Senator Chuck Grassley, Ranking Member
Questions for the Record
Hon. Kai N. Scott
Nominee to the U.S. District Court for the Eastern District of Pennsylvania

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

   Response: Black's Law Dictionary provides two distinct definitions of "superprecedent": First, it is "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation." Second, it is "precedent that has become so well established in the law by a long line of reaffirmations that it is very difficult to overturn it." *Precedent*, Black's Law Dictionary (11th ed. 2019). However, I have never used this term, and I was unable to find "super precedent," "superprecedent," or "super-precedent" in any Supreme Court or Third Circuit opinions. If confirmed, I would follow all binding Supreme Court and Third Circuit precedent.

2. **In your opinion, what qualifications, qualities and characteristics should a lawyer seeking elevation to the federal bench exhibit?**

   Response: I believe it is within the President's power to nominate candidates to the federal bench and it is best left to Congress to determine what qualifications, qualities, and characteristics a lawyer must and should exhibit in order to be confirmed to the federal bench. I have no opinion as to what these qualifications, qualities, and characteristics should be.

3. **Please define the term 'victimless crime' and please explain, with specificity, what types of crimes qualify as 'victimless crimes'.**

   Response: The term "victimless crime" and what types of crimes might qualify as "victimless crimes" are matters of debate among policymakers and public opinion. According to Black's Law Dictionary, it is "[a] crime that is considered to have no direct victim, usu[ally] because only consenting adults are involved." *Crime*, Black's Law Dictionary (11th ed. 2019). If confirmed, I would be bound by applicable criminal statutes as well as binding precedent of the Supreme Court and Third Circuit, and I would apply that law even in cases that involve what is colloquially referred to as "victimless crimes."

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

   Response: I am unfamiliar with the context in which Justice Brown Jackson said this in 2013. Black's Law Dictionary defines "living constitutionalism" as a doctrine in which "the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). I have never referred to myself as a "living constitutionalist" – I have

never adopted any specific theory of constitutional interpretation. However, my understanding is that the Constitution has an enduring and fixed quality, unless it is amended through the Article V process. I would otherwise apply all binding Supreme Court and Third Circuit precedent.

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

   Response: Black's Law Dictionary has nine definitions for "equity," and only one of them seems applicable to social equity: "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019). I have no personal definition of social equity and am unaware of any accepted jurisprudential definition of the term or its key principles. Because the definition of "social equity" is subject to rigorous social and political debate, it is best left to policymakers to determine what it means and whether law or policy should take it into account. But if any binding Supreme Court or Third Circuit precedent articulates principles of social equity, then I would faithfully apply that precedent.

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

   Response: Threatening Supreme Court Justices is wrong. Moreover, threatening a Supreme Court Justice may constitute a crime. If I were to preside over a criminal prosecution of a defendant who has allegedly threatened a Supreme Court Justice, I would apply any binding Supreme Court and Third Circuit precedent to determine whether a crime occurred.

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

   Response: A fundamental right that is not enumerated in the Constitution may be protected by the Due Process Clause if it passes the *Glucksberg* test: The right must be (1) "deeply rooted in this Nation's history and tradition" and (2) "implicit in the concept of ordered liberty." *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations and quotations omitted). The Supreme Court recently applied this test in *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228 (2022). I would follow all binding Third Circuit and Supreme Court precedent to determine whether a party's asserted right is a fundamental right.

8. **While defending one of your clients, how many times have you offered the second amendment as a support for your arguments on their behalf? Please also provide the citations for those case.**

   Response: I do not recall ever explicitly citing the Second Amendment as support for an argument that I have made on behalf of a client.

9. **As a general matter, if a judge encounters unsettled Supreme Court precedent, should she anticipate where the Supreme Court will end up, or simply do her best to apply what the Supreme Court has already held?**

   Response: If a judge encounters unsettled Supreme Court precedent, she should first apply all binding Supreme Court and, in this jurisdiction, Third Circuit precedent. If binding precedent is insufficient to settle the issue, then the judge may consider analogous Supreme Court and Third Circuit precedent and even persuasive precedent in other circuits. District judges generally should not forecast how the Supreme Court will ultimately resolve any unsettled issue.

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

    Response: 18 U.S.C. § 1507 criminalizes picketing or parading (1) in or near a United States court building or (2) in or near a building or residence occupied or used by a United States judge, juror, witness, or court officer. Such picketing or parading is a criminal activity if the person commits it with the intent to influence any judge, juror, witness, or court officer in the discharge of his or her duty. Criminal picketing or parading is punishable by a fine or up to one year of incarceration, so it is a misdemeanor offense.

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

    Response: To my knowledge, the Supreme Court has not squarely addressed whether 18 U.S.C. § 1507 is facially constitutional, nor has the Third Circuit reached this issue. As a sitting criminal judge, it would be inappropriate for me to opine on the facial constitutionality of a criminal statute where there is no clear binding precedent and no specific case before me. Additionally, as a federal district court nominee, it would be inappropriate for me to prejudge an issue that could theoretically come before me.

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

    Response: If confirmed, I would apply the Constitution, applicable federal or state law, and binding precedent of the Supreme Court and the Third Circuit to the facts of each specific case. I would approach each case with an open mind, and treat all people and parties who appear before me or engage with my chambers or courtroom with respect. To my knowledge, no Supreme Court decision from the last 50 years exemplifies this judicial philosophy better or worse than any other decision, because I am unaware of any case in which the Justices did not adhere to the same basic principles.

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

Response: If confirmed, I would apply the Constitution, applicable federal or state law, and binding precedent of the Supreme Court and the Third Circuit to the facts of each specific case. I would approach each case with an open mind, and treat all people and parties who appear before me or engage with my chambers or courtroom with respect. To my knowledge, no Third Circuit Court decision from the last 50 years exemplifies this judicial philosophy better or worse than any other decision, because I am unaware of any case in which the Judges did not adhere to the same basic principles.

14. **You have stated your opposition to incarceration, noting a "resistance to impose sentences that are alternatives to incarceration, when appropriate . . .". In your opinion, what types of crimes, if any, warrant a term of incarceration?**

    Response: I do not believe that I have ever stated that I am opposed to incarceration. As a sitting state court judge for the past seven years, I have imposed sentences that require incarceration on numerous occasions. The law requires individualized sentencing and judges must consider numerous factors in determining whether incarceration or some other alternative is appropriate. As a sitting state court judge and potential District Court judge, I don't believe it would be appropriate for me to list what types of crimes, in a categorical manner, warrant a term of incarceration.

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

    Response: Questions about reallocating funds away from police departments to other support services are best left to policymakers and legislatures to determine. If confirmed, I would never substitute my own beliefs for decisions made by the legislative branch. I would instead apply binding precedent of the Supreme Court and the Third Circuit.

16. **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: I am not sure what is most important during the COVID-19 pandemic. I think this is a matter best left for policymakers and researchers to determine. If I am fortunate to become a federal judge, should a case ever come before me that makes claims involving "violent, gun re-offenders," community safety, and COVID-19 concerns, I will closely review any facts presented to me and apply any binding precedent from the Supreme Court and the Third Circuit. I can say that bail, sentencing, and other prisoner-release determinations are extremely fact-specific inquiries and require considerations of many factors.

17. **Would you describe a method of interpreting enumerated individual constitutional rights that depends on their original public meaning at the time of their enumeration as "rigid"?**

Response: No, because I have no opinion on or preferred method of constitutional interpretation.

18. **Would you describe a method of interpreting individual constitutional rights that depends on them being "deeply rooted in the nation's history" as "rigid"?**

    Response: No, because I have no opinion on or preferred method of constitutional interpretation.

19. **What or how much emphasis should a judge place on the suffering of the victim when crafting a sentence for a criminal defendant? Please explain.**

    Response: Pursuant to 18 U.S.C. § 3553(a), one of the many factors that federal judges must consider at sentencing is the nature and circumstances of the offense. The nature and circumstances of the offense encompass the impact of the crime on the victim. However, I cannot make a categorical claim about how much emphasis should be placed on this factor relevant to other factors; each sentencing decision is a fact-based inquiry that involves weighing many factors.

20. **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 judicial nominee and a sitting judge, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. However, a few Supreme Court cases are so fundamental and so widely legally and societally accepted that the issues presented in those cases will not likely be relitigated. *Brown v. Board of Education* is one of those very few cases, and on that basis, I can comfortably state that *Brown v. Board of Education* was correctly decided.

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

       Response: As a judicial nominee and a sitting judge, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. However, a few Supreme Court cases are so fundamental and so widely legally and societally accepted that the issues presented in those cases will not likely be relitigated. *Loving v. Virginia* is one of those very few cases, and on that basis, I can comfortably state that *Loving v. Virginia* was correctly decided.

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

       Response: As a judicial nominee and a sitting judge, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If I

am fortunate to be confirmed, I would apply all binding Supreme Court and Third Circuit precedent.

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

Response: As a judicial nominee and a sitting judge, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If I am fortunate to be confirmed, I would apply all binding Supreme Court and Third Circuit precedent.

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

Response: As a judicial nominee and a sitting judge, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If I am fortunate to be confirmed, I would apply all binding Supreme Court and Third Circuit precedent.

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

Response: As a judicial nominee and a sitting judge, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If I am fortunate to be confirmed, I would apply all binding Supreme Court and Third Circuit precedent.

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

Response: As a judicial nominee and a sitting judge, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If I am fortunate to be confirmed, I would apply all binding Supreme Court and Third Circuit precedent.

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

Response: As a judicial nominee and a sitting judge, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If I am fortunate to be confirmed, I would apply all binding Supreme Court and Third Circuit precedent.

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

Response: As a judicial nominee and a sitting judge, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If I am fortunate to be confirmed, I would apply all binding Supreme Court and Third Circuit precedent.

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

Response: As a judicial nominee and a sitting judge, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If I am fortunate to be confirmed, I would apply all binding Supreme Court and Third Circuit precedent.

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

Response: As a judicial nominee and a sitting judge, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If I am fortunate to be confirmed, I would apply all binding Supreme Court and Third Circuit precedent.

21. **In a case of first impression should the Constitution be interpreted according to how it was understood by the public at the time of enactment? If not, how do you think it should be interpreted?**

Response: Yes, the public's understanding of the Constitution at the time the Constitution was enacted is often relevant in cases of first impression. If confirmed, my analysis of a matter of first impression would begin with an application of all binding Supreme Court and then Third Circuit precedent. If no precedent controls, I would be bound to follow the plain text of the Constitution. If the plain text were unclear, then I would look to the original public meaning of the Constitution. If the original public meaning of the Constitution were clear and resolved the issue, then that would end my legal analysis; I would adopt that original public meaning.

22. **What role should empathy play in interpreting the law?**

Response: Empathy has no role in the interpretation of laws. If I were fortunate to become confirmed as a District Court judge, empathy would have no role in my interpretation or application of all binding Supreme Court and Third Circuit precedent to the facts before me.

23. **When campaigning for your judicial position on the Pennsylvania Court of Common Pleas, you stated, "I am committed to serving at least one full term (10 years) before seeking a judicial post at a higher level. I think that it is imperative to gain at least ten years of experience as a Judge in the Court of Common Pleas before attempting to gain experience in a different area or higher court." You were elected in November 2015—you have approximately seven years of experience in the Court of Common Pleas. What has changed about your assessment of the level of experience needed to successfully seek a higher judicial post compared to when you made this promise?**

Response: I do not recall the context of the question posed, nor this answer, I believe that when I made this statement that I was referencing seeking a higher position at the state court appellate level or bench. I am now seeking confirmation to be a judge at the trial

court level. I believe that my position as a state court trial judge for the past seven years, as well as my ten years as a federal criminal trial attorney has given me the vast experience that I need to make a successful transition to the role of a federal trial court judge.

24. **You have stated that "the law should be utilized as an agent to change the norms of our society to better us all."**

    a. **Please define judicial activism.**

    Response: Black's Law Dictionary defines "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu[ally] with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Black's Law Dictionary (11th ed. 2019).

    b. **What kinds of norms do you intend to "change" if confirmed as a District Court judge?**

    Response: If confirmed as a District Court judge, I do not intend to change any norms. I will faithfully apply the Constitution, any other applicable laws and statutes, and the binding precedents of the Supreme Court and the Third Circuit Court of Appeals in each case that appears before me.

25. **You have provided commentary about sentencing, explaining that "[t]he sentence depends on the crime. On what the crime is, what the harm is to the community, and I would look at the individual. I'd try to balance the harm to society and who the individual is. It's not one size fits all. There are too many variables." Your statements indicate a policy issue with the goals of sentencing. How can I be assured that you will sentence defendants based on the law and not on your personal assessment of the individual and his/her crime?**

    Response: I have no policy issue with the goals of sentencing. Each sentencing decision is a fact-specific inquiry. District Court judges must consider the factors related to the goals of sentencing pursuant to 18 U.S.C. § 3553(a), including the history and characteristics of the defendant and the nature and circumstances of the crime. If confirmed, I will faithfully apply those factors, as well as all of the other factors to be considered at sentencing, when determining the appropriate sentence to be imposed.

26. **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.

27. **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: Yes, in early February 2021 I was contacted via email communication by an individual associated with the American Constitution Society. That individual provided information regarding the application process to become a United States district judge. In mid-February, I was contacted via email by the same individual following up on the information that had been sent to me. I responded to the follow-up the next day in an email, and then received an email thanking me for my response. There have been no further communications with anyone from the American Constitution Society.

28. **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.

29. **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.

30. **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, advise, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

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

       Response: No.

    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara**

Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

Response: No.

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

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

       Response: No.

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

       Response: No.

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

       Response: No.

32. **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.

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

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

Response: No.

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

Response: No.

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

Response: No.

34. **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.

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

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: On February 8, 2021, I submitted to the offices of Senator Robert Casey and Senator Patrick Toomey a Questionnaire for consideration to fill a vacancy on the United States District Court for the Eastern District of Pennsylvania. Senator Casey's staff later contacted me to arrange an interview with a selection committee. The selection-committee interview occurred on May 18, 2021. I then interviewed with members of Senator Casey's staff on June 23, 2021. Next, I interviewed with Senator Casey on July 22, 2021. On August 17, 2021, I interviewed with members of Senator Toomey's staff. I then interviewed with Senator Toomey on August 31, 2021. Subsequently, attorneys from the White House Counsel's Office interviewed me on February 15, 2022. I have remained in contact with officials from the Office of Legal Policy at the Department of

Justice since February 16, 2022. On July 12, 2022, the President announced his nomination of me to the United States District Court for the Eastern District of Pennsylvania.

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

    Response: I received these questions on September 14, 2022. I prepared my own responses to the best of my ability after conducting any necessary legal research and reviewing applicable personal records, including my Senate Judiciary Questionnaire. I received feedback from officials at the Office of Legal Policy at the Department of Justice. I considered that feedback while I finalized my answers. I submitted my responses on September 19, 2022.

Senator Mazie K. Hirono
Questions for the Record

Judge Kai N. Scott
Nominee to the U.S. District Court for the Eastern District of Pennsylvania

1. **As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:**

   a. **Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

      Response: No.

   b. **Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

      Response: No.

Senator Mike Lee
Questions for the Record
Judge Kai N. Scott
Nominee to the U.S. District Court for the Eastern District of Pennsylvania

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

   Response: If I am fortunate to be confirmed as a federal district judge, I would apply the Constitution, applicable federal or state law, and binding precedent of the Supreme Court and the Third Circuit to the facts of each specific case. I would approach each case with an open mind, and treat all people and parties who appear before me or engage with my chambers or courtroom with respect.

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

   Response: If confirmed, I would be obligated to follow Supreme Court and Third Circuit precedent regarding interpreting statutory provisions. In a case of first impression, I would first start with the text of the statute. If the statute is unambiguous, there would be no need for further analysis. If the text is ambiguous, I would then consider canons of construction, persuasive precedent from other circuits, and if necessary legislative history (such as committee report) that may provide clear evidence of congressional intent.

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

   Response: I would first look to any established and binding precedent by the Supreme Court and the Third Circuit. If no binding precedent existed, I would analyze the plain meaning of the text. If the text was ambiguous, I would consult any persuasive authority from other circuits that may be analogous to the provision being analyzed.

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

   Response: Judges must apply the unambiguous language of a constitutional provision. The Supreme Court has affirmed that the meaning of the Constitution is fixed, absent changes made through the Article V amendment process. *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). If confirmed, I would follow the binding precedent of the Supreme Court and the Third Circuit regarding constitutional interpretation.

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 Supreme Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). If confirmed, I would follow all binding Supreme Court and Third Circuit precedent concerning interpretation of federal statutes and constitutional provisions.

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

   Response: The elements of Article III standing are: (1) the plaintiff must have suffered an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant; and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo Inc. v. Robins*, 578 U.S. 330, 338 (2016).

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

   Response: In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court recognized that Congress has implied powers beyond those that are specifically enumerated in the Constitution. Congress has authority to carry out these powers through the Necessary and Proper Clause.

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

   Response: If confirmed, I would apply binding Supreme Court and Third Circuit precedent to evaluate the constitutionality of a law that Congress has enacted.

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

   Response: Generally speaking, a fundamental right that is not enumerated in the Constitution may be protected by the Due Process Clause of the Fourteenth Amendment if it passes the *Glucksberg* test: The right must be (1) "deeply rooted in this Nation's history and tradition" and (2) "implicit in the concept of ordered liberty." See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations and quotations omitted). The Supreme Court recently applied this test in *Dobbs v. Jackson Women's Health Org.*,

142 S. Ct. 2228 (2022). I would follow all binding Third Circuit and Supreme Court precedent to determine whether a party's asserted right is a fundamental right.

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

    Response: Again, generally speaking, a fundamental right that is not enumerated in the Constitution may be protected by the Due Process Clause of the Fourteenth Amendment if that right is (1) "deeply rooted in this Nation's history and tradition" and (2) "implicit in the concept of ordered liberty." See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations and quotations omitted). The Supreme Court has determined that consenting adults have certain fundamental rights that are protected under substantive due process, including: the right to use contraceptives, see *Griswold v. Connecticut*, 318 U.S. 479 (1965); the right to enter into an interracial marriage, *Loving v. Virginia*, 377 U.S. 1 (1967); the right to engage in private sexual conduct, *Lawrence v. Texas*, 539 U.S. 558 (2003); and the right to enter into a same-sex marriage, *Obergefell v. Hodges*, 576 U.S. 644 (2015). Additionally, the Supreme Court has acknowledged the rights to direct the teaching and upbringing of one's own children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and to be free from forced sterilization, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). This is a nonexhaustive list.

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

    Response: My personal beliefs about personal rights and economic rights are irrelevant to my interpretations of law or applications of laws to particular facts. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), overruled the Supreme Court's prior decisions that arguably articulated a substantive due process right to abortion (*Roe v. Wade* and *Planned Parenthood v. Casey*). Several cases have overruled *Lochner v. New York*, insofar as it claimed that substantive due process protects economic rights. *See, e.g., West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

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

    Response: The Commerce Clause authorizes Congress to regulate: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) those activities having a substantial relation to interstate commerce. *Gonzalez v. Raich*, 545 U.S. 1 (2005).

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

Response: The Supreme Court has held that race, religion, national origin, and alienage are suspect classes that must survive the strict scrutiny analysis.

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

    Response: Our constitutional system of checks and balances and separation of powers prevent power from being amassed by any single one of the three branches of government. Thus, preventing abuse of power by a single branch.

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

    Response: If confirmed, I would listen to the arguments of counsel and review the submission of the parties. I would then apply the Supreme Court and Third Circuit precedent to effectively rule on the issue before me.

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

    Response: Empathy has no role in the interpretation of laws or in a judge's consideration of a case. If confirmed, empathy would have no role in my interpretation or application of all binding Supreme Court and Third Circuit precedent to the facts before me. However, judges should treat all people with dignity and respect in the courtroom.

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

    Response: Both these outcomes should be avoided, as they are equally unacceptable.

18. **From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?**

    Response: I have no opinion on this, as I have not researched this issue, and do not have sufficient information on which to base an opinion.

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

    Response: I have no personal definitions of "judicial review" and "judicial supremacy," and I do not have an opinion about the degree to which these terms differ. Black's Law

Dictionary defines “judicial review” as “[a] court's power to review the actions of other branches or levels of government; especially], the courts' power to invalidate legislative and executive actions as being unconstitutional.” Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines “judicial supremacy” as “[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, especially] U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states.” Black's Law Dictionary (11th ed. 2019).

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

    Response: Elected state and federal legislators and executive officers take an oath to uphold the Constitution. They are bound to follow the decisions of the Supreme Court interpreting the Constitution.

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: Judicial officers are bound by their duties to only consider the facts and evidence related to a case and the applicable law in making their decisions. They should not consider their own beliefs or empathy or sympathy when making rulings or deciding a case.

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

    Response: If confirmed, I would apply all binding precedent of the Supreme Court and Third Circuit. As a judicial nominee, it would be inappropriate for me to question the precedent established by higher courts.

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

    Response: None.

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

    Response: I am unfamiliar with the context in which the Biden Administration has developed this definition. Black's Law Dictionary defines "equity" in relevant part as "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019). I have no personal definition of "equity," nor do I have a personal opinion of which definition is more accurate. Further, my personal opinion would be irrelevant to my interpretation of the law. If confirmed, I would follow all binding precedent of the Supreme Court and the Third Circuit if the meaning of the term "equity" is ever relevant to a case before me.

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

    Response: Black's Law Dictionary defines "equity" in relevant part as "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines "equality" as "[t]he quality, state, or condition of being equal." Black's Law Dictionary (11th ed. 2019). The two definitions are not identical, but I have no personal opinion about whether there is a material difference in these terms. Further, my personal opinion would be irrelevant to my interpretation of the law. If confirmed, I would follow all binding precedent of the Supreme Court and the Third Circuit if the meanings of the terms "equity" and "equality" are ever relevant to a case before me.

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

    Response: The Fourteenth Amendment prohibits a state from denying "any person within its jurisdiction the equal protection of the laws." If confirmed, and if this matter ever came before me, I would follow all binding precedent of the Supreme Court and the Third Circuit.

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

    Response: I do not have a personal definition of "systemic racism." Black's Law Dictionary does not define "systemic racism," but it defines "systemic discrimination" as "[a]n ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society or a particular industry, profession, company, or geographic location."

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

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

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

    Response: I do not personally distinguish the terms "critical race theory" from "systemic racism," because I have not developed personal definitions of either term and have not thoroughly researched this topic.

30. **In a judicial candidate questionnaire, you stated "[W]hen necessary, the law should be utilized as an agent to change the norms of our society to better us all." Does this apply to judges? If so, how?**

    Response: Policy makers and legislators can certainly use the law to change the norms of society. However, judges are limited in their role as fair and neutral arbiters of the law. As a current sitting state court judge, and if confirmed as a District Court judge, I would faithfully apply the Constitution, current applicable laws and statutes, and the precedent of the Supreme Court and the Third Circuit in each case that appears before me.

31. **When asked about running for an elected judgeship, you stated "If you're running to go on an ego trip, I wouldn't advise you to go through it. But, if you're running to be a change agent, it's worth it." What is a "change agent?" Do you believe that the proper role of a judge is to be a "change agent?"**

    Response: Yes. While I understand that a "change agent" may have multiple definitions, I meant this in the sense that I would never let my career run stagnant or let ego and pride overtake my commitment to learning and growing and working as hard as I can to resolve cases as a jurist. I do not have any opinions about the proper role of a judge, beyond my answer to Question 1 that judges must apply binding precedent to facts fairly and open-mindedly and treat all people and parties respectfully. A judge can certainly fulfill that role without identifying as a "change agent."

32. **In U.S. v. Gormley, you represented a defendant convicted of distribution and possession of thousands of images and videos of child pornography that depicted children as young as infants engaged in sexually explicit conduct, "including intercourse, oral and anal sex, bondage, urination and bestiality." In this case, you argued for a downward departure from the recommended range under the sentencing guidelines based on mental and emotional distress suffered by the defendant. How would you view this case differently as a judge? What consideration would you give to the physical, mental and emotional distress suffered by the child and infant victims compared to the mental and emotional distress of the defendant?**

    Response: Crimes against children are some of the worst imaginable. I do not recall all of the specifics related to this case, as I believe I represented Mr. Gormley over fifteen years ago. I do recall that I advocated for a downward departure or mitigated sentence for the Defendant based on his mental health history, abuse of alcohol, and other physical health problems. In my role as an advocate for Mr. Gormley, I was duty bound by the Rules of Professional Responsibility to zealously advocate for my client. My role as a judge is quite different from that of an advocate. In the last seven years as a state trial court judge, I have always been fair and impartial, and I will continue to do so if confirmed to be a United States District Judge. Further, I would faithfully consider all of the sentencing factors that are required by 18 U.S.C. § 3553(a) including the nature and circumstances of the offense, the history and characteristics of the defendant, and other factors enumerated by the statute.

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

<u>Questions for the Record for Judge Kai N. Scott, Nominee for the Eastern District of Pennsylvania</u>

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.

Senator Ted Cruz
Questions for the Record
Ms. Kai N. Scott
Nominee to the U.S. District Court for the Eastern District of Pennsylvania

1. **Is racial discrimination wrong?**

   Response: Any discrimination that violates constitutional or statutory protections is unlawful. I would apply binding precedent of the Supreme Court and Third Circuit to determine whether alleged instances of racial discrimination violate the law.

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

   Response: It would be inappropriate for me to offer an opinion about whether there are unarticulated unenumerated rights in the Constitution that the Supreme Court can or should identify in the future. If confirmed, I would apply binding Supreme Court and Third Circuit precedent to adjudicate any party's claim that an unenumerated constitutional right exists.

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

   Response: If confirmed, I would apply the Constitution, applicable federal or state law, and binding precedent of the Supreme Court and the Third Circuit to the facts of each specific case. I would approach each case with an open mind, and treat all people and parties who appear before me or engage with my chambers or courtroom with respect. I am aware of no particular Supreme Court Justice who aligns with this philosophy more than any other Supreme Court Justice; I believe that all Justices follow these very basic principles.

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

   Response: Black's Law Dictionary defines "originalism" as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). No, I would not characterize myself as an "originalist." I have never adhered to any particular theory of constitutional interpretation.

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

   Response: Black's Law Dictionary defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." No, I would not characterize myself as an "living constitutionalist." I have never adhered to any particular theory of constitutional interpretation.

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

   Response: Yes. First, I would faithfully apply all binding Supreme Court and then Third Circuit precedent. If no precedent controls, I would be bound to follow the plain text of the Constitution. If the plain text were unclear, then I would look to the original public meaning of the Constitution. If the original public meaning of the Constitution were clear and resolved the issue, then that would end my legal analysis; I would adopt that original public meaning.

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 is usually not relevant to a jurist's work in determining the meaning of the Constitution or a statute. If confirmed, I would comply with any applicable law's directives to consider current public understandings of the Constitution or a statute. Absent such a clear directive, I would faithfully apply all binding precedent of the Supreme Court and Third Circuit, which is not rooted in jurists' guesses about the public's future understandings of the Constitution or the law. I would consider persuasive, non-binding precedent and reasoning only if no binding precedent settles an issue of first impression.

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

   Response: No. I believe the Constitution is fixed and cannot change unless it is amended through the Article V amendment process.

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

Response: Yes, the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* is binding precedent.

a. Was it correctly decided?

Response: As a judicial nominee and a sitting judge, it is generally inappropriate for me to comment on whether any Supreme Court case was correctly decided. If confirmed, I would apply all binding Supreme Court and Third Circuit precedent.

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

Response: Yes, the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* is binding precedent.

a. Was it correctly decided?

Response: As a judicial nominee and a sitting judge, it is generally inappropriate for me to comment on whether any Supreme Court case was correctly decided. If confirmed, I would apply all binding Supreme Court and Third Circuit precedent.

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

Response: Yes, the Supreme Court's ruling in *Brown v. Board of Education* is binding precedent.

a. Was it correctly decided?

Response: As a judicial nominee and a sitting judge, it is generally inappropriate for me to comment on whether any Supreme Court case was correctly decided. However, a few Supreme Court cases are so widely legally and socially accepted that the issues are not likely to be re-litigated. Such is the case with *Brown v. Board of Education*. On that basis, I am comfortable stating that this matter was correctly decided. If confirmed, I would apply all binding Supreme Court and Third Circuit precedent.

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

Response: 18 U.S.C. § 3142(e)(3) lists several offenses that trigger a rebuttable presumption in favor of the defendant's pretrial detention, if a judicial officer finds that there is probable cause to believe that the defendant has committed the offense. These

offenses include: (1) certain drug offenses carrying maximum penalties of at least 10 years of incarceration; (2) certain acts of terrorism; (3) acts involving slavery or human trafficking that carry a maximum penalty of at least 20 years of incarceration; and (4) many crimes involving minor victims. Additionally, 18 U.S.C. § 3142(e)(2) specifies that certain prior convictions can trigger a presumption in favor of pretrial detention.

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

   Response: Implicit in the phrasing of 18 U.S.C. § 3142 is Congress's belief that the commission of certain crimes are strong indicators that the defendant poses a threat to community safety or that the defendant is unlikely to appear in court. I am unaware of any more specific policy rationales underlying this 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. Supreme Court jurisprudence generally directs federal courts to find that a law violates the Free Exercise Clause of the First Amendment if a law's burden upon an individual's free exercise of religion is not neutral or generally applicable to all individuals regardless of their religion and the law is not narrowly tailored to meet a compelling government interest (*i.e.*, the law must survive strict scrutiny because religion is a suspect classification). *See generally Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). In addition to the First Amendment, Congress has enacted laws that limit the government's ability to infringe upon individuals' religious liberties, such as the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court interpreted the RFRA to apply to protect the religious freedom of a closely held corporation to exclude certain methods of contraception from its group health insurance plans.

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

    Response: Under the Free Exercise Clause, laws that burden the free exercise of religion are first analyzed to determine whether they are both neutral and generally applicable. A government regulation that discriminates against religious organizations or religious people, and thus is not neutral and generally applicable, must survive the strict scrutiny analysis. Strict scrutiny requires the law to be narrowly tailored to meet a compelling government interest. See *Kennedy v. Bremerton Sch. Dist.,* 142 S. Ct. 1264 (2022). Further, the federal government is subject to the restrictions of the Religious Freedom Restoration Act (RFRA).

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

    Response: In *Roman Catholic Diocese of Brooklyn, New York v. Cuomo,* 141 S. Ct. 63 (2020), the Supreme Court held that the applicants were entitled to injunctive relief because they were: (1) likely to succeed on the merits of their claim that their First Amendment rights had been violated; (2) the restrictions imposed would cause irreparable harm by not allowing individuals to worship in person for a period of time; and (3) there was no evidence that granting the injunction would be harmful to 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 the applicants were entitled to injunctive relief because they were: (1) likely to succeed on the merits of their claim that their First Amendment rights had been violated; (2) the restrictions imposed would likely cause irreparable harm; and (3) there was no evidence that "public health would be imperiled" by granting the injunction. Further, the Court held that the State of California's restrictions were not neutral and generally applicable because they treated certain secular activities and businesses more favorably than religious activities.

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 violated the Free Exercise Clause when it treated the plaintiff, a baker who refused to bake a wedding cake for a same-sex couple because of his religious beliefs, with overt hostility because of his sincerely held religious beliefs. The Court opined that the baker was "entitled to a neutral decisionmaker who would give full and fair consideration to his

religious objection", that he had not received such consideration, and thus the Commission's ruling was violative of the Free Exercise Clause.

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

    Response: Yes. The Supreme Court in *Frazee v. Illinois Dept. Of Employment Sec.*, 489 U.S. 829. 834 (1989), held that an individual's sincerely held beliefs are protected even if the belief is not "the command of a particular religious organization." Further, an individual's religious belief need not be "logical, consistent or comprehensible to others" in order to be protected. *Thomas v. Rev. Bd. Of Indiana Emp. Sec. Div.,* 450 U.S. 707, 715 (1981). The determination of what is a "religious belief or practice" is not to turn upon a judicial perception of the particular belief or practice in question. *Id*. at 713-714.

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

       Response: Please see my response to Question 19.

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

       Response: Please see my response to Question 19.

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

       Response: I am unaware of the current official position of the Catholic Church regarding abortion or any other issue.

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

    Response: The Supreme Court held in *Our Lady of Guadalupe School v. Morrisey-Berru,* 140 S. Ct. 2049 (2020), that the "ministerial exception" protects the rights 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 2052. The Court reasoned that although the teachers at issue in this case were not given the title "minister", their roles in the school were part of the "core" of the school's mission. *Id.* at 2055. Thus, they still

fell within the ministerial exception, and they were barred from bringing employment discrimination claims against the school. *Id.* at 2060.

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

    Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that the City's refusal to contract with Catholic Social Services (CSS) for the provision of foster care services unless it agreed to certify same-sex couples violated the Free Exercise Clause. The Court determined that the restrictions imposed on this religious entity were not generally applicable, given that the city had created a system of exceptions, but that CSS was not entitled to an exception for its sincerely held religious beliefs. Thus, the restriction could not survive strict scrutiny.

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

    Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that Maine's "non-sectarian" requirement for their tuition assistance program violated the Free Exercise Clause, because it had the effect of disqualifying certain religious institutions or schools simply because of its religious character. Thus, the law was subject to strict scrutiny. The Court opined that the Government's interest did not meet the heavy burden required under the strict scrutiny analysis.

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

    Response: The Supreme Court held in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), that a public school district had violated the Free Exercise and Free Speech Clauses of the First Amendment by disciplining and ultimately firing a high school football coach who had knelt at midfield to quietly pray after games. The school district claimed that its disciplinary actions were necessary measures taken to avoid violating the Establishment Clause. *Id.* at 2427. The Supreme Court rejected this claim, holding that the school district's disciplinary actions failed to survive strict scrutiny analysis, because the district's actions were not neutral and generally applicable, and Kennedy's personal religious practice had not risen to the level of a violation of the Establishment Clause. *Id.* at 2426-29.

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

    Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), a particular Amish community residing in Fillmore County, Minnesota claimed that the county's septic-system mandate violated the Religious Land Use and Institutionalized Persons Act (RLUIPA). The Supreme Court remanded the case to state court to further analyze the RLUIPA in light of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). Justice Gorsuch concurred, elaborating that RLUIPA triggers a strict scrutiny analysis that requires courts to "scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 2432.

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

    Response: 18 U.S.C. § 1507 states that it is a crime to picket or parade at or near a courthouse, residence, or other building containing a judge, juror, witness, or court officer with the intent to influence that person's performance of his or her duties or the intent to otherwise interfere with the administration of justice. As a sitting judge and judicial nominee, it is inappropriate for me to opine on how I would interpret a statute in a particular factual context.

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

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

       Response: I am unfamiliar with how federal courts train their employees; to my knowledge, no training in the Eastern District of Pennsylvania provides a training that covers this information. Any such trainings must comply with the Constitution and federal law.

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

       Response: Please see my response to 26a.

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

Response: Please see my response to 26a.

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

Response: Please see my response to 26a.

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

    Response: I am not aware of any trainings conducted at the Eastern District of Pennsylvania that teach this, and I do not know what role I would have, if any, in shaping these trainings. I can commit that if I ever have a role in shaping trainings at the court, I will comply with all laws and regulations.

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

    Response: Yes.

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

    Response: As a judicial nominee and a sitting judge, it is inappropriate for me to comment on either the appropriateness or the constitutionality of executives' process in making political appointments.

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

    Response: The question of whether the criminal justice system is systemically racist is best left to policymakers, academics, researchers, the general public to determine instead of the courts. As a state court judge who has presided over more than one thousand criminal matters, I have strived to treat all parties who have come before me fairly and impartially. If confirmed, I will impartially apply any precedent of the Supreme Court and the Third Circuit to the facts of any case before me in which parties contest whether the criminal justice system is systemically racist.

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

Response: The size of the Supreme Court is a matter for Congress to determine. I have no opinion on whether Congress should increase or decrease the number of justices on the Supreme Court. If confirmed, I will apply binding Supreme Court precedent regardless of how many justices sit on the Court.

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

    Response: No.

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

    Response: After analyzing the text of the Second Amendment and considering its original public meaning, the Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."

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

    Response: As the Supreme Court emphasized in *New York State Rifle & Pistol Association v. Bruen*, the government violates individuals' Second Amendment Rights if the government is unable to demonstrate that its regulation restricting firearms is consistent with this Nation's historical tradition of firearm regulation. 142 S. Ct. 211 (2022). This rule is consistent with the rules of *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 451 U.S. 742 (2010).

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

    Response: Yes.

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

    Response: No. To my knowledge, no Supreme Court or Third Circuit precedent has held that the right to own a firearm warrants less protection than any other individual constitutional right.

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

Response: No. To my knowledge, no Supreme Court or Third Circuit precedent has held that the right to own a firearm warrants less protection than the right to vote under the Constitution.

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

    Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to opine on this issue.

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

    Response: Black's Law Dictionary defines "prosecutorial discretion" as "[a] prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." Discretion, Black's Law Dictionary (11th ed. 2019). I do not understand what a "substantive administrative rule change" is in the context of this question. However, I understand rules to be binding on every person within an office or agency and direct them to follow a certain policy, rule, or principle in all cases governed by that rule. Thus, "prosecutorial discretion" appears to be more case-specific and to apply in conjunction with substantive administrative rules; administrative rules would govern an individual prosecutor's "power to choose from the options available in a criminal case."

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

    Response: No. The President has no authority to unilaterally repeal a statute. Congress authorized the use of capital punishment for some offenses in 18 U.S.C. § 3591

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

    Response: The Supreme Court held in *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021), that the Centers for Disease Control and Prevention (CDC) had exceeded its authority by imposing a nationwide moratorium on evictions in particular counties during the COVID-19 pandemic. The Court opined that it expects Congress to speak clearly and provide explicit authorization to an agency when it seeks to exercise powers of "vast economic and political Significance." *Id.* At 2489

42. **You said "you would personally hire a staff that was very diverse with women and minorities, and you would encourage your colleagues to do the same." If somebody is applying to a law clerk position within your chambers, would the color of their skin affect their chances of being hired?**

Response: No, an applicant's race or skin color does not affect that applicant's chances of being hired as one of my clerks. In my seven years as a judge, I have hired racially diverse law clerks.

43. **When you were discussing running for a judgeship, you stated, "If you're running to be a change agent, it's worth it." If you are confirmed as a judge on the Eastern District of Pennsylvania, will you be a change agent?**

    Response: This quote, in its full context, is "If you're running [for an elected judgeship] to go on an ego trip, I wouldn't advise you to go through it. But, if you're running to be a change agent, it's worth it." While I understand that a "change agent" may have multiple definitions, I meant this in the sense that I would never let my career run stagnant or let ego and pride overtake my commitment to learning and growing and working as hard as I can to resolve cases as a jurist. I will continue to learn, grow, and work as hard as I can if I am fortunate to be appointed as a judge in the Eastern District of Pennsylvania.

44. **Are judges change agents or neutral arbiters of the law?**

    Response: Judges are, first and foremost, neutral arbiters of the law. Judges must follow and apply the law as currently written. I have done this in my role as a current state court judge for the past seven years. If confirmed, I would continue to do this and apply the Constitution, applicable statutes, and the binding precedent of the Supreme Court and the Third Circuit Court of Appeals.

Senator Ben Sasse
Questions for the Record for Judge Kai N. Scott
Nominee to the U.S. District Court for the Eastern District of Pennsylvania

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

   Response: No.

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

   Response: If confirmed, I would apply the Constitution, applicable federal or state law, and binding precedent of the Supreme Court and the Third Circuit to the facts of each specific case. I would approach each case with an open mind, and treat all people and parties who appear before me or engage with my chambers or courtroom with respect.

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

   Response: No, I would not describe myself as an originalist. I have never adopted a specific theory of constitutional interpretation.

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

   Response: No, I would not describe myself as a textualist. I have never adopted a specific theory of constitutional interpretation.

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

   Response: No. I believe the Constitution is fixed and cannot change unless it is amended through the Article V amendment process.

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

   Response: I do not admire the jurisprudence of any specific Justice or group of Justices more than any other. If confirmed, I would apply the Constitution, applicable federal or state law, and binding precedent of the Supreme Court and the Third Circuit to the facts of each specific case. Further, I would treat all those who enter my courtroom with dignity and respect.

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: United States Circuit Courts are bound by the precedent of the Supreme Court. In the absence of such precedent, an appellate court can only overrule its own precedent through en banc proceedings. Fed. R. App. P. 35(a).

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: If confirmed, I would follow the precedent of the Supreme Court and the Third Circuit regarding statutory interpretation. I would first consider the plain meaning of the text of a statute or constitutional provision. If the text is clear and unambiguous, the analysis would end there. However, if the text is unclear or ambiguous, I would then consider canons of construction, persuasive precedent from other circuits, and finally, if necessary, legislative history.

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

    Response: No. While the federal sentencing guidelines do try to promote unwarranted disparities in sentencing, the race of an individual is not an appropriate consideration when imposing a sentence. 18 U.S.C. § 3553(a) informs the Court of what sentencing factors should be considered. These factors include the nature and circumstances of the offense, the history and characteristics of the defendant, as well as multiple other factors.

Senator Josh Hawley
Questions for the Record

Judge Kai N. Scott
Nominee to the U.S. District Court for the Eastern District of Pennsylvania

1. **In your materials to the Committee, you included remarks you gave about sentencing transgender offenders. You said judges "must consider what type of facility these individuals should be designated for" because you were concerned that some of them may become victims while in prison. There have been recent examples where offenders who were biologically male, but who identified as women, were placed in prison housing with biological women and then raped those women. How will you work to ensure that future criminals whom you sentence will not do the same?**

   Response: As a judge, I have no power to prevent anyone who is serving a sentence in prison from committing a sexual crime against another individual in that same prison. Notably, the Prison Rape Elimination Act was unanimously passed by Congress and aims to protect prisoners of all genders from rape regardless of what gendered facility they are housed in. If legislators or other policymakers are concerned about this issue and promulgate more specific laws about transgender women housed in women's prisons, then I would apply the law as it is written and any binding Supreme Court and Third Circuit precedent.

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

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

      Response: Each case that would come before me would be analyzed based on its specific facts and circumstances. At sentencing, I would consider all binding precedent of the Supreme Court and Third Circuit, as well as the federal sentencing guidelines and the relevant 18 U.S.C. § 3553(a) sentencing factors. Beyond that, I don't believe it would be appropriate to further opine, in a categorical way, how I would rule on types of cases that may appear before me.

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

Response: Please see my response to Question 2(a).

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

Response: Please see my response to Question 2(a).

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

Response: Please see my response to Question 2(a).

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

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

Response: As a current sitting judge and a judicial nominee, I do not believe that it would be proper for me to comment or opine on this issue. Policy decisions about what penalties should be assigned to criminal offenses are within the purview of legislators and other policy makers.

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

Response: Please see my response to Question 3(a).

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

Response: As a current sitting judge and a judicial nominee, I do not believe that it would be proper for me to comment or opine on an issue that may appear before me.

4. **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 federal judge is obligated to follow the law and binding precedent established by the Supreme Court and the federal circuit in which the court sits. if confirmed, that is what I will do.

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

Response: Yes, *Dobbs v. Jackson Women's Health Organization* is binding precedent.

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

Response: Federal courts may abstain from exercising jurisdiction over cases or controversies that are otherwise properly before them only in "exceptional circumstances" in which directing the parties to state court "would clearly serve an important countervailing interest." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

The Third Circuit has described "[t]ypical comity-based grounds for abstention" as follows:

> *Pullman* abstention, an outgrowth of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), is proper when a state court determination of a question of state law might moot or change a federal constitutional issue presented in a federal court case; *Burford* abstention, an outgrowth of *Burford v. Sun Oil Co*., 319 U.S. 315 (1943), which is proper when questions of state law in which the state has expressed a desire to establish a coherent policy with respect to a matter of substantial public concern are presented; and *Younger* abstention, an outgrowth of *Younger v. Harris*, 401 U.S. 37 (1971), which is proper when federal jurisdiction has been invoked for the purpose of restraining certain state proceedings.

Nat'l City Mortg. Co. v. Stephen, 547 F.3d 78 (3d Cir. 2011).

Additionally, the Supreme Court and Third Circuit have held that *Colorado River* abstention may apply to situations in which "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," warrant that a federal court abstain from exercising concurrent jurisdiction over a matter. *Id.* at 83-84 (quoting *Colorado River*, 424 U.S. 800 at 817 (some internal citations omitted)).

Finally, *Rooker-Feldman* doctrine, which stems from *Rooker v. Fidelity Trust Co*., 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S 462 (1983), generally "strips federal courts of jurisdiction over controversies that are essentially appeals from state-court judgments." *See Williams v. BASF Catalysts LLC*, 765 F.3d 306 (3d Cir. 2014). It is a narrow doctrine that only applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Lance v. Dennis*, 546 U.S. 459 (2006).

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

   Response: No.

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

      Response: N/A

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

   Response: I have no opinion as to what role the original public meaning of the Constitution's text *should* play in the courts' interpretation of the Constitution's provisions. If confirmed, I would be obligated to apply binding Supreme Court and Third Circuit precedent regarding the interpretation of any Constitutional provisions at issue in a particular case. If that precedent directs me to interpret a provision according to the original public meaning of the Constitution's text, then I will faithfully do so.

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

   Response: If confirmed, I would first attempt to interpret legal texts by faithfully applying all binding Supreme Court and Third Circuit precedent. If no clear precedent exists, but the plain meaning of the statute is clear, then I would apply the plain meaning and end my analysis. But if the plain meaning of a statute or text is ambiguous, I would apply cannons of construction, persuasive precedent, and legislative history. I would apply legislative history only if it provides clear evidence of Congress's intentions.

   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: No, not all legislative history is the same, according to Supreme Court jurisprudence. For example, floor statements made by individual legislators are

generally considered to be more casual in nature and are thus less persuasive than Committee Reports. *See Garcia v. U.S.*, 469 U.S. 70 (1984).

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

Response: If confirmed, I would follow all binding precedent established by the Supreme Court and the Third Circuit to interpret any provisions of the United States Constitution. I cannot imagine any situation in which I would ever consult the laws of foreign nations to aid my interpretation of the provisions of the United States Constitution, unless perhaps I am attempting to determine the law that applied at the time the Constitution was founded, and in that case, it might be helpful to look at British common law that applied at the time that the Constitution was founded.

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

Response: Under *Baze v. Rees*, 553 U.S. 35 (2008), and *Glossip v. Gross*, 576 U.S. 863 (2015), a petitioner may obtain a preliminary injunction against a method of carrying out capital punishment that violates the Eight Amendment's prohibition against cruel and unusual punishment only if the petitioner establishes that (1) the method creates a demonstrated risk of severe pain and (2) that risk is substantial in comparison to the risk of known and available alternatives. To my knowledge, the Third Circuit does not appear to have developed any additional standards beyond this general framework.

11. **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. *See Glossip v. Gross*, 576 U.S. 863, 877-78, 134 S. Ct. 2726, 2737 (2015).

12. **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: In *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), the Supreme Court held that a habeas corpus petitioner has no substantive due process right to access DNA analysis. *See also Grier v. Klem*, 591 F.3d 672 (3d Cir.

2010) (stating "[t]here is no substantive due process right to access DNA evidence" and citing *Osborne*).

13. **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.

14. **Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a 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: Supreme Court jurisprudence generally directs federal courts to find that a law violates the Free Exercise Clause of the First Amendment if a law's burden upon an individual's free exercise of religion is not neutral or generally applicable to all individuals regardless of their religion and the law is not narrowly tailored to meet a compelling government interest (*i.e.*, the law must survive strict scrutiny because religion is a suspect classification). *See generally Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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

    Response: Please see my response for Question 14. A government regulation that discriminates against religious organizations or religious people, and is not neutral and generally applicable, is subject to strict scrutiny.

16. **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 in *Frazee v. Illinois Dept. Of Employment Sec.*, 489 U.S. 829. 834 (1989), held that an individual's sincerely held beliefs are protected even if the belief is not "the command of a particular religious organization." Further, an individual's religious belief need not be "logical, consistent or comprehensible to others" in order to be protected. *Thomas v. Rev. Bd. Of Indiana Emp. Sec. Div.,* 450 U.S. 707,

715 (1981). The determination of what is a "religious belief or practice" is not to turn upon a judicial perception of the particular belief or practice in question. *Id*. at 713-714

17. **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: The Supreme Court in *District of Columbia v. Heller,* 554 U.S. 570, 635 (2005) held that the District of Columbia's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."

    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.

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

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

       Response: In his dissent, Justice Holmes seemed to indicate that he believed that the majority had reached a decision based on their own personal preferences for a desired outcome by using a particular economic theory. He explained that the "Constitution is not intended to embody a particular economic theory."

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

       Response: As a sitting judge and a judicial nominee, it would not be appropriate for me to comment or opine on this issue.

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

Response: No, I am not aware of any Supreme Court opinions that have not been formally overruled by the Supreme Court but that are no longer good law. If appointed, I would faithfully apply all binding precedent of the Supreme Court and the Third Circuit.

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

Response: N/A

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

Response: Yes.

20. **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: My personal belief regarding whether Judge Learned Hand is correct or not is irrelevant, because if confirmed, I will faithfully apply all binding precedent of the Supreme Court and Third Circuit regarding what constitutes a monopoly.

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

Response: N/A

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

Response: The Supreme Court held in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992), that, absent any "readily available alternatives," evidence demonstrating that Eastman Kodak controlled at least 80% of the relevant markets was sufficient evidence of a finding of monopoly power, at least at the summary-judgment phase of litigation. In a case in which the Third Circuit granted a defendant's summary-judgment motion and dismissed the plaintiff's monopolization claim, the Third Circuit reasoned that "[i]n broad terms, *Kodak* stands for the proposition that market reality is the touchstone of antitrust analysis. . . . *Kodak* does not transform every firm with a dominant share of the relevant aftermarket into a monopolist. To create a triable question of aftermarket monopoly power, the plaintiff must produce hard evidence

dissociating the competitive situation in the aftermarket from activities occurring in the primary market." *Harrison Aire, Inc. v. Aerostar Intern., Inc.*, 243 F.3d 374 (3d Cir. 2005). Admittedly, I am not very familiar with monopoly jurisprudence, but my initial review of Third Circuit case law did not yield a concrete number higher than the 80% mentioned in *Eastman Kodak* that could constitute a minimum percentage of market share. If nominated, I would thoroughly research all applicable Supreme Court and Third Circuit precedent in this substantive area.

21. **Please describe your understanding of the "federal common law."**

    Response: Federal common law is a narrow area of the law that exists, in cases or controversies with Article III standing, only in limited circumstances when there is no controlling federal statute. The Supreme Court has articulated that "there is no federal general common law". *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). However, the Court has recognized limited areas in which "federal common law" may apply in the absence of a statute. These areas could include admiralty matters or certain controversies between the States.

22. **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: With respect to the interpretation of a state constitutional provision, federal courts must defer to the interpretation of the highest court in the state at issue.

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

       Response: Federal law requires that identical texts should be interpreted identically, and consistent with binding federal precedent. However, states have the freedom to interpret their own constitution as they choose. Thus, it is possible that identical federal and state constitutional provisions could be written identically but interpreted differently.

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

       Response: A state constitution may provide broader protection for its citizens than the United States Constitution.

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

    Response: As a judicial nominee and a sitting judge, it is generally inappropriate for me to comment on whether any Supreme Court case was correctly decided. However, a few

Supreme Court cases are so fundamental and so widely legally and societally accepted that the issues presented in those cases will not likely be relitigated. *Brown v. Board of Education* is one of those very few cases, and on that basis, I can comfortably state that *Brown v. Board of Education* was correctly decided.

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

    Response: The authority to issue injunctions is a power found in Federal Rule of Civil Procedure 65 which sets forth the procedures for issuing an injunction. The crafting of an injunction "is an exercise of discretion and judgement, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). While there has been great debate among policy makers about a District Court's authority to issue nationwide injunctions, to my knowledge the Supreme Court has not squarely addressed this issue.

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

       Response: Please see my response to Question 24.

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

       Response: Please see my response to Question 24.

25. **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 24.

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

    Response: Federalism refers to the system of government that recognizes the division of power between the state and federal governments. The Constitution provides specific enumerated powers to the federal government, and the States or the people are afforded all other rights that are not delegated to the federal government in the Constitution or prohibited by it. Federalism permits the states to provide broader protection to its citizens than those afforded by the United States Constitution.

27. **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 6.

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

    Response: While injunctive relief is typically used to prevent future harm, an award of money damages is typically provided when there has been some past harm. I have no opinion on the advantage or disadvantage of awarding damages versus injunctive relief. If confirmed, I would evaluate all the facts and evidence in any case or controversy that appears before me, apply the precedent of the Supreme Court and Third Circuit, and make a fair, impartial and reasoned decision about which remedy I believe would be appropriate.

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

    Response: Generally speaking, a fundamental right that is not enumerated in the Constitution may be protected by the Due Process Clause of the Fourteenth Amendment if that right is (1) "deeply rooted in this Nation's history and tradition" and (2) "implicit in the concept of ordered liberty." See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations and quotations omitted). The Supreme Court has determined that consenting adults have certain fundamental rights that are protected under substantive due process, including: the right to use contraceptives, see *Griswold v. Connecticut*, 318 U.S. 479 (1965); the right to enter into an interracial marriage, *Loving v. Virginia*, 377 U.S. 1 (1967); the right to engage in private sexual conduct, *Lawrence v. Texas*, 539 U.S. 558 (2003); and the right to enter into a same-sex marriage, *Obergefell v. Hodges*, 576 U.S. 644 (2015). Additionally, the Supreme Court has acknowledged the rights to direct the teaching and upbringing of one's own children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and to be free from forced sterilization, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). This is a nonexhaustive list.

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

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

       Response: The First Amendment subjects government actions to strict scrutiny if those actions discriminate against religious organizations or religious individuals in ways that are not neutral and generally applicable.

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

Response: No. Freedom of worship, which often refers to an individual's right to participate in religious services, is one portion of the broader right to the free exercise of religion. The right to free exercise of religion also protects an individual's freedom to hold and act upon religious beliefs in daily life. The government can encroach upon that religious freedom only in very narrow circumstances outlined in my response to Question 14.

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

Response: Please see my response to Question 14.

d. **Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?**

Response: The Supreme Court in *Frazee v. Illinois Dept. Of Employment Sec.*, 489 U.S. 829. 834 (1989), held that an individual's sincerely held beliefs are protected even if the belief is not "the command of a particular religious organization." Further, an individual's religious belief need not be "logical, consistent or comprehensible to others" in order to be protected. *Thomas v. Rev. Bd. Of Indiana Emp. Sec. Div.,* 450 U.S. 707, 715 (1981). The determination of what is a "religious belief or practice" is not to turn upon a judicial perception of the particular belief or practice in question. *Id*. at 713-714.

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

Response: The Supreme Court opined that the Religious Freedom Restoration Act (RFRA) "applies to all Federal Law, and the implementation of that law whether statutory or otherwise. RFRA also permits Congress to exclude statutes from RFRA's protections." *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020)

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

Response: No.

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

    a. **What do you understand this statement to mean?**

    Response: I am unfamiliar with the context in which Justice Scalia made this statement. I understand it to mean that judges should apply law and precedent without considering whether that law or precedent will bring them to a particular desired result or outcome.

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

    Response: No, I do not believe I have ever taken the position in litigation or a publication that a federal or state statute was unconstitutional.

    a. **If yes, please provide appropriate citations.**

    Response: N/A

33. **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.

34. **Do you believe America is a systemically racist country?**

    Response: I have no opinion about whether the entirety of America is a systemically racist country, and my belief about this matter is irrelevant to my ability to faithfully apply precedent of the Supreme Court and the Third Circuit.

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

    Response: Yes.

36. **How did you handle the situation?**

    Response: As is the duty of every public defender – and indeed every advocate – I zealously advocated for my client and disregarded my personal views. Further, I presented any and all viable legal and factual arguments in good faith.

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

Response: Yes.

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

    Response: I have not thoroughly analyzed every Federalist Paper. No singular Federalist Paper has shaped my view of the law more than any other Federalist Paper.

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

    Response: This is a matter that is heavily debated among people with varying religious, spiritual, philosophical, scientific, and political beliefs, and, thus, it is best left to the legislature and policymakers to determine. My understanding is that *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), directs courts to leave this question to the people and to their elected representatives, rather than the courts. As a sitting judge and a judicial nominee, it would be improper for me to comment or opine on this issue. Should this matter ever come before me, I will apply this directive and all other binding precedent of the Supreme Court and Third Circuit.

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

    Response: I believe that I testified twice in federal court proceedings. In both cases, I was called as a witness in former clients' post-conviction proceedings. I am unable to find any available testimony.

41. **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.

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

   a. **Apple?**

   Response: Yes.

   b. **Amazon?**

   Response: Yes.

   c. **Google?**

   Response: No.

   d. **Facebook?**

   Response: No.

   e. **Twitter?**

   Response: No.

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

Response: No. Although it is a common practice for attorneys to help edit or draft portions of briefs without signing their names to those briefs, to my knowledge, I never did so as an Assistant Federal Defender for the Eastern District of Pennsylvania or an Assistant Defender for the Defender Association of Philadelphia. As a sitting judge, I have not authored or edited any briefs.

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

   Response: N/A.

44. **Have you ever confessed error to a court?**

Response: Yes.

   a. **If so, please describe the circumstances.**

Response: During my seventeen years of practice as an attorney, I cannot recall ever making or confessing a material error before any court. However, there were certainly times that I acknowledged and promptly corrected non-substantive errors in the heat of trial practice. Further, I have argued legal and factual positions that courts have ultimately rejected, but in every instance, I adopted these positions in good faith to advocate for clients to the best of my knowledge and ability.

During my seven years as a state court judge, I wrote sixty opinions. I must write an opinion only if a party appeals from one of my decisions. In researching two of those opinions, I realized that I had erred in part, and I addressed the error in each opinion. The Superior Court of Pennsylvania agreed with my admissions of error in each case, and remanded the cases for me to correct those errors. Both cases, *Commonwealth v. Kearney*, No. CP-51-CR-0005031-2017 (Pa. C.P. Jan. 9, 2019), *rev'd*, 225 A.3d 912 (Pa. Super. Ct. 2019), and *Commonwealth v. Meyers*, No. CP-51-CR-0009678-2016 (Pa. C.P. Oct. 29, 2019), *rev'd in part*, 2801 EDA 2019 (Pa. Super. Ct. 2020), are summarized in my Questionnaire for Judicial Nominees.

As both a jurist and an attorney, I believe that mistakes are inevitable. What matters is that both the parties and the judge act efficiently to address the error and, if necessary, correct it.

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

Response: Judicial nominees take an oath to tell the whole truth and are obligated to adhere to all other applicable judicial and legal ethical rules. The Code of Conduct for United States Judges applies to both sitting federal judges and nominees to the federal judiciary. Thus, I have answered all of these questions truthfully and completely to the best of my ability, while also adhering to other ethical considerations. For example, Canon 3(A)(6) of the Code of Conduct for United States Judges directs judicial nominees to refrain from “mak[ing] public comment on the merits of a matter pending or impending in any court.”

Senator John Kennedy
Questions for the Record

Judge Kai N. Scott
Nominee to the U.S. District Court for the Eastern District of Pennsylvania

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

   Response: If confirmed, I would apply the Constitution, applicable federal or state law, and binding precedent of the Supreme Court and the Third Circuit to the facts of each specific case. I would approach each case with an open mind, and treat all people and parties who appear before me or engage with my chambers or courtroom with respect.

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

   Response: No, a judge should not consider the consequences of ruling a particular way when deciding a case. If the text of a law is clear and unambiguous, the inquiry ends there. The Supreme Court has "explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020).

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

   Response: No.

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

   Response: The Supreme Court has held that private owners of shopping centers do not violate the Constitution by restricting speech unrelated to the shopping center's operations, such as prohibiting the distribution of anti-war leaflets on its property. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 552 (1972). However, any specific restrictions would have to analyzed pursuant to precedent of the Supreme Court and the Third Circuit on a case by case basis.

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

   Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court discussed the places that the Constitution refers to "the people." The Court opined that the "the people...refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with his country to be considered part of that community." 554 U.S. 570, 580 (2008).

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

   Response: The Supreme Court has recognized that "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Court further recognized these rights due non-citizens in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-271 when it cited to *Plyler*, stating that non-citizens "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."

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

   Response: Please see answer to Question 6. However, I will note that the Supreme Court has distinguished the Fourth Amendment protections enjoyed by non-citizens inside the borders of the United States compared to what rights may be afforded at the international border of the United States. The Supreme Court opined in *United States v. Martizez-Fuerte*, 473 U.S. 531, 538 (1985) that Border Patrol may operate checkpoints and stop vehicles, without a warrant for brief questioning on immigration status without suspicion of unlawful activity or immigration status.

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

   Response: If confirmed, this is an issue that may come before me. Thus, it would be inappropriate for me to comment or opine on this issue.

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

   Response: The Supreme Court in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), held that Indiana's statute requiring voters to present photo identification to cast a ballot did not violate the Equal Protection Clause of the Fourteenth Amendment based on the facts of that case. Whether such laws are draconian or racist is one for policy makers to determine, and it would be inappropriate for me, as a judicial nominee, to opine on this issue.

Questions from Senator Thom Tillis
for Judge Kai Niambi Scott

Nominee to be United States District Judge for
the Eastern District of Pennsylvania

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

   Response: Yes.

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

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

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

   Response: Impartiality is an expectation for a judge.

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

   Response: No. Judges should apply the law to the facts of the case and should not strive for any particular outcome.

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

   Response: Yes, at times faithfully interpreting the law could result in what one could consider to be an "undesirable outcome". However, judges must fairly and impartially apply precedent to the facts of each case without regard to their personal views.

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

   Response: No. Judges should apply the law to the facts of the case. Judges should not interject their own politics or policy preferences when interpreting and applying the law.

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

   Response: If confirmed, I will follow binding Supreme Court and Third Circuit precedent regarding the Second Amendment, including *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), *McDonald v. City of Chicago,* 561 U.S. 742 (2010), and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

8. **How would you evaluated 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 evaluate the facts and evidence of the case and follow binding Supreme Court and Third Circuit precedent regarding the Second Amendment, including *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), and any precedential caselaw regarding pandemic restrictions, including *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

9. **What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?**

   Response: The Supreme Court has established that law enforcement personnel are entitled to qualified immunity unless: (1) they violated a federal statutory or constitutional right; and (2) that constitutional right was clearly established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Thus, if the answer is yes to both prongs of this analysis or inquiry, then qualified immunity would not apply.

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: This question is an important consideration for policy makers. If confirmed, I would apply the precedent of the Supreme Court and Third Circuit.

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

    Response: Please see the response to Question 10.

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

Response: If confirmed, I would apply the precedent of the Supreme Court and the Third Circuit. As a judicial nominee, it would not be appropriate for me to comment on or criticize the Supreme Court's patent eligibility jurisprudence.

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

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

       Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Third Circuit precedent to the particular facts of any case before me.

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

       Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Third Circuit precedent to the particular facts of any case before me.

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

       Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Third Circuit precedent to the particular facts of any case before me.

    d. ***BetterThanTesla ElectricCo* develops a system for building customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system**

combining computerized billing with electric car charging. Should *BetterThanTesla*'s billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?

Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Third Circuit precedent to the particular facts of any case before me.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Third Circuit precedent to the particular facts of any case before me.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Third Circuit precedent to the particular facts of any case before me.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Third Circuit precedent to the particular facts of any case before me.

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

   Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Third Circuit precedent to the particular facts of any case before me.

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

   Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Third Circuit precedent to the particular facts of any case before me.

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

   Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Third Circuit precedent to the particular facts of any case before me.

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

    Response: If confirmed, I would evaluate the facts of the cases and the applicable precedent established by the Supreme Court and the Third Circuit on all cases before me. As a judicial nominee, it would not be appropriate for me to comment on or criticize the clarity or consistency of the current jurisprudence needed to incentivize innovation.

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

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

Response: In my 17 years of practicing law and 7 years as a state court trial judge, I do not recall ever having the opportunity to handle any matters involving copyright law.

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

Response: In my 17 years of practicing law and 7 years as a state court trial judge, I do not recall ever having the opportunity to handle any matters involving the Digital Millennium Copyright Act.

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

Response: In my 17 years of practicing law and 7 years as a state court trial judge, I do not recall ever having the opportunity to handle any matters involving intermediary liability for online service providers that host unlawful content posted by users.

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

Response: In my 17 years of practicing law and 7 years as a state court trial judge, I do not recall ever having the opportunity to handle any matters involving free speech and intellectual property issues, including copyright.

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

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

    Response: If confirmed, I would follow binding precedent of the Supreme Court and the Third circuit regarding any statutory interpretation. Thus, when reviewing the text of a statute, if the plain meaning of the text is clear and unambiguous, no further analysis needs to be conducted. However, if the text is unclear and

ambiguous, I would next consider canons of construction, persuasive precedent from other circuits, and finally, legislative history (such as committee reports).

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: If confirmed, I will be bound by the precedent of the Supreme Court and the Third Circuit. Generally, courts must give *Chevron* deference to an agency's interpretations arrived at via formal adjudications or notice and comment rule making. Other materials such as opinion letters, policy statements, agency manuals, and enforcement guidelines are not controlling or binding but may be given deference if they are persuasive. *Christensen v. Harris Cnty*, 529 U.S. 576, 587 (2000).

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

Response: If confirmed, I will apply the precedent of the Supreme Court and the Third Circuit if confronted with this type of case or controversy before me. As a judicial nominee, it would be inappropriate for me to state my personal beliefs.

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

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

Response: Judges are obligated to apply the precedent of the Supreme Court and the relevant circuit regarding specific statutes. If confirmed, I would apply the law as written to the facts as presented.

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 17(a).

18. **In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their**

case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.

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

   Response: I do not have an opinion on the issue of "judge shopping" or "forum shopping" in litigation, as I have not personally conducted my own research about this issue.

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

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

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

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

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

   Response: Please see my response to Question 18(a). Additionally, I can commit to not proactively taking steps to attract a particular type of case or litigant to my courtroom.

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

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

       Response: As a judicial nominee, it would be improper for me to opine on this policy issue.

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

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

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

    Response: As a judicial nominee, it would be improper for me to opine on this policy issue.

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

       Response: As a judicial nominee, it would be improper for me to opine on this policy issue.

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

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

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

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

       Response: As a judicial nominee, it would not be appropriate for me to comment on this issue.

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

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

22. **In United States v. Gormley, you advocated for a lesser sentence than recommended under the Sentencing Guidelines for a defendant charged with possession and distribution of child pornography, of which he possessed thousands of still images and dozens of videos, including infants. You grounded your reasoning in**

extraordinary mental and emotional distress and the totality of the circumstances. Do you recall what those circumstances were?

Response: Crimes against children are some of the worst crimes imaginable. In my role as an advocate for Mr. Gormley, over fifteen years ago, the Rules of Professional Responsibility required that I provide zealous advocacy for my client. I do not recall all of the facts of this case, nor all of the specific reasoning that I applied when requesting a downward departure or mitigated sentence. I do recall that Mr. Gormley had a history of severe depression, alcoholism, and physical health challenges. However, I believe that there were other factors that I presented when arguing for a mitigated sentence that I am now unable to recall due to the lengthy lapse of time between now and when I last represented Mr. Gormley.