Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Justice Tamika Montgomery-Reeves
Nominee to the Court of Appeals for the Third Circuit
September 14, 2022

1. **You have significant experience as both a litigator and as a judge. You spent several years in private practice working on complex commercial litigation before your appointment to Delaware's Chancery Court in 2015. Since you were elevated to the Delaware Supreme Court, you have participated in approximately 600 decisions and have issued nearly 200 written opinions and substantive orders.**

   a. **How have these experiences prepared you to serve as a federal appellate judge?**

      Response: My experience as a complex commercial and corporate litigator and as a Vice Chancellor on the Delaware Court of Chancery allowed me to develop strong analytical, research, and writing skills. Both roles also required that I learn to quickly get up to speed on complex matters and to navigate long and complex records, including voluminous transcripts and exhibits. Serving as a Justice on the Delaware Supreme Court has allowed me to work on a wide range of complex legal matters. In each instance, I have been able to quickly master the applicable law and the record and render a fair and impartial decision based on the applicable law and facts. Finally, serving as a Justice on the Delaware Supreme Court has provided me with experience deciding matters by panel. Although each of us, as appellate judges, must exercise our own independent judgment, the give and take of conferencing a case and reviewing draft opinions is an essential part of the process. Because of this process, I fully understand the importance of respect for my colleagues, collegiality, and the benefits of learning from the other judges. The lessons I have learned from my colleagues have made me a better judge, and our disagreements about cases have never led to animosity. I expect the same would be true on the Third Circuit if I am confirmed.

   b. **What types of criminal matters have you handled during your time on the Delaware Supreme Court?**

      Response: During my time on the Delaware Supreme Court, I have handled a broad range of criminal law matters including issues under the Fourth Amendment of the United States Constitution and Article I, Section 6 of the Delaware Constitution; cases involving the Fifth Amendment's double jeopardy clause and right against self-incrimination; cases involving an accused's Sixth Amendment rights under the confrontation clause, right to counsel, and right to a speedy trial; interpretation of criminal statutes; issues regarding whether prosecutorial misconduct occurred and whether discovery obligations had been met; challenges to a trial court's evidentiary rulings; various post-conviction motions and matters; and review of trial court sentencing decisions.

2. **During your hearing, members of the Judiciary Committee asked you to offer your personal views on various proposals to increase diversity in the Delaware legal community.**

   a. **Would your personal views have any bearing on your decision making as a judge?**

      Response: No.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Justice Tamika R. Montgomery-Reeves
Nominee to be United States Circuit Judge for the Third Circuit

1. **During your hearing before the Senate Judiciary Committee, we discussed the potential application of *In re Caremark International Inc. Derivative Litigation* to claims by activist shareholders that company directors have a duty to address a wide variety of environmental, social, and governance ("ESG") issues.**

    a. **You suggested that, under Delaware law, company directors enjoy broad discretion and could use that discretion to focus on ESG issues. In your view, could directors be liable for violating the duty of care if they pursue ESG policies to the detriment of company profitability?**

    Response: Please see my response to Question 1b.

    b. **BlackRock CEO Larry Fink has voiced support for "stakeholder capitalism," a controversial idea that would require business leaders to focus on climate change and broader social issues that may have little to do with a company's actual business activities. How would you assess a *Caremark* claim predicated on company directors' failure to adopt stakeholder capitalism or address a specific ESG issue?**

    Response: A cardinal precept of the General Corporation Law of the State of Delaware is that directors manage the business and affairs of the corporation. 8 *Del. C.* § 141(a). This role includes a decision-making function and an oversight function. When carrying out their responsibilities, directors of Delaware corporations owe two overarching fiduciary duties—the duty of care and the duty of loyalty—to the corporations they serve and to the stockholders. The duty of care requires that directors act on an adequately informed basis with director liability for a duty of care violation predicated upon concepts of gross negligence. The duty of loyalty mandates that the best interests of the corporation and its stockholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally. *McKenna v. Singer*, 2017 WL 3500241, at *15 (Del. Ch. July 31, 2017).

    Under *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996), "a director must make a good faith effort to oversee the company's operations. Failing to make that good faith effort breaches the duty of loyalty and can expose a director to liability. In other words, for a plaintiff to prevail on a *Caremark* claim, the plaintiff must show that a fiduciary acted in bad faith—'the state of mind traditionally used to define the mindset of a disloyal director.'" *Marchand v. Barnhill*, 212 A.3d 805, 821 (Del. 2019) (internal footnotes and citations omitted).

"Bad faith is established, under *Caremark*, when 'the directors [completely] fail[ ] to implement any reporting or information system or controls[,] or . . . having implemented such a system or controls, consciously fail[ ] to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.' In short, to satisfy their duty of loyalty, directors must make a good faith effort to implement an oversight system and then monitor it." *Id.* at 821 (alterations in original) (internal footnotes and citations omitted).

"As with any other disinterested business judgment, directors have great discretion to design context- and industry-specific approaches tailored to their companies' businesses and resources. But *Caremark* does have a bottom-line requirement that is important: the board must make a good faith effort—i.e., try—to put in place a reasonable board-level system of monitoring and reporting. Thus, [Delaware] case law gives deference to boards and has dismissed *Caremark* cases even when illegal or harmful company activities escaped detection, when the plaintiffs have been unable to plead that the board failed to make the required good faith effort to put a reasonable compliance and reporting system in place." *Id.* (internal footnotes and citations omitted).

Whether directors would be liable for violating fiduciary duties if they (1) pursued ESG policies to the detriment of company profitability, (2) failed to adopt stakeholder capitalism, or (3) failed to address a specific ESG issue, would require a fact-specific analysis that cannot be done without significantly more information. Even if I had the additional information, it would be inappropriate for me, as a sitting Justice on the Delaware Supreme Court, to opine on these issues here as they are likely to be the subject of further litigation in Delaware. What I can say is that "directors have great discretion to design context- and industry-specific approaches tailored to their companies' businesses and resources." *Id.* (internal footnotes and citations omitted).

Further in examining disinterested business decisions, Delaware courts apply the business judgment rule. The "business judgment rule" is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. *See Andersen v. Mattel, Inc.*, 2017 WL 218913, at *3 (Del. Ch. Jan. 19, 2017). When the business judgment rule applies, the board's business decisions will not be disturbed if they can be attributed to any rational business purpose; a court under such circumstances will not substitute its own notions of what is or is not sound business judgment for the board's notions. *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971).

2. **During your service on the Delaware Supreme Court's Diversity Strategic Planning Steering Committee, a committee report stated that the bar exam "likely serves as a barrier to the racial and ethnic diversity of attorneys in Delaware." This report was discussed repeatedly at your hearing, so you've now had plenty of time to review it.**

Do you agree with that statement and, if so, what would you propose states use in lieu of a bar exam to determine attorney competence?

Response: I am aware of this statement; however, I did not research, draft, or edit this statement. The recommendations in the report have been submitted to the Delaware Supreme Court. The Delaware Supreme Court has not yet considered any proposal in lieu of a bar exam to determine attorney competence.

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

Response: I am not familiar with Justice Jackson's statement. I believe that the Constitution may be changed only through the Article V amendment process. While I believe that the meaning of the Constitution is fixed, I recognize that the Constitution contains enduring principles that are broad enough to apply to new circumstances. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022) ("Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the founders specifically anticipated.").

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

Response: I disagree.

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

Response: I am not familiar with this statement. As a sitting Justice on the Delaware Supreme Court, I follow all precedent from the Supreme Court of the United States. If confirmed, I will follow all Supreme Court and Third Circuit precedents.

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

Response: The Supreme Court has issued many well-written and thoughtful decisions over the past 50 years. As such, I am unable to identify a single decision that exemplifies my judicial philosophy. I am, however, happy to explain my judicial philosophy. As both a trial judge and state supreme court justice for the past seven years, my judicial philosophy has been to approach every case with an open mind (setting aside any personal views), to give all litigants a meaningful opportunity to be heard, to be well-prepared (having diligently studied the issues presented, the applicable law, and the

record), to engage with my colleagues respectfully and with an open mind, to decide the properly presented issues based solely on the applicable law and the facts, and to draft opinions that clearly explain the court's ruling and reasoning. I believe this is consistent with many Supreme Court opinions.

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

   Response: The Third Circuit has issued many well-written and thoughtful decisions over the past 50 years. As such, I am unable to identify a single decision that exemplifies my judicial philosophy. I am, however, happy to explain my judicial philosophy. As both a trial judge and state supreme court justice for the past seven years, my judicial philosophy has been to approach every case with an open mind (setting aside any personal views), to give all litigants a meaningful opportunity to be heard, to be well-prepared (having diligently studied the issues presented, the applicable law, and the record), to engage with my colleagues respectfully and with an open mind, to decide the properly presented issues based solely on the applicable law and the facts, and to draft opinions that clearly explain the court's ruling and reasoning. I believe this is consistent with many Third Circuit opinions.

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

   Response: The Supreme Court has held that an unenumerated right is fundamental and protected under the Due Process Clauses of the Fifth and Fourteenth Amendments if the right is "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] w[as] sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations and internal quotation marks omitted).

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

   Response: If confirmed, I will follow Supreme Court and Third Circuit precedents identifying the appropriate method to interpret any provision of the Constitution. For example, the Supreme Court has emphasized the importance of the original public meaning of the Second Amendment in cases addressing the right to bear arms. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022). The Supreme Court, however, has instructed courts to consider "contemporary community standards" in certain First Amendment cases. *Ashcroft v. Am. C. L. Union*, 535 U.S. 564, 574-75 (2002).

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

Response: In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that the Religious Freedom Restoration Act of 1993 (RFRA) covers both religious organizations and small businesses operated by observant owners. Under RFRA, if any federal law places a substantial burden on a person's exercise of religion, the government must show that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

When RFRA does not apply, the Supreme Court has held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). A law is not neutral if "the object or purpose of the law is suppression of religion or religious conduct," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), or if the record shows that the government seeks to "impose regulations that are hostile to the religious beliefs of affected citizens" or "act[s] in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices," *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citation omitted). A law is not generally applicable if it is subject to discretionary individualized exemptions, *Fulton*, 141 S. Ct. at 1878, or if the law treats any "comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). If the law is neutral and generally applicable, rational basis review applies. If the law is not neutral and generally applicable, strict scrutiny applies.

11. How do you decide when text is ambiguous?

Response: "The plain meaning of the statute controls unless the language is ambiguous or leads to absurd results." *United States v. One "Piper" Aztec "F" De Luxe Model 250 PA 23 Aircraft Bearing Serial No. 27-7654057,* 321 F.3d 355, 358 (3d Cir. 2003). "A provision is ambiguous only where the disputed language is reasonably susceptible of different interpretations." *Geisinger Cmty. Med. Ctr. v. Sec'y U.S. Dep't of Health & Hum. Servs.*, 794 F.3d 383, 394 (3d Cir. 2015) (citation omitted).

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

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

Response: As a sitting judge, and as a nominee, it would be inappropriate for me to opine on whether Supreme Court precedent is "correctly decided." As a sitting judge, I follow all binding Supreme Court precedents without regard to any personal opinions. If confirmed, I will continue to follow all binding Supreme

Court precedent, without hesitation or reservation. Consistent with the responses of other nominees, I agree that there are, however, a small number of cases that are foundational to our system of justice and unlikely to be relitigated such that I may state whether I believe they were correctly decided. *Brown v. Board of Education* is one such case, and I believe it was correctly decided.

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

Response: As a sitting judge, and as a nominee, it would be inappropriate for me to opine on whether Supreme Court precedent is "correctly decided." As a sitting judge, I follow all binding Supreme Court precedents without regard to any personal opinions. If confirmed, I will continue to follow all binding Supreme Court precedent, without hesitation or reservation. Consistent with the responses of other nominees, I agree that there are, however, a small number of cases that are foundational to our system of justice and unlikely to be relitigated such that I may state whether I believe they were correctly decided. *Loving v. Virginia* is one such case, and I believe it was correctly decided.

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

Response: As a sitting judge, and as a nominee, it would be inappropriate for me to opine on whether Supreme Court precedent is "correctly decided." As a sitting judge, I follow all binding Supreme Court precedents without regard to any personal opinions. If confirmed, I will continue to follow all binding Supreme Court precedent, without hesitation or reservation.

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

Response: The Supreme Court overturned *Roe v. Wade* in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

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

Response: The Supreme Court overturned *Planned Parenthood v. Casey* in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

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

Response: As a sitting judge, and as a nominee, it would be inappropriate for me to opine on whether Supreme Court precedent is "correctly decided." As a sitting judge, I follow all binding Supreme Court precedents without regard to any personal opinions. If confirmed, I will continue to follow all binding Supreme Court precedent, without hesitation or reservation.

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

Response: As a sitting judge, and as a nominee, it would be inappropriate for me to opine on whether Supreme Court precedent is "correctly decided." As a sitting judge, I follow all binding Supreme Court precedents without regard to any personal opinions. If confirmed, I will continue to follow all binding Supreme Court precedent, without hesitation or reservation.

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

Response: As a sitting judge, and as a nominee, it would be inappropriate for me to opine on whether Supreme Court precedent is "correctly decided." As a sitting judge, I follow all binding Supreme Court precedents without regard to any personal opinions. If confirmed, I will continue to follow all binding Supreme Court precedent, without hesitation or reservation.

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

Response: As a sitting judge, and as a nominee, it would be inappropriate for me to opine on whether Supreme Court precedent is "correctly decided." As a sitting judge, I follow all binding Supreme Court precedents without regard to any personal opinions. If confirmed, I will continue to follow all binding Supreme Court precedent, without hesitation or reservation.

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

Response: As a sitting judge, and as a nominee, it would be inappropriate for me to opine on whether Supreme Court precedent is "correctly decided." As a sitting judge, I follow all binding Supreme Court precedents without regard to any personal opinions. If confirmed, I will continue to follow all binding Supreme Court precedent, without hesitation or reservation.

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

Response: As a sitting judge, and as a nominee, it would be inappropriate for me to opine on whether Supreme Court precedent is "correctly decided." As a sitting judge, I follow all binding Supreme Court precedents without regard to any personal opinions. If confirmed, I will continue to follow all binding Supreme Court precedent, without hesitation or reservation.

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

Response: 18 U.S.C. § 1507 provides, "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or

residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both. Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt."

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

Response: In *Cox v. Louisiana*, the Supreme Court analyzed whether a Louisiana statute that was modeled after 18 U.S.C. § 1507 was "invalid on its face as an unjustified restriction upon freedoms guaranteed by the First and Fourteenth Amendments to the United States Constitution." 379 U.S. 559, 560 (1965). The Supreme Court held that the Louisiana "statute on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." *Id.* at 564. I am not aware of a Supreme Court case that directly addresses the constitutionality of 18 U.S.C. § 1507.

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

Response: On April 16, 2022, Senator Thomas Carper contacted me to request a meeting to discuss the vacancy on the United States Court of Appeals for the Third Circuit in Delaware. On April 20, 2022, I met with Senator Carper. On May 9, 2022, I was notified by an attorney from the White House Counsel's Office that I had been recommended as a potential candidate for a vacancy on the United States Court of Appeals for the Third Circuit. I interviewed with that office on May 10, 2022. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On June 29, 2022, the President announced his intent to nominate me.

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

Response: No.

17. During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: No.

18. During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: No.

19. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No.

20. During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundation, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

22. The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."

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

Response: No.

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

Response: No.

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

Response: No.

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

a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.**

Response: No.

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

Response: No.

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

Response: No.

24. 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.

25. 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.

26. 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.

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

Response: On September 14, 2022, the Office of Legal Policy provided these questions to me. I drafted my responses. The Office of Legal Policy reviewed my responses and provided limited feedback. The responses are my own.

Senator Mike Lee
Questions for the Record
Tamika Montgomery-Reeves, Nominee to be United States Circuit Judge for the Third Circuit

1. How would you describe your judicial philosophy?

Response: As both a trial judge and state supreme court justice for the past seven years, my judicial philosophy has been to approach every case with an open mind (setting aside any personal views), to give all litigants a meaningful opportunity to be heard, to be well-prepared (having diligently studied the issues presented, the applicable law, and the record), to engage with my colleagues respectfully and with an open mind, to decide the properly presented issues based solely on the applicable law and the facts, and to draft opinions that clearly explain the court's ruling and reasoning.

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

Response: If confirmed, I would first look for Supreme Court or Third Circuit precedent that interprets the statute at issue. If no Supreme Court or Third Circuit precedent existed, I would begin with the text of the statute. If the statute was unambiguous, my analysis would end there because the plain meaning of the text controls. If the statute was ambiguous, I would consider the structure of the statute, canons of statutory construction, precedents from other courts, and legislative history that the Supreme Court and the Third Circuit have identified as reliable.

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

Response: If confirmed, I would first look for Supreme Court or Third Circuit precedent that resolves the specific issue. If no Supreme Court or Third Circuit precedent existed, I would apply the framework, test, or interpretive methodology that the Supreme Court and the Third Circuit use for the specific provision of the Constitution at issue.

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

Response: The text of the Constitution must be the starting point of any analysis. Additionally, the Supreme Court has placed great weight on the original meaning when interpreting the Constitution. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

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

Response: Please see my response to Question 2.

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

Response: The plain meaning of a statute or constitutional provision typically refers to the public understanding of the relevant language at the time of enactment. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). The Supreme Court has relied upon changes in social norms in certain contexts, such as in considering whether language is an obscenity that is not protected under the First Amendment. *Miller v. California*, 413 U.S. 15, 37 (1973) ("[O]bscenity is to be determined by applying 'contemporary community standards[.]'" (internal citations omitted)).

6. What are the constitutional requirements for standing?

Response: "Over the years, [Supreme Court] cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not "conjectural" or "hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Def. of Wildlife*, 504 U.S. 555, 561 (1992) (some alterations in original) (internal citations omitted).

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

Response: The Supreme Court held in *M'Culloch v. Maryland* that the Necessary and Proper Clause of the Constitution grants Congress implied powers necessary to implement its enumerated powers. 17 U.S. 316 (1819). The Supreme Court has not identified a list of all implied powers.

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

Response: The Supreme Court has held that the "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012). Thus, I would evaluate the constitutionality of a law enacted without reference to a specific constitutional enumerated power based upon applicable Supreme Court and Third Circuit precedents.

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

Response: The Supreme Court has held that an unenumerated right is fundamental and protected under the Due Process Clauses of the Fifth and Fourteenth Amendments if the right is "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] w[as] sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations and internal quotation marks omitted).

"In a long line of cases, [the Supreme Court] ha[s] held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed.2d 510 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed.2d 349 (1972); [and] to bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952) . . . ." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The Supreme Court "ha[s] also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S., at 278–279, 110 S. Ct., at 2851-2852." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

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

Response: The Supreme Court has held that the Constitution does not protect the right to an abortion. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). The Supreme Court has also held that the Constitution does not protect the rights at stake in *Lochner v. New York*, 198 U.S. 45 (1905). *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). If confirmed, I would rely on Supreme Court and Third Circuit precedents to determine whether substantive due process protects a right.

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

Response: The Supreme Court has held that Congress may regulate "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce, or

the persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted).

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

Response: The Supreme Court looks for "traditional indicia of suspectedness." Such a class would possess an "immutable characteristic determined solely by the accident of birth" or be "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robinson*, 415 U.S. 361, 375 n.14 (1974) (citations omitted). The Supreme Court has held that classifications based on race, religion, national origin, and alienage are suspect classes, and laws based on those characteristics are subject to strict scrutiny. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

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

Response: Checks and balances and separation of powers protect liberty by preventing the excessive accumulation of power in any one branch of government. *Morrison v. Olson*, 487 U.S. 654 (1988); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020).

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: If confirmed, I would review the record and research the appliable precedents from the Supreme Court and the Third Circuit. I would decide the case based on the applicable law and the facts.

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

Response: Cases must be decided only on the applicable law and the facts. Personal views should not influence rulings.

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 outcomes; judges should work hard to avoid both.

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: In my career as a law clerk, corporate litigator, and state court judicial officer, I have not researched this issue. Presumably, one explanation might be that Congress has passed significantly more statutes since 1857. Regardless, I do not believe judges should be either "aggressive" or "passive" in reviewing federal statutes. Instead, judges should fairly and impartially decide the issues properly presented to them based on the applicable law and the facts of the case.

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

Response: I understand judicial review to refer to the courts' ability to consider the lawfulness of government action. I understand judicial supremacy to refer to the principle that the Supreme Court's interpretation of the Constitution is binding on all lower courts, state governments, and federal governments.

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

Response: Elected officials take an oath to uphold the Constitution. Elected officials also are bound by Supreme Court decisions interpreting the Constitution. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

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

Response: It discusses the role of the judiciary in the Constitution's scheme of separation of powers and explains that the role of the judiciary is limited. Judges interpret the law. Judges do not make the law, nor do they enforce it.

22. 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: Only the Supreme Court may overturn Supreme Court precedent. Only the Supreme Court or the Court of Appeals for the Third Circuit sitting en banc may overturn Third Circuit precedent. A lower court judge must apply binding precedents. If confirmed, I will follow all applicable precedents of the Supreme Court and the Third Circuit.

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

Response: None.

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

Response: I am not familiar with the full context of the quote. There are numerous different dictionary definitions of "equity." For example, Black's Law Dictionary defines "equity" as "1. Fairness; impartiality; evenhanded dealing <the company's policies require managers to use equity in dealing with subordinate employees>. 2. The body of principles constituting what is fair and right; natural law <the concept of 'inalienable rights' reflects the influence of equity on the Declaration of Independence>." *Equity*, *Black's Law Dictionary* (11th ed. 2019.) Merriam-Webster defines it as "[j]ustice according to natural law or right; *specifically*: freedom from bias or favoritism." *Equity*, *Merriam-Webster.com Dictionary* (2022). The Oxford English Dictionary defines it as "[t]he quality of being fair and impartial." *Equity*, *Oxford English Dictionary* (3rd ed. 2015).

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

Response: There are numerous different dictionary definitions of "equity." For example, Black's Law Dictionary defines "equity" as "1. Fairness; impartiality; evenhanded dealing <the company's policies require managers to use equity in dealing with subordinate employees>. 2. The body of principles constituting what is fair and right; natural law <the concept of 'inalienable rights' reflects the influence of equity on the Declaration of Independence>." *Equity*, *Black's Law Dictionary* (11th ed. 2019.) Merriam-Webster defines it as "[j]ustice according to natural law or right; *specifically*: freedom from bias or favoritism." *Equity*, *Merriam-Webster.com*

Dictionary (2022). The Oxford English Dictionary defines it as "[t]he quality of being fair and impartial." *Equity*, *Oxford English Dictionary* (3rd ed. 2015).

The same dictionaries define equality as "[t]he quality, state, or condition of being equal; esp. likeness in power or political status," *Equality*, *Black's Law Dictionary* (11th ed. 2019); "[t]he quality or state of being equal," *Equality*, *Merriam-Webster.com Dictionary* (2022); and "[t]he state of being equal, especially in status, rights, or opportunities," *Equality*, *Oxford English Dictionary* (3d ed. 2015).

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's Equal Protection Clause states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. If confirmed, I would follow Supreme Court and Third Circuit precedents in analyzing Fourteenth Amendment issues.

27. How do you define "systemic racism?"

Response: There are numerous different definitions of "systemic racism." The Oxford English Dictionary defines it as "[d]iscrimination or unequal treatment on the basis of membership of a particular ethnic group (typically one that is a minority or marginalized), arising from systems, structures, or expectations that have become established within society or an institution." *Systemic racism*, *Oxford English Dictionary* (3d ed. 2015). Black's Law Dictionary does not define "systemic racism"; however, it does define "systemic discrimination." "Systemic discrimination" is defined as "[a]n ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society or a particular industry, profession, company, or geographic location." *Systemic discrimination*, *Black's Law Dictionary* (11th ed. 2019). Similarly, the Merriam Webster Dictionary provides the following statement under the definition of "racism": "The systemic oppression of a racial group to the social, economic, and political advantage of another." *Racism*, *Merriam-Webster.com Dictionary* (2022).

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

Response: There are numerous different definitions of "critical race theory." For example, Black's Law Dictionary defines it as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities. Critical race theorists observe that even if the law is couched in neutral language, it cannot be neutral because those who fashioned it had their own subjective perspectives that, once enshrined in law, have disadvantaged minorities and even perpetuated racism." *Critical Race Theory*, *Black's Law Dictionary* (11th ed. 2019). Merriam-Webster defines it as "a group of concepts (such as the idea that race is a sociological rather than biological

designation, and that racism pervades society and is fostered and perpetuated by the legal system) used for examining the relationship between race and the laws and legal institutions of a country and especially the United States." *Critical Race Theory*, *Merriam-Webster.com Dictionary* (2022).

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

Response: I have not researched "critical race theory" or "systemic racism." Please see my responses to Questions 27 and 28 for definitions of "critical race theory" and "systemic racism."

30. You served as a co-chair on the Delaware Supreme Court's Diversity Strategic Planning Steering Committee. What were your responsibilities as a co-chair on this panel?

Response: On May 13, 2021, on the recommendation of the Chief Justice, the Delaware Supreme Court adopted an administrative order establishing the Delaware Bench and Bar Diversity Project to study the diversity needs of the Delaware Bench and Bar and to make recommendations to the Supreme Court to promote diversity in the Delaware legal community. The Chief Justice asked me to serve as co-chair with him. As provided in the Court order, the Delaware Supreme Court created a steering committee and five working groups to examine considerations and needs to improve the K-12 pipeline to college and law school, to improve access to college and law school, to examine the Delaware bar exam and admissions process, to reduce attrition issues, and to increase the number of qualified attorneys with diverse backgrounds to pursue legal and judicial careers. The Delaware Supreme Court partnered with the National Center for State Courts ("NCSC") and AccessLex Center for Legal Education Excellence ("AccessLex") to provide subject matter expertise, help with data analysis, facilitate working groups, conduct interviews, and develop recommendations. The goal of the project was to present the Delaware Supreme Court with a series of programmatic and policy recommendations that, if adopted, might improve the diversity of the Delaware legal profession over time. Neither the co-chairs nor the Delaware Supreme Court Justices dictated the recommendations made by the working groups or the steering committee.

As a co-chair of the project, I identified for NCSC and AccessLex individuals who might serve on the steering committee or working groups, and individuals who might participate in interviews. I also communicated with some of those individuals. I attended steering committee meetings and also attended some working group meetings so that I could (1) understand the process and (2) provide information from the judiciary to the extent NCSC, AccessLex, or the members of the working groups requested it to facilitate their work. Additionally, I focused on making sure that the work of each group was completed in a timely fashion. I did not formulate recommendations.

The report and recommendations are under consideration by the Delaware Supreme Court.

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

Questions for the Record for Tamika Montgomery-Reeves, Nominee for the Third Circuit

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

Response: Congress has enacted various statutes that prohibit racial discrimination. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Further, the Supreme Court has held that all racial classifications made by the government must satisfy the strict scrutiny test, which requires that they be narrowly tailored to achieve a compelling government interest. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013); *Johnson v. California*, 543 U.S. 499, 505 (2005).

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

Response: The Supreme Court has held that an unenumerated right is fundamental and protected under the Due Process Clauses of the Fifth and Fourteenth Amendments if the right is "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] w[as] sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations and internal quotation marks omitted). If confirmed, I would use that test and any binding precedents from the Supreme Court and Third Circuit to analyze any future claim to a fundamental right.

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

Response: As both a trial judge and state supreme court justice for the past seven years, my judicial philosophy has been to approach every case with an open mind (setting aside any personal views), to give all litigants a meaningful opportunity to be heard, to be well-prepared (having diligently studied the issues presented, the applicable law, and the record), to engage with my colleagues respectfully and with an open mind, to decide the properly presented issues based solely on the applicable law and the facts, and to draft opinions that clearly explains the court's ruling and reasoning. I have not studied any Supreme Court Justice's philosophy and cannot identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with mine.

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

Response: Under the interpretive method known as originalism, the meaning of the Constitution is determined by reference to the original understanding of its provisions at the time that it was adopted. I do not use labels like "originalist" to describe myself. If confirmed, I would apply the applicable interpretive principles identified by the Supreme Court and the Third Circuit. For example, in analyzing Second Amendment issues, the

Supreme Court has stated, "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022) (citation omitted).

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 describes "living constitution" as, "A constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." *Living constitution*, *Black's Law Dictionary* (11th ed. 2019). I do not use labels like "living constitutionalist" to describe myself. If confirmed, I would apply the applicable interpretive principles identified by the Supreme Court and the Third Circuit. For example, in analyzing Second Amendment issues, the Supreme Court has stated, "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022) (citation omitted). The Supreme Court added that "[a]lthough its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the founders specifically anticipated." *Id.* at 2132. But in analyzing whether speech is unprotected obscenity or protected free speech under the First Amendment, the Supreme Court has instructed that courts assess "contemporary community standards" of decency. *Ashcroft v. Am. C. L. Union*, 535 U.S. 564, 574-75 (2002).

6. If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?

Response: If confirmed, as a circuit judge, I will be bound by Supreme Court and Third Circuit precedents regarding how to interpret the relevant constitutional provision. Even if there were not binding precedents on the particular constitutional issue, I will follow the interpretive methods the Supreme Court and the Third Circuit have employed in interpreting that provision. Typically, that would mean that if the text and original public meaning of the provision are clear, the inquiry ends there. The Supreme Court, however, has instructed courts to consider "contemporary community standards" in certain First Amendment cases. *Ashcroft v. Am. C. L. Union*, 535 U.S. 564, 574-75 (2002).

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

Response: Typically, the public's current understanding of the Constitution or of a statute would not be relevant when determining the meaning of the Constitution or a statement. The Supreme Court, however, has instructed courts to consider

"contemporary community standards" in certain First Amendment cases." *Ashcroft v. Am. C. L. Union*, 535 U.S. 564, 574-75 (2002).

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

Response: No. I do not believe the meaning of the Constitution changes over time absent changes through the Article V amendment process. Although the Constitution is "fixed," it sets out enduring principles that "must apply to circumstances beyond those the founders specifically anticipated." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

Response: Yes.

a. Was it correctly decided?

Response: As a sitting judge, and as a nominee, it would be inappropriate for me to opine on whether Supreme Court precedent is "correctly decided." As a sitting judge, I follow all binding Supreme Court precedents without regard to any personal opinions. If confirmed, I will continue to follow all binding Supreme Court precedents, without hesitation or reservation.

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

Response: Yes.

a. Was it correctly decided?

Response: As a sitting judge, and as a nominee, it would be inappropriate for me to opine on whether Supreme Court precedent is "correctly decided." As a sitting judge, I follow all binding Supreme Court precedents without regard to any personal opinions. If confirmed, I will continue to follow all binding Supreme Court precedents, without hesitation or reservation.

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

Response: Yes.

a. Was it correctly decided?

Response: As a sitting judge, and as a nominee, it would be inappropriate for me to opine on whether Supreme Court precedent is "correctly decided." As a sitting judge, I

follow all binding Supreme Court precedents without regard to any personal opinions. If confirmed, I will continue to follow all binding Supreme Court precedents, without hesitation or reservation. Consistent with the responses of other nominees, I agree that there are, however, a small number of cases that are foundational to our system of justice and unlikely to be relitigated such that I may state whether I believe they were correctly decided. *Brown v. Board of Education* is one such case, and I believe it was correctly decided.

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

Response: Under 18 U.S.C. § 3142(e)(2) "a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community" when (1) a defendant has been convicted of certain specified offenses (such as certain crimes of violence that carry a maximum term of imprisonment of ten years, offenses for which life imprisonment or death is the maximum sentence, certain drug offenses that carry a maximum term of imprisonment of ten years, certain felonies involving minors or firearms, and other enumerated offenses); (2) the offense was committed while the person was on release pending trial; and (3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described. Under 18 U.S.C. § 3142(e)(3), "[s]ubject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed" certain drug offenses carrying a maximum term of imprisonment of ten years or more, certain offenses involving firearms, certain offenses involving minor victims, and other enumerated offenses.

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

Response: I am not aware of Supreme Court or Third Circuit precedent discussing the policy rationales underlying the presumption.

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

Response: Yes. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) the Supreme Court held that the Religious Freedom Restoration Act of 1993 (RFRA) covers both religious organizations and small businesses operated by observant owners. Under RFRA, if any federal law places a substantial burden on a person's exercise of religion, the government must show the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Burwell*, 573 U.S. at 695 (citing 42 U.S.C. § 2000bb-1).

When RFRA does not apply, the Supreme Court has held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (citation omitted). A law is not neutral if "the object or purpose of the law is suppression of religion or religious conduct," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), or if the record shows that the government seeks to "impose regulations that are hostile to the religious beliefs of affected citizens" or "act[s] in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices," *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citation omitted). A law is not generally applicable if it is subject to discretionary individualized exemptions, *Fulton*, 141 S. Ct. at 1878, or if the law treats any "comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). If the law is neutral and generally applicable, rational basis review applies. If the law is not neutral and generally applicable, strict scrutiny applies.

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

Response: Any governmental law or policy that discriminates on the basis of religion is subject to strict scrutiny. In that case, the government must prove that it has "a compelling governmental interest," and the law or policy "must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

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

Response: The Supreme Court held that the applicants clearly established their entitlement to the preliminary injunctive relief sought. The Supreme Court analyzed the requirements for a preliminary injunction and held that (1) the religious organizations "made a strong showing that the challenged restrictions violate 'the minimum requirement of neutrality' to religion"; (2) the religious organizations demonstrated that they would suffer irreparable harm if the restrictions were enforced because "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury'"; and (3) it had "not been shown that granting the applications [would] harm the public." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020) (internal citations omitted).

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296. The Supreme Court stated that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* The Supreme Court determined that the California COVID-19 related restrictions triggered strict scrutiny because California treated "some comparable secular activities more favorably than at-home religious exercise." *Id.* at 1297. The Supreme Court then held that the plaintiffs were entitled to injunctive relief pending appeal because they had demonstrated a likelihood of success and irreparable harm, and California failed to show "that 'public health would be imperiled' by employing less restrictive measures." *Id.*(citation omitted).

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), a baker refused to make a cake for a same-sex couple's wedding because doing so would violate his religious beliefs. The same-sex couple filed suit, alleging that the baker had impermissibly discriminated against them. The Colorado Civil Rights Commission concluded that the baker violated Colorado's anti-discrimination laws and ordered the baker to make their cake. During the Commission's hearing, one commissioner stated that "[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust"; the commissioner also called the baker's beliefs "despicable pieces of rhetoric." *Id.* at 1729. On appeal, the Supreme Court held that the Commission violated the baker's rights under the Free Exercise Clause of the First Amendment. The Supreme Court held that the Commission had not applied the state's anti-discrimination law in a "neutral and respectful" manner towards religion and instead had showed "clear and impermissible hostility" toward the baker's sincere religious beliefs. *Id.* at 1729.

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

Response: The Supreme Court has held that an individual's religious beliefs are protected even if the beliefs are not consistent with those of a faith tradition. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989). "[C]ourts must not presume to

determine the place of a particular belief in a religion or the plausibility of a religious claim." *Emp. Div., Dept. of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990) (citations omitted).

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

Response: The Supreme Court has held that an individual's religious beliefs are protected even if the beliefs are not consistent with those of a faith tradition. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989). "[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Emp. Div., Dept. of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990) (citations omitted).

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

Response: The Supreme Court has held that an individual's religious beliefs are protected even if the beliefs are not consistent with those of a faith tradition. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989). "[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Emp. Div., Dept. of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990) (citations omitted).

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

Response: As a sitting judge and as a nominee, it would be inappropriate for me to comment on the official position of a religion.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court addressed the application of the "ministerial exception" to teachers at religious schools. The ministerial exception is based in the principle that the First Amendment protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 2055 (citation omitted). The teachers at Catholic schools brought claims alleging that they had been wrongfully terminated under the Age Discrimination in Employment Act and Americans with Disabilities Act. On appeal, the Supreme Court

reaffirmed its holding in *Hosanna-Tabor* that the ministerial exception foreclosed the claims brought by the teachers. *Id.* at 2066-68. The Court stated that while factors such as title, religious training, and holding oneself out as a minister of the church may be important in determining whether the ministerial exception applies, "[w]hat matters, at bottom, is what an employee does. And implicit in [its] decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Id.* at 2064. The Supreme Court held that the record showed that teachers performed vital religious duties. Thus, the Court concluded that the teachers qualified for the ministerial exception. *Id.* at 2066.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020), Philadelphia had refused to contract with Catholic Social Services ("CSS") for the provision of foster care services because CSS refused to certify same-sex couples as potential foster parents. Philadelphia concluded that CSS's policy violated Philadelphia's non-discrimination requirement for its foster-care contracts. On appeal, the Supreme Court held that Philadelphia's non-discrimination requirement was not neutral and generally applicable because it included a provision that allowed Philadelphia to grant exemptions from the policy at the sole discretion of thecity Commissioner. Because of this discretionary exemption provision, Philadelphia's non-discrimination requirement was not a neutral and generally applicable regulation subject to rational-basis review under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Instead, the Court held that the policy had to satisfy strict scrutiny under *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The Supreme Court then held that the City could not show that its refusal to contract with the organization was narrowly tailored to advance a compelling governmental interest. Thus, the City violated the organization's rights under the Free Exercise Clause.

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

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that a Maine public-benefits program that provided tuition assistance for private schools violated the Free Exercise Clause because it barred religious schools from receiving tuition assistance solely because they are religious. This holding is consistent with

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

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

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court held that a school district violated the Free Speech and Free Exercise Clauses of the First Amendment when it fired a high school football coach for praying quietly and privately at midfield after football games. First, the Supreme Court held that the coach's speech was not government speech. Instead, it was private expression protected by the First Amendment, because the prayers were not "within the scope" of his duties as a coach. *Id.* at 2424. Second, regarding the Free Exercise Clause, the Court explained that the district admitted it was motivated "at least in part because of" the "religious character" of the coach's actions. *Id.* at 2422. As a result, the Court applied heightened scrutiny to the school district's actions. *Id.* at 2426. The school district tried to justify its actions by arguing that it was required to act to avoid a violation of the Establishment Clause of the First Amendment. Relying on historical practices and understandings of the Establishment Clause, the Supreme Court rejected this argument and held that the school district had not shown that allowing the coach to pray would have "coerc[ed] students to pray" and that the district's other arguments were based on a misunderstanding of the Establishment Clause. *Id.* at 2428-29.

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

Response: *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), involved regulations that required Amish houses to have modern septic systems to dispose of gray water. Justice Gorsuch used his concurrence to highlight his views on issues the lower court and administrative authorities should consider on remand in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). He stated that *Fulton* clarifies that the Religious Land Use and Institutionalized Persons Act requires strict scrutiny, which requires the government to demonstrate that its land use regulation is narrowly tailored to serve a compelling governmental interest. *Mast*, 141 S. Ct. at 2432. He stated that courts "cannot 'rely on "broadly formulated"' governmental interests, but must 'scrutinize the asserted harm of granting specific exemptions to particular religious claimants.'" *Id.* (alterations and citations omitted). "Accordingly, the question in this case 'is not whether the [County] has a compelling interest in enforcing its [septic system requirement] *generally*, but whether it has such an interest in denying an exception' from that requirement to the Swartzentruber Amish *specifically*.'" *Id.* (alterations in original). He also stated that governments and courts must give due weight to exemptions given to other groups (like hunters, fishermen, and owners of rustic cabins) and to regulations

used in other jurisdictions (some of which allowed the same exception that Fillmore County rejected). *Id.* at 2432-33. Lastly, he stated that the government cannot reject alternatives based on assumptions or supposition. Instead, the county must prove with evidence that its rules are narrowly tailored, which here meant proving that the proposed alternatives would not "work on these particular farms with these particular claimants." *Id.* at 2433.

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

Response: If confirmed, I will follow Supreme Court and Third Circuit precedents when interpreting the statute and analyzing whether it infringes on First Amendment rights. Then, I would decide the case fairly and impartially based only on the applicable law and the facts.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: Yes.

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

Response: Yes.

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

Response: I am not aware of Supreme Court or Third Circuit precedent addressing the factors that a President may consider in making political appointments under the Constitution. If I am confirmed and such a case were to come before me, I would resolve the case based on the applicable law and the facts.

30. Is the criminal justice system systemically racist?

Response: Questions regarding whether certain laws impact different racial groups differently are important questions for Congress and policymakers to consider. As a sitting Justice on the Delaware Supreme Court, I resolve each case fairly and impartially, based solely on the law and the facts. If confirmed, I will do the same as a judge on the Third Circuit.

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

Response: As a sitting judge and as a judicial nominee, it would be inappropriate for me to comment on whether Congress should increase or decrease the number of Justices. If confirmed, I will follow all precedents of the Supreme Court regardless of the size and composition of the Court.

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

Response: No.

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

Response: The Supreme Court addressed the original public meaning of the Second Amendment in both *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *New York Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). In *Bruen*, the Court

stated that, based on its interpretation of the Second Amendment's text and original public meaning, the Amendment protects "the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense" and "to carry a handgun for self-defense outside the home." *Id.* at 2122.

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

Response: In *New York Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2126 (citations omitted).

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

Response: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Constitution protects an individual right to keep and bear arms.

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

Response: I am not aware of case law from the Supreme Court or the Third Circuit comparing the level of protection afforded under the Second Amendment to the level of protection afforded by other individual rights specifically enumerated in the Constitution.

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

Response: I am not aware of case law from the Supreme Court or the Third Circuit comparing the level of protection afforded under the Second Amendment to the level of protection afforded by other individual rights specifically enumerated in the Constitution.

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

Response: The Supreme Court has held that the Executive Branch generally has "absolute discretion" to decide whether to prosecute or enforce civil or criminal enforcement proceedings. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

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

Response: Black's Law Dictionary (11th ed. 2019) defines "prosecutorial discretion" as "[a] prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." Administrative rule changes are subject to the Administrative Procedure Act.

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

Response: No. The President may not repeal an act of Congress or abolish state laws that allow the death penalty.

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

Response: *Alabama Assoc'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), concerned a nationwide eviction moratorium imposed by the Centers for Disease Control and Prevention (CDC). The Supreme Court held that the applicants were "virtually certain to succeed on the merits of their argument that the CDC [had] exceeded its authority" and that the "equities do not justify depriving the applicants of the District Court's judgment in their favor." *Ala. Assoc'n of Realtors*, 141 S. Ct. at 2486, 2489. Thus, the Supreme Court vacated the stay of a district court's order vacating a nationwide moratorium on evictions imposed by the CDC during the COVID-19 pandemic.

42. Can you explain *Judicial Watch, Inc. v. University of Delaware* (Del. 2021)?

Response: In 2012, then-Vice President Joseph R. Biden, Jr. donated his senatorial papers to the University of Delaware. In April 2020, the appellants submitted requests under the Delaware Freedom of Information Act (FOIA) to access these papers and any records relevant to or discussing the papers. The University denied both requests, stating that the papers were not subject to FOIA. The Office of the Attorney General of the State of Delaware and the Delaware Superior Court affirmed the denial. Thereafter, the appellants appealed to the Delaware Supreme Court.

On appeal, the appellants argued that the Superior Court (1) improperly interpreted the definition of "public records" in Delaware's FOIA statute, (2) erroneously shifted the

burden of proof to appellants to prove that the requested documents were subject to FOIA, (3) incorrectly held that the University carried its burden to justify its denial of records, (4) wrongly concluded that the University adequately searched for records responsive to appellants' requests, and (5) abused its discretion in not awarding attorneys' fees and costs. Appellants asked the Delaware Supreme Court to reverse only the Superior Court's rulings regarding the gift agreement pursuant to which the papers were donated (the "Agreement"), all records and communications from the University about the proposed release of the apers, as well as any communications between the University and either President Biden or anyone acting on his behalf (the "Communication Records"), and Board of Trustee Meeting minutes (the "Board Minutes").

We held that the appellants were entitled to the Board Minutes. We reversed the holdings regarding the Agreement and the Communications Records and remanded the case. In particular, we held that the plain language of the definition of "public record," which the statute defines as "university documents relating to the expenditure of public funds," 29 *Del. C.* § 10002(l), is unambiguous and means that the university document sought must "relat[e] to the expenditure of public funds." We held that the University had the burden of proof in the case, but the University failed to meet its burden of proof. We explained that "unless it is clear on the face of the request that the demanded records are not subject to FOIA, to meet the burden of proof under Section 10005(c)," the University "must state, under oath, the efforts taken to determine whether there are responsive records and the results of those efforts." *Jud. Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1012 (Del. 2021). We held that "it [wa]s not clear on the face of the requests for the Agreement or Communication Records that they are not subject to FOIA, and the University does not contend otherwise." *Id.* Thus, the majority reversed and remanded on the third, fourth, and fifth issues.

There was one dissenting opinion in this case. The lone dissenting justice would have affirmed the judgment of the Superior Court. *Id* at 1013-15.

43. Did you win an award from the Biden Institute at the University of Delaware a year earlier (in 2020)?

Response: In June 2020, I was informed that I had been selected as the 2020 Woman of Power and Purpose for the University of Delaware's Biden Institute. I did not apply for this recognition; nor did I receive anything of value in connection with this recognition. In connection with this program, I spoke with college-aged students about my life and provided advice for entering the legal profession.

44. Why did you not recuse yourself from such an obvious conflict of interest?

Response: I reviewed the Delaware Judges' Code of Judicial Conduct and consulted with the Chief Justice of the Delaware Supreme Court and determined that no disabling conflict of interest existed. The case was heard en banc by the Delaware Supreme Court; all five judges reviewed the law and the facts and decided the case fairly and impartially; and four judges agreed with the majority opinion.

45. Is the bar examination a barrier that prevents Hispanics and African Americans from doing well in the legal profession?

Response: Issues related to diversity in the Delaware legal community are the subject of a report to the Delaware Supreme Court, which is now being studied by my colleagues and me. I would not want to comment on these important issues until I have reviewed the materials fully and conferred with my colleagues. Providing an answer to this question may be seen as prejudging questions that the Delaware Supreme Court is tasked with evaluating.

46. Do minority lawyers need unique accommodations to become successful?

Response: No.

Senator Ben Sasse
Questions for the Record for Tamika R. Montgomery-Reeves
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
September 7, 2022

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

   Response: No.

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

   Response: As both a trial judge and state supreme court justice for the past seven years, my judicial philosophy has been to approach every case with an open mind (setting aside any personal views), to give all litigants a meaningful opportunity to be heard, to be well-prepared (having diligently studied the issues presented, the applicable law, and the record), to engage with my colleagues respectfully and with an open mind, to decide the properly presented issues based solely on the applicable law and the facts, and to draft opinions that clearly explain the court's ruling and reasoning.

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

   Response: Under the interpretive method known as originalism, the meaning of the Constitution is determined by reference to the original understanding of its provisions at the time that it was adopted. I do not use labels like "originalist" to describe myself. If confirmed, I would apply the applicable interpretive principles identified by the Supreme Court and the Third Circuit. For example, in analyzing Second Amendment issues, the Supreme Court has stated, "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022) (citation omitted).

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

   Response: I do not use labels like "textualist" to describe myself. If confirmed, I would apply the applicable interpretive principles identified by the Supreme Court and the Third Circuit. Typically, that would mean that if the text and original public meaning of the provision are clear, the inquiry ends there. The Supreme Court, however, has instructed courts to consider "contemporary community standards" in certain First Amendment cases. *Ashcroft v. Am. C. L. Union*, 535 U.S. 564, 574-75 (2002).

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

Response: No. I do not believe the meaning of the Constitution changes over time absent changes through the Article V amendment process. Although the Constitution is "fixed," it sets out enduring principles that "must[] apply to circumstances beyond those the founders specifically anticipated." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

Response: I admire many different qualities about many different Justices of the United States Supreme Court. I cannot identify a Justice whose jurisprudence I most admire. If confirmed, I will follow all applicable Supreme Court precedents.

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: "[O]nly the Court sitting en banc can overturn a prior precedent." *United States v. Garner*, 961 F.3d 264, 273 (3d Cir. 2020) (citing *Joyce v. Maersk Line Ltd.*, 876 F.3d 502, 508 (3d Cir. 2017)); *see also* 3d Cir. I.O.P. 9.1 ("[N]o subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so."). Rule 35 of the Federal Rules of Appellate Procedure provides a rehearing en banc may be ordered when: "A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. Pro. 35(a).

The Third Circuit has stated, "We do not overturn our precedents lightly." *Al-Sharif v. U.S. Citizenship & Immigr. Servs.*, 734 F.3d 207, 212 (3d Cir. 2013). "[P]recedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error." *Id.* (alteration in original) (citing *Citizens United v. FEC*, 558 U.S. 310, 362 (2010)). "However, stare decisis 'is not an inexorable command.' '[W]hen governing decisions are unworkable,' they may be overturned." *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991)). "This is particularly true 'if the precedent is particularly recent and has not generated any serious reliance interests,' or if the precedent has 'sustained serious erosion from our recent decisions.'" *Id.* (internal citations omitted).

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

Response: Please see my response to Question 7.

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

Response: The starting point for statutory interpretation is the text of the statute. If the statute is unambiguous, my analysis would end there because the plain meaning of the text controls. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (citations omitted); *Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017) (citations omitted). If the statute is ambiguous, then I may consider the structure of the statute, canons of statutory construction, precedents from other courts, and legislative history that the Supreme Court and the Third Circuit have identified as reliable. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345 (1997) (looking to the structure of the statute and other interpretive tools to determine the meaning of an ambiguous statute).

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: 18 U.S.C. § 3553(a) identifies "factors to be considered in imposing a sentence." Those factors do not include whether defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups. Section 3553(a)(6) does instruct a sentencing court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

Senator Josh Hawley
Questions for the Record

Tamika Montgomery-Reeves
Nominee, U.S. Court of Appeals for the Third Circuit

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: No. A judge must decide matters fairly and impartially based on the applicable law and the facts.

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

    Response: The judicial oath requires judges to "faithfully and impartially discharge and perform all the duties incumbent upon" them "under the Constitution and laws of the United States." 28 U.S.C. § 453. If confirmed, I would follow that oath.

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

    Response: Yes.

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

    Response: The Third Circuit has recognized several abstention doctrines.

    The *Pullman* abstention doctrine:

    Abstention under *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941), "applies 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 149 (3d Cir. 2000) (citing *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). "In other words, abstention under *Pullman* 'is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication,

or at least materially change the nature of the problem.'" *Id.* (citing *Bellotti v. Baird*, 428 U.S. 132, 147 (1976)). "The purpose of abstaining is twofold: (1) to avoid a premature constitutional adjudication which could ultimately be displaced by a state court adjudication of state law; and (2) to avoid 'needless friction with state policies.'" *Id.* (citing *R.R. Comm. of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941)). "While these are compelling considerations, . . . *Pullman* abstention should be rarely invoked." *Id.* (citing *Artway v. Att'y Gen. of N.J.*, 81 F.3d 1235, 1270 (3d Cir. 1996)).

"Before a federal court may abstain under *Pullman*, three 'exceptional circumstances' must be present. First, there must be 'uncertain issues of state law underlying the federal constitutional claims.'" *Id.* (citing *Presbytery of N.J. of the Orthodox Presbyterian Church v. Whitman*, 99 F.3d 101, 106 (3d Cir. 1996)). "Second, the state law issues must be amenable to a state court interpretation which could 'obviate the need to adjudicate or substantially narrow the scope of the federal constitutional claim. Third, it must be that 'an erroneous construction of state law by the federal court would disrupt important state policies.'" *Id.* at 149-50. "If all three circumstances are present, the District Court is then required to determine, in the Court's discretion, 'whether abstention is appropriate by weighing such factors as the availability of an adequate state remedy, the length of time the litigation has been pending, and the impact of delay on the litigants.'" *Id.* (quoting *Artway*, 81 F.3d at 1270).

The *Younger* abstention doctrine:

"To promote comity between the national and state governments, *Younger* [*v. Harris*, 401 U.S. 37 (1971),] requires federal courts to abstain from deciding cases that would interfere with certain ongoing state proceedings." *Smith & Wesson Brands, Inc. v. Att'y Gen. of N.J.*, 27 F.4th 886, 890 (3d Cir. 2022) (citing *Malhan v. Sec'y U.S. Dep't of State*, 938 F.3d 453, 461 (3d Cir. 2019)).

"*Younger* extends . . . no further than three 'exceptional circumstances': (1) 'state criminal prosecutions'; (2) 'civil enforcement proceedings'; and (3) 'civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Id.* at 891 (alterations in original) (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013)). "Abstention is not in order simply because a pending state-court proceeding involves the same subject matter." *Id.* (alterations in original).

The *Burford* abstention doctrine:

Abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), "'is concerned with protecting complex state administrative processes from undue federal interference.'" *Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 692-93 (3d Cir. 2011) (quoting *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 491 U.S. 350, 362 (1989)). "'The purpose of *Burford* is to avoid federal intrusion into matters of local concern and which are within the special competence of local courts.'" *Id.* at 693 (quoting *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 303–04 (3d Cir. 2004) (internal quotation marks omitted)). The *Burford* doctrine provides that "[w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Id.* (quoting *New Orleans Pub. Serv. Inc.*, 491 U.S. at 361).

"[A] court must engage in a 'two-step analysis' when deciding whether to abstain under *Burford*. The first step is to determine 'whether timely and adequate state-court review is available.'" *Id.* (citing *Riley v. Simmons*, 45 F.3d 764, 771 (3d Cir. 1995) (internal quotation marks omitted)). "Only if the answer to the question is in the affirmative may a court then consider whether 'the case before it involves difficult questions of state law impacting on the state's public policy or whether the district court's exercise of jurisdiction would have a disruptive effect on the state's efforts to establish a coherent public policy on a matter of important state concern.'" *Id.*

The *Thibodaux* abstention doctrine:

The Third Circuit has stated that "*Thibodaux* is really a variant of the *Burford* abstention doctrine and has not evolved as a separate doctrine of its own. The case permits a federal court to abstain in a diversity case where state law is unclear and an important state interest is at stake." *Grode v. Mut. Fire, Marine & Inland Ins. Co.*, 8 F.3d 953, 957 (3d Cir. 1993).

The *Colorado River* abstention doctrine:

"*Colorado River* abstention provides that, under 'exceptional circumstances,' a federal court may abstain from its otherwise 'virtually unflagging obligation' to assert jurisdiction over a case because (1) there is a parallel case in state court, and (2) after 'careful[ly] balancing' a series of factors 'heavily weighted in favor of the exercise of jurisdiction,' maintaining the federal case would be a waste of judicial

resources." *Golden Gate Nat. Sr. Care, LLC v. Minich*, 629 F. App'x 348, 349 (3d Cir. 2015) (alterations in original) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 13-16, 19 (1983)); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976)).

"The first step a district court must take before abstaining under *Colorado River* is to determine whether the federal and state proceedings are 'parallel.'" *Id.* (citing *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 307-08 (3d Cir. 2009)). "Two proceedings generally are considered parallel when they 'involve the same parties and substantially identical claims, raising nearly identical allegations and issues', and when plaintiffs in each forum seek the same remedies." *Id.* (internal citations omitted).

"If a court finds the proceedings to be parallel, it then carefully balances a host of factors to determine if abstention is warranted, bearing in mind that it should place a thumb on the scales in favor of granting jurisdiction." *Id.* (citing *Moses H. Cone*, 460 U.S. at 16). "[T]he pertinent factors [are]: (1) [in an in rem case,] which court first assumed jurisdiction over [the] property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether federal or state law controls; and (6) whether the state court will adequately protect the interests of the parties." *Id.* (citing *Nationwide*, 571 F.3d at 308) (some alterations in original).

The *Rooker-Feldman* doctrine:

The Third Circuit uses a four-prong inquiry for this doctrine. *Vuyanich v. Smithton Borough*, 5 F.4th 379, 385 (3d Cir. 2021). "To trigger the [*Rooker-Feldman*] doctrine, the following requirements must be met: (1) the federal plaintiff lost in state court; (2) the plaintiff complains of injuries caused by the state-court judgments; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments." *Id.* (quoting *Great W. Mining & Min. Co. v. Fox Rothschild, LLP*, 615 F.3d 159, 166 (3d Cir. 2010)). "Prongs 2 and 4 [are] the 'key requirements,' but only meeting all four requirements prevents a district court from exercising jurisdiction under *Rooker-Feldman*." *Id*.

The "equitable mootness" doctrine:

"[E]quitable mootness [is] a judge-made abstention doctrine that allows a court to avoid hearing the merits of a bankruptcy appeal because implementing the requested relief would cause havoc." *See In re SemCrude LP*, 728 F.3d 314, 317 (3d Cir. 2013).

"Before there is a basis to forgo jurisdiction, granting relief on appeal must be almost certain to produce a 'perverse' outcome—'chaos in the bankruptcy court' from a plan in tatters and/or significant 'injury to third parties.' Only then is equitable mootness a valid consideration." *Id.* at 320 (citing *In re Phila. Newspapers LLC*, 690 F.3d 161, 168 (3d Cir. 2012) (quotations omitted)).

When deciding whether abstention is appropriate under the equitable mootness doctrine, the Court's considerations should be as follows: "(1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation." *In re Tribune Media Co.*, 799 F.3d 272, 278 (3d Cir. 2015) (citing *In re SemCrude*, 728 F.3d at 321).

4. **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.**

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

   Response: If confirmed, I will follow Supreme Court and Third Circuit precedents identifying the appropriate method to interpret any provision of the Constitution. For example, the Supreme Court has emphasized the importance of the original public meaning of the Second Amendment in cases addressing the right to bear arms. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

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

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

      Response: I would first look for Supreme Court or Third Circuit precedent that interprets the statute at issue. If no Supreme Court or Third Circuit precedent existed, I would begin with the text of the statute. If the statute was unambiguous, my analysis would end there because the plain meaning of the text controls. If the statute was ambiguous, I would consider the structure of the statute, canons of statutory construction, precedents from other courts, and legislative history that the Supreme Court and the Third Circuit have

identified as reliable. The Supreme Court has explained that, as a general matter, committee reports are more probative of legislative intent than "passing comments of one Member" or "casual statements from the floor debates." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: The United States Constitution is a domestic document and should be interpreted according to domestic law. If confirmed, I would look to Supreme Court and Third Circuit precedents to interpret the Constitution.

7. 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: To prevail on a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment, "a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019) (citations omitted). The Supreme Court has held that to prevail on such a claim a petitioner must (1) demonstrate that the method of execution presents a "substantial risk of serious harm" and (2) 'identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]' the risk of harm involved." *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)) (alterations in original).

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

Response: Yes.

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

Response: No.

10. 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.

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 facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.

Response: The Supreme Court has held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). A law is not neutral if "the object or purpose of the law is suppression of religion or religious conduct," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), or if the record shows that the government seeks to "impose regulations that are hostile to the religious beliefs of affected citizens" or "act[s] in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices," *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citation omitted). A law is not generally applicable if it is subject to discretionary individualized exemptions, *Fulton*, 141 S. Ct. at1878, or if the law treats any "comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). If the law is neutral and generally applicable, rational basis review applies. If the law is not neutral and generally applicable, strict scrutiny applies.

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

Response: Please see my response to Question 11.

13. 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 Third Circuit has stated that "[f]ew tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion." *Africa v. Com. of Pa.*, 662 F.2d 1025, 1031 (3d Cir. 1981).

The Third Circuit has also stated that "[t]his task is particularly difficult when [courts] have to determine whether a nontraditional faith requires the protection o the First Amendment." *Fallon v. Mercy Cath. Med. Ctr. of Se. Pa.*, 877 F.3d 487, 490 (3d Cir. 2017). "The mere assertion of a religious belief does not automatically trigger First Amendment protections, however. To the contrary, only those beliefs which are both sincerely held and religious in nature are entitled to constitutional protection." *DeHart v. Horn*, 227 F.3d 47, 51 (3d Cir. 2000). However, a court "must be careful to conduct only a review into the substantiality of the religious burden and not to question the reasonableness of the religious belief itself. *Real Alts., Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 357 (3d Cir. 2017) (citing *Burell v. Hobby Lobby*, 573 U.S. 682, 724 (2014) (RFRA does not permit courts to address "whether the religious belief asserted in a RFRA case is reasonable")).

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Supreme Court held that the Second Amendment protects an individual right "of law-abiding, responsible citizens" to keep and bear arms for self-defense in the home.

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.

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

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

Response: I believe Justice Holmes explained what he meant when he said that "a Constitution is not intended to embody a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (1905). I understand that Justice

Holmes was illustrating that the Constitution did not codify the theories in Mr. Herbert Spencer's Social Statics work nor any other.

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 largely abrogated *Lochner* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). If confirmed, I will follow all applicable Supreme Court and Third Circuit precedents.

16. 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: Only the Supreme Court may overrule its precedent. A Supreme Court opinion may also be superseded by an amendment to the Constitution. If confirmed, I will follow all applicable precedents of the Supreme Court and the Third Circuit.

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

Response: Yes.

17. 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: If confirmed, I will follow all Supreme Court and Third Circuit precedents to determine what constitutes a monopoly. For example, the Supreme Court has held that control of "80% to 95%" of a market, "with no readily available substitutes," is sufficient to survive summary judgment under § 2 of the Sherman Act. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992). In that case, the Supreme Court also noted that it previously held that company holdings of 87% of the market and "over two-thirds of the market," respectively, constituted monopolies. *Id.* (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)).

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

Response: Please see my response to Question 17a.

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: In *Time-Picayune Pub. Co. v. U.S.*, 345 U.S. 594 (1953), the Supreme Court stated that "[o]bviously no magic inheres in numbers; 'The relative effect of percentage command of a market varies with the setting in which that factor is placed.'" *Id.* at 612 (internal citations omitted).

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

Response: Federal common law generally refers to the rules derived from decisions of the federal courts. The Supreme Court held in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) that there is no general federal common law. Instead, federal common law exists only in certain "limited enclaves in which federal courts may derive some substantive law in a common law way," such as in admiralty cases. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

19. 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 look to that state's interpretation of its constitutional rights because the federal provision provides the floor. States can provide greater protections. Whether a state constitutional provision has provided greater protection would be a question of state law.

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

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: As a sitting judge, and as a nominee, it would be inappropriate for me to opine on whether Supreme Court precedent is "correctly decided." As a sitting judge, I follow all binding Supreme Court precedents without regard to any personal opinions. If confirmed, I will continue to follow all binding Supreme Court precedent, without hesitation or reservation. Consistent with the responses of other nominees, I agree that there are, however, a small number of cases that are foundational to our system of justice and unlikely to be relitigated such that I may state whether I believe they were correctly decided. *Brown v. Board of Education* is one such case, and I believe it was correctly decided.

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

Response: To my knowledge, the Supreme Court has not yet resolved this specific question, although this is an issue currently being litigated in numerous courts. As a judicial nominee, it would be inappropriate for me to comment on issues that are pending or that might come before the court. If confirmed, and if this issue was properly presented to me, I would follow applicable Supreme Court and Third Circuit precedents in determining whether federal courts have the legal authority to issue nationwide injunctions.

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

Response: Rule 65 of the Federal Rules of Civil Procedure governs the issuance of injunctions.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on issues that are pending or that might come before the court.

22. 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: As a judicial nominee, it would be inappropriate for me to comment on issues that are pending or that might come before the court such when it is appropriate to issue a nationwide injunction.

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

Response: Federalism addresses the distribution of power between the federal government and state governments. The Constitution divides these respective powers by enumerating a limited set of powers that the federal government may exercise and that the states are barred from exercising, and it reserves the remaining powers for the states. This scheme is most clearly outlined in the Tenth Amendment, which provides that the powers neither given to the federal government nor barred from the states are reserved for the states or the people.

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

Response: Please see my response to Question 3.

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

Response: Generally, injunctive relief addresses and prevents future harm, while damages generally remedy past harms. Determining which type of relief is available and appropriate in each case would require a fact specific analysis.

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

Response: The Supreme Court has held that an unenumerated right is fundamental and protected under the Due Process Clauses of the Fifth and Fourteenth Amendments if the right is "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] w[as] sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations and internal quotation marks omitted).

"In a long line of cases, [the Supreme Court] ha[s] held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); [and] to bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952) . . . ." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The Supreme Court "ha[s]

also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S., at 278–279, 110 S. Ct., at 2851–2852." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

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

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

Response: The "free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Emp. Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990).

Regarding state action, the Supreme Court has held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). A law is not neutral if "the object or purpose of the law is suppression of religion or religious conduct," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), or if the record shows that the government seeks to "impose regulations that are hostile to the religious beliefs of affected citizens" or "act[s] in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices," *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citation omitted). A law is not generally applicable if it is subject to discretionary individualized exemptions, *Fulton*, 141 S. Ct. at 1878, or if the law treats any "comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). If the law is neutral and generally applicable, rational basis review applies. If the law is not neutral and generally applicable, strict scrutiny applies.

Under the Religious Freedom Restoration Act (RFRA), if any federal law places a substantial burden on a person's exercise of religion, the government must show the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

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 Supreme Court or Third Circuit precedent that distinguishes between the "free exercise of religion" and "freedom of worship."

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

Response: Please see my response to Question 27a.

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 a court's only function "in this context is to determine" whether the person's religious belief reflects "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 724-25 (2014). "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Fulton v. City of Philadelphia* 141 S. Ct. 1868, 1876 (2021).

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 Supreme Court has stated that "[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate case." *Bostock v. Clayton County*., 140 S. Ct. 1731, 1754 (2020). In those cases, the government must show that any federal law that places a substantial burden on a person's exercise of religion "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

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.

28. 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 refer to the inevitable fact that a judge who faithfully follows the applicable law will, at some point, reach a result that is, in the judge's personal opinion, an undesirable outcome.

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

Response: No.

a. If yes, please provide appropriate citations.

30. 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.

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

Response: I believe America is an amazing country, and I feel blessed to live here with my family. I believe there are numerous different understandings of the term "systemic racism." I further believe that questions regarding systemic racism implicate important policy considerations for policymakers, not the judicial branch.

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

Response: Yes.

33. How did you handle the situation?

Response: Attorneys are bound to zealously advocate for their clients, within the bounds of the law and ethical obligations, regardless of personal views.

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

Response: Yes.

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

Response: I am unable to identify any particular Federalist Paper that has shaped my views of the law.

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

Response: In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court explained that states have a legitimate interest in "respect for and preservation of prenatal life at all stages of development" and that its decision was "not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests" or "on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." *Id.* at 2256, 2262, 2284. If confirmed, I will follow all binding Supreme Court and Third Circuit precedents.

37. 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: I testified before the Delaware State Senate when I was nominated to serve as a Justice on the Delaware Supreme Court in 2019 and when I was nominated to serve as a Vice Chancellor on the Delaware Court of Chancery in 2015.

38. 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.

39. 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.

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

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

Response: In my career in private practice at large firms, I worked on many briefs. Sometimes I helped teams of attorneys by reviewing briefs that I would not have signed. Additionally, it is unlikely that my name was listed on all briefs that I might have been involved in drafting as a junior associate. I do not have a list of such briefs or access to information that would allow me to compile such a list.

41. Have you ever confessed error to a court?

Response: To the best of my recollection, no.

a. If so, please describe the circumstances.

42. 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: Judicial nominees swear an oath to tell the truth to this Committee and to provide complete and truthful answers to the Committee's questions to the best of their ability, consistent with their ethical and professional obligations.

Questions for the Record
Senator John Kennedy

Tamika Montgomery-Reeves

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

   Response: As both a trial judge and state supreme court justice for the past seven years, my judicial philosophy has been to approach every case with an open mind (setting aside any personal views), to give all litigants a meaningful opportunity to be heard, to be well-prepared (having diligently studied the issues presented, the applicable law, and the record), to engage with my colleagues respectfully and with an open mind, to decide the properly presented issues based solely on the applicable law and the facts, and to draft opinions that clearly explain the court's ruling and reasoning.

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

   Response: The starting point for statutory interpretation is the text of the statute. If the statute is unambiguous, the analysis should end there because the plain meaning of the text controls. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (citations omitted); *Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017) (citations omitted).

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

   Response: No

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

   Response: The First Amendment prohibits the government from abridging free speech. The Supreme Court has held that private owners of a shopping center are not governmental actors; as such, they may impose restrictions on speech without violating the First Amendment of the United States Constitution. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

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

   Response: The Supreme Court has stated, "While this textual exegesis is by no means conclusive, it suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered

part of that community." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

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

   Response: The Supreme Court has stated, "There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection. The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country." *Mathews v. Diaz*, 426 U.S. 67, 78-79 (1976) (internal footnote citations omitted); *see also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("The Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.") (citations omitted).
   .

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

   Response: The Supreme Court has stated, "Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' has a history as old as the Fourth Amendment itself." *U.S. v. Ramsey*, 431 U.S. 606, 619 (1977) (footnote omitted).

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

   Response: The Supreme Court has recently stated, "Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2261 (2022).

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

Response: In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Supreme Court held that voter identification laws are not unconstitutional per se. If confirmed, I would follow Supreme Court and Third Circuit precedents in determining the legality of any challenged state voter identification laws.

Questions from Senator Thom Tillis
for Tamika R. Montgomery-Reeves
Nominee to be United States Circuit Judge
for the Third Circuit

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 understand "judicial activism" to describe when a judge advances a personal agenda or relies on personal opinions to decide cases. Judicial activism is not appropriate.

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

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

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

   Response: No.

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

   Response: Yes. I am able to reconcile it because a judge's duty is to faithfully interpret the law in every instance. In some instances, the legislature may amend the law to address an undesirable outcome.

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

   Response: No.

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

   Response: If confirmed, I will follow all applicable precedents of the Supreme Court and the Third Circuit in considering challenges under the Second Amendment. *See*, *e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Frien v. Pa. State Police*, --F.4th--, 2022 WL 3724097 (3d Cir. 2022).

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

Response: If confirmed, I will follow all applicable precedents of the Supreme Court and the Third Circuit in evaluating allegations that local officials used a crisis to improperly burden constitutional rights. The Supreme Court considered a challenge to COVID-19 restrictions that burdened the constitutional rights protected under the Free Exercise Clause in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). The Court applied strict scrutiny to those restrictions and granted an injunction.

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: If confirmed, I will follow Supreme Court and Third Circuit precedent concerning the doctrine of qualified immunity. The Supreme Court has held that the doctrine of qualified immunity shields officials from civil liability whenever their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). A right is "clearly established" if it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Id.* (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)); *Dennis v. City of Philadelphia*, 19 F.4th 279, 288 (3d Cir. 2021) ("A clearly established right is one that is so apparent that 'every reasonable official would understand that what he is doing is unlawful.'" (quoting *James v. N.J. State Police*, 957 F.3d 165, 169 (3d Cir. 2020))).

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 judicial nominee, it would be inappropriate for me to comment on whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers. If confirmed, I will follow all applicable precedents of the Supreme Court and the Third Circuit.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on the proper scope of qualified immunity protections for law enforcement. If confirmed, I will follow all applicable precedents of the Supreme Court and the Third Circuit.

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

a. What experience do you have with copyright law?

Response: In my career as a Justice on the Delaware Supreme Court, a Vice Chancellor on the Delaware Court of Chancery, and a corporate litigator, I have not worked substantively on issues involving copyright law.

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

Response: In my career as a Justice on the Delaware Supreme Court, a Vice Chancellor on the Delaware Court of Chancery, and a corporate litigator, I have not worked on issues 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: In my career as a Justice on the Delaware Supreme Court, a Vice Chancellor on the Delaware Court of Chancery, and a corporate litigator, I have not worked on issues addressing intermediary liability for online service providers that host unlawful content posted by users.

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

Response: As a Justice on the Delaware Supreme Court, I have sat on panels and joined majority opinions addressing First Amendment free speech issues. In my career as a Justice on the Delaware Supreme Court, a Vice Chancellor on the Delaware Court of Chancery, and a corporate litigator, I have not worked substantively on any intellectual property law issues.

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

a. In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated

in the legislative history, have when deciding how to apply the law to the facts in a particular case?

Response: If confirmed, I would first look for Supreme Court or Third Circuit precedent interpreting the statute at issue. If no Supreme Court or Third Circuit precedent existed, I would begin with the text of the statute. If the statute was unambiguous, my analysis would end there because the plain meaning of the text controls. If the statute was ambiguous, I would consider the structure of the statute, canons of statutory construction, precedents from other courts, and legislative history that the Supreme Court and the Third Circuit have identified as reliable. The Supreme Court has explained that, as a general matter, committee reports are more probative of legislative intent than "passing comments of one Member" or "casual statements from the floor debates." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: The Supreme Court has held that if an agency issued an interpretation of a statute it administers through a sufficiently formal process, such as notice-and-comment rulemaking, that interpretation would be entitled to deference under the *Chevron* doctrine. *United States v. Mead Corp*., 533 U.S. 218, 227 (2001); *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 298 (3d Cir. 2012); *Swallows Holding, Ltd. v. C.I.R.*, 515 F.3d 162, 169 (3d Cir. 2008). When reviewing an agency's construction of a statute, courts apply a two-step process. The courts first determine "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Second, if Congress has not unambiguously expressed its intent, then the Court will defer to the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. The Supreme Court has further explained that an agency's interpretation of its own regulations would also be entitled to deference in certain circumstances. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). When those doctrines do not apply, an agency's interpretation of a statute or regulation it administers is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which means courts "must follow it only to the extent it has the 'power to persuade.'" *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1510 (2020) (quoting *Skidmore*, 323 U.S. at 140).

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

Response: As a judicial nominee, it would be inappropriate for me to comment on how issues that might come before the courts should be resolved. If confirmed, I

will follow all applicable precedents from the Supreme Court and the Third Circuit in evaluating this type of claim.

14. 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: Courts must interpret the DMCA in the same manner as other federal laws. The general methodology guiding a court's interpretation of a statute is settled. If confirmed, and assuming there are no binding precedent directly addressing the issue in the case, I would begin with the text of the statute. If the statute was unambiguous, the analysis ends there because the plain meaning of the text controls. If the statute was ambiguous, I would consider the structure of the statute, canons of statutory construction, precedents from other courts, and legislative history that the Supreme Court and the Third Circuit have identified as reliable. The Supreme Court has explained that, as a general matter, committee reports are more probative of legislative intent than "passing comments of one Member" or "casual statements from the floor debates." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: Please see my response to Question 14a.

15. 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: These are very important issues for policymakers to consider. As a judicial nominee, it would be inappropriate for me to comment on this matter. I can commit that, if confirmed, I will follow the venue rules and applicable Supreme Court and Third Circuit precedents.

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

Response: Please see my response to question 15a.

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

Response: I believe all judges have an obligation to decide matters fairly and impartially based on only the applicable law and facts. If confirmed, I would not take proactive steps to attract a particular type of case or litigant to the Third Circuit.

16. 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: These are very important issues for policymakers to consider. As a judicial nominee, it would be inappropriate for me to comment on this matter. I can commit that, if confirmed, I will follow the venue rules and applicable Supreme Court and Third Circuit precedents.

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

Response: Please see my response to Question 16.

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? Should such a rule apply only where a single judge sits in a division?

Response: Please see my response to Question 16.

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

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

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

Response: As a judicial nominee, it would be inappropriate for me to comment on the propriety of the conduct of other judges or how that conduct should be perceived. I do believe, however, that all lower court judges are obligated to follow binding precedent, regardless of any personal views about what the law should require.

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

Response: Please see my response to Question 17a.

18. This year, when asked whether corporate law is vehicle for social change, you answered that Delaware law is "enabling in nature" and provides the "[a]bility to address evolving business challenges and expectations of their shareholders." What did you mean by that?

Response: A cardinal precept of the General Corporation Law of the State of Delaware is that directors manage the business and affairs of the corporation. 8 *Del. C.* § 141(a). This role includes a decision-making function and an oversight function. When carrying out their responsibilities, directors of Delaware corporations owe two overarching fiduciary duties—the duty of care and the duty of loyalty—to the corporations they serve and to the stockholders. The duty of care requires that directors act on an adequately informed basis with director liability for a duty of care violation predicated upon concepts of gross negligence. The duty of loyalty mandates that the best interests of the corporation and its stockholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally. *McKenna v. Singer*, 2017 WL 3500241, at *15 (Del. Ch. July 31, 2017).

Under *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996), "a director must make a good faith effort to oversee the company's operations. Failing to make that good faith effort breaches the duty of loyalty and can expose a director to liability. In other words, for a plaintiff to prevail on a *Caremark* claim, the plaintiff must show that a fiduciary acted in bad faith—'the state of mind traditionally used to define the mindset of a disloyal director.'" *Marchand v. Barnhill*, 212 A.3d 805, 821 (Del. 2019) (internal footnotes and citations omitted).

"Bad faith is established, under *Caremark*, when 'the directors [completely] fail[ ] to implement any reporting or information system or controls[,] or . . . having implemented such a system or controls, consciously fail[ ] to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.' In short, to satisfy their duty of loyalty, directors must make a good faith effort to implement an oversight system and then monitor it." *Id.* at 821 (alterations in original) (internal footnotes and citations omitted).

"As with any other disinterested business judgment, directors have great discretion to design context- and industry-specific approaches tailored to their companies' businesses and resources. But *Caremark* does have a bottom-line requirement that is important: the board must make a good faith effort—i.e., try—to put in place a reasonable board-level system of monitoring and reporting. Thus, [Delaware] case law gives deference to boards and has dismissed *Caremark* cases even when illegal or harmful company activities escaped detection, when the plaintiffs have been unable to plead that the board failed to make the required good faith effort to put a reasonable compliance and reporting system in place." *Id.* (internal footnotes and citations omitted).

Determining whether directors may be liable under *Caremark* for failing to "engage in environmental, social, and governance issues" would require a fact-specific analysis that cannot be done without significantly more information. Even if I had the additional information, it would be inappropriate for me, as a sitting Justice on the Delaware Supreme Court, to opine on these issues here as they are likely to be the subject of further litigation in Delaware. What I can say is that "directors have great discretion to design context- and industry-specific approaches tailored to their companies' businesses and resources." *Id.* (internal footnotes and citations omitted).

Further, in examining disinterested business decisions, Delaware courts apply the business judgment rule. The "business judgment rule" is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. *See Andersen v. Mattel, Inc.*, 2017 WL 218913, at *3 (Del. Ch. Jan. 19, 2017). When the business judgment rule applies, the board's business decisions will not be disturbed if they can be attributed to any rational business purpose; a court under such circumstances will not substitute its own notions of what is or is not sound business judgment for the board's notions. *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971).

19. "Stakeholder capitalism" is the philosophy that businesses should have a role in effecting social or political change. Some have suggested extending *Caremark* to hold companies that do not engage in environmental, social, and governance issues liable. Do you agree that companies should have a social duty beyond their shareholders?

Response: Please see my response to Question 18.