Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Judge Florence Y. Pan
Nominee to be United States Circuit Court Judge for the District of Columbia Circuit
June 29, 2022

1. **You have significant appellate experience as a litigator and as a judge. As an Assistant U.S. Attorney in the Appellate Division of the U.S. Attorney's Office for the District of Columbia, you briefed and argued criminal cases before the D.C. Circuit, as well as the D.C. Court of Appeals. In 2007, you were promoted to Deputy Chief of the Appellate Division, where you reviewed briefs and supervised moot courts in preparation for oral arguments. As a judge, you have authored opinions while sitting by designation on the D.C. Court of Appeals.**

   a. **What did you learn from your time briefing and arguing appeals that will serve you on the D.C. Circuit?**

      Response: My experience as an appellate litigator allowed me to develop strong analytical, research, and writing skills. I also learned how to apply appellate standards of review; and how to identify strong versus weak claims on appeal. Finally, I am very comfortable reviewing long and complex records on appeal, including voluminous transcripts and exhibits.

   b. **What lessons did you learn from reviewing appellate briefs and preparing your colleagues for oral arguments that would aid you in serving as a circuit court judge?**

      Response: By reviewing a large volume of briefs in the Appellate Division at the U.S. Attorney's Office, I became familiar with many of the common appellate claims raised in criminal cases. As a supervisor, I attended many oral arguments and gained insight into the types of questions that are most illuminating in a colloquy with the court. I also came to appreciate the type of judicial demeanor that is most conducive to a productive exchange of ideas at oral argument -- *i.e.*, I understand the importance of being extremely prepared and ready to ask questions that focus on the most important aspects of the case at hand; while also allowing the parties the freedom to make their strongest points, and remaining open-minded to the arguments of both the parties and my colleagues.

   c. **What have you learned sitting by designation on the D.C. Court of Appeals that would aid you in serving as a circuit court judge?**

      Response: In sitting by designation on the D.C. Court of Appeals, I was exposed to the dynamics of decision-making as one member of a three-judge panel. I understand the importance of collegiality and the benefits of learning from the other judges. I appreciate that efficiency and setting internal deadlines are especially important when other judges are awaiting feedback or edits from me.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Florence Y. Pan
Judicial Nominee to the U.S. Court of Appeals for the D.C. Circuit

1. **If confirmed as a Circuit Judge, will you uphold all Supreme Court precedent?**

   Response: Yes.

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

   Response: The Supreme Court has held that fundamental rights protected by the Due Process Clause of the Fifth and Fourteenth Amendments are those that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

3. **Should you be confirmed, what specific factors will you take into consideration when deciding whether to overturn circuit precedent?**

   Response: An appellate court, sitting en banc, may overrule a precedent of the court. Rule 35 of the Federal Rules of Appellate Procedure provides that 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."

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 with that statement.

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

   Response: In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court held that parents have a constitutional right to make decisions about the instruction of their children and to control their children's education.

6. **Do you believe that we should defund or decrease funding for police departments and law enforcement, including the law enforcement entities responsible for protecting the federal courthouses in Portland from violent rioters? Please explain.**

   Response: The appropriate level of funding for police departments and law enforcement is a policy issue that should be addressed by the legislature, after appropriate

investigation and fact-finding. As a sitting judge and nominee, it would not be appropriate for me to express an opinion about this issue.

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

   Response: Please see my response to Question 6.

8. **What is more important during the COVID-19 pandemic: ensuring the safety of the community by keeping violent, gun re-offenders incarcerated or releasing violent, gun re-offenders to the community?**

   Response: Under 18 U.S.C. § 3582(c)(1)(A) and the First Step Act, a court may grant a reduction in sentence for "extraordinary and compelling reasons," which may include an offender's heightened risk of contracting or experiencing serious complications from COVID-19. Such relief may be granted, however, only after considering whether relief is warranted under 18 U.S.C. § 3553(a), which requires consideration of the safety of the community. A court make must make this determination on a case-by-case basis.

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

   Response: The First Amendment provides that Congress shall make no law abridging "the right of the people . . . to petition the Government for a redress of grievances."

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

    Response: A judge's "empathy" is not a factor to be considered in imposing a sentence under 18 U.S.C. § 3553(a).

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

    Response: I agree that the Constitution does not require the appointment of counsel in a civil case.

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

    Response: I have not worked at a law firm except as a summer associate. I am not familiar with how law firms determine which clients to represent, and I do not have an opinion on this matter.

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

Response: A lawyer has a duty of loyalty to each client. It would be unethical and a conflict of interest to allow one client to influence the position that the lawyer asserts on behalf of another client. *See* D.C. Rule of Professional Conduct 1.7(b)(4) ("[A] lawyer shall not represent a client with respect to a matter if [t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to . . . a third party . . . .").

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

Response: 18 U.S.C. § 1507 makes it unlawful to picket, parade, or demonstrate in or near a court or a residence of a judge, juror, witness, or court officer, "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty."

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

Response: I am not aware of any Supreme Court precedent that specifically addresses the constitutionality of 18 U.S.C. § 1507 on its face. As a sitting judge and as a nominee, it would be inappropriate for me to comment on an issue that might come before the court. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

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

    Response: As a sitting judge and as a nominee, I do not think it would be appropriate for me to comment on the "correctness" of a Supreme Court precedent. If confirmed, I will apply all binding Supreme Court precedents, without regard to any personal opinions about their "correctness." There are, however, a small number of constitutional decisions that are foundational to our system of justice. *Brown v. Board of Education* is one of those decisions.

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

    Response: As a sitting judge and as a nominee, I do not think it would be appropriate for me to comment on the "correctness" of a Supreme Court precedent. If confirmed, I will apply all binding Supreme Court precedents, without regard to any personal opinions about their "correctness." There are, however, a small number of constitutional decisions that are foundational to our system of justice. *Loving v. Virginia* is one of those decisions.

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

    Response: The Supreme Court overruled *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022).

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

Response: The Supreme Court overruled *Planned Parenthood of Southeastern Pennsylvania v. Casey* in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022).

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

Response: As a sitting judge and as a nominee, I do not think it would be appropriate for me to comment on the "correctness" of a Supreme Court precedent. If confirmed, I will apply all binding Supreme Court precedents, without regard to any personal opinions about their "correctness."

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

Response: Please see my response to Question 16(e).

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

Response: Please see my response to Question 16(e).

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

Response: Please see my response to Question 16(e).

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

Response: Please see my response to Question 16(e).

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

Response: Please see my response to Question 16(e).

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, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

        Response: No.

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

        Response: I met Christopher Kang when he was employed in the White House Counsel's Office during the Obama administration. When I was nominated to the United States District Court in 2021, he sent me an email of congratulations.

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: I have never been in contact with anyone associated with Alliance for Justice. With respect to Demand Justice, please see my response to Question 21(c).

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?**

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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 Foundations requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

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

Response: No.

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

Response: My husband's cousin, David Danzig, is employed by the Open Society Foundations as a communications officer. I have never discussed my nomination with him.

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: I met Robert Raben in approximately 2011, when I applied for a position as a United States District Judge for the District of Columbia. The Hispanic National Bar Association (HNBA) endorsed my nomination, and Mr. Raben was the Chair of the HNBA's Committee on Endorsements at that time.

27. **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 21, 2022, I was contacted by an attorney from the White House Counsel's Office regarding my interest in being considered for potential nomination to the D.C. Circuit. After that date, I was in communication with officials from the Office of Legal Policy at the Department of Justice. On May 25, 2022, my nomination was submitted to the Senate.

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

Response: On June 29, 2022, the Office of Legal Policy at the Department of Justice provided these questions to me. I reviewed the questions and drafted my responses. The Office of Legal Policy reviewed my responses and provided limited feedback before I finalized them. The answers are my own.

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

Questions for the Record for Florence Y. Pan, Nominee for the District of Columbia 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: Various federal statutes prohibit racial discrimination, such as Title VI and Title VII of the Civil Rights Act of 1964; the Equal Credit Opportunity Act; the Fair Housing Act; and the Voting Rights Act of 1965.

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

Response: As a trial judge for the past 13 years, my judicial philosophy has been to be well prepared, to be open-minded, to give all litigants a meaningful opportunity to be heard, and to apply the law to the facts of each case that comes before me. I do not identify with any particular Supreme Court Justice in terms of judicial philosophy. I believe that a judge should follow precedent and should decide only those matters that are necessary to the resolution of the case. I believe that judges should set aside their personal views and opinions, and even-handedly apply the law.

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

Response: Originalism is an interpretive method through which the meaning of the Constitution is determined by adhering to the original understanding of its provisions at the time that it was adopted. The original understanding to be applied may be either the original public meaning of the words in the document (*i.e.*, the understanding of the public at the time of ratification), or the original intent of the Framers who wrote the words in question. I do not like to use labels such as "originalist" to describe myself, but I think that original public meaning and original intent are critical considerations in constitutional interpretation. *See New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ___ (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: My understanding is that "living constitutionalism" describes a viewpoint that the Constitution's meaning evolves and changes to adapt to contemporary circumstances. I do not like to use labels such as "living constitutionalist" to describe myself. I think that the Constitution has a fixed quality and is a document with enduring meaning.

5. In your Questions for the Record last year, you expressly declined to identify as a

"textualist" or "originalist," instead merely stating that "original intent and original public meaning" were "important considerations" in interpreting the Constitution. What else do you believe are "important considerations," for constitutional interpretation and do you believe that they can override the text of the Constitution?

Response: Other sources of constitutional interpretation that I would consider include the precedents of the Supreme Court and the D.C. Circuit. The text, however, is the starting point and the foundation for all constitutional analysis.

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

Response: I would follow Supreme Court precedent concerning whether to rely on originalism to interpret the provision at issue. For example, the Supreme Court has taken an originalist approach in interpreting the Second Amendment, *see, e.g.*, *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ___ (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008); but it has taken a different approach in interpreting cruel and unusual punishment under the Eighth Amendment, *see, e.g.*, *Kennedy v. Louisiana,* 554 U.S. 407, 419 (2008) (explaining that the Eighth Amendment "draws[s] its meaning from the evolving standards of decency that mark the progress of a maturing society" (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (alteration in original)).

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

Response: The public's current understanding of the Constitution or a statute may overlap or may be consistent with the provision's original public meaning.

8. **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 fundamental rights protected by the Due Process Clause of the Fifth and Fourteenth Amendments are those that are "deeply rooted in [the] Nation's history and tradition" and "implicit in the concept of ordered liberty." *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations omitted). Future litigation may concern the proposed recognition of unenumerated rights in the Constitution that have not yet been articulated by the Supreme Court. Thus, as a sitting judge and as a nominee, it would not be appropriate for me to comment on this issue. I would carefully evaluate any future claims under the standard the Supreme Court has

identified.

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

Response: I believe that the Constitution has a fixed quality and is an enduring document that Americans can rely upon to safeguard fundamental rights. In addition, the Constitution has been interpreted by the Supreme Court to apply to issues and facts of first impression.

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

Response: Yes.

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

Response: Yes.

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)(3), the rebuttable presumption that no condition or combination of conditions can reasonably assure the safety of any other person and the community is triggered when a defendant is charged with a drug offense carrying a maximum sentence of ten years or more; a crime involving slavery or human trafficking; certain terrorism offenses; certain offenses involving minor victims; and certain enumerated offenses, including violations relating to the sale, delivery, and transfer of firearms in contravention of 18 U.S.C. § 924(c).

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

Response: My research has not revealed any cases that discuss 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. The Bill of Rights is the primary source of limits on the government's power to constrain individual liberty. Laws that burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). "[G]overnment

regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (emphasis in original). Likewise, "the inclusion of a formal system of entirely discretionary exceptions" in a government policy renders the policy "not generally applicable," thus triggering strict-scrutiny review. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). Under strict scrutiny, a law that burdens the free exercise of religion can stand "only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests." *Id.* at 1881 (quoting *Lukumi Babalu*, 508 U.S. at 546). If the law is both neutral (on its face and in practice) and generally applicable, it is subject to rational basis review. *See Empl. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 878–80 (1990).

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

Response: A governmental policy that discriminates against a religious group or belief is subject to strict scrutiny: It must be narrowly tailored to serve a compelling state interest. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (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 determined that the church and the synagogues were entitled to relief pending appellate review because: (1) They showed that their First Amendment claims were likely to prevail, in that they made a strong showing that the challenged restrictions violated "the minimum requirement of neutrality to religion," *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993), and failed strict scrutiny; (2) They demonstrated irreparable harm from enforcement of the restrictions, in that their parishioners and members would lose their First Amendment freedoms for some period of time; and (3) The State did not show that granting the applications would harm the public.

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 applicants challenging California's COVID-19 restrictions on religious exercise at home were entitled to injunctive relief pending appeal. The 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 (emphasis in original). The Court determined that strict scrutiny was applicable because California permitted secular activities at places like hair salons, retail stores, personal care services, and movie theaters, while restricting at-home religious exercise. The Court held that applicants were entitled to an injunction because they were likely to succeed on the merits of their free exercise claim; they were irreparably harmed by the loss of free exercise rights for even minimal periods of time; and the State had not shown that public health would be imperiled by employing less restrictive measures.

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

Response: 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), the Supreme Court held that the Colorado Civil Rights Commission impermissibly violated the Free Exercise Clause of the First Amendment by treating Phillips, the owner of Masterpiece Cakeshop, with overt hostility on account of his religion. Phillips had declined to sell a wedding cake to a same-sex couple, stating that to do so would violate his sincerely held religious beliefs. The same-sex couple filed suit, alleging that Phillips had impermissibly discriminated against them. The Colorado Civil Rights Commission agreed with the same-sex couple and ordered Phillips to bake and sell a cake to them. During the Commission's adjudication, 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," and called Phillips's beliefs "despicable pieces of rhetoric." *Id.* at 1729. In light of those remarks, as well as the noted asymmetry in outcome in refusal-of-service cases between religious objectors and secular objectors before the Commission, the Court held that although Colorado may be able to compel Phillips to serve same-sex couples, it must do so through a neutral decisionmaker that gives fair consideration to his religious objection.

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: In *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989), the Supreme Court made clear that an individual's religious beliefs are protected even if the beliefs are not consistent with those of a faith tradition. *Id.* at 834 ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); *see also Emp. Div., Dept. of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990) ("[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

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

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: As a sitting judge and as a nominee, it would not be appropriate 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 clarified how the "ministerial exception" should be applied to teachers at religious schools. The ministerial exception prohibits courts from interfering with religious institutions' management of certain employees, a principle that is rooted in the First Amendment's protection of 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). In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Court applied the ministerial exception to preclude an employment-discrimination suit brought by a teacher at a religious school, concluding that the teacher's title, educational training, and responsibilities demonstrated that she held an important, ministerial position with the religious institution. *See* 565

U.S. 171 (2012). In *Our Lady of Guadalupe*, the Court reversed the Ninth Circuit's overly rigid application of *Hosanna-Tabor*, holding that application of the ministerial exception depends on a totality-of-the-circumstances test that turns largely on the question of "what an employee does." Because educating young people in their faith, inculcating its teachings, and training students to live their faith are responsibilities that lie at the very core of a private religious school's mission, the ministerial exception applies to teachers that perform those functions, even if the teachers do not hold the formal title of "minister" and are not themselves practicing members of the religion of the school.

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), the Supreme Court held that Philadelphia's non-discrimination requirement for its foster-care contracts was not a generally applicable provision that incidentally burdened religious exercise, and therefore was subject to strict scrutiny. Based on the non-discrimination requirement, Philadelphia had refused to contract with Catholic Social Services ("CSS") in the placement of foster children because CSS, based on its religious views, would not certify same-sex couples as foster parents. But the non-discrimination policy included a provision that allowed the city to grant exemptions from the policy at the sole discretion of a city Commissioner; this provision took the non-discrimination policy out of the category of neutral and generally applicable regulations that are subject to rational-basis review under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Instead, Philadelphia's non-discrimination policy was subject to strict scrutiny under *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). Because the City could not show that its refusal to contract with CSS was narrowly tailored to advance a compelling government interest, the Court held that Philadelphia's application of the non-discrimination requirement to CSS violated 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*, No. 20-1088 (U.S. June 21, 2022), the Supreme Court held that a Maine public-benefits program that helps fund tuition at private schools violated the Free Exercise Clause because it barred religious schools from receiving

tuition assistance solely because they are religious. This is the same reasoning that the Court applied in *Trinity Lutheran Church of Columbia 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*, No. 21-418 (U.S. June 27, 2022), the Supreme Court held that a school district violated the Free Speech and Free Exercise Clauses of the First Amendment when it terminated the employment of a high school football coach who knelt at midfield after games to offer a quiet personal prayer. After determining that the school district had burdened Kennedy's sincere religious practice, pursuant to a policy that was not neutral and generally applicable, the Court recognized the complexity associated with the interplay between free speech rights and government employment by applying the two-part *Pickering-Garcetti* framework, established in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The Court determined that (1) Kennedy's prayers were private speech and not government speech; and (2) Kennedy's interest in religious exercise outweighed the school district's asserted interest in avoiding an Establishment Clause violation, which erroneously relied on the abandoned endorsement test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Based on an interpretation of the Establishment Clause by reference to historical practices and understandings, and a determination that the record did not support any finding that Kennedy's conduct coerced students to engage in religious activity, the Court held that there was no conflict between the Free Exercise and Establishment Clauses, and that Kennedy's rights under the Free Speech and Free Exercise Clauses had been violated.

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

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), which involved regulations that required Amish houses to have septic systems to dispose of used water, Justice Gorsuch concurred with the majority's decision to grant the writ of certiorari, vacate the state court's judgment, and remand for further consideration in light of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). In his concurrence, Justice Gorsuch expressed his view of how the state court on remand should apply strict scrutiny under the Religious Land Use and Institutionalized Persons Act, noting that: (1) The court should consider the county's interest in the specific application of sanitation regulations to the particular community at issue, and whether the county has a compelling interest in denying an exception from the sanitation regulations to the Swartzentruber Amish; (2) The court should give due weight to exemptions that other groups enjoy, and require the county to

offer a compelling explanation why the same flexibility extended others cannot be extended to the Amish; (3) The court should give weight to rules in other jurisdictions that appear to allow the alternative proposed by the Amish; and (4) The court should require the county to prove with evidence that the alternative proposed by the Amish will not work on the particular farms with the particular claimants.

25. What do you understand to be a "Major Question" for the purposes of the "Major Questions Doctrine"?

Response: A major question is a "decision[] of vast economic and political significance." *West Virginia v. EPA*, No. 20-1530, at 11 (U.S. June 30, 2022) (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). A major question is likely to arise when an agency "'claim[s] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'" *Id.* at 20 (quoting *Utility Air*, 573 U.S. at 324).

26. What do you understand to be the distinction between the Major Questions Doctrine and the Non-Delegation Doctrine?

Response: The Major Questions Doctrine provides that where an agency seeks to regulate in an area of vast economic and political significance, the agency must point to clear congressional authorization for the authority that it claims. The Non-Delegation Doctrine provides that Congress generally cannot delegate its legislative powers to other entities; but if Congress does give regulatory authority to an agency, Congress must give such an agency an "intelligible principle" on which to base its regulations.

27. What do you understand to be the original meaning of an "officer of the United States" under the appointments clause of Article II?

Response: To be an "Officer of the United States" under the Appointments Clause of Article II, an individual must (1) "occupy a 'continuing' position established by law," *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (quoting *United States v. Germaine*, 99 U.S. 508, 511 (1879)); (2) "exercis[e] significant authority pursuant to the laws of the United States," *id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)); and (3) be tasked with "primarily federal" rather than "primarily local" duties, *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020).

In his concurring opinion in *Lucia*, Justice Thomas suggested that the requirement of "significant authority" may not be consistent with the original meaning of an "Officer of the United States." *See Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring) ("The Founders likely understood the term 'Officers of the United States' to encompass all federal civil officials who perform an ongoing, statutory duty — no matter how important or significant the duty.").

a. What do you understand to be the distinction between "principal" and "inferior" officers of the United States?

Response: "'[W]hether one is an "inferior" officer depends on whether he has a superior' other than the President. An inferior officer must be 'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980 (2021) (quoting *Edmond v. United States*, 520 U.S. 651, 662–63 (1997)).

28. What do you understand to be the limitations on the President's powers to remove an "officer of the United States"?

Response: The general rule is that "the President possesses 'the authority to remove those who assist him in carrying out his duties.'" *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2198 (2020) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010)). "[T]wo exceptions — one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority — 'represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power.'" *Id.* at 2199–200 (quoting *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 196 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)).

29. In *St. Mary Medical Center v. Becerra*, you took a broad view of statutory ambiguity for the purposes of *Chevron* deference. How hard do you think judges should have to examine a statute before finding it ambiguous?

Response: To determine whether "the intent of Congress is clear" under the first step of *Chevron*, the court must exhaust the "traditional tools of statutory construction," including textual analysis, structural analysis, and legislative history. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 & n.9 (1984); *see also Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) ("The traditional tools include examination of the statute's text, legislative history, and structure; as well as its purpose." (citations omitted)).

30. What tools or methods should judges use in helping discern statutory ambiguity?

Response: Please see my response to question 29.

31. Is it ever appropriate to use legislative history to determine if a statute is ambiguous or not?

Response: Legislative history is a source that courts may consider in determining whether the intent of Congress is clear under the first step of *Chevron*. The Supreme Court examined legislative history in the *Chevron* opinion itself. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 851 (1984).

32. Do you believe that internal agency adjudications adequately protect Americans' due process rights?

Response: Formal agency adjudications are trial-type proceedings that are governed by the Administrative Procedure Act's ("APA") formal hearing provisions, contained in 5 U.S.C. §§ 554, 556–557. Agencies also engage in informal adjudications. Parties to either type of adjudication may seek judicial review of the agency's action for arbitrary and capriciousness; statutory or constitutional violations; and other grounds set forth in the APA. *See* 5 U.S.C. §§ 701–706.

33. Do you believe that agency policymaking through administrative adjudication is consistent with the text and underlying principles of the Administrative Procedure Act?

Response: As a sitting judge and as a nominee, it would not be appropriate for me to comment on an issue that might arise in litigation before the court. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

34. What do you believe falls into the category of "public rights"?

Response: In *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856), the Supreme Court distinguished between any act "which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty," and other acts that Congress may vest in courts or in other agencies, stating that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which [C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.* at 282. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion), the Supreme Court confirmed that the distinction between "public rights" and "private rights" was still important in determining which matters could be assigned to legislative courts and administrative agencies. The Court noted that the public-rights doctrine extends to "matters arising 'between the [g]overnment and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,' and only to matters that historically could have been determined exclusively by those departments. *Id.* (citations omitted). Such matters may be committed to determination by a legislative court or administrative agency. Among the

public rights that are susceptible of judicial determination but do not require it are: claims against the United States, *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (then-existing Court of Claims); the disposal of public lands, *United States v. Coe*, 155 U.S. 76 (1894) (Court of Private Land Claims); and questions concerning membership in Indian tribes, *Wallace v. Adams*, 204 U.S. 415 (Choctaw Citizenship Court).

35. Do you believe that administrative agency tribunals are consistent with the vesting clause of Article III?

Response: As a sitting judge and as a nominee, it would not be appropriate for me to comment on an issue that might arise in litigation before the court. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

36. 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: As a sitting judge and as a nominee, it would not be appropriate for me to comment on an issue that might arise in litigation before the court. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

37. 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.

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

Response: I would not support the provision of trainings of that nature.

39. 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: As a sitting judge, I select law clerks based on their merits. If confirmed, I will select law clerks and staff based on their merits.

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

Response: Generally speaking, diversity in government institutions increases public confidence and provides role models for members of groups that may be underrepresented in government. To my knowledge, the Supreme Court has not considered the constitutionality of considering skin color or sex when making a political appointment.

41. Is the criminal justice system systemically racist?

Response: Empirical evidence supports the conclusion that certain racial groups receive less favorable treatment in the criminal justice system than others. *See, e.g.*, *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*, United States Sentencing Commission (November 2017).

42. 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 nominee, it would not be appropriate for me to comment on whether Congress should increase or decrease the number of judges on the U.S. Supreme Court. I will faithfully apply the precedents of the Supreme Court regardless of the outcome of that policy debate.

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

Response: The Supreme Court explicated the original public meaning of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

44. What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*,

***McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?**

Response: In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ___ (2022), the Supreme Court adopted the following standard: **"**In keeping with *Heller*, . . . 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.'" (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n. 10 (1961)).

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

Response: The Supreme Court has held that an individual's right to keep and bear a firearm for self-defense is constitutionally protected.

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

Response: The Supreme Court has held that the right to own a firearm is protected by the Second Amendment. I am not aware of any authorities that compare the amount of protection afforded to the Second Amendment to the amount of protection afforded to other constitutional rights.

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

Response: Please see my response to Question 46.

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

Response: Generally speaking, the executive is entitled to determine his or her policy priorities and to exercise prosecutorial discretion.

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

Response: Prosecutorial discretion refers to the choices that prosecutors make in determining which cases to prosecute and what charges to bring. Legislative or substantive agency rules may be changed pursuant to the notice-and-comment

procedures prescribed by the Administrative Procedure Act. *See* 5 U.S.C. § 553.

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

Response: The federal death penalty is authorized by statute. *See* 18 U.S.C. § 228. That statute can be changed only by an act of Congress and cannot be unilaterally changed by the President. To the extent that most death penalty cases arise under state law provisions, the President likewise does not have authority to abolish state laws that authorize the death penalty.

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

Response: In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court vacated the stay pending appeal of a district court's nationwide injunction against the Center for Disease Control's eviction moratorium. The Court applied the four-factor test from *Nken v. Holder*, 556 U.S. 418 (2009), which instructs courts to consider: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434. The Court vacated the stay after concluding that the applicants were virtually certain to succeed on the merits of their claim that the Center for Disease Control had exceeded its statutory authority in imposing the eviction moratorium; and that the equities weighed in favor the applicants and against the government.

Senator Josh Hawley
Questions for the Record

Florence Pan
Nominee, U.S. Court of Appeals for the D.C. 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.

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

      Response: A judge takes an oath to "faithfully and impartially discharge and perform all the duties incumbent upon [him or her] . . . under the Constitution and laws of the United States." I interpret this oath to require faithful application of the law to the facts of the case before me.

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

   Response: While the Supreme Court has stated that "federal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant," the Court "has recognized . . . certain instances in which the prospect of undue interference with state proceedings counsels against federal relief." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72–73 (2013). The abstention doctrines that arise most frequently include:

   The *Pullman* abstention doctrine, which "holds that 'when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question.'" *John Doe v. Metro. Police Dep't of D.C.*, 445 F.3d 460, 468 n.18 (D.C. Cir. 2006) (quoting *JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1124 (D.C. Cir. 2004)).

   The *Younger* abstention doctrine, which is "called for when three conditions are satisfied: 'first, . . . there are ongoing state proceedings that are judicial in nature; second, the state proceedings must implicate important state interests; third, the proceedings must afford

an adequate opportunity in which to raise the federal claims.'" *Eisenberg v. W. Va. Office of Disciplinary Counsel*, 856 F. App'x 314, 315 (D.C. Cir. 2021) (quoting *Hoai v. Sun Ref. & Mktg. Co.*, 866 F.2d 1515, 1518–19 (D.C. Cir. 1989)) (alteration in original).

The *Burford* abstention doctrine, which is "appropriate where there have been presented 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.'" *Silverman v. Barry*, 727 F.2d 1121, 1123 n.4 (D.C. Cir. 1984) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814–15 (1976)).

The *Thibodaux* abstention doctrine, which is applicable to cases wherein the issues are "'intimately involved with [the States'] sovereign prerogative,' the proper adjudication of which might be impaired by unsettled questions of state law." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996) (quoting *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959)).

The *Colorado River* abstention doctrine, which "allows a district court to abstain 'due to the presence of a concurrent state proceeding.'" *Sheptock v. Fenty*, 707 F.3d 326, 332 (D.C. Cir. 2013) (quoting *Colo. River Water Conservation Dist.*, 424 U.S. at 818). The Court balances certain factors, including: "which court 'first assum[ed] jurisdiction over property' involved in the case; 'the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums.'" *Id.* (quoting *Colo. River Water Conservation Dist.*, 424 U.S. at 818) (alteration in original).

The *Rooker-Feldman* abstention doctrine, which precludes lower federal courts from "exercising appellate jurisdiction over final state-court judgments.'" *Lance v. Dennis*, 546 U.S. 459, 463 (2006); *see also D.C. Healthcare Sys., Inc. v. District of Columbia*, 925 F.3d 481, 486 (D.C. Cir. 2019) (explaining that the *Rooker-Feldman* doctrine is "'confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers . . . inviting district court review and rejection of [the state court's] judgments.'" (quoting *Skinner v. Switzer*, 562 U.S. 521, 532 (2011)) (emphasis omitted) (alterations in original).

The ecclesiastical abstention doctrine, which requires a civil court to accept as binding the decisions of a religious organization regarding the governance and discipline of its members. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724–25 (1976) (holding that civil courts could not review a church's disciplinary decision regarding one of its members).

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

   Response: No.

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

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

   Response: Original public meaning plays a critical role in interpreting the Constitution. *See, e.g., New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ___ (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

   Response: In interpreting a federal statute, I would begin with the text. If the plain meaning of the language in the statute were clear, that would be dispositive. I would also rely on precedents of the Supreme Court and the D.C. Circuit. If there were no such precedents, I would look to canons of statutory construction, the structure of the statute, precedents from other courts, and legislative history.

   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: Whether to consider legislative history and what weight to give such legislative history would depend on the facts and circumstances of the case before the court. I would consider the record of the case, and the arguments and legal authorities cited by the parties before making such a determination.

   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 U.S. Constitution is a uniquely American document and should be interpreted based on domestic law and authorities.

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

Response: To prevail on a claim that a method of execution violates the Eighth Amendment's prohibition against cruel and unusual punishment, a petitioner must: (1) demonstrate that an execution protocol presents a "substantial risk of serious harm;" and (2) identify a "feasible" and "readily implemented" alternative method of execution that will significantly reduce the "risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)); *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1129 (2019) (confirming that "anyone bringing a method of execution claim alleging the infliction of unconstitutionally cruel pain must meet the *Baze-Glossip* test.").

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

   Response: Yes, the petitioner must "establish the existence of a known and available alternative method of execution that would entail a significantly less severe risk" of pain. *Glossip*, 576 U.S. at 878 (citation omitted); *see also Bucklew*, 139 S. Ct. at 1125 (explaining that a petitioner must show "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain").

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

   Response: No.

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

   Response: No.

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

    Response: Laws that burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). "[G]overnment regulations are not neutral and

generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (emphasis in original). Likewise, "the inclusion of a formal system of entirely discretionary exceptions" in a government policy renders the policy "not generally applicable," thus triggering strict-scrutiny review. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). Under strict scrutiny, a law that burdens the free exercise of religion can stand "onl/..y if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests." *Id.* at 1881 (quoting *Lukumi Babalu*, 508 U.S. at 546). If the law is both neutral (on its face and in practice) and generally applicable, it is subject to rational basis review. *See Empl. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 878–80 (1990).

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

Response: A governmental policy that discriminates against a religious group or belief is subject to strict scrutiny: It must be narrowly tailored to serve a compelling state interest. *See, e.g., Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

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

Response: The Supreme Court has held that "'religious 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) (quoting *Thomas v. Rev. Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 714 (1981)). Instead, a court's "'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (citation omitted).

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

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

Response: In *Heller*, the Supreme Court held that the Second Amendment protects an individual's right to keep a firearm in the home for self-defense.

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

Response: No.

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

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

Response: Justice Holmes made that statement to underscore his view that judges should exercise restraint in striking down legislative enactments. The majority opinion in *Lochner* held that a law limiting the number of hours that bakers could work in a week was unconstitutional, relying on the bakers' freedom of contract and reflecting the majority's support for a policy of laissez-faire economics. Spencer's "Social Statics" was a libertarian treatise. Justice Holmes's point was that whether one espoused libertarianism or not, the Constitution did not require adherence to that philosophy.

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

Response: The analysis adopted in *Lochner* was abandoned by the Supreme Court in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), when the Court declined to rely on liberty of contract to strike down a minimum-wage law.

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

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

Response: Only the Supreme Court can overrule its own precedent. As a sitting district judge and, if confirmed, as a circuit judge, I will faithfully

apply all binding Supreme Court precedent. To the extent that some of the Supreme Court's precedents may be challenged as "no longer good law," it would not be appropriate for me to comment on such cases that may come before the court. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: If confirmed, I will follow the Supreme Court and D.C. Circuit's precedents on what constitutes a monopoly. The Supreme Court has defined monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). The D.C. Circuit has refined this definition, stating that "[m]ore precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level." *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc).

Monopoly power can be shown through direct proof or through circumstantial evidence of market structure. Under the more common structural approach, "monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers." *Id.* (citing *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995)). The Supreme Court has found that market share in excess of two-thirds is dominant. *See Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (holding that market share "over two-thirds" constitutes monopoly power); *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (determining that 87% market share constitutes monopoly power); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992) (holding that 80% constitutes monopoly power); *E.I. du Pont de Nemours & Co.*, 351 U.S. at 379, 391 (concluding that 75% constitutes monopoly power).

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

Response: Please see my response to Question 16(a).

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

Response: Please see my response to Question 16(a).

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

Response: Federal courts exercising diversity jurisdiction must apply the substantive law of the state in which the court is located. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Thus, federal common law is limited to areas such as admiralty law, antitrust law, and bankruptcy law.

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

Response: It would be within the province of the state's Supreme Court to authoritatively determine the scope of the state constitutional right.

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

Response: Where text is clear and unambiguous, it should be given effect. Otherwise, one should look to other sources to interpret the text, such as legal precedents.

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

Response: A state constitutional provision may provide greater protections than the federal Constitution does.

19. 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, I do not think it would be appropriate for me to comment on the "correctness" of a Supreme Court precedent. If confirmed, I will apply all binding Supreme Court precedents, without regard to any personal opinions about their "correctness." There are, however, a small number of constitutional decisions that are foundational to our system of justice. *Brown v. Board of Education* is one of those decisions.

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

Response: A district court has discretion in fashioning suitable relief and defining the terms of an injunction. "[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Moreover, "the scope of injunctive relief is dictated by the extent of the violation established . . . ." *Id.*

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

Response: I am not aware of any statute or Supreme Court precedent that establishes a standard for granting nationwide injunctions. The authority to issue a nationwide injunction appears to stem from the court's general power to fashion suitable relief.

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

Response: Although district courts have discretion to fashion suitable relief, the power to issue a nationwide injunction should be used judiciously and only after careful consideration, with an awareness of the sweeping nature of such relief.

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

Response: Please see my response to Question 20(b).

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

Response: Federalism is a structural check on the accumulation of power by the federal government, and thus is intended to help safeguard individual liberty.

23. 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 2.

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

Response: Damages and injunctive relief are aimed at addressing different types of harm. Damages generally compensate an injured party monetarily, while injunctive relief compels action or inaction by the opposing party. The appropriate relief is dictated by the facts and circumstances of the case, based on whether the appropriate legal standards have been met.

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

Response: The Supreme Court has held that fundamental rights protected by the Due Process Clause of the Fifth and Fourteenth Amendments are those that are "deeply rooted in [the] Nation's history and tradition" and "implicit in the concept of ordered liberty." *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations omitted). Some of the rights that the Supreme Court has protected under the doctrine of substantive due process include: The right to use contraception; the right of interracial couples to marry; the right to engage in intimate sexual conduct; and the right of same-sex couples to marry.

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

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

Response: Please see my response to Question 10.

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 familiar with any distinction between "the right to 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: The Supreme Court has 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." *Tandon v. Newsom*, 141 S. Ct. 1294,

1296 (2021) (emphasis in original). Likewise, "the inclusion of a formal system of entirely discretionary exceptions" in a government policy renders the policy "not generally applicable," thus triggering strict-scrutiny review. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021).

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: Please see my response to Question 12.

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

Response: The Religious Freedom Restoration Act (RFRA) aims to protect religious freedom by subjecting any law that substantially burdens a person's exercise of religion to strict scrutiny, regardless of whether the law is generally applicable. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), however, the Supreme Court held that RFRA is unconstitutional as applied to the states. *Id.* at 536. Thus, unlike other federal civil rights laws, RFRA applies only to the federal government.

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: *See Iwuchukwu v. Archdiocese for the Military Services*, Case No. 21-cv-1980, 2022 WL 424984 (D.D.C. Feb. 11, 2022) (applying ecclesiastical abstention doctrine).

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

a. What do you understand this statement to mean?

Response: Judges must faithfully apply the law to the facts, even if the resulting outcome is undesirable.

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

Response: Not that I can recall.

a. If yes, please provide appropriate citations.

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

Response: No.

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

Response: I would not use the term "systemically racist" to describe my country.

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

Response: In representing the United States as an Assistant United States Attorney and as an attorney at the U.S. Department of Justice, I advanced the government's interests without regard to my personal views.

32. How did you handle the situation?

Response: Please see my response to Question 31.

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

Response: Yes.

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

Response: In Federalist 78, Alexander Hamilton stated that judges exercise "neither force nor will, but merely judgment."

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

Response: Any personal beliefs that I may have about that issue or any other issue do not guide my decision-making as a judge. If confirmed, I will faithfully apply the Supreme Court's precedents on all issues.

36. Other than at your hearing before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is

available online or as a record, please include the reference below or as an attachment.

Response: On July 14, 2021, I testified at a confirmation hearing before the Senate Judiciary Committee, in connection with my nomination to be a United States District Judge for the District of Columbia. Video available at https://www.judiciary.senate.gov/meetings/07/07/2021/nominations.

On July 13, 2016, I testified at a confirmation hearing before the Senate Judiciary Committee, in connection with my nomination to be a United States District Judge for the District of Columbia. The transcript is included with my Senate Judiciary Questionnaire.

On May 13, 2009, I testified at a confirmation hearing before the Senate Committee on Homeland Security and Governmental Affairs, in connection with my nomination to be an Associate Judge of the Superior Court of the District of Columbia. The transcript and my opening statement are included with my Senate Judiciary Questionnaire.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: Not that I am aware of. I have money invested in mutual or common investment funds that hold securities. I am not aware of the specific securities held in those funds.

b. Amazon?

Response: Please see my response to Question 38(a).

c. Google?

Response: Please see my response to Question 38(a).

d. Facebook?

Response: Please see my response to Question 38(a).

e. Twitter?

Response: Please see my response to Question 38(a).

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

Response: No.

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

40. Have you ever confessed error to a court?

Response: Yes.

a. If so, please describe the circumstances.

Response: In cases that I handled as an Assistant United States Attorney, assigned to the Appellate Division of the U.S. Attorney's Office for the District of Columbia, there were occasions when the government declined to defend a conviction on the grounds relied upon in the trial court. For example, in the case of *McNeil v. United States*, 933 A.2d 354 (D.C. 2007), the government conceded that error occurred when the prosecutor elicited evidence of the defendant's invocation of her Miranda rights as proof that she was sane, in violation of a Supreme Court precedent; but we took the position that the error was harmless.

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

Response: I believe that judicial nominees have a duty to answer questions posed by

the members of the Senate Judiciary Committee in good faith and to be as forthcoming as possible, consistent with their ethical and professional obligations.

Questions for the Record
Senator John Kennedy

Florence Pan

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

   Response: As a judge for the past 13 years, my judicial philosophy has been to be well prepared, to be open-minded, to give all litigants a meaningful opportunity to be heard, and to apply the law to the facts of each case that comes before me.

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

   Response: In interpreting a federal statute, I begin with the text. If the plain meaning of the language in the statute is clear, that is generally dispositive.

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

   Response: Statements made by a president about a law normally are not a part of the law's legislative history.

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

   Response: Shopping centers are generally owned by private parties, and the First Amendment is "a guarantee only against abridgment by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (citation omitted). Thus, a shopping center that barred the distribution of handbills opposing the Vietnam War did not run afoul of the First Amendment where there was "no such dedication of [petitioner's] privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights." *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551, 570 (1972); *see also Hudgens*, 424 U.S. 507 (holding that employees had no First Amendment right to enter a shopping center in which their employer operated a store to advertise their strike against the employer). State law, however, may limit a shopping center owner's ability to restrict speech on the property. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (holding that a California Supreme Court decision allowing individuals to exercise state-protected rights of expression and petition on a shopping center owner's private property did not violate federally recognized property rights or the First Amendment).

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

   Response: Under the major questions doctrine, where an agency seeks to regulate in an area of vast economic and political significance, the agency must point to clear

congressional authorization for it to regulate in the manner proposed. *See West Virginia v. EPA*, 597 U.S. ___ (2022). Under *Chevron*, where a statute is silent or ambiguous with respect to a particular issue, a reviewing court defers to the reasonable interpretation of an agency charged by Congress with administering the statute being construed. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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

Response: In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), a plurality of the Supreme Court noted that the phrase "the people" in the Fourth Amendment, as well as in the First, Second, 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." The plurality opinion articulated the test in different ways, at various points referring to voluntary presence in the United States; "substantial connections" to the country; and "accept[ance of] some societal obligations." *Id.* at 271–73. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court determined that "the right of the people" in the Second Amendment refers to individuals (not militias); and noted that "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset." The *Heller* Court approvingly quoted *Verdugo-Urquidez* and applied a "strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *Id.* at 581. In dissent, Justice Stevens noted that the majority opinion limited "the people" described in the Second Amendment to a "significantly narrower" group—law-abiding citizens—than those entitled to assert First and Fourth Amendment rights. *Id.* at 644.

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

Response: The Supreme Court has stated: "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." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (citations omitted). I am not aware of any Supreme Court precedent specifically addressing whether noncitizens unlawfully present in the United States are entitled to a right of privacy. Nor am I aware of precedents discussing whether the holding in *Mathews* may be in tension with the plurality opinion in *Verdugo-Urquidez*, discussed in my response to Question 6.

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

Response: The D.C. Circuit has held that non-citizens unlawfully present in the United States are protected by the Fourth Amendment. *See Au Yi Lau v. INS*, 445 F.2d 217, 223

(D.C. Cir. 1971) ("[A]liens in this country are sheltered by the Fourth Amendment in common with citizens . . . ."); *see also INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044–46 (1984) (assuming that undocumented immigrants have Fourth Amendment rights). But after the Supreme Court decided *Verdugo-Urquidez*, as discussed in my response to Question 6, at least one circuit has held that the Fourth Amendment does not apply to undocumented immigrants who do not have significant connections to the United States. *See United States v. Barona*, 56 F.3d 1087, 1093 (9th Cir. 1995).

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

Response: In the context of abortion, the Supreme Court has not addressed the question of when equal protection of the law attaches to a human life.

10. 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 upheld a law that required citizens voting in person to present government-issued photo identification, ruling that even-handed restrictions that protect the integrity and reliability of the electoral process can pass constitutional muster.

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

Response: The constitutional basis for a federal judge to issue a universal injunction appears to be the "judicial power" vested by Article III of the Constitution. To the extent that this authority may be challenged in future litigation, it would be inappropriate for me to comment on whether that authority has been either properly exercised or consistent with the Constitution. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

Senator Mike Lee
Questions for the Record
Florence Y. Pan, Nominee to be United States Circuit Judge for the District of Columbia Circuit

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

Response: As a judge for the past 13 years, my judicial philosophy has been to be well prepared, to be open-minded, to give all litigants a meaningful opportunity to be heard, and to apply the law to the facts of each case that comes before me.

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

Response: In interpreting a federal statute, I would begin with the text. If the plain meaning of the language in the statute were clear, that would be dispositive. I would also rely on precedents of the Supreme Court and the District of Columbia Circuit. If there were no such precedents, I would look to canons of statutory construction, the structure of the statute, precedents from other courts, and legislative history.

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

Response: In interpreting a constitutional provision, I would first examine the text of the provision. I would rely on the precedents of the Supreme Court and the District of Columbia Circuit. I also would consider the original intent and original public meaning of the provision.

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

Response: The text and the original meaning of a constitutional provision play critical roles in interpreting the Constitution. The text is the starting point of any analysis of a constitutional provision. The Supreme Court has often placed great weight on original meaning in interpreting the Constitution. *See*, *e.g.*, *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ___ (2022); *District of Columbia v. Heller,* 554 U.S. 570 (2008).

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

Response: Please 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 generally refers

to the public understanding of the relevant language at the time of enactment. The Supreme Court, however, has recognized and relied upon the evolution of social norms in certain contexts, such as in considering cruel and unusual punishment under the Eighth Amendment. *See Trop v. Dulles*, 356 U.S. 86 (1958) (Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). If confirmed, I would be bound by the precedents of the Supreme Court and the District of Columbia Circuit, regardless of whether that precedent relied on original public meaning.

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

Response: Article III limits the exercise of federal court jurisdiction to cases or controversies. To establish standing to bring a case, a plaintiff must demonstrate (1) that they personally have suffered an actual or threatened injury; (2) that the injury is fairly traceable to the challenged conduct of the defendant; and (3) that the injury is likely to be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

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

Response: In *McCulloch v. Maryland*, 17 U.S. 316, 418 (1819), the Supreme Court held that under the Necessary and Proper Clause, congressional power encompasses implied and incidental powers that are "conducive" to the "beneficial exercise" of an enumerated power. Chief Justice Marshall wrote, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

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

Response: When evaluating the constitutionality of a law that was enacted without reference to a specific enumerated power, I would follow the precedents of the Supreme Court and the District of Columbia Circuit. I would carefully consider the arguments of the parties and my own independent legal research.

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

Response: The Supreme Court has held that some rights are not expressly enumerated in the Constitution but are nevertheless protected under the Due Process Clause of the Fifth and Fourteenth Amendments. Such rights are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

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

Response: Some of the rights that the Supreme Court has held are protected under the doctrine of substantive due process include: the right to use contraception; the right of interracial couples to marry; the right to engage in intimate sexual conduct; and the right of same-sex couples to marry.

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: If confirmed, I will not rely on my personal beliefs in considering the scope of substantive due process protections. The Supreme Court has determined that substantive due process does not include a right to abortion. *See Dobbs v. Jackson Women's Health Organization,* 597 U.S. ___ (2022). In footnote four of *United States v. Carolene Products Co*, 304 U.S. 144, 152 n.4 (1938), Justice Harlan Fiske Stone distinguished between statutes dealing with economic and social-welfare legislation and those that implicate the essence of ordered liberty. Justice Stone wrote that there may be a "narrower scope for operation of the presumption of constitutionality" where non-economic constitutional rights are concerned.

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

Response: The Supreme Court has held that, under the Commerce Clause, Congress may regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that substantially affect interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

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

Response: The Supreme Court has held that strict scrutiny is warranted when the government classifies people based upon "traditional indicia of suspectedness," including those that pertain to an "immutable characteristic determined solely by accident of birth." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974); *see also United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The Supreme Court has determined that race, religion, national origin, and alienage are suspect classes subject to strict scrutiny.

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 are important structural protections that prevent the excessive accumulation of power in any one branch of the government.

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: In reviewing whether the governmental action was lawful, I would rely on the precedents of the Supreme Court and the District of Columbia Circuit. For example,

Justice Robert H. Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), provides a framework for evaluating the exercise of unenumerated executive powers.

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

Response: In considering a case, a judge should apply the governing law to the facts of the case that is before the court. A judge should not allow his or her personal views or emotions to influence his or her rulings.

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

Response: An error in constitutional interpretation is a bad outcome, whether it results in the invalidation or the upholding of a statute. Upholding a statute, however, validates the independent judgment of a coordinate branch of government, and therefore is less disruptive than overturning a statute.

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: One reason that fewer statutes were struck down between 1789 and 1857 is that Congress passed far fewer statutes during that period of time. The downside of "aggressive" exercise of judicial review is that it results in the overturning of laws that have been passed and approved by democratically elected officials in the legislative and executive branches of the government. The downside of judicial passivity is that it suggests a failure by the courts to uphold their obligation to review legislation to ensure that it comports with the requirements of the Constitution.

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

Response: I understand judicial review to describe the routine process of courts considering and ruling upon claims that challenge the lawfulness of legislation or government conduct. I understand judicial supremacy to refer to the principle that the Supreme Court's interpretation of the Constitution is authoritative.

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

Response: As a sitting judge and as a nominee, it would not be appropriate for me to comment on how elected officials should fulfill their duties. The rule of law, however, requires all members of society to respect duly rendered judicial decisions.

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 is the duty of a judge to apply the law to the facts of the case before the court. In this respect, a judge does not employ force or will, but uses only judgment to interpret the law, as it was written by the legislative branch and approved by the executive. Officials in the legislative and executive branches may seek to implement the will of the people who elected them, through legislation and policy initiatives. That is not the function of a judge.

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

Response: As a lower court judge, it is my duty to apply binding precedents. If confirmed, I will apply all precedents of the Supreme Court and the District of Columbia Circuit. If a party raises a good faith challenge to a precedent, I am nevertheless bound to apply the precedent. Only the Court of Appeals sitting en banc or the Supreme Court would have the authority to overrule the precedent.

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: Group identity is not one of the factors that may be considered in imposing a sentence under 18 U.S.C. § 3553(a).

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

Response: I am not familiar with this quote, or the context in which it was made. I equate

the concept of equity with fairness.

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

Response: I understand "equity" to mean fairness. I understand "equality" to mean treating people in the same way.

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

Response: I am not aware of any Supreme Court decision that has considered or applied the Equal Protection Clause to the precise definition of "equity" from the above quote.

27. **How do you define "systemic racism?"**

Response: I understand "systemic racism" to refer to a form of racism that is embedded through laws and regulations within a society or an organization.

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

Response: I understand "critical race theory" to refer to a body of legal scholarship that seeks to critically examine the law as it intersects with issues of race.

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

Response: I understand "critical race theory" to be an academic subject. I understand "systemic racism" to be a label that seeks to describe a form of racism.

Senator Ben Sasse
Questions for the Record for Florence Y. Pan
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
June 22, 2022

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

   Response: No.

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

   Response: As a trial judge for the past 13 years, my judicial philosophy has been to be well prepared, to be open-minded, to give all litigants a meaningful opportunity to be heard, and to apply the law to the facts of each case that comes before me.

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

   Response: I do not use labels such as "originalist" to describe my view of the law. I believe that original public meaning is a critical consideration in interpreting the Constitution.

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

   Response: I do not use labels such as "textualist" to describe my view of the law. I believe that the text is the starting point and the foundation of all constitutional and statutory interpretation.

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

   Response: I do not use labels such as "living document" to describe my view of the Constitution. I believe that the Constitution has a fixed quality and is an enduring document that Americans can rely upon to safeguard fundamental rights. In addition, the Constitution has been interpreted by the Supreme Court to apply to issues and facts of first impression.

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 Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg, who were the first women appointed to the Supreme Court. They have been important role

models for me. Both of them overcame many barriers and challenges in their professional lives, and they were exemplary public servants.

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

   Response: An appellate court, sitting en banc, may overrule a precedent of the court. Rule 35 of the Federal Rules of Appellate Procedure provides that an "en banc 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."

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: In interpreting a federal statute, I would begin with the text. If the plain meaning of the language in the statute were clear, that would be dispositive. I would also rely on precedents of the Supreme Court and the District of Columbia Circuit. If there were no such precedents, I would look to canons of statutory construction, the structure of the statute, precedents from other courts, and legislative history. I would not look to general principles of justice.

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: This is not a factor that may be considered in imposing a sentence under 18 U.S.C. § 3553(a).

Questions from Senator Thom Tillis
for Florence Y. Pan
Nominee to be United States Circuit Judge for the District of Columbia 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 and preferences in deciding cases. Judicial activism is not appropriate.

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

   Response: I believe that impartiality should be expected and required of any 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: When faithfully applying the law, the outcome is not always the most desirable. Nevertheless, a judge's duty is to faithfully apply the law in every instance. It is the legislature's job to amend the law if the outcomes of the law's application are undesirable.

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 apply all applicable precedents of the Supreme Court and the District of Columbia Circuit in considering challenges under the Second Amendment. *See*, *e.g.*, *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ___ (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244 (D.C. Cir. 2011).

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 apply all applicable precedents of the Supreme Court and the District of Columbia Circuit in evaluating challenges under the Second Amendment. The Supreme Court considered a challenge to COVID-19 restrictions that burdened constitutional rights in *Tandon v. Newsom*, 593 U.S. ___ (2021). The Court applied strict scrutiny to those restrictions and granted an injunction against enforcing the restrictions with respect to persons exercising their rights under the Free Exercise Clause.

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 the precedents of the Supreme Court and the District of Columbia Circuit with respect to claims of qualified immunity. The Supreme Court has held that government officials are entitled to qualified immunity unless they have violated a plaintiff's "clearly established" statutory or constitutional rights.

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

    Response: As a sitting judge and as a nominee, it would not be appropriate for me to comment on whether the law of qualified immunity provides sufficient protection for law enforcement officers. If confirmed, I will apply all applicable legal precedents. Whether additional protections are needed is a matter for the legislature to consider.

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

    Response: Please see my response to Question 10.

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: As a judge for the past 13 years, and as an Assistant United States Attorney for the 10 years before that, I have never had occasion to substantively consider or apply copyright law.

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

Response: I have not considered or applied the Digital Millennium Copyright Act.

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

Response: I have not addressed 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: I have not considered or addressed free speech in the context of intellectual property issues, including copyright.

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: In interpreting a federal statute, I would begin with the text. If the plain meaning of the language in the statute were clear, that would be dispositive. I would also rely on precedents of the Supreme Court and the District of Columbia Circuit. If there were no such precedents, I would look to canons of statutory construction, the structure of the statute, precedents from other courts, and legislative history.

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 D.C. Circuit has held that interpretations issued by the Copyright Office after formal adjudication or notice-and-comment procedures are "entitled to deference under *Chevron*." *SoundExchange, Inc. v. Muzak LLC*, 854 F.3d 713, 718 (D.C. Cir. 2017) (citing *Cablevision Systems Development Company v. Motion Picture Association of America, Inc.*, 836 F.2d 599, 609 (D.C. Cir. 1988)). The

Copyright Office's "interpretation of its own rules is entitled to 'substantial deference' and will be set aside only if 'plainly erroneous or inconsistent with the regulation.'" *Universal City Studios LLLP v. Peters*, 402 F.3d 1238, 1242 (D.C. Cir. 2005) (quoting *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994)). When the position of the Copyright Office is set forth instead in the Compendium of U.S. Copyright Office Practices or some other non-binding administrative manual, its interpretation "at most merits deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). That 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).

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 judge for the past 13 years, and as an Assistant United States Attorney for the 10 years before that, I have not had the opportunity to review the cases that would be relevant to responding to this question. In any event, to the extent that this question raises an issue that could come before the court, it would not be appropriate for me to comment on how the issue might be resolved. *See* Code of Conduct for United States Justices, Canon 3(A)(6).

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: As a sitting judge and as a nominee, it would not be appropriate for me to opine generally about how best to interpret and apply the law in this area. If I am confirmed and a case raising this issue comes before the court, I will thoroughly study and review the relevant authorities and precedents before determining how to interpret and apply the law, given the facts of the case.

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 14(a).

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: I do not think that "judge shopping" or "forum shopping," as defined in the question, is appropriate. The random assignment of cases to judges promotes public confidence in the fairness and impartiality of the judiciary.

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 15(a).

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

Response: I do not think that "forum selling," as defined in the question, would be appropriate under any circumstances.

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: The question of proper venue is resolved on a case-by-case basis, in accordance with applicable precedents and rules. Where plaintiffs have a choice of venue, they may prefer a jurisdiction that has expertise in a particular area of law. If the courts in such a jurisdiction apply the law in a fair and even-handed manner, the number of cases in the jurisdiction should not necessarily affect the public's perception of fairness.

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: The issue of whether procedures and rules adopted in a particular district have adversely affected the administration of justice is best addressed by rule-making and policy-making bodies, after appropriate investigation and fact-finding.

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(a).

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: A writ of mandamus affords parties an important pathway to correct error in a legal proceeding. A judge should follow precedents established by a reviewing court, including those set forth in a writ of mandamus.

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

Response: Multiple issuances of a writ of mandamus on the same issue to the same judge would be concerning. It is important for judges to adhere to precedents and rulings made by a reviewing court.