Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Lindsay Clayton Jenkins
Judicial Nominee to the United States District Court for the Northern District of Illinois

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

   Response: In *Washington v. Glucksberg*, the Supreme Court held that some rights are not enumerated in the Constitution but are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. Specifically, these are only rights "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." 521 U.S. 702, 720–21 (1997). If confirmed, I would be bound by this test when evaluating whether there are any new unenumerated rights in the Constitution.

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

   Response: I disagree.

3. **When asked why he wrote opinions that he knew the Supreme Court would reverse, Judge Stephen Reinhardt's stock response was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

   Response: No.

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

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

5. **Do you think that election integrity is a problem in this country? Please explain.**

   Response: Election integrity issues are primarily questions for policymakers. If confirmed, and to the extent that a matter came before me concerning voting rights or the integrity of an election, I would follow all Supreme Court and Seventh Circuit precedent.

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 to which this question refers. I believe the Constitution has a fixed quality and is an enduring document. It may only be changed through the Article V amendment process. The Supreme Court has repeatedly reaffirmed the enduring quality of the Constitution. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022) ("Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.") If confirmed, I will follow Supreme Court precedent and Seventh Circuit precedent on matters of constitutional interpretation.

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

   Response: I would not characterize any single Supreme Court decision as most exemplifying my judicial philosophy. If confirmed, I will follow Supreme Court and Seventh Circuit precedent regardless of whether it exemplifies my judicial philosophy. As a lawyer and a former law clerk, I believe that judges should fairly and impartially decide only the issues presented by the particular case, apply the law to the facts impartially, and follow all binding precedent. I would strive to be open-minded and respectful of all parties, ensuring that litigants are given a meaningful opportunity to be heard. I would faithfully observe the limited role of the court and strive to ensure that any rulings be circumscribed by the applicable constitutional provision, statutes and Supreme Court and Seventh Circuit precedent.

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

   Response: I would not characterize any single Seventh Circuit decision as most exemplifying my judicial philosophy. If confirmed, I will follow Supreme Court and Seventh Circuit precedent regardless of whether it exemplifies my judicial philosophy. As a lawyer and a former law clerk, I believe that judges should fairly and impartially decide only the issues presented by the particular case, apply the law to the facts impartially, and follow all binding precedent. I would strive to be open-minded and respectful of all parties, ensuring that litigants are given a meaningful opportunity to be heard. I would faithfully observe the limited role of the court and strive to ensure that any rulings be circumscribed by the applicable constitutional provision, statutes and Supreme Court and Seventh Circuit precedent.

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

   Response: This is a question for policymakers.

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

    Response: Yes. The plain text of the First Amendment provides that "Congress shall make no law ... abridging the freedom of speech ... or the right of the people ... to petition the Government for a redress of grievances." U.S. Const. amend. I.

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

    Response: 18 U.S.C. § 3553(a) governs sentencing. Empathy is not listed as a factor. This provision directs courts to consider only: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range; (5) pertinent policy statements from the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records; and (7) the need to provide restitution to any victims of the offense. If confirmed, any sentencing determination would be guided by these factors.

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

    Response: "There is no constitutional or statutory right to counsel in federal civil cases." *Romanelli v. Suliene*, 615 F.3d 847, 851 (7th Cir. 2010).

13. **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 *Roe v. Wade* correctly decided?**
    d. **Was *Planned Parenthood v. Casey* correctly decided?**
    e. **Was *Griswold v. Connecticut* correctly decided?**
    f. **Was *Gonzales v. Carhart* correctly decided?**
    g. **Was *McDonald v. City of Chicago* correctly decided?**
    h. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
    i. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**
    j. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

    Response: If confirmed, I would faithfully apply all Supreme Court precedent. Consistent with the responses of other nominees, I agree that there are some constitutional decisions that are foundational to our system of justice and unlikely to be relitigated such that I can state that they were correctly decided. These decisions include *Brown v. Board of Education* and *Loving v. Virginia*. The Supreme Court overruled *Roe v. Wade* and *Planned Parenthood v. Casey* in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). The other referenced

decisions are binding precedent. If confirmed, I will apply all binding precedent of the Supreme Court and the Seventh Circuit.

14. **Is threatening Supreme Court justices right or wrong?**

Response: Depending on the underlying circumstances, threats against Supreme Court justices may violate the law. Several federal statutes, including for instance 18 U.S.C. §§ 111, 115(a) 119, 875, 876 and 1503, criminalize this kind of conduct provided that the requisite elements of the offense are satisfied.

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

Response: 18 U.S.C. § 1507 provides that, "[w]hoever, 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."

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

Response: My research did not reveal any Supreme Court or Seventh Circuit precedent holding this statute unconstitutional. In *Cox v. State of Louisiana*, the Supreme Court considered a Louisiana state statute comparable to 18 U.S.C. § 1507 and held the statute valid on its face and as applied. 379 U.S. 559 (1965) (overturning the state conviction on other grounds). If confirmed, I would apply all Supreme Court and Seventh Circuit precedent when considering any matter of constitutional interpretation.

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

Response: States may prohibit "fighting words," that is, "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971); *Purtell v. Mason*, 527 F.3d 615 (7th Cir. 2008).

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

Response: "True threats" reach "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359

(2003). The First Amendment does not protect "true threats." *United States v. Parr*, 545 F.3d 491, 494 (7th Cir. 2008).

19. **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.

20. **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.

21. **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.

22. **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.

23. **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.

24. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

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

Response: No.

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

Response: No.

25. **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.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

28. **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.

29. **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.

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

Response: In October 2021, Senators Durbin and Duckworth issued a public announcement seeking applicants to fill a vacancy created after a District Judge announced his intention to assume senior status. On October 25, 2021, I submitted my application to the Senators' 12-member Screening Committee. On November 13, 2021, I interviewed with the Screening Committee. On December 1, 2021, I interviewed with Senator Durbin. On December 7, 2021, I interviewed with Senator Duckworth. On December 16, 2021, my name was included on a list of seven candidates that Senators Durbin and Duckworth submitted to the White House for its consideration. On February 7, 2022, I interviewed with attorneys from the White House Counsel's Office. Since then, I have been in contact with officials at the Office of Legal Policy at the Department of Justice. On July 14, 2022, the President announced his intent to nominate me.

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

Response: I received written questions for the record on October 19, 2022. I reviewed each question and prepared my responses using my Senate Judiciary Questionnaire. I also reviewed my files and conducted research. I submitted a draft of my answers to lawyers with the Office of Legal Policy, who provided feedback, which I considered.

Questions for the Record for Lindsay C. Jenkins
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
Lindsay C. Jenkins, Nominee to the United States District Court for the Northern District of Illinois

1. How would you describe your judicial philosophy?

Response: As a lawyer and a former law clerk, I believe that judges should fairly and impartially decide only the issues presented by the particular case, apply the law to the facts impartially, and follow all binding precedent. I would strive to be open-minded and respectful of all parties ensuring that litigants are given a meaningful opportunity to be heard. I would faithfully observe the limited role of the court and strive to ensure that any rulings be circumscribed by the applicable constitutional provision, statutes and Supreme Court and Seventh Circuit precedent.

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

Response: In any circumstance requiring interpretation of a federal statute, I would look to binding Supreme Court and Seventh Circuit precedent interpreting the statute. If there is no binding precedent, I would look at the plain language of the statute. If the statutory language is unambiguous, the analysis ends. If the text of the statute is ambiguous and there is no binding precedent interpreting it, I would consult persuasive authority such as Supreme Court and Seventh Circuit precedent on analogous statutes or similar language, other circuit precedent, relevant canons of construction, and legislative history as an interpretive tool of last resort. *See Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546 (2005).

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

Response: I would begin the analysis with the plain text of the constitutional provision at issue and the precedent set forth by the Supreme Court and the Seventh Circuit. If the language of the provision is clear and unambiguous, that would end the analysis. If the provision is ambiguous, I would look to other circuit court decisions as persuasive authority and I would apply the interpretive tools specified by the Supreme Court and Seventh Circuit precedent.

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

Response: The original meaning of a constitutional provision plays a critical role when interpreting the constitution. The Supreme Court has set forth the importance of this approach when interpreting many Constitutional provisions and I would faithfully apply that methodology. This includes, for instance, the Supreme Court's methodology in the context of the Second Amendment. *See New York State Rifle &*

Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2132 (2022); *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 refer to my response to Question 2.

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

Response: The plain meaning of a statute or constitutional provision generally refers to the public understanding of the relevant language at the time of enactment. The Supreme Court has looked to the original public meaning in multiple contexts. *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022); *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.")

6. What are the constitutional requirements for standing?

Response: Article III standing requires that a plaintiff show (1) an injury in fact; (2) traceable to the conduct of the defendant; and (3) that is likely to be redressed by a favorable ruling of the court. *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 *McCullough v. Maryland*, the Supreme Court held that under the Necessary and Proper Clause of Article I, Section 8, Congress has implied powers beyond those enumerated in the Constitution, for instance, the implied power to establish a national bank. 17 U.S. 316, 421 (1819).

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 apply binding Supreme Court and Seventh Circuit precedent to when evaluating the constitutionality of a law enacted by Congress.

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

Response: Yes. In *Washington v. Glucksberg*, the Supreme Court held that some rights are not enumerated in the Constitution but are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. 521 U.S. 702 (1997). Specifically,

these rights are "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id*. at 720–21.

The Supreme Court has found unenumerated rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), *Obergefell v. Hodges*, 576 U.S. 644 (2015); to marital privacy and contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); to engage in private sexual conduct, *Lawrence v. Texas*, 539 U.S. 558 (2003); and to bodily integrity. *Rochin v. California*, 342 U.S. 165 (1952).

10. What rights are protected under substantive due process?

Response: Please refer to my response to Question 9.

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

Response: My personal beliefs about substantive due process would play no role in my analysis of any case that came before me. The Supreme Court has held that the Constitution does not confer a right to an abortion. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

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

Response: The Supreme Court has identified three broad categories that Congress may regulate under its commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or person and things in interstate commerce; and (3) activities that, in the aggregate, have a substantial effect on interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

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

Response: A suspect class is one that has experienced a "'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). The Supreme Court has recognized that race, alienage, national origin, and religion meet this criteria and are subject to strict scrutiny. *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: Articles I, II, and III grant separate powers to the legislative, executive, and judicial branches to make, enforce, and interpret the law, respectively. Checks and balances and the separation of powers is the hallmark of our Constitution's structure.

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 follow Supreme Court and Seventh Circuit precedent in evaluating this question.

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

Response: None.

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

Response: Both are improper and 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 have not closely studied this statistic, nor have I researched the issue. As a result, I do not have sufficient information to respond. If confirmed, I would not take such a trend into consideration and would apply the law to the facts of the case presented in accordance with Supreme Court precedent.

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

Response: Black's Law Dictionary defines judicial review as, "[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." Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines judicial supremacy as "[t]he 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." Black's Law Dictionary (11th ed. 2019).

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

Response: Article VI of the Constitution binds legislators, executive and judicial officers to support the Constitution. *See* U.S. Const., art. VI. Each are also required to follow the Supreme Court's interpretation of the Constitution. *See Cooper v. Aaron*, 358 U.S. 1 (1958).

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

Response: A judge's job is to carefully apply and interpret the law in relation to the particular case or controversy presented. The job is not to make the law, which is the province of the legislative branch, or to enforce the law, which is the province of the executive branch.

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: District court judges are obligated to follow the binding precedent of the Supreme Court and the corresponding circuit, in my case the Seventh Circuit. The job is one of restraint. District judges should never seek to extend or limit precedent where it does not apply.

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

Response: None. The only factors that may be considered at sentencing are those outlined in 18 U.S.C. § 3553(a). If confirmed, any sentencing determination would be guided by these factors.

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

Response: I am not familiar with this statement, and I am unaware of any federal statute or precedent from the Supreme Court or Seventh Circuit that defines equity in the manner described above. Black's Law Dictionary defines "equity" as "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019).

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

Response: Black's Law Dictionary defines "equality" as "the quality, state, or condition of being equal; esp., in likeness in power or political status." Black's Law Dictionary (11th ed. 2019). This is different than the definition of "equity" cited in response to Question 24 above. These definitions are generally consistent with my understanding of these terms.

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

Response: The Fourteenth Amendment provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. I am unaware of any federal statute or precedent from the Supreme Court or Seventh Circuit that has applied the Equal Protection Clause to the definition of equity cited above.

27. How do you define "systemic racism?"

Response: I do not have a personal definition of this term. Cambridge Dictionary defines systemic racism as "policies and practices that exist throughout a whole society or organization, and that result in and support a continued unfair advantage to some people and unfair or harmful treatment of others based on race." Cambridge Dictionary (2022).

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

Response: I do not have a personal definition of this term. Black's Law Dictionary defines "critical race theory" as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Black's Law Dictionary (11th ed. 2019).

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

Response: I have not studied "critical race theory" or "systemic racism." I will follow all Supreme Court and Seventh Circuit precedent, including on matters of race, and my decisions would not be based on any academic theory.

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

Questions for the Record for Lindsay C. Jenkins, nominated to be United States District Judge for the Northern District of Illinois

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

Response: Congress has enacted statutes prohibiting race discrimination. This includes, for instance, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) and the Fair Housing Act of 1968, 42 U.S.C. § 3605(a). The Supreme Court has also recognized race as a suspect classification such that it is subject to strict scrutiny review.

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: In *Washington v. Glucksberg*, the Supreme Court held that some rights are not enumerated in the Constitution but are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. Specifically, these are only rights "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." 521 U.S. 702, 720–21 (1997). If confirmed and confronted with a claim that an unenumerated right not recognized by the Supreme Court exists, I would apply the *Glucksberg* framework and any other Supreme Court and Seventh Circuit precedent.

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

Response: As a lawyer and a former law clerk, I believe that judges should fairly and impartially decide only the issues presented by the particular case, apply the law to the facts impartially, and follow all binding precedent. I would strive to be open-minded and respectful of all parties, ensuring that litigants are given a meaningful opportunity to be heard. I would faithfully observe the limited role of the court and strive to ensure that any rulings be circumscribed by the applicable constitutional provision, statutes and Supreme Court and Seventh Circuit precedent. I have not studied the jurisprudence of any particular Supreme Court Justice and therefore I do not identify with any particular Supreme Court Justice based on his or her philosophy. If confirmed, I will follow binding Supreme Court precedent and the method of interpretation used to resolve cases, regardless of which Justice authored the opinion.

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

Response: Black's Law Dictionary defines the term "originalism," as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). The original public meaning and the original intent of a provision plays a critical role when interpreting the Constitution. The Supreme Court has set forth the importance of this approach when interpreting many constitutional provisions and I would faithfully apply that methodology when Supreme Court precedent requires it. This includes, for instance, the Supreme Court's methodology in the context of the Second Amendment. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: Black's Law Dictionary defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). I believe the Constitution has a fixed quality and is an enduring document. It may only be changed through the Article V amendment process. The Supreme Court has repeatedly reaffirmed the enduring quality of the Constitution. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022) ("Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.") If confirmed, I will follow Supreme Court precedent and Seventh Circuit precedent on matters of constitutional interpretation.

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: I would look first to the binding precedent of the United States Supreme Court and the Seventh Circuit. Should no such precedent exist, I would be bound by the methodology established by the Supreme Court in considering constitutional issues. In many instances, the Supreme Court has instructed lower courts to follow the original public meaning of the Constitution. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022); *Crawford v. Washington*, 541 U.S. 36 (2004).

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: The Supreme Court has recognized the importance of "the ordinary public meaning of [a statute's] terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). *See also New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022) (explaining that the Founders created a Constitution "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs," and that, "[a]lthough its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.")

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

Response: No. The Constitution may only be changed through the Article V amendment process.

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

Response: Yes.

a. **Was it correctly decided?**

Response: *Dobbs* is binding precedent. As a judicial nominee, it is generally inappropriate for me to offer an opinion on whether Supreme Court precedents are correctly decided. If confirmed, I will apply all precedent of the Supreme Court and the Seventh Circuit, including *Dobbs*.

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

Response: Yes.

a. **Was it correctly decided?**

Response: *Bruen* is binding precedent. As a judicial nominee, it is generally inappropriate for me to offer an opinion on whether Supreme Court precedents are correctly decided. If confirmed, I will apply all precedent of the Supreme Court and the Seventh Circuit, including *Bruen*.

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

Response: Yes.

a. **Was it correctly decided?**

Response: *Brown* is binding precedent. As a judicial nominee, it is generally inappropriate for me to offer an opinion on whether Supreme Court precedents are correctly decided. Consistent with the responses of other nominees, however, there are some constitutional decisions that are foundational to our system of justice and unlikely to be relitigated such that I can state that *Brown* 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(e) establishes a rebuttable presumption in favor of pre-trial detention for certain offenses such that no release conditions will reasonably assure the defendant's appearance in court and the safety of the community. This includes a drug offense for which the maximum sentence is 10 years or more, an offense under 18 U.S.C. §§ 924(c), 956(a), or 2332b, offenses involving slavery or human trafficking, and certain offenses involving minors. 18 U.S.C. § 3142(e)(3).

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

Response: In general, the presumption in favor of pretrial detention reflects Congress' determination that defendants accused of certain crimes present a greater flight risk or danger to 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. Any governmental burden on the free exercise of religion must be neutral and generally applicable, otherwise, strict scrutiny applies. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). A law is not neutral and generally applicable if "the object or purpose of the law is suppression of religion or religious conduct." *Id*. at 533. A facially neutral law is not neutral and generally applicable if the record shows that it has been applied out of hostility or animus toward religion. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018). If a law or policy allows the government to make individualized, discretionary exemptions, it is likely not neutral or generally applicable, and would fail strict scrutiny. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). If a law or policy treats any "comparable secular activity more favorably than religious exercise," then that law or policy is not neutral or generally applicable. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

In addition, federal governmental actions are governed by the Religious Freedom Restoration Act of 1993. *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014). If a federal law places a substantial burden on the free exercise of religion, the government must demonstrate that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

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

Response: Any governmental burden on the free exercise of religion must be neutral and generally applicable, otherwise, strict scrutiny applies. Under this analysis, the policy must be narrowly tailored to serve a compelling governmental interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court enjoined the enforcement of a New York executive order that placed restrictions on attendance at in-person religious services. 141 S. Ct. 63 (2020). The Supreme Court found that the religious entities were likely to prevail on their First Amendment claims because the regulation singled out houses of worship and failed to satisfy strict scrutiny. *Id*. at 68. The Supreme Court concluded that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," and that it had "not been shown that granting the applications [would] harm the public." *Id*. at 66–68.

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

Response: In *Tandon v. Newsom*, the Supreme Court held that the Ninth Circuit erred in denying the plaintiff an injunction against restrictions on at-home religious gatherings. 141 S. Ct. 1294 (2021). The Supreme Court held that government regulations are not neutral and generally applicable where the government treats any comparable secular activity more favorably than religious activity. *Id*. at 1296. The Supreme Court stated that, "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id*. Comparability is concerned with the risks various activities pose, not the reasons why people gather. *Id*. The Supreme Court determined that the government had the burden of establishing that less restrictive measures could not address its interest in reducing the spread of COVID-19. *Id*.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court held that the Colorado Civil Rights Commission's cease and desist order violated the Free Exercise Clause's requirement not to base laws or regulations on hostility to a religion or religious viewpoint. 138 S. Ct. 1719 (2019). The Supreme Court found that, through its comments, the Commission exhibited "clear and impermissible hostility" towards the plaintiff's sincere religious belief. *Id*. at 1729. The Commission's action, therefore, was not neutral.

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. Sincere beliefs rooted in religion are protected by the Free Exercise Clause regardless of whether they are consistent with the mainstream of their religious membership. *Frazee v. Illinois Dept. of Empl. Sec*., 489 U.S. 829 (1989). "Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protections." *Thomas v. Review Board of the Indiana Emp't Security Division*, 450 U.S. 707, 714 (1981).

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

Response: Please refer to my response to Question 19. If I were faced with a case where a litigant's sincerely held religious beliefs were challenged, I would follow all Supreme Court and Seventh Circuit precedent.

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

Response: Please refer to my response to Question 19. If I were faced with a case where a litigant's sincerely held religious beliefs were challenged, I would follow all Supreme Court and Seventh Circuit precedent.

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

Response: As a judicial nominee, it would be inappropriate for me to state the "official position" of a religious organization.

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

Response: In *Our Lady of Guadalupe School v. Morrissey–Berru*, the Supreme Court held that the "First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" 140 S. Ct. 2049, 2055 (2020). The Court found that the employment discrimination claims by two teachers employed by a religious school fell within the "ministerial exception" because the teachers' religious teaching responsibilities "lie at the very core of the mission of a private religious school." *Id*. at 2064.

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

Response: In *Fulton v. City of Philadelphia*, the Supreme Court held that the city of Philadelphia's refusal to contract with a Catholic social service agency unless that agency agreed to certify same-sex couples as foster parents violated the Free Exercise Clause of the First Amendment. 141 S. Ct. 1868 (2021). The city's non-discrimination policy was not neutral or generally applicable because the Commissioner was permitted to make exceptions at his discretion. As a result, the law was subject to, and failed, strict scrutiny.

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: Maine's tuition assistance program violated the Free Exercise Clause of the First Amendment because the law was not neutral and generally applicable by virtue of funding only non-religious schools. *Carson v. Makin*, 142 S. Ct. 1987 (2022). Applying strict scrutiny, the Supreme Court found that the state did not have a compelling interest in prohibiting the use of tuition payments at religious schools because "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Id*. at 1997.

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

Response: In *Kennedy v. Bremerton School District*, the Supreme Court held that the

dismissal of a football coach for engaging in prayer midfield after games violated the Free Exercise and Free Speech Clauses of the First Amendment. 142 S. Ct. 2407 (2022). The coach's prayer on the football field did not occur while he was acting within the scope of duties as a coach. The school's policy prohibiting his conduct was subject to strict scrutiny and the school could not show that prohibiting the prayer served a compelling purpose or that it was narrowly tailored to achieve 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: *Mast v. Fillmore County* involved an Amish community's request for a county ordinance exemption based on their religious beliefs under the Religious Land Use and Institutionalized Persons Act. 141 S. Ct. 2430 (2021). Justice Gorsuch issued a concurring opinion reaffirming the Supreme Court's holding in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Justice Gorsuch wrote that the county "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." *Mast v. Fillmore*, 141 S. Ct. 2430, 2432 (2021) (Gorsuch, J., concurring).

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: I do not want to create the misimpression that I have prejudged any matter that might come before me. Supplying an answer to this question could give that misimpression. If confirmed, I would carefully research and apply all appropriate Supreme Court and Seventh Circuit precedent and use the principles of statutory construction when considering the facts presented by such a case.

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

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

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

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

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

Response to subparts (a) through (d): No.

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

Response: I am not aware of any trainings on these topics conducted by the Northern District of Illinois. Any trainings must comply with the Constitution and all applicable federal laws.

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: It would be inappropriate for me to express an opinion on the constitutionality of an executive branch political appointment. If faced with this issue, I would carefully consider the record, the arguments of the parties, the governing law, and any relevant Supreme Court and Seventh Circuit precedent.

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

Response: Consideration of this question is one for policymakers with the benefit of the appropriate data and research. For 15 years, I proudly served as an Assistant United States Attorney advocating on behalf of the government in criminal cases. If confirmed, I would always treat every litigant with equal dignity and respect and I would approach all matters, both civil and criminal, without regard to impermissible considerations including but not limited to race.

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

Response: The appropriate size of the Supreme Court is a question for Congress.

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

Response: No.

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

Response: In *District of Columbia v. Heller*, the Supreme Court held that the original public meaning of the Second Amendment is to "guarantee the individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592 (2008). If confirmed, I would apply this interpretation.

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 *District of Columbia v. Heller*, the Supreme Court held that the Second

Amendment protects an individual right to keep and bear arms for self-protection in the home. 554 U.S. 570 (2008). In *New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court held that states may not prohibit the possession of handguns outside of the home for self-protection. 142 S. Ct. 2111, 2126 (2022). The Court in *Bruen* explained that to justify its regulation, "the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id*.

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

Response: Yes, under *District of Columbia v. Heller*, "the Second Amendment conferred an individual right to keep and bear arms." 554 U.S. 570, 595 (2008).

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

Response: I am not aware of any Supreme Court precedent holding that the right to own a firearm receives less protection that any other rights specifically enumerated in the Constitution.

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

Response: I am not aware of any Supreme Court precedent holding that the right to own a firearm receives less protection that any other rights specifically enumerated in the Constitution.

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

Response: As a judicial nominee, it would not be appropriate to express an opinion on an issue that may come before me. Article II provides that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

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

Response: The Supreme Court has described prosecutorial discretion as "carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State." *Bond v. United States*, 572 U.S. 844, 865 (2014). The executive generally has "absolute discretion" to decide whether to initiate enforcement proceedings. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The Supreme Court has described a substantive administrative rule change as one "affecting individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

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

Response: No. The Federal Death Penalty Act is authorized by statute. 18 U.S.C. § 3591 *et seq*. No statute can be unilaterally changed by the President.

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. Department of Health and Human Services*, the Supreme Court found that the plaintiffs were likely to prevail on their claim that the Centers for Disease Control and Prevention exceeded its statutory authority under the Public Health Service Act when it instituted a nationwide eviction moratorium in response to COVID–19. 141 S. Ct. 2485, 2487 (2021). The Supreme Court held that in promulgating and extending the eviction moratorium, the CDC likely exceeded its authority under § 361(a) of the Public Health Service Act, noting that "this provision has rarely been invoked – and never before to justify an eviction moratorium." *Id*. The Court found that the moratorium put landlords at risk of irreparable harm and that the government's interests had decreased over time since the stay was granted. Ultimately, the Court concluded that for a federally imposed eviction moratorium to continue, Congress must specifically authorize it. *Id*. at 2489–90.

Senator Ben Sasse
Questions for the Record for Lindsay C. Jenkins
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
October 12, 2022

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

   Response: No.

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

   Response: As a lawyer and a former law clerk, I believe that judges should fairly and impartially decide only the issues presented by the particular case, apply the law to the facts impartially, and follow all binding precedent. I would strive to be open-minded and respectful of all parties ensuring that litigants are given a meaningful opportunity to be heard. I would faithfully observe the limited role of the court and strive to ensure that any rulings be circumscribed by the applicable constitutional provision, statutes and Supreme Court and Seventh Circuit precedent.

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

   Response: Black's Law Dictionary defines the term "originalism" as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). If confirmed, I will follow all Supreme Court and Seventh Circuit precedent.

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

   Response: The text is the starting point for every question of constitutional or statutory interpretation. *See, e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021); *U.S. Venture, Inc. v. United States*, 2 F.4th 1034, 1037 (7th Cir. 2021) ("When interpreting a statute, we start with its text."). If confirmed, I will follow all Supreme Court and Seventh Circuit precedent.

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

   Response: The Constitution has a fixed quality and is an enduring document. It can only be changed through the Article V process. The Supreme Court has repeatedly reaffirmed the enduring quality of the Constitution. As an example, the Supreme Court has explained that the Founders created a Constitution that is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs," and that,

"[a]lthough its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

   Response: I have not studied the jurisprudence of any particular Supreme Court Justice and therefore I am unable to identify a particular Justice whose jurisprudence I most admire. If confirmed, I will follow binding Supreme Court precedent and the method of interpretation used to resolve cases, regardless of which Justice authored the opinion.

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

   Response: An appellate court is bound by its own precedent until it is overruled by an *en banc* decision of that court or by the Supreme Court. Federal Rule of Appellate Procedure 35 provides that *en banc* hearing(s) are not favored and ordinarily will not be ordered unless (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance. F.R.A.P. 35(a). As a district court judge, I would be required to following the precedent set by the Seventh Circuit.

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 refer to my response to Question 7.

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

   Response: If confirmed, I would be obligated to follow Supreme Court and Seventh Circuit precedent concerning consideration of extrinsic factors. In any circumstance requiring interpretation of a federal statute, I would look to binding Supreme Court and Seventh Circuit precedent interpreting the statute. If there is no binding precedent, I would look at the plain language of the statute. If the statutory language is unambiguous, the analysis ends. If the text of the statute is ambiguous, I would consult persuasive authority such as Supreme Court and Seventh Circuit precedent on analogous statutes or similar language, other circuit precedent, relevant canons of construction, and legislative history as an interpretive tool of last resort. *See Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546 (2005).

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

    Response: No. 18 U.S.C. § 3553(a) governs sentencing. Section 3553(a)(6) states that the court must consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. This factor requires consideration of the conduct of comparable defendants regardless of race or ethnicity.

Senator Josh Hawley
Questions for the Record

Lindsay C. Jenkins
Nominee, U.S. District Court for the Northern District of Illinois

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 to all subparts: In my role as an Assistant United States Attorney, I frequently handled and supervised child pornography cases many of which involved each of the enhancements referenced above as set forth in Chapter 2 Part G of the Sentencing Guidelines Manual. *See, e.g.*, U.S.S.G. §§ 2G2.1(b), 2G2.2(b). In that advocacy role, I carefully considered the facts of each case, the Sentencing Guidelines Manual commentary and application notes, and Supreme Court and Seventh Circuit precedent to advocate for application of these and other enhancements within the bounds of the law.

    The role I held as a federal prosecutor would be very different from that I would hold as a judge, if confirmed. As a judge, I will not advocate for a particular position but rather begin from a neutral posture, listening carefully to the parties' arguments while objectively considering the facts presented and their application to Supreme Court and Seventh Circuit precedent. In the context of sentencing, I would also consider the Sentencing Guidelines Manual commentary and application notes. I would take seriously the mandate that, at sentencing, a district judge's first task is to "correctly calculate the applicable guidelines range," before giving meaningful consideration to each factor in 18 U.S.C. § 3553(a). *United States v. Swank*, 37 F.4th 1331, 1334 (7th Cir. 2022); *see also* U.S.S.G. § 1B1.1. A "district court's failure to correctly calculate a defendant's Guidelines range constitutes procedural error." *United States v. Boyle,* 28 F.4th 798, 802 (7th Cir. 2022) (citing *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904, (2018)).

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: Consideration of the appropriate statutory penalties for any crime are decisions for policymakers.

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

    Response: Consideration of the appropriate statutory penalties for any crime are decisions for policymakers.

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: No.

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

    Response: The judicial oath requires judges to "discharge and perform all the duties incumbent upon" them "under the Constitution and laws of the United States." 28 U.S.C. § 453. If confirmed, I will faithfully uphold this oath and apply the relevant Supreme Court and Seventh Circuit precedent to each case.

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

    Response: The Seventh Circuit has recognized the following abstention doctrines:

    The *Pullman* abstention doctrine requires federal courts to abstain from exercising jurisdiction when (1) there is substantial uncertainty as to the meaning of the state law; and (2) there exists a reasonable probability that a state court's clarification of state law might obviate the need for a federal constitutional ruling. *Int'l. Coll. of Surgeons v. City of Chi*., 153 F.3d 356, 365 (7th Cir. 1998); *R.R. Comm'n of Tex. v. Pullman Co*., 312 U.S. 496, 498 (1941). Under *Pullman* abstention, "a court abstains in order to avoid

unnecessary constitutional adjudication." 153 F.3d at 365 (citing *Pullman,* 312 U.S. at 498).

The *Burford* abstention doctrine pertains to circumstances where federal courts should abstain from deciding an unsettled question of state law that relate to a complex state regulatory scheme. *Burford v. Sun Oil Co*., 319 U.S. 315 (1943). In the Seventh Circuit, there are two narrow situations under *Burford* in which federal courts may abstain: (1) when it is faced with "difficult questions of state law" implicating state policies; or (2) when concurrent federal jurisdiction would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Adkins v. VIM Recycling, Inc*., 644 F.3d 483, 504 (7th Cir. 2011).

The *Younger* abstention doctrine prohibits a federal court from interfering with ongoing state judicial proceedings absent extraordinary circumstances. *See Younger v. Harris*, 401 U.S. 37 (1971). In the Seventh Circuit, *Younger* abstention is appropriate where "there is an ongoing state proceeding that is judicial in nature, involves important state interests, provides the plaintiff an adequate opportunity to raise the federal claims, and no exceptional circumstances exist." *Ewell v. Toney*, 853 F.3d 911, 916 (7th Cir. 2017).

The *Colorado River* abstention doctrine recognizes a narrow set of circumstances in which a federal suit should be stayed or dismissed in favor of a concurrent parallel state suit involving the same subject matter. *Colorado River Conservation Dist. v. United States*, 424 U.S. 800 (1976). The Seventh Circuit employs a two-step inquiry when assessing whether *Colorado River* abstention is appropriate: First, the court asks whether the concurrent state and federal actions are parallel. If they are not parallel, the analysis ends. If they are parallel, the court considers "whether the necessary exceptional circumstances exist to support a stay or dismissal." *Loughran v. Wells Fargo Bank, N.A*., 2 F.4th 640, 647 (7th Cir. 2021) (quoting *DePuy Synthes Sales, Inc. v. OrthoLA*, Inc., 953 F.3d 469, 477 (7th Cir. 2020)). The ten factors the court must weigh when making the parallel determination are: (1) whether the case concerns rights in property, and if so, whether the state has assumed jurisdiction over that property; (2) the inconvenience of the federal forum; (3) the desirability of consolidating litigation in one place, that is, the value in avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained in the concurrent fora; (5) whether the source of governing law is federal or state; (6) the adequacy of the state court action to protect the federal plaintiffs' rights; (7) the relative progress of the state and federal proceedings; (8) the presence or absence of concurrent jurisdiction; (9) the availability of removal; and (10) whether the federal action is vexatious or contrived. *Loughran*, 2 F.4th at 647.

The *Rooker–Feldman* abstention doctrine precludes federal courts (other than the Supreme Court) from exercising jurisdiction over claims brought by parties that seek to review or modify final state court judgments. *See Rooker v. Fidelity Trust Co*., 263 U.S. 413 (1923); *Dist. Of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); *see also Andrade v. City of Hammond, Ind*., 9 F.4th 947, 949–50 (7th Cir. 2021). The Seventh Circuit employs a two-step analysis when assessing whether the doctrine bars jurisdiction. First, the court asks, "whether a plaintiff's federal claims are independent or,

instead, whether they either directly challenge a state court judgment or are inextricably intertwined with one." *Id*. at 950 (internal quotation marks omitted). Second, the court determines "whether the plaintiff had a reasonable opportunity to raise the issue in state court proceedings." *Id*.

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

   Response: No.

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

      Response: N/A.

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

   Response: In all cases, I would adhere to the binding precedent of the United States Supreme Court and the Seventh Circuit. In many instances, the Supreme Court has instructed lower courts to follow the original public meaning when considering matters of constitutional interpretation. *See New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36, 42–46 (2004). I would faithfully apply that methodology as required by Supreme Court precedent.

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

   Response: In any circumstance requiring interpretation of a federal statute, I would look to binding Supreme Court and Seventh Circuit precedent interpreting the statute. If there is no binding precedent, I would look at the plain language of the statute. If the statutory language is unambiguous, the analysis ends. If the text of the statute is ambiguous, I would consult persuasive authority such as Supreme Court and Seventh Circuit precedent on analogous statutes or similar language, other circuit precedent, relevant canons of construction, and legislative history. Regarding legislative history, the Supreme Court has cautioned that legislative history is "often murky, ambiguous, and contradictory" and capable of being manipulated to achieve results that could not be attained through the statutory language. *See Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005). The Supreme Court has also said that extrinsic materials including legislative history "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Id*.

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

Response: The Supreme Court has held that some types of legislative history are more probative of legislative intent than other types. *Garcia v. United States*, 469 U.S. 70, 76 (1984) (noting that "Committee Reports are 'more authoritative' than comments from the floor.")

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

Response: I am not aware of any circumstance where it would be appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution. If confirmed, I would apply Supreme Court and Seventh Circuit precedent.

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

Response: A plaintiff raising an Eighth Amendment cruel and unusual punishment challenge to an execution protocol must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason. *See Glossip v. Gross*, 576 U.S. 863, 877 (2015). The Seventh Circuit has held that constitutional challenges to the means of execution under the Eighth Amendment requires a plaintiff to "demonstrate both that there is an objectively serious deprivation and the deprivation was done with deliberate indifference." *Woods v. Buss*, 496 F.3d 620, 623 (7th Cir. 2007).

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

Response: Yes.

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

Response: No.

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

Response: No.

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

Response: In analyzing the free exercise of religion, the Supreme Court has stated "our cases establish the general proposition 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." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). When evaluating whether a law is neutral, the law must be facially neutral, that is, "the minimum requirement of neutrality is that a law not discriminate on its face." *Id*. at 533–34. There cannot be any religious animus in the enactment or enforcement of a facially neutral law. If a law was adopted with religious animus, it likely is not neutral or generally applicable. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729–32 (2018).

Additionally, a law that allows for individualized exemptions but does not allow for an exemption for a religious entity means that the law or policy is likely not neutral or generally applicable. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). The Supreme Court has explained that "government regulations are not neutral and general applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

The Religious Freedom Restoration Act of 1993 (RFRA) applies to restrictions imposed by the federal government and prohibits the government from substantially burdening a person's free exercise of religion, even if that burden results from a rule of general applicability. 42 U.S.C. § 2000bb-1. The Supreme Court has explained that a substantial

burden on free exercise occurs when: (1) non-compliance would cause "severe" economic consequences for the plaintiffs; and (2) compliance with the mandate would require the plaintiffs to violate their sincerely held religious beliefs. *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 719–26 (2014).

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

Response: Please refer to my response to Question 12. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court explained that, 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." 508 U.S. 520, 546 (1993). The government cannot "in a selective manner impose burdens only on conduct motivated by religious belief." *Id*. at 543; *see also Ill. Bible Colls. Ass'n v. Anderson*, 870 F.3d 631, 639–40 (7th Cir. 2017). Any government restriction must apply to religious and secular activity in the same way. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (government regulation is subject to strict scrutiny "whenever they treat any comparable secular activity more favorably than religious exercise.")

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

Response: The Supreme Court has held that sincere beliefs rooted in religion are protected by the Free Exercise Clause regardless of whether they are consistent with the mainstream of their religious membership. *Frazee v. Illinois Dept. of Empl. Sec*., 489 U.S. 829 (1989). The Free Exercise Clause protects an individual's religious beliefs so long as they are sincerely held. "Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protections." *Thomas v. Review Board of the Indiana Emp't Security Division*, 450 U.S. 707, 714 (1981). The Seventh Circuit has explained that "the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations." *West v. Radtke*, 48 F.4th 836, 847 (7th Cir. 2022).

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

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

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

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

Response: No.

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

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

Response: I understand this to mean that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*." *Lochner v. New York*, 198 U.S. 45, 75 (1905).

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

Response: *Lochner* was largely abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

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

a. If so, what are they?

Response: I am not aware of any.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: I am unaware of a market share figure that conclusively establishes whether a company has monopoly power. Generally speaking, courts have required a dominant market share before monopolization is found. *See, e.g.*, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 480 (1992) (holding that litigants' evidence showing that manufacturer controlled 80% to 95% of the service market was sufficient to survive summary judgment under the monopoly standard of § 2 of the Sherman Act). The Seventh Circuit has recognized that in § 2 cases, "a substantial percentage of the sales is usually at least 50%." *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666–67 (7th Cir. 1987). If confirmed, I will follow all applicable Supreme Court and Seventh Circuit precedent.

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

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

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

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

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

Response: In *Erie Railroad Co. v. Tompkins*, the Supreme Court held that, in the context of diversity jurisdiction, there is "no federal general common law." 304 U.S. 64, 78 (1938). The Supreme Court has recognized a few limited areas where federal common law exists, such as admiralty disputes and certain controversies between states. *See Rodriguez v Federal Deposit Insurance Corp.*, 140 S. Ct. 713, 717 (2020).

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

Response: I would interpret the state constitutional provision in accordance with state law. A state may decide that its constitution provides greater protection than the federal Constitution as to a particular enumerated right.

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

Response: When interpreting the scope of a state constitutional provision, I would defer to the decisions of the applicable state's highest court. In *Yates v. United States*, the Supreme Court explained "that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." 574 U.S. 528, 537 (2015) (collecting cases).

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

Response: States may provide greater protections, but they may not afford less protection than those guaranteed by the federal Constitution. Per Article VI, states are bound to follow the federal Constitution. In *Arizona v. Evans*, the Supreme Court explained that state courts may "interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." 514 U.S. 1, 8 (1995).

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

Response: *Brown v. Board of Education* is binding precedent that I would be obligated to follow. It is generally inappropriate for nominees to comment on the correctness of binding precedent. Consistent with the responses of other nominees, however, there are some constitutional decisions that are foundational to our system of justice and unlikely to be relitigated such that I can state that they were correctly decided. *Brown v. Board of Education* is such a case.

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

Response: Injunctions are governed by Federal Rule of Civil Procedure 65. The Supreme Court has explained that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Nationwide injunctions are those

injunctions which bind conduct by parties who are not before the court. The legal basis for issuing a nationwide injunction is the subject of jurisprudential debate. *See Department of Homeland Security v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III."); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018). If faced with this issue, I would carefully review the facts presented and apply binding Supreme Court and Seventh Circuit precedent concerning the scope of the court's authority to grant equitable relief.

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

Response: Please refer to my response to Question 22.

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

Response: Please refer to my response to Question 22.

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

Response: Please refer to my response to Question 22.

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

Response: The federal government is one of limited, enumerated powers. Federalism prevents the excessive concentration of power in any one entity and acts as a restraint on the power of the federal government. *See, e.g.*, *Gregory v. Ashcroft*, 501 US. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power.")

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

Response: Please refer to my response to Question 4.

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

Response: Generally speaking, an award of damages redresses past harm. Injunctive relief is aimed at preventing future harm. Whether to award damages versus

injunctive relief is a decision to be made on a case-by-case basis after careful consideration of the applicable law to the facts presented.

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

Response: In *Washington v. Glucksberg*, the Supreme Court held that the Due Process Clause of the Fifth and Fourteenth Amendments protects rights that are "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." 521 U.S. 702, 720–21 (1997). The Supreme Court has recognized this doctrine in the context of the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), *Obergefell v. Hodges*, 576 U.S. 644 (2015); to marital privacy and contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); to engage in private sexual conduct, *Lawrence v. Texas*, 539 U.S. 558 (2003); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952).

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

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

Response: The First Amendment's right to free exercise of religion is a fundamental right. Its protections are a bedrock value of our constitutional democracy. If confirmed, I will follow applicable Supreme Court and Seventh Circuit precedent. Please also refer to my responses to Questions 12, 13 and 14.

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 protects more aspects than the freedom of worship. For instance, the right encompasses the right to be free from discrimination by the government due to religious belief, and the right to control certain employment decisions related to a religious group's faith. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.

Ct. 1719 (2018); *Our Lady of Guadalupe School v. Morrissey–Berru*, 140 S. Ct. 2049 (2020).

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

Response: The Religious Freedom Restoration Act of 1993 (RFRA) applies to restrictions imposed by the federal government and prohibits the government from substantially burdening a person's free exercise of religion, even if that burden results from a rule of general applicability. 42 U.S.C. § 2000bb-1. In the context of a federal law, the government's action must satisfy strict scrutiny.

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 Supreme Court in *Burwell v. Hobby Lobby Stores, Inc*., explained the court may only determine whether a religious belief reflects "an honest conviction." 573 U.S. 682, 724–25 (2014); *see also Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Please also refer to my response to Question 14.

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

Response: The Religious Freedom Restoration Act of 1993 (RFRA) "provide[s] very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 693 (2014). It applies to restrictions imposed by the federal government and prohibits the government from substantially burdening a person's free exercise of religion, even if that burden results from a rule of general applicability. 42 U.S.C. § 2000bb-1. The Supreme Court has explained that a substantial burden on free exercise occurs when: (1) non-compliance would cause "severe" economic consequences for the plaintiffs; and (2) compliance with the mandate would require the plaintiffs to violate their sincerely held religious beliefs. *Burwell*, 573 U.S. at 719–26.

Under RFRA, the government's action must satisfy strict scrutiny. Generally applicable employment laws fail strict scrutiny if they substantially burden one's religious practice. *Burwell*, 573 U.S. at 690–91 (the Affordable Care Act's contraception mandate violated the religious freedom of the owners of a privately held company). Likewise, generally applicable federal prohibitions that substantially burden religious practice will fail strict scrutiny if the

government fails to show a compelling interest in applying the prohibition to the religious practice. *See, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1225 (2006).

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

Response: No.

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

a. What do you understand this statement to mean?

Response: Although I am not familiar with the context of this remark, I understand this comment to mean that judges should faithfully and impartially apply the rule of law in each case regardless of the outcome, and that a judge's role is to scrupulously apply the law to the facts of a case rather than make decisions based on personal beliefs.

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

Response: To the best of my knowledge, no.

a. If yes, please provide appropriate citations.

Response: N/A.

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

Response: No.

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

Response: Consideration of this question is one for policymakers with the benefit of the appropriate data and research. For 15 years, I proudly served as an Assistant United States Attorney advocating on behalf of the government in criminal cases. If confirmed, I would treat every litigant with equal dignity and respect and I would

approach all matters, both civil and criminal, without regard to impermissible considerations including but not limited to race.

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

Response: Yes.

34. How did you handle the situation?

Response: I fulfilled my duty to zealously advocate for my client setting aside my personal views.

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

Response: Yes.

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

Response: My views of the law have not been shaped by any particular Federalist Paper. If confirmed, my views would be shaped by Supreme Court and Seventh Circuit precedent.

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

Response: This issue was left unanswered by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). Because this issue could come before me, it would not be appropriate for me to answer with my opinion. Regardless of my personal view, I would faithfully apply all precedent in any such case.

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

Response: No.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: To the best of my recollection, any brief that I primarily authored would have had my name on it. In my 15 years as an Assistant United States Attorney, I proofread, edited or authored portions of countless briefs filed by colleagues with the United States Attorney's Office that I supervised. I cannot recall with specificity the instances in which I assisted with briefs in this capacity.

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

42. Have you ever confessed error to a court?

Response: To the best of my recollection, no.

a. If so, please describe the circumstances.

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

Response: Nominees must answer all questions truthfully and should be forthcoming in their responses to the best of their ability. I believe a nominee's oath regarding his or her testimony allows the Senate Judiciary Committee to fulfill its important and constitutionally mandated advice and consent role.

Questions from Senator Thom Tillis
for Lindsay Clayton Jenkins
Nominee to be United States District Judge for the Northern District of Illinois

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: Black's Law Dictionary defines "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Black's Law Dictionary (11th ed. 2019). Such an approach is not appropriate.

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

   Response: Impartiality is an expectation. Canon 2 of the Code of Conduct for United States Judges states that a judge "should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The judicial oath of office similarly requires a judge's commitment to impartiality. *See* 28 U.S.C. § 453.

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

   Response: No.

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

   Response: Yes. A judge's role is to interpret statutes and faithfully apply controlling precedent to the facts presented by a case. Outcome-determinative adjudication is never appropriate.

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

   Response: No.

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

Response: I will faithfully apply all Supreme Court and Seventh Circuit precedent in every case involving an individual's right to keep and bear arms under the Second Amendment. This includes the Supreme Court's holdings in *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022), *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chi.*, 561 U.S. 742 (2010), as well as any other Supreme Court and Seventh Circuit precedent decided on this issue in future cases.

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

Response: I would faithfully apply all Supreme Court and Seventh Circuit precedent if I were presented with such a case. In the context of Second Amendment rights, this includes the Supreme Court's holdings in *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022), *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chi.*, 561 U.S. 742 (2010). It would also include the Supreme Court's holdings addressing pandemic-related restrictions that burden constitutional rights. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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: Government officials are entitled to qualified immunity under 42 U.S.C. § 1983 unless: (1) they violated a federal statutory or constitutional right; and (2) the unlawfulness of their conduct was clearly established at the time. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). "'Clearly established'" means that, "at the time of the officer's conduct, the law was 'sufficiently clear' that every 'reasonable official would understand that what he is doing' is unlawful." *Id*. *See also Carvajal v. Dominguez*, 542 F.3d 561, 566 (7th Cir. 2008) (A clearly established right turns on whether, at the time of the alleged violation, "it would be clear to a reasonable official that his or her conduct was unlawful in the situation.") If the answer to either of these questions is no, then the official is entitled to qualified immunity. I would faithfully apply this and any other binding precedent if confirmed.

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

Response: Whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers is a question for policymakers to consider. My personal views on this issue would not affect my analysis or the result.

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

Response: The proper scope of qualified immunity protections for law enforcement is a question for policymakers to consider. In any case where the issue of qualified immunity is raised, I would faithfully apply the standards set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

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

Response: As a judicial nominee, it would not be appropriate for me to express an opinion on the Supreme Court's patent eligibility jurisprudence. Should I be confirmed, I will follow all Supreme Court precedent involving the scope of 35 U.S.C. § 101.

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

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

    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 subparts: I do not want to create the misimpression that I have prejudged any matter that might come before me. Supplying answers to these hypothetical scenarios could give that misimpression. If confirmed, I would apply all Supreme Court and Federal Circuit precedent, including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Mayo Collaborative Services v. Prometheus Lab., Inc*., 566 U.S. 66 (2012); *Bilski v. Kappos*, 561 U.S. 593 (2010); and *KSR Int'l Co. v. Teleflex Inc*., 550 U.S. 398 (2007).

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

Response: Please refer to my responses to Questions 12 and 13.

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

a. **What experience do you have with copyright law?**

Response: In the context of my role as an Assistant United States Attorney, I have had some experience with matters involving allegations of criminal copyright infringement under the Copyright Act, 17 U.S.C. § 506(a) and 18 U.S.C. § 2319(b).

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

Response: None.

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

Response: None.

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

Response: In the context of my role as an Assistant United States Attorney, I have investigated, supervised and authorized the prosecution and resolution of cases involving First Amendment and free speech issues including hate crimes, solicitation of a crime of violence, unlawful interstate communication of threats, and threatening a federal official. *See, e.g.*, 18 U.S.C. §§ 115, 241, 373, 871, 875 and 876. I have also handled criminal matters involving theft of trade secrets under 18 U.S.C. § 1832, and copyright infringement under the Copyright Act, 17 U.S.C. § 506(a) and 18 U.S.C. § 2319(b). In that context, I was regularly required to consider, among other things, whether the speech is a "true threat" rather than protected speech.

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

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

Response: In any circumstance requiring interpretation of a federal statute, I would look to binding Supreme Court and Seventh Circuit precedent interpreting the statute. If there is no binding precedent, I would look at the plain language of the statute. If the statutory language is unambiguous, the analysis ends. If the text of the statute is ambiguous, I would consult persuasive authority such as Supreme Court and Seventh Circuit precedent on analogous statutes or similar language, other circuit precedent, relevant canons of construction, and legislative history. Regarding legislative history, the Supreme Court has cautioned that legislative history is "often murky, ambiguous, and contradictory" and capable of being manipulated to achieve results that could not be attained through the statutory language. *See Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005). The Supreme Court has also said that extrinsic materials including legislative history "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Id*.

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

Response: Under the Supreme Court's holding in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., if a statute is ambiguous regarding the area of interpretation, and the interpretation is issued through a formal process, it may be entitled to deference. 467 U.S. 837 (1984). Agency interpretations contained in materials such as agency manuals and guidelines are "entitled to respect" only to the extent that they have the "power to persuade." *Christensen v. Harris Cnty*., 529 U.S. 576, 587 (2000).

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 would follow all applicable Supreme Court and Seventh Circuit precedent if I were confronted with this issue.

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

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

Response: In any circumstance requiring interpretation of a federal statute, including the DMCA, I would look to binding Supreme Court and Seventh Circuit precedent interpreting the statute. If there is no binding precedent, I would look at the plain language of the statute. If the statutory language is unambiguous, the analysis ends. If the text of the statute is ambiguous, I would consult persuasive authority such as Supreme Court and Seventh Circuit precedent on analogous statutes or similar language, other circuit precedent, relevant canons of construction, and legislative history. The Supreme Court has cautioned that legislative history is "often murky, ambiguous, and contradictory" and capable of being manipulated to achieve results that could not be attained through the statutory language. See *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005).

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: I would follow all applicable Supreme Court and Seventh Circuit precedent if I were confronted with this issue.

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

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

Response: If a case involving an allegation of impermissible forum shopping were to come before me, I would apply all Supreme Court and Seventh Circuit precedent, including precedent on the applicable venue rules pursuant to 28 U.S.C § 1391. Additionally, I understand that the Northern District of Illinois has implemented procedures pursuant to 28 U.S.C. § 137 to discourage forum and/or judge shopping.

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

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

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

Response: No. In addition to my response to Question 18(a), I can commit that I would not take steps to attract a particular type of case or litigant should I be confirmed.

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

Response: Please refer to my response to Question 18(c).

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

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

    Response: Under Canon 1 of the Code of Conduct for United States Judges, judges must uphold the integrity and independence of the judiciary. The Commentary to Canon 1 states that judges also have a duty to comply with the law.

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

    Response: Please refer to my response to Question 19(a).

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

    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: If a case were to come before me that raised this issue, I would apply all Supreme Court and Seventh Circuit precedent, including precedent on the applicable venue rules pursuant to 28 U.S.C § 1391. Beyond that, it would not be appropriate for me to express an opinion on a matter that is best suited for policymakers to decide.

    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 refer to my response to Question 20(a).

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

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

Response: As a judicial nominee, it would not be appropriate for me to comment on this question. I would follow all Supreme Court and Seventh Circuit precedent, if confirmed.

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

Response: Please refer to my response to Question 21(a).