Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Stephen Henley Locher
Judicial Nominee to the U.S. District Court for the Southern District of Iowa

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

   Response: To the best of my knowledge, the Supreme Court and Eighth Circuit have never used the phrase "super precedent." I am not familiar with academic or scholarly definitions of this phrase. If confirmed as a District Judge, I would faithfully follow all binding precedent from the Supreme Court and Eighth Circuit.

2. **Should law firms undertake the pro bono prosecution of crimes?**

   Response: I am not aware of any law, regulation, custom, or practice in which a private law firm undertakes the pro bono prosecution of crimes. My understanding is that the prosecution of crimes occurs through the government. If I was presented with a case in which a private law firm was prosecuting a case, and someone challenged the prosecution, I would carefully research the issue and apply binding precedent.

3. **Do you agree with 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 referenced statement but understand that the phrase "living constitution" is sometimes used to refer to a doctrine of constitutional interpretation in which the meaning of the Constitution changes over time in accordance with changes in social norms or values. I do not believe the meaning of the Constitution changes over time.

4. **Should judicial decisions take into consideration principles of social "equity"?**

   Response: To the best of my knowledge, the Supreme Court and Eighth Circuit have never used the phrase "social equity" or directed that it be taken into consideration in deciding cases. Accordingly, I would not do so.

5. **Is threatening Supreme Court Justices right or wrong? Please explain your answer.**

   Response: Threatening Supreme Court justices is wrong and may be a federal crime.

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

   Response: The Supreme Court has held that the Constitution protects unenumerated rights only if they are "fundamental rights and liberties which are, objectively, deeply

rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal punctuation omitted). Furthermore, there must be a "careful description" of any such asserted fundamental right. *Id.*

7. **Should a defendant's personal characteristics influence the punishment he or she receives?**

   Response: District judges are required to consider the factors set forth in 18 U.S.C. § 3553(a) when making sentencing decisions. The first factor, set forth in § 3553(a)(1), is the "nature and circumstances of the offense and the history and characteristics of the defendant." In accordance with this directive from Congress, if confirmed as a District Judge, I will consider the history and characteristics of the defendant, among other factors, when making sentencing decisions.

8. **What is the legal basis for a nationwide injunction? What considerations would you consider as a district judge when deciding whether to grant one?**

   Response: Courts have the authority to issue injunctive relief pursuant to Fed. R. Civ. P. 65. The Supreme Court has held that a party seeking injunctive relief must show: (1) it has suffered an irreparable injury; (2) the absence of an adequate remedy at law; (3) that, considering the balance of hardships between the moving and resisting parties, an injunction is warranted; and (4) that "the public interest would not be disserved" by issuing injunctive relief. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010). "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Id.* at 165. I would faithfully follow this and all other binding Supreme Court and Eighth Circuit precedent.

9. **What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?**

   Response: To the best of my knowledge, neither the Supreme Court nor Eighth Circuit has established a legal standard for evaluating whether a law or regulation infringes on Second Amendment rights. The Eighth Circuit has held, however, that Second Amendment challenges to felon-in-possession statutes should be analyzed under a two-step inquiry. *See United States v. Adams*, 914 F.3d 602, 605 (8th Cir. 2019). First, the defendant must establish that the Second Amendment protects his particular conduct. *Id.* Second, the defendant must establish that his prior felony conviction is insufficient to justify the challenged regulation of Second Amendment rights. *Id.* I would faithfully follow this and all other binding Supreme Court and Eighth Circuit precedent.

10. **Is gun violence a public-health crisis?**

Response: Whether gun violence is a public-health crisis is a policy issue for policymakers to address.

11. Is racism a public-health crisis?

Response: Whether racism is a public-health crisis is a policy issue for policymakers to address.

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

Response: Yes. *See Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

13. Do Blaine Amendments violate the Constitution?

Response: I am not familiar with "Blaine Amendments" beyond the discussion of them in *Espinoza v. Montana Dep't of Rev.*, 140 S. Ct. 2246, 2259 (2020). In *Espinoza*, the Supreme Court held that it was unconstitutional for Montana to make public funds available for use for private, non-religious education but not private, religious education. The Supreme Court held that a provision of the Montana Constitution purporting to require Montana to treat private religious and non-religious education differently with respect to the use of state funds violated the free exercise clause of the First Amendment. I would faithfully follow *Espinoza* and all other binding precedent.

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

a. Was *Brown v. Board of Education* correctly decided?

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. However, as the issue of de jure school segregation is highly unlikely to arise in a case before me, I am comfortable, consistent with the practice of past nominees, in stating that I believe *Brown v. Board of Education* was correctly decided.

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

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. However, as the issue of a ban on interracial marriage is highly unlikely to arise in a case before me, I am comfortable, consistent with the practice of past nominees, in stating that I believe *Loving v. Virginia* was correctly decided.

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

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question.

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

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question.

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

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question.

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

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question.

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

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question.

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

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question.

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

Response: As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. Accordingly, I am unable to answer this question.

15. **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: I did not, nor am I aware of anyone else doing so on my behalf.

16. **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: I did not, nor am I aware of anyone else doing so on my behalf.

17. **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: I did not, nor am I aware of anyone else doing so on my behalf.

18. **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: I did not, nor am I aware of anyone else doing so on my behalf.

19. **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.

20. **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: Daniel L. Goldberg was a law school classmate of mine. I have had contact with him on approximately three or four occasions since we graduated from law school in 2003.

21. **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.

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

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

Response: No.

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

Response: No.

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

Response: No.

23. **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.

24. **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.

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

Response: On November 22, 2021, Senators Chuck Grassley and Joni Ernst issued a press release inviting members of the Iowa legal community to submit applications for the judicial vacancy that would arise upon the retirement of then-Chief Judge John A. Jarvey in March 2022. On December 14, 2021, I submitted an application. On January 17, 2022, and January 28, 2022, I interviewed with the Judicial Selection Commission established by Senators Grassley and Ernst. On February 4, 2022, I interviewed with an attorney from the White House Counsel's Office. On February 7, 2022, Senators Grassley and Ernst issued a press release announcing they had recommended me to President Biden for the open judgeship. On April 13, 2022, President Biden announced his intent to nominate me.

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

Response: I reviewed these questions, performed as much research as time permitted, and drafted written responses. In advance of being finalized, my draft responses were shared with attorneys at the Department of Justice, Office of Legal Policy. But the work always remained my own.

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

Questions for the Record for Stephen Locher, Nominee for the Southern District of Iowa

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

Response: Yes, racial discrimination is wrong. The Fourteenth Amendment prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws" and is applicable to the federal government by virtue of the due process clause of the Fifth Amendment. In addition, there are federal statutes prohibiting racial discrimination in a variety of contexts, and the Supreme Court has held that any classifications based on race must satisfy strict scrutiny review. If confirmed, I would faithfully follow all binding Supreme Court and Eighth Circuit precedent on issues of racial discrimination.

2. How should federal district courts consider Supreme Court precedent when deciding cases?

Response: Federal district courts should faithfully follow Supreme Court precedent when deciding cases.

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

Response: My approach to deciding cases starts with the recognition that, as a Magistrate Judge (and, if confirmed, a District Judge), I am obligated to follow Supreme Court and Eighth Circuit precedent. This means, among other things, that I must utilize whatever philosophy or approach is reflected in that precedent.

When I am confronted with an issue of first impression, my analysis starts with the language of the statute or rule I am being asked to apply. If the meaning of the language is clear and unambiguous, my analysis ends, and I issue my ruling in accordance with that meaning. If the meaning is ambiguous, or if different provisions of the statute or rule are in conflict with one another, I employ other canons of construction to resolve the ambiguity or conflict.

I have not studied the philosophies of the Supreme Court Justices from the Warren, Burger, Rehnquist, and/or Roberts Courts. Moreover, the work of a trial court judge is very different from the work of a Supreme Court Justice. Accordingly, I am not able to identify which Justice's philosophy is most analogous to mine.

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

Response: Black's Law Dictionary defines "originalism" as a doctrine of interpretation in which "words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). The Supreme Court has applied originalism when deciding constitutional and statutory issues. *See, e.g.*, *United States v.*

Jones, 565 U.S. 400 (2012) (Fourth Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). If confirmed, I would faithfully follow this and all other binding precedent.

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 a doctrine in which "the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). I do not believe the meaning of the Constitution changes over time.

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

   Response: The proper role of a federal court is to leave matters of public policy to the legislative and executive branches.

7. **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: Given the abundance of precedent interpreting virtually every provision of the Constitution, it is impossible for me to imagine a scenario in which I would be presented with a constitutional issue of true first impression. At minimum, there almost certainly would be precedent closely on point, if not directly so. Accordingly, I would be obligated to follow the approach directed by the closely-on-point precedent. In a Second Amendment case, for example, I would be bound by the original public meaning of the Constitution. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

   Response: Generally not. However, the Supreme Court has sometimes decided constitutional issues through reference to contemporary standards, such as when determining whether punishment is cruel and unusual under the Eighth Amendment. *See, e.g.*, *Trop v. Dulles*, 356 U.S. 86 (1956). If confirmed, I would faithfully follow this and all other binding precedent.

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

   Response: No. However, the Supreme Court sometimes has decided constitutional issues

through reference to contemporary standards, such as when determining whether punishment is "cruel and unusual" under the Eighth Amendment. *See, e.g.*, *Trop v. Dulles*, 356 U.S. 86 (1956). Similarly, the Supreme Court sometimes has been required to apply the Constitution to circumstances the Drafters could not have foreseen at the time of enactment. For example, in *United States v. Jones*, 565 U.S. 400 (2012), the Supreme Court held that the Fourth Amendment requires a search warrant before law enforcement officers may attach a GPS tracking device on a privately-owned vehicle. If confirmed, I would faithfully follow this and all other binding precedent.

10. 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: The free exercise clause of the First Amendment and the Religious Freedom Restoration Act (RFRA) create identifiable limits to what government may impose or require of religious organizations and small businesses operated by observant owners. For example, under RFRA, the federal government may not substantially burden a person's exercise of religion—even through a facially neutral law—unless the application of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Similarly, under the free exercise clause of the First Amendment, the government may not treat any comparable secular activity more favorably than religious exercise. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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

Response: Under the free exercise clause of the First Amendment and the Religious Freedom Restoration Act (RFRA), the government is not permitted to discriminate against religious organizations or religious people unless the discriminatory law or regulation is narrowly tailored (or, under RFRA, the "least restrictive means") to achieve a compelling governmental interest. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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

Response: The Supreme Court held that the church and synagogues were entitled to a preliminary injunction because they had "made a strong showing that the challenged

restrictions violate the minimum requirement of neutrality to religion." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (internal punctuation omitted). The Supreme Court reached this conclusion, in part, because of evidence that the challenged rules appeared to be targeting Orthodox Jews, as well as evidence that comparable secular activity was not subject to the same restrictions. *Id.* at 66-67. The Supreme Court further concluded that the challenged restrictions, if enforced, would cause irreparable harm in the form of lost First Amendment freedoms. *Id.*

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

Response: In *Tandon*, the Supreme Court held that government regulations are not neutral and generally applicable if they treat *any* comparable secular activity more favorably than religious exercise. In such circumstances, the regulation must satisfy strict scrutiny review. *Tandon* held that Covid-19-related restrictions in California did not satisfy this standard.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission violated the First Amendment (free exercise) rights of a baker who declined for religious reasons to bake a cake for a couple's wedding. The Court held that, in applying a facially neutral law, the government is not permitted to treat religious activity with disfavor vis-à-vis non-religious activity. *Id.* at 1731.

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

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

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

Response: Under *Frazee* and other free exercise cases, a court would not be obligated to recognize a religious interpretation that was not sincerely held. However, the "narrow function" of a court is to determine whether the religious belief is "an honest conviction." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (quoting *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S.

707, 715 (1981)). Courts have "no business" addressing whether the religious belief is reasonable. *Id.* "[I]t is not for [courts] to say that [a person's] religious beliefs are mistaken or insubstantial." *Id.*

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

Response: Under *Frazee* and other free exercise cases, a court would not be obligated to recognize a "view" or "interpretation" of religious and/or church doctrine that was not sincerely held. However, the "narrow function" of a court is to determine whether the religious belief is "an honest conviction." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (quoting *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 715(1981)). Courts have "no business" addressing whether the religious belief is reasonable. *Id.* "[I]t is not for [courts] to say that [a person's] religious beliefs are mistaken or insubstantial." *Id.*

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

Response: No.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court reaffirmed its prior holding in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), that the First Amendment allows religious institutions to make employment decisions on the basis of religious considerations that otherwise might violate federal or state law, provided the employees in question hold positions in which they perform "vital religious duties." *See Morrissey-Berru*, 140 S. Ct. at 2066. These cases rest on the premise that the First Amendment gives religious institutions the right to decide matters of church governance free from state interference. *Id.* at 2060.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1848 (2021), the Supreme Court held that the City of Philadelphia violated the First Amendment free exercise rights of Catholic Social Services by refusing to refer children to the agency after learning of the

agency's refusal, on religious grounds, to certify same-sex couples to be foster parents. The City argued that the refusal was based on a facially neutral and generally applicable ordinance prohibiting discrimination on the basis of sexual orientation, as well as a standard contract with foster care agencies reaffirming the non-discrimination requirement. *Id.* at 1877-78. However, the Supreme Court applied strict scrutiny because the contract gave the City discretion to grant exceptions from complying with the non-discrimination requirements. *Id.* "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id.* (cleaned up).

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

Response: In his concurrence in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), Justice Gorsuch criticized Minnesota county officials and lower courts for misapprehending the Religious Land Use and Institutionalized Persons Act (RLUIPA), which requires the application of strict scrutiny to any law or regulation that imposes a substantial burden on a person's religious exercise. *Id.* at 2432. Justice Gorsuch explained that the county and lower courts erred in treating the county's *general* interest in sanitation as a "compelling governmental interest" rather than considering the *specific* application of those rules to the Amish community and its sincerely-held religious beliefs. *Id.* He concluded that the county and lower courts further erred by failing to give appropriate weight to exemptions enjoyed by other, non-religious groups. *Id.*

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

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

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

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

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

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

Response: I am not aware of any such training in the Eighth Circuit or Southern District of Iowa. Any training provided by federal courts should be consistent with

the Constitution and laws of the United States.

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

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

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

Response: I am not aware of any such training in the Eighth Circuit or Southern District of Iowa. I will commit that my court, so far as I have a say, will provide trainings consistent with the Constitution and laws of the United States.

22. Is the United States' criminal justice system systemically racist?

Response: Whether the criminal justice system is systemically racist is a policy issue for policymakers to consider.

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

Response: The Constitution gives the President the authority, with the advice and consent of the Senate, to make appointments to political positions. As a sitting judge and judicial nominee, it would not be appropriate for me to offer an opinion as to what factors the President and Senate should consider in connection with these appointments or whether certain considerations would be constitutional.

24. 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.

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

Response: Whether the number of justices on the Supreme Court should be increased or decreased is a policy issue for policymakers to consider. I am obligated to follow Supreme Court precedent regardless of the Court's size.

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

Response: Yes. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

27. 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 or Eighth Circuit precedent holding that the right to own a firearm receives less protection than the other individual rights specifically enumerated in the Constitution.

28. 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 or Eighth Circuit precedent holding that the right to own a firearm receives less protection than the right to vote under the Constitution.

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

Response: The Supreme Court has recognized that the executive branch has broad discretion in deciding whether or how to prosecute cases. *See Wayte v. United States*, 470 U.S. 598, 607 (1985); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980). As a sitting judge and judicial nominee, it would not be appropriate for me to offer an opinion as to how this discretion should be exercised.

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

Response: I am not aware of any Supreme Court or Eighth Circuit precedent definitively addressing this question. If such a question were to come before me, I would consider the arguments of the parties and carefully research the law.

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

Response: The President could not abolish the death penalty without the passage of legislation by Congress amending or repealing 18 U.S.C. § 3591, which authorizes capital punishment for certain offenses. However, the Supreme Court has recognized that the executive branch has broad discretion in deciding whether or how to prosecute cases. *See Wayte v. United States*, 470 U.S. 598, 607 (1985); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980). In addition, the President has the power under Article II of the Constitution to "grant Reprieves and Pardons for Offenses against the United States."

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

Response: In *Alabama Assn' of Realtors for Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021), the Supreme Court vacated a stay of an order holding that the Center for

Disease Control and Prevention (CDC) exceeded its statutory authority when it imposed a nationwide moratorium on evictions of tenants. The Supreme Court held that the applicants had a substantial likelihood of success on the merits of their claim that the CDC exceeded its authority. *Id.* at 2488. Accordingly, and taking into account other factors relevant to whether to issue a stay, the Court concluded the stay should be vacated. *Id.* at 2489-90. The Court held that "[i]t is up to Congress, not the CDC, to decide whether the public interest merits further action here." *Id.* at 2490.

Senator Josh Hawley
Questions for the Record

Stephen Locher
Nominee, Southern District of Iowa

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

   a. **Do you agree with that philosophy?**

   Response: I am not familiar with this quote, but I do not agree with the proposition that judges should "do what [they] think is right" regardless of what the law says. Judges are obligated to follow the law, not their personal beliefs as to what is "right."

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

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

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

   Response: The Supreme Court has recognized many abstention doctrines.

   Under the *Rooker-Feldman* doctrine, a federal district court or court of appeals is not permitted to reverse or modify a state court judgment even if it implicates federal issues. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005). Instead, appellate review of any such judgment is limited to the U.S. Supreme Court. *Id.* The *Rooker-Feldman* doctrine is limited to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before [federal] district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 284.

   Under the *Pullman* doctrine, federal courts should consider abstaining from deciding federal constitutional challenges to a state law if a state court might interpret the law in a way that avoids the federal issue. *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). The Eighth Circuit considers the following factors in analyzing whether *Pullman* abstention is appropriate: (1) the effect abstention would have on the rights to be protected by considering the nature of the right and necessary

remedy; (2) available state remedies; (3) whether the challenged state law is unclear; (4) whether the challenged state law is fairly susceptible to an interpretation that would avoid federal constitutional issues; and (5) whether abstention will avoid unnecessary federal intervention in state operations. *See Beavers v. Ark. State Bd. of Dental Examiners*, 151 F.3d 838, 841 (8th Cir. 1998).

Under the *Burford* doctrine, a federal court should consider abstaining "when a state has established a complex regulatory scheme supervised by state courts and serving important state interests, and when resolution of the case demands specialized knowledge and the application of complicated state laws." *Bilden v. United Equitable Ins. Co.*, 921 F.2d 822, 825 (8th Cir. 1990); *see also Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* abstention applies only in "extraordinary and narrow circumstances." *Brown v. Mortgage Elec. Reg. Sys., Inc.*, 738 F.3d 926, 930 n.3 (8th Cir. 2013).

Under the *Younger* doctrine, federal courts should abstain from interfering with state criminal proceedings or "particular state civil proceedings that are akin to criminal prosecutions . . . or that implicate a State's interest in enforcing the orders and judgments of its courts." *Sprint Comm'ns, Inc. v. Jacobs*, 571 U.S. 69, 72-73 (2013); *see also Younger v. Harris*, 401 U.S. 37 (1971). *Younger* abstention is appropriate only in "exceptional" cases. *Jacobs*, 571 U.S. at 73. Under Eighth Circuit precedent, *Younger* abstention is proper "if there is an ongoing state judicial proceeding, the proceeding implicates important state interests, there is an adequate opportunity in the state proceedings to raise constitutional challenges, and in the absence of bad faith, harassment, or other exceptional circumstances." *Yamaha Motor Corp., U.S.A. v. Stroud*, 179 F.3d 598 (8th Cir. 1999).

Under the *Colorado River* doctrine, federal courts should consider abstaining when there is parallel litigation in state court involving the same parties and the same issues. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them" *id.* at 824, and thus *Colorado River* abstention is appropriate only in exceptional circumstances. *See Fru-Con Const. Corp. v. Controlled Air, Inc.*, 574 F.3d 527 (8th Cir. 2009). Eighth Circuit precedent requires courts to consider the following factors: whether there is a res over which one court has established jurisdiction; (2) the inconvenience of the federal forum; (3) whether maintaining separate actions may result in piecemeal litigation; (4) which case has priority; (5) whether state or federal law controls; and (6) the adequacy of the state forum to protect the federal plaintiff's rights. *See id.* at 534.

The *Brillhart/Wilton* abstention doctrine bears some similarity to the *Colorado River* doctrine but recognizes that "exceptional circumstances" need not be present when the federal case seeks declaratory relief while a state proceeding is pending. *See Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995); *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942). Under Eighth Circuit precedent, *Brillhart/Wilton* abstention may be appropriate if the state court proceeding "present[s] the same issues, not governed by federal law, between the same parties." *Royal Indem. Co. v. Apex Oil Co.*, 511 F.3d 788, 796 (8th Cir. 2008) (internal punctuation omitted). "[T]he federal court must evaluate 'whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.'" *Id.* (quoting *Brillhart*, 316 U.S. at 495).

Finally, *Thibodaux* abstention arises when state proceedings involve unresolved issues of state law that are of great importance to the state. *See La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). The Eighth Circuit appears to have treated *Thibodaux* abstention as a subset of the other abstention doctrines, rather than an independent doctrine with its own standard. *See, e.g., Aaron v. Target Corp.*, 357 F.3d 768, 777 (8th Cir. 2004) (citing *Thibodaux* to support opinion affirming application of *Younger* abstention).

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

   Response: No.

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

      Response: Not applicable.

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

   Response: The Supreme Court has held that the text and original meaning of a constitutional provision play an important role in interpreting the Constitution. *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). If confirmed, I would faithfully follow this and all other binding precedent.

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

   Response: The Supreme Court has held that legislative history may be used to help interpret ambiguous statutory language. *See Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011). It should not, however, be used to create ambiguity where the text of a statute is clear. *Id.* I would follow this and all other binding precedent.

   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 the "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). The Supreme Court has "eschewed reliance on the passing comments of one Member . . . and casual comments from the floor debates." *Id.* I would follow this and all other binding precedent.

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

      Response: Unless there is binding Supreme Court or Eighth Circuit precedent directing me to do so, I would not consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution.

6. **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: Under binding Supreme Court and Eighth Circuit precedent, an inmate must establish that the method of execution presents a risk that is "sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (cleaned up). The inmate further must establish that there is an alternative that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Id.* (cleaned up). Finally, the record must show that the state lacked a legitimate penological reason for refusing to adopt the alternative protocol. *Id.*; *accord Johnson v. Precythe*, 954 F.3d 1098, 1100 (8th Cir. 2020).

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

   Response: The inmate must establish that there is an alternative that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (cleaned up).

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

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

9. **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.

10. **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: If a state law is truly neutral and generally applicable, the law is subject to rational basis review. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). However, a facially neutral law will not qualify for this deferential standard if its enactment or application was motivated by religious animus, *see, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729-31 (2018), or if the law is subject to exemptions that are being granted on more favorable terms to any secular activity than to comparable religious activity, *see, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Instead, strict scrutiny will apply in such circumstances. *See id.*

    Given the question's reference to "state" governmental action, I do not understand it as implicating the Religious Freedom Restoration Act (RFRA), which applies only to the federal government. To the extent federal action is also at issue in the question,

however, RFRA would require strict scrutiny review even of a facially neutral and generally applicable law if it imposes a substantial burden on a person's exercise of religion. *See Burwell v. Hobby Lobby*, 573 U.S. 682 (2014).

11. **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: State governmental action that discriminates against a religious group or religious belief is subject to strict scrutiny review. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246 (2020); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

12. **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 the "narrow function" of a court is to determine whether the religious belief is "an honest conviction." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (quoting *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 716) (1981)). Courts have "no business addressing []whether the religious belief asserted in a RFRA case is reasonable[]." *Id.* "[I]t is not for [courts] to say that [a person's] religious beliefs are mistaken or insubstantial." *Id.*

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

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

       Response: In *Heller*, the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms that does not require a connection between the arms and service in a militia. The Court struck down as unconstitutional statutes banning handgun possession in the home and requiring other types of firearms to be unloaded and dissembled or bound by a trigger lock or similar device.

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.

14. **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: In context, it appears that Justice Holmes was expressing the view that judges should not use their personal disagreement with laws as a basis for finding them unconstitutional under the Fourteenth Amendment. If this understanding is correct, yes, I agree with his statement.

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

       Response: The Supreme Court has recognized that the doctrine in *Lochner* "has long since been discarded," *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), and thus I will not follow *Lochner*.

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

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

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

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

       Response: Yes.

16. **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: In *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), the Court cited favorably to Judge Hand's conclusion that 90% market share constitutes monopoly power and concluded that 87% market share also "leaves no doubt" that monopoly power exists. In an earlier case, the Supreme Court held that "over two-thirds of the entire domestic field of cigarettes, and . . . over 80% of the field of comparable cigarettes" constituted a "substantial monopoly." *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946). Moreover, and more generally, the Supreme Court has defined monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). If confirmed, I would follow this and all other binding Supreme Court and Eighth Circuit precedent.

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

Response: See my response to Question 16(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: I am not aware of any Supreme Court or Eighth Circuit precedent establishing a minimum percentage of market share for a company to constitute a monopoly. However, the Supreme Court has defined monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). In *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), the Court cited favorably to Judge Hand's conclusion that 90% market share constitutes monopoly power and concluded that 87% market share also "leaves no doubt" that monopoly power exists. In an earlier case, the Supreme Court held that "over two-thirds of the entire domestic field of cigarettes, and . . . over 80% of the field of comparable cigarettes" constituted a "substantial monopoly." *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946). I would follow this and all other binding Supreme Court and Eighth Circuit precedent.

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

Response: "Common law" refers to areas of law that derive from judicial precedent rather than through statutes. However, "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). "Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020). "These areas have included admiralty

disputes and certain controversies between States." *Id.* Federal judges may not make new common law without satisfying "strict conditions" such as the need to "protect uniquely federal interests." *Id.* (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

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

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

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

       Response: In our system of federalism, the highest court of a state is given the freedom to interpret that state's constitution differently than the Supreme Court has interpreted the U.S. Constitution even if the relevant text is identical in both documents, provided that the interpretation of the state constitution does not infringe on a right protected by the U.S. Constitution.

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

       Response: In our system of federalism, the highest court of a state is given the freedom to interpret that state's constitution more broadly than the Supreme Court has interpreted the U.S. Constitution even if the relevant text is identical in both documents, provided that the interpretation of the state constitution does not infringe on a right protected by the U.S. Constitution.

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

    As a sitting judge and judicial nominee, it would be improper for me to comment on whether I believe a case is correctly decided when the issues in the case (or related issues) could come before me for decision in a future case. However, as the issue of de jure school segregation is highly unlikely to arise in a case before me, I am comfortable, consistent with the practice of past nominees, in stating that I believe *Brown v. Board of Education* was correctly decided.

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

Response: Federal courts have the authority to issue injunctive relief pursuant to Fed. R. Civ. P. 65. The Supreme Court has held that a party seeking injunctive relief must show: (1) it has suffered or will suffer an irreparable injury; (2) the absence of an adequate remedy at law; (3) that, considering the balance of hardships between the moving and resisting parties, an injunction is warranted; and (4) that "the public interest would not be disserved" by issuing injunctive relief. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010). "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Id.* at 165. I would faithfully follow this and all other binding Supreme Court and Eighth Circuit precedent.

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

Response: See my answer to Question 20.

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

Response: See my answer to Question 20.

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

Response: See my answer to Question 20.

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

Response: Federalism is a central feature of our constitutional system. The Constitution intentionally gives only limited powers to the federal government and reserves all other powers to the States. In so doing, the Constitution leaves room for states to enact their own laws and regulations according to the needs and circumstances of that state.

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

Response: See my answer to Question 2.

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

Response: As a sitting judge and judicial nominee, I am obligated to follow the law without regard to my personal views. Under binding Supreme Court precedent, a party seeking injunctive relief must show: (1) it has suffered or will suffer an irreparable injury; (2) the absence of an adequate remedy at law; (3) that, considering the balance of hardships between the moving and resisting parties, an injunction is warranted; and (4) that "the public interest would not be disserved" by issuing injunctive relief. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010). "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Id.* at 165. I would faithfully follow this and all other binding Supreme Court and Eighth Circuit precedent.

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

Response: The Supreme Court has held that the substantive due process clauses of the Fifth and Fourteenth Amendments protect unenumerated rights that are "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal punctuation omitted).

26. **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: My understanding of the scope of the First Amendment's right to free exercise of religion is based on binding Supreme Court precedent, important examples of which are set forth in my answers to Questions 10, 11, and 12.

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

    Response: I am not aware of any Supreme Court or Eighth Circuit precedent definitively comparing "free exercise" with "free worship," although *Lee v. Weisman*, 505 U.S. 577, 591 (1992), appeared to treat "exercise" more broadly than "worship" when it said the "Free Exercise Clause embraces a freedom of conscience and worship…"

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

Response: The Eighth Circuit held that in order to be considered a "substantial burden" on free exercise, the governmental action must: (1) "significantly inhibit or constrain conduct or expression that manifests some central tent of a person's individual religious beliefs"; (2) "meaningfully curtail a person's ability to express adherence to his or her faith"; or (3) "must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion." *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997) (cleaned up). I would faithfully follow this and all other binding Supreme Court and Eighth Circuit precedent.

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 has held that the "narrow function" of a court is to determine whether the religious belief is "an honest conviction." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (quoting *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 715 (1981)). Courts have "no business addressing []whether the religious belief asserted in a RFRA case is reasonable[]." *Id.* "[I]t is not for [courts] to say that [a person's] religious beliefs are mistaken or insubstantial." *Id.*

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

Response: The Religious Freedom Restoration Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a).

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

Response: No.

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that judges should follow the law regardless of their personal views or preferences.

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

Response: I once represented a client who was an avid hunter and owned land in Iowa but was a resident of a different state. On his behalf, in my capacity as an advocate, I took the position that an Iowa statute preventing him as a non-resident landowner from hunting on his own land on the same terms as a resident landowner was unconstitutional under the Iowa Constitution.

a. If yes, please provide appropriate citations.

Response: *Carter v. Iowa Dep't of Nat. Res.*, No. 18-0087, 2019 WL 479096 (Iowa Ct. App. Feb. 6, 2019).

29. 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.

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

Response: Whether America is a systemically racist country is a policy issue for policymakers to address.

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

Response: From time to time as a litigator, I took positions on behalf of clients that I might not have supported as a matter of policy. My clients were entitled, however, to zealous representation, which I provided in accordance with my ethical obligations.

32. How did you handle the situation?

Response: During my time as a litigator, I was ethically obligated to zealously represent my clients even if it occasionally meant taking positions that I might not have supported as a matter of policy. I satisfied my ethical obligation to do so.

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

    Response: Yes.

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

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

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

    Response: As a sitting judge and judicial nominee, it would be improper for me to offer an opinion on an issue like this one. As a Magistrate Judge (and if confirmed as a District Judge), I am obligated to follow all binding Supreme Court and Eighth Circuit precedent.

36. **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.

37. **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.

38. 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.

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

Response: I can recall one case in which I authored most sections of appellate briefs that were filed in court without my name on the briefs. In addition to this one instance, I was asked from time to time to review and offer feedback on briefs prepared by others, including during my time in private practice and while working as an Assistant United States Attorney. I do not recall specific case names where I provided such review.

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

Response: *In re: Dornier Aviation (N. Am.), Inc.*, 453 F.3d 225 (4th Cir. 2006).

40. Have you ever confessed error to a court?

Response: To the best of my recollection, I never confessed error to a court.

a. If so, please describe the circumstances.

Response: Not applicable.

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

    Response: I am obligated to answer all questions truthfully and have done so to the best of my ability and recollection. Similarly, I am obligated to answer all questions fully except where judicial ethics require me to limit an answer in some way.

Questions for the Record for Stephen Henley Locher
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
Stephen Locher, Nominee to the United States District Court for the Southern District of Iowa

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

   Response: My approach to deciding cases starts with the recognition that, as a Magistrate Judge (and, if confirmed, a District Judge), I am obligated to follow Supreme Court and Eighth Circuit precedent. This means, among other things, that I must utilize whatever philosophy or approach is reflected in that precedent.

   When I am confronted with an issue of first impression, my analysis starts with the language of the statute or rule I am being asked to apply. If the meaning of the language is clear and unambiguous, my analysis ends, and I issue my ruling in accordance with that meaning. If the meaning is ambiguous, or if different provisions of the statute or rule are in conflict with each other, I employ other canons of construction to resolve the ambiguity or conflict.

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

   Response: I would review the language of the statute in question, in conjunction with binding Supreme Court and Eighth Circuit precedent.

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

   Response: I would review the language of the constitutional provision in question, in conjunction with binding Supreme Court and Eighth Circuit precedent.

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

   Response: The Supreme Court has held that the text and original meaning of a constitutional provision play an important role in interpreting the Constitution. *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). If confirmed, I would faithfully follow this and all other binding precedent.

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

   Response: My approach to reading and interpreting statutes starts with the recognition that, as a Magistrate Judge (and, if confirmed, a District Judge), I am obligated to follow Supreme Court and Eighth Circuit precedent. This means, among other things,

that I must utilize whatever approach to reading and interpreting statutes is reflected in that precedent.

When I am confronted with a question of statutory interpretation of first impression, my analysis starts with the language of the statute. If the meaning of the language is clear and unambiguous, my analysis ends, and I issue my ruling in accordance with that meaning. If the meaning is ambiguous, or if different provisions of the statute are in conflict with one another, I employ other canons of construction to resolve the ambiguity or conflict.

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 Supreme Court has held that the public understanding of relevant language at the time of enactment plays an important role in interpreting a statute or constitutional provision. *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). If confirmed, I would faithfully follow this and all other binding precedent.

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

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

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

   Response: In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that the necessary and proper clause in Article I, Section 8, of the United States Constitution gives Congress certain implied powers that are not explicitly enumerated in the Constitution.

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 evaluate the constitutionality of any law in accordance with Supreme Court and Eighth Circuit precedent.

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

Response: The Supreme Court has held that the substantive due process clauses of the Fifth and Fourteenth Amendments protect unenumerated rights that are "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal punctuation omitted). These rights include the right to marry, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion. *Id.*

10. What rights are protected under substantive due process?

Response: See my answer to Question 9.

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

Response: The Supreme Court precedent holding that the rights identified in my answer to Question 9 are protected under the Fifth and Fourteenth Amendments remains good law. By contrast, the Supreme Court has recognized that the doctrine reflected in *Lochner* "has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

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

Response: The Supreme Court has held that Congress has the power, through the Commerce Clause, to regulate: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, as well as persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The Supreme Court has struck down legislation that exceeds the limits of Congress's authority under the Commerce Clause. *See, e.g.*, *id.*; *United States v. Morrison*, 529 U.S. 598 (2000). If confirmed, I would faithfully follow this and all other binding precedent.

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

Response: The Supreme Court has identified race, national origin, religion, and alienage as suspect classes for which strict scrutiny applies. *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

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

Response: Separation of powers is a bedrock feature of our Constitution and system of government. The drafters of the Constitution intentionally sought to limit the

power of each branch of government, while also giving each branch oversight authority over the others. Importantly, separation of powers principles are intended not just to "protect each branch of government from incursion by the others," but to "protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011).

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

Response: I would identify and apply binding Supreme Court and Eighth Circuit precedent, in conjunction with the text of the Constitution, to determine whether the branch in question had exceeded its constitutional authority.

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

Response: Judges should make decisions based on the facts and law, not their personal views.

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

Response: Both are undesirable, and therefore I will strive to do neither.

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 never studied trends in the Supreme Court's exercise of its authority to strike down federal statutes and am therefore unable to explain why the exercise of such authority is more prevalent in some eras than others. The aggressive exercise of judicial review could raise concerns about whether the judiciary is acting outside its limited constitutional role of deciding cases and controversies; conversely, judicial passivity could lead to the legislative or executive branches exceeding *their* constitutional boundaries. Ultimately, a judge must follow the law wherever it leads, and without respect to the number of federal statutes (if any) the judge is striking down.

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

Response: As it relates to constitutional issues, Black's Law Dictionary defines "judicial review" as a "court's power to review the actions of other branches or levels of government" and "judicial supremacy" as the "doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review . . . are binding

on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019).

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

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

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

Response: Federalist 78 recognizes that the role of a judge is to interpret and apply the law, not to make it. Similarly, it is important for a judge to decide only the case in front of him or her, and not offer advisory opinions on issues not properly before the court.

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: As a Magistrate Judge (and, if confirmed, a District Judge), my obligation is to follow binding precedent regardless of whether I believe it is correctly decided. In the case of precedent that is not directly on point, a district judge still must consider whether it is so closely analogous that it should be applied.

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: District judges are required to consider the factors set forth in 18 U.S.C. § 3553(a) when making sentencing decisions. Section 3553(a) does not mention race, gender, nationality, sexual orientation, or gender identity as a factor in sentencing decisions. Accordingly, I would not consider them.

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: One of the ways Black's Law Dictionary defines "equity" is "[f]airness, impartiality, evenhanded dealing." Black's Law Dictionary (11th ed. 2019). The word "equity" is also used in binding Supreme Court and Eighth Circuit precedent in a variety of other contexts. *See, e.g.*, *Rufo v. Inmates of the Suffolk Cty. Jail*, 502 U.S. 367, 391 (1992) ("[A] consent decree is a final judgment that may be reopened only to the extent that equity requires.").

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

Response: If the definition of "equity" is understood as revolving around concepts of fairness and impartiality, it would be somewhat different than "equality," which is a term of comparison; i.e., "[t]he quality, state, or condition of being equal." Black's Law Dictionary (11th ed. 2019). There is, however, overlap between the two in the sense that equality (or equal treatment) may be an aspect of ensuring equity.

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 does not include the word "equity." It does, however, forbid states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." I will faithfully follow any Supreme Court or Eighth Circuit precedent applying the Fourteenth Amendment.

27. How do you define "systemic racism?"

Response: I have no personal definition of the phrase "systemic racism" and am not aware of any consensus definition of the phrase.

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

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

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

Response: Without a personal or consensus definition of the phrase "systemic racism," I am not able to compare it to "critical race theory."

Senator Ben Sasse
Questions for the Record for Stephen Henley Locher
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
May 11, 2022

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

   Response: No.

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

   Response: My approach to deciding cases starts with the recognition that, as a Magistrate Judge (and, if confirmed, a District Judge), I am obligated to follow Supreme Court and Eighth Circuit precedent. This means, among other things, that I must utilize whatever philosophy or approach is reflected in that precedent.

   When I am confronted with an issue of first impression, my analysis starts with the language of the statute or rule I am being asked to apply. If the meaning of the language is clear and unambiguous, my analysis ends, and I issue my ruling in accordance with that meaning. If the meaning is ambiguous, or if different provisions of the statute or rule are in conflict with each other, I employ other canons of construction to resolve the ambiguity or conflict.

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

   Response: The Supreme Court has held that the text and original meaning of a constitutional provision play an important role in interpreting the Constitution. *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). If confirmed, I would faithfully follow this and all other binding precedent.

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

   Response: The Supreme Court has repeatedly held that the "starting point for our analysis is the statutory text." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003). When "the words of a statute are unambiguous, 'the judicial inquiry is complete.'" *Id.* (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). If confirmed, I would faithfully follow this and all other binding precedent.

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

Response: No, the meaning of the Constitution does not change over time. There are, however, circumstances in which courts must apply the Constitution to circumstances that the Drafters could not have foreseen at the time of enactment. For example, in *United States v. Jones*, 565 U.S. 400 (2012), the Supreme Court held that the Fourth Amendment requires a search warrant before law enforcement officers may attach a GPS tracking device on a privately-owned vehicle.

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 closely studied the jurisprudence of Supreme Court Justices appointed since January 20, 1953 (or any other time) and therefore am unable to identify any Justice whose jurisprudence I admire the most.

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

   Response: As a United States Magistrate Judge (and, if confirmed, a District Judge), my obligation is to follow binding appellate court precedent regardless of whether it conflicts with the original public meaning of the Constitution. I am not aware of any Eighth Circuit precedent describing the substantive factors that it considers when deciding whether to reaffirm precedent that conflicts with the original public meaning of the Constitution.

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

   Response: As a United States Magistrate Judge (and, if confirmed, a District Judge), my obligation is to follow binding appellate court precedent regardless of whether it conflicts with the original public meaning of the text of a statute. I am not aware of any Eighth Circuit precedent describing the substantive factors that it considers when deciding whether to reaffirm precedent that conflicts with the original public meaning of the text of a statute.

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: When the text of a statute is clear, legislative history should play no role in statutory interpretation. If the text of a statute is ambiguous, or different provisions of a statute are in conflict with one another, the Supreme Court and Eighth Circuit have held that legislative history may be considered to help resolve the ambiguity or conflict. *See, e.g.*, *Garcia v. United States*, 469 U.S. 70, 76 (1984). Absent binding Supreme Court or

Eighth Circuit precedent directing otherwise, general principles of justice should not play a role in statutory interpretation.

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

    Response: District judges are required to consider the factors set forth in 18 U.S.C. § 3553(a) when making sentencing decisions. One of these factors is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *See* 18 U.S.C. § 3553(a)(6). If confirmed as a District Judge, I will consider this and all other statutory factors when sentencing an individual defendant.

Questions from Senator Thom Tillis

for Stephen Locher
Nominee to be United States District Judge for the Southern District of Iowa

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

   Response: Yes.

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

   Response: I interpret "judicial activism" to refer to situations where a judge decides a case based on the judge's personal preferences, rather than the law. Under this interpretation, I consider judicial activism inappropriate.

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

   Response: It is an expectation.

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, there will be times when the law requires a result that some, or even most, observers would consider undesirable. Judges are obligated to follow the law in every case, regardless of the perceived or actual desirability of the outcome.

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

   Response: No.

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

   Response: I will faithfully follow all binding Second Amendment precedent, including, for example, *District of Columbia v. Heller*, 554 U.S. 570 (2008), which recognizes an individual Second Amendment right to keep and bear arms, and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which held that this individual right is applicable to the

states.

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 evaluate any such lawsuit in accordance with binding precedent, including, for example, *District of Columbia v. Heller*, 554 U.S. 570 (2008), which recognizes an individual Second Amendment right to keep and bear arms, and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which held that this individual right is applicable to the states.

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: The doctrine of qualified immunity protects law enforcement officers and other government officials from liability for civil damages if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). In accordance with this binding precedent, lower courts must consider two prongs: first, whether the official violated a person's statutory or constitutional rights; and, second, whether such rights were "clearly established"–i.e., whether a reasonable person would have known of them at the time of the alleged violation. *Id.* at 232. In *Pearson*, the Supreme Court held that the "judges of the district courts and the courts of appeal should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 236. I would follow *Pearson* and all other binding Supreme Court and Eighth Circuit precedent.

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

    Response: As a sitting judge and judicial nominee, it would not be appropriate for me to offer an opinion on whether I believe an area of law has been correctly decided when the issues in that area (or related issues) could come before me for decision in a future case. Policymakers may, however, wish to analyze this issue.

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

    Response: As a sitting judge and judicial nominee, it would not be appropriate for me to offer an opinion on whether I believe an area of law has been correctly decided when the issues in that area (or related issues) could come before me for decision in a future case.

Policymakers may, however, wish to analyze this issue.

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

    Response: As a sitting judge and judicial nominee, it would not be appropriate for me to offer an opinion on Supreme Court jurisprudence involving issues that could come before me for decision in a future case. Policymakers may, however, wish to analyze this issue.

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

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

       Response: The Supreme Court has held that "[l]aws of nature, natural phenomena, and abstract ideas are not patentable." *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013) (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70 (2012)). However, "an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection." *Mayo*, 566 U.S. at 71 (quoting *Diamond v. Diehr*, 450 U.S. 175, 187 (1981) (emphasis in original)). In *Alice Corp. Pty. Ltd. v. CLS Bank Intern.*, 573 U.S. 208, 217 (2014), the Supreme Court summarized a two-part framework for distinguishing between patent-eligible and -ineligible applications. First, a court must "determine whether the claims at issue are directed to one of those patent-ineligible concepts." *Id.* If so, the court must proceed to the second step of "consider[ing] the elements of each claim both individually and as an ordered combination to determine whether the additional elements transform the nature of the claim into a patent-eligible application." *Id.* (internal punctuation omitted).

       In any case involving patent eligibility, I would apply *Alice Corp.*, *Myriad Genetics*, *Mayo*, and all other binding Supreme Court and Eighth Circuit precedent.

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

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

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

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

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

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

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

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

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

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

g. ***BioTechCo* discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTech Co* invents**

a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?

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

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

Response: Whether there should be exemptions to patent infringement laws is a policy issue for policymakers to consider.

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

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

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

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

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

Response: See my responses to Questions 12 and 13(a).

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: I have been involved in a handful of cases and matters as an attorney and

judge involving issues of copyright law.

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

Response: To the best of my recollection, I have not been involved in any cases as a lawyer or judge involving the Digital Millennium Copyright Act.

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

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

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

Response: To the best of my recollection, I have not been involved in any cases as a lawyer or judge involving the relationship between free speech and intellectual property (including copyright), although I have handled intellectual property cases in other contexts as both a lawyer and judge. I do not recall handling any First Amendment cases as a lawyer but have served as a judge in a small number of such cases, at least one of which is still active.

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

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

Response: When the meaning of a legislative text is clear and unambiguous, that meaning should be followed without respect to legislative history. *See Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011). If the text is ambiguous, or if different provisions of the text conflict with one another, the Supreme Court has held that courts may use legislative history to help resolve the ambiguity or conflict. *See id.*

The Supreme Court has explained that the "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). The Supreme Court has "eschewed reliance on the passing comments of one Member . . . and casual comments from the floor debates." *Id.* I would follow this and all other binding precedent.

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

Response: I am not aware of any binding Supreme Court or Eighth Circuit precedent definitively addressing whether, and to what extent, the analysis of the U.S. Copyright Office should play a role in deciding how to apply the law to the facts in a particular copyright case. Other circuits, however, have concluded that some level of deference should be given to the U.S. Copyright Office. *See, e.g.*, *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 478 (6th Cir. 2015) (summarizing cases).

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: This is a policy issue for policymakers to address.

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

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

Response: Judges must apply the Digital Millennium Copyright Act according to the language of the statute and governing precedent.

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

Response: Judges must apply the Digital Millennium Copyright Act according to the language of the statute and governing precedent.

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

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

    Response: In the Southern District of Iowa, cases are randomly assigned to District Judges and Magistrate Judges across the district. This limits the ability of a litigant in the Southern District of Iowa to engage in judge-shopping or forum-shopping, and I am not aware of any complaints or allegations of such conduct.

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

    Response: Judges are obligated to decide cases based on the facts and law. Whether the judge's adherence to the rule of law encourages or discourages forum shopping is irrelevant, provided the judge is following the law.

    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: Judges are obligated to decide cases based on the facts and law. To the extent litigants see adherence to the rule of law in a particular forum as a reason for that forum to be more attractive than others, I do not view this as problematic. By contrast, if a judge is *declining* to adhere to the rule of law so as to attract certain types of cases or litigants, I would view this as highly problematic.

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

    Response: I will commit to deciding cases based on the facts and law. Whether my adherence to the rule of law attracts or discourages litigants from bringing cases in my district is irrelevant to the strength of this commitment.

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: The issue of what should be done if a judge continues to flaunt binding case law despite numerous mandamus orders is for the court of appeals in the judge's district to address. As a sitting judge and judicial nominee, it would not be appropriate for me to offer an opinion on the subject other than to say that, if confirmed, I will faithfully follow all binding precedent.

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

   Response: See 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?**

Response: I have not studied how the overwhelming concentration of a particular type of litigation in one or two judicial districts might affect perceptions of the judiciary. As a sitting judge and judicial nominee, I am committed to deciding cases based on the facts and law.

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: I am not familiar with the procedures or rules for case assignment in districts other than the Southern District of Iowa. In the Southern District of Iowa, cases are randomly assigned to District Judges and Magistrate Judges across the district. This limits the ability of a litigant to engage in judge-shopping or forum-shopping, and I am not aware of any complaints or allegations of such conduct.

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: In the Southern District of Iowa, patent cases, like all other types of cases, are randomly assigned to District Judges and Magistrate Judges across the district. This limits the ability of a litigant in the Southern District of Iowa to engage in judge-shopping or forum-shopping, and I am not aware of any complaints or allegations of such conduct

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: I would prefer never to be reversed on mandamus by a court of appeals and am committed to deciding cases based on the facts and law.

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

       Response: See my answer to Question 21(a).