783 (2008) offer some guidance. In *Verdugo-Urquidez*, the Court states that the Fourth Amendment phrase "the people" seems to be a term of art used in select parts of the Constitution and contrasts with the words "person" and "accused" used in Articles of the Fifth and Sixth Amendments regulating criminal procedures. This suggests that "the people" refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. *See, United States v. Verdugo-Urquidez*, 494 U.S. 259, 259–60, (1990).

In *District of Columbia v. Heller,* the Court quoted *Verdugo-Urquidez's* definition, and similarly suggested that the term "the people" has a consistent meaning throughout the Constitution. *District of Columbia v. Heller,* 554 U.S. 570, 128 S. Ct. 2783, 2790-91 (2008). *District of Columbia v. Heller,* 554 U.S. 570, 580,128 S. Ct. 2783 (2008) also states that "the people" "refers to all members of the political community" in the context of the discussion about a challenge to the Second Amendment's "right of people to keep and bear arms." *Id.* at 581. There is also discussion by the Court that the meaning of "the people" needs to be evaluated based on the context within which it is written.

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

Response: Yes. The Constitution protects rights that apply to persons or people. The rights that are afforded under the Constitution are not limited to citizens. If I were confirmed, I would follow Supreme Court and Third Circuit precedent on any case or controversy regarding the issue person's right to privacy.

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

Response: Yes. The Fourth Amendment states that "[T]the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." The Fourth Amendment does not include the word "citizen" or "non-citizen." A person in the United States regardless of citizenship is entitled to the protections of the Fourth Amendment. *See United States v. Ramsey*, 431 U.S. 606 (1977).

To the question regarding searches by border patrol authorities and/or other law enforcement, the Court has distinguished border searches. The court stated in *Zadvdas v. Davis,* 533 U.S. 678, 693 (2001) that "[I]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders*." See United States v. Verdugo-Urquidez,* 494 U.S. 259, 269 (1990) (Fifth Amendment's protections do not extend to aliens outside the territorial boundaries*); Johnson v. Eisentrager,* 339 U.S. 763, 784 (1950) (same). But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. See *Plyler v. Doe,* 457 U.S. 202, 210 (1982); *Mathews v. Diaz,* 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding,* 344 U.S. 590, 596-598, and n. 5 (1953); *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886); cf. Mezei, supra, at 212 ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"). The Supreme Court has held that the Due Process Clause protects an alien subject to a final order of deportation. *See Wong Wing v. United States,* 163 U.S. 228, 238 (1896), though the nature of that protection may vary depending upon status and circumstance, see *Landon v. Plasencia,* 459 U.S. 21, 32-34 (1982); *Johnson*, supra, at 770.

The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. Time and again, we have stated that "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States* v. *Ramsey,* 431 U.S. 606, 616 (1977). Congress, since the beginning of our Government, "has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." *Montoya de Hernandez, supra,* at 537 (internal cites omitted). The Court in *Ramsey* stated "That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration. Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. See *United States v. Ramsey*, 431 U.S. 606, 619 (1977). Accordingly, the border-search exception allows officers to conduct "routine inspections and searches of individuals or conveyances seeking to cross [United States] borders" without any particularized suspicion of wrongdoing." See *United States v. Ramsey*, 431 U.S. 606, 619 (1977) (internal quotations and citation omitted). Individualized suspicion may, however, be required if a border search is "highly intrusive" or impinges on "dignity and privacy interests." *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004).

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

Response: As a judicial nominee, it would be inappropriate for me to comment on any matter or issue that could come before me. If I were confirmed, I would follow Supreme Court and Third Circuit precedent on any case or controversy that presented with the question regarding human life and equal protection under the law.

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

Response: The Supreme Court addressed the issued of voter identification in *Crawford v. Marion County Election Board,* 553 U.S. 181 (2008), the Court held that in reviewing an Indiana state statute that "In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes "excessively burdensome requirements" on any class of voters. *See Storer* v. *Brown*, 415 U.S. 724, 738 (1974). A facial challenge must fail where the statute has a "'plainly legitimate sweep.'" *Washington State Grang*e, 552 U. S., at ___ and n. 7 (1997) (Stevens, J., concurring in judgments)) (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 739–740 (1997). When we consider only the statute's broad application to all Indiana voters we conclude that it "imposes only a limited burden on voters' rights." *Burdick*, 504 U. S., at 439. The "'precise interests'" advanced by the State are therefore sufficient to defeat petitioners' facial challenge to SEA 483. *Id*., at 434. If I were confirmed, I would follow Supreme Court and Third Circuit precedent in any case or controversy where the subject of voter identification in order to cast a ballot was an issue.

Questions from Senator Thom Tillis
for Kelley B. Hodge
Nominee to be United States District Judge for the Eastern District of Pennsylvania

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

   Response: Yes.

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

   Response: Judicial activism is defined as "A 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). No, judicial activism is not appropriate. Cases and controversies that come before the court should be decided based on the facts, arguments of the litigants, application of the law and following Supreme Court and Circuit Court precedent.

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

   Response: Impartiality is an expectation for a judge.

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

   Response: No, a judge should not second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome.

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

   Response: Yes. Judges swear or affirm in their oath to "[F]aithfully and impartially discharge and perform all the duties incumbent upon [them] as [_] under the Constitution and laws of the United States." Judges must adhere to this oath without fear or favor. I reconcile that responsibility because, if I were confirmed, it would be my responsibility to administer justice by adherence to the rule of law.

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

   Response: No.

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

Response: If confirmed, I would follow my oath as a judge. In doing so, I would adhere to the upholding the Constitution and the laws of the United States and following precedent set forth by the Supreme Court in cases regarding the Second Amendment such as *District of Columbia v. Heller,* 554 U.S. 570 (2008), *McDonald v. City of Chicago,* 561 U.S. 742 (2010), and *New York State Rifle & Pistol Association v. Bruen,* 142 S. Ct. 2111 (2022).

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

   Response: If confirmed, I would evaluate any lawsuit or complaint based on the facts of the case, the arguments of the litigants and applying the law to the facts. The Constitution is an enduring document and the rights contained therein are retained by the people.

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: Qualified Immunity is a judicially created legal doctrine that "[P]rotects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or Constitutional rights of which a reasonable person would have known." *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (Quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). I would follow Supreme Court and Third Circuit precedent regarding the application of qualified immunity.

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

    Response: Please see response to Question 9 above.

11. **In an article you wrote on law enforcement, you mentioned eliminating qualified immunity for police officers specifically as a means to address "systemic racism."**

    a. **If qualified immunity were eliminated as you propose, then what should be the appropriate legal protection for law enforcement officers?**

       Response: The piece I wrote was a firm "Alert" that is written to notify clients and others who work, or have an interest, in the legal subject matter about current or pending changes in the law or legislation. This alert was written in June 2020 following the murder of George Floyd and during a time of active conversation about race, law enforcement and the criminal justice system and reforms. I did not propose eliminating qualified immunity but listed it as one of nine recommendations that was being put forth. I included in the alert, a link to a source for the

recommendations, which was the Justice in Policing Act of 2020 that was being discussed in Congress.

b. Why do you think eliminating qualified immunity is an appropriate policy choice given the extraordinary challenges our brave law enforcement officers face?

Response: Please see response to 11(a) above. As a former Assistant District Attorney and the former Interim District Attorney of Philadelphia, I have worked with law enforcement on almost a daily basis for many years. I have first-hand knowledge of their work and service.

12. You have repeatedly claimed that there is "palpable" distrust of law enforcement in communities across the country and have advocated for "reallocating" police funding. Do you believe that defunding the police, or "reallocating police funding," will improve criminal justice?

Response: Please see response to 11(a) above. The listing of "reallocating police funding" in the alert was my reporting out what recommendations were being proposed and discussed at the local, state and national levels by other entities. I was not stating a personal opinion on that recommendation or any of the other listed recommendations but reporting out what was being discussed broadly on the subject matter.

13. 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: Given that my background is primarily in criminal law, labor and employment and civil rights, I do not have the requisite knowledge to provide a comprehensive answer to this question. However, if confirmed, I would take the necessary time to thoroughly research this area of the law and any other area that I may not have previous experience, in order to become knowledgeable and equipped to address the specific legal issue presented and provide a well-reasoned analysis.

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

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

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

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

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

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

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

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

manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?

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

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

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

Response: To all the subparts (a-j), noted above, it would not be appropriate for me as a judicial nominee to give my opinion on these hypothetical questions because I do not want to appear to be pre-judging a matter that could come before me. However, if confirmed and presented with any of the hypotheticals, I would take the necessary steps to research the area of the law, apply the law to the facts and adhere to precedent.

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

Response: Please see response to Question 14(a-j) above.

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

a. What experience do you have with copyright law?

Response: In my 25 years of experience as an attorney with a number of years as a litigator, I have handled hundreds of cases in court. However, I have not had occasion to handle cases in copyright law.

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

Response: While I have 25 years of experience as an attorney and a number of years as a litigator, I do not have experience with 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: I do not have experience addressing intermediary liability for online service providers that host unlawful content posted by users.

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

Response: My experience with First Amendment and Free Speech issues have come from my adjunct teaching at University of Virginia School of Law an introductory course on Higher Education and the Law. I do not have experience otherwise addressing free speech and intellectual property issues.

17. 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: If confirmed, if interpreting a statute, I would look to find and apply Supreme Court and Third Circuit precedent. If there was no Supreme Court or Third Circuit precedent on point, then I would look to the text of the statute. If the text is clear, my analysis would stop there. If the text is ambiguous, I would continue my analysis to see if any other Circuit Court has interpreted the statute and has provided persuasive authority. If there is no guidance or interpretation found in any of the above stated areas, I would look to legislative history to see if there is direction contained in the history (i.e. legislative committee reports) on statutory interpretation.

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: The Supreme Court and Third Circuit precedent would govern what deference the court should give to the expert federal agency. (See *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.,* 468 U.S. 837 (1984); *West Virginia v. EPA,* 142 S. Ct. 2587 (2022)).

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: I do not have experience or knowledge of this specific area of the law. However, if confirmed and presented with a matter involving the Digital Millennium Copyright Act, I would thoroughly research the subject matter as well as engage with colleagues on the bench who have past knowledge or expertise in order to apply the law to the facts presented and provide a well-reasoned analysis.

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

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

Response: Judges must adhere to Supreme Court precedent and the precedent of their Circuit where the matter is heard. Changes in the technological landscape prompts policy considerations and would necessitate a legislative review and response.

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

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

19. 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 am not familiar with the issue presented in question 19 beyond what has been provided above. In light of my limited awareness and the speculative nature of the question, in part, I feel it would be inappropriate for me as a judicial nominee to attempt to provide a response. If confirmed, I would faithfully and impartially apply the law and follow precedent in all cases that would come before me.

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

Response: Judges have a responsibility to follow their oath and abide by the Code of Conduct for United States Judges (Jud. Conf. 2019) at all times.

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: I am not personally familiar with the practice of "forum selling" as described in question 19. I do not believe that judges should engage in the described behavior. I believe that judges should follow their oath and abide by the Code of Conduct for United States Judges (Jud. Conf. 2019) at all times.

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

Response: Yes. I do commit to follow the Code of Conduct for United States Judges (Jud. Conf. 2019) and not engage in any conduct that would potentially violate an ethical duty as a judge.

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

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

Response: As a judicial nominee, it would be inappropriate to comment on a hypothetical or on the action or inaction of a judge.

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

Response: As a judicial nominee, it would be inappropriate to speculate on this hypothetical circumstance.

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

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

Response: As a judicial nominee, it would be inappropriate for me to comment on a hypothetical or respond to a question regarding advocacy. The Code of Conduct for United States Judges states in Canon 1 that "An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective." If confirmed, I would faithfully adhere to the Code of Conduct for United States Judges.

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

Response: Please see response to 21(a) above. As a judicial nominee, it would be inappropriate for me to comment on a hypothetical or respond to a question regarding advocacy.

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

a. If a single judge is repeatedly reversed on mandamus by a court of appeals on the same issue within a few years' time, how many such reversals do you believe

must occur before an inference arises that the judge is behaving in a lawless manner?

Response: As a judicial nominee, it would be inappropriate to comment on a hypothetical circumstance or to offer a response based on speculation.

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

Response: As a judicial nominee, it would be inappropriate to comment on a hypothetical circumstance or to offer a response based on speculation.