Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Judge Leonard Stark
Nominee to the Court of Appeals for the Federal Circuit
December 8, 2021

1. **The Federal Circuit is different from the 12 other regional courts of appeal because it has nationwide jurisdiction over limited subject matter. That docket primarily includes patent matters and appeals from certain administrative agencies, Article I tribunals, and the Court of International Trade. Since 2010, you have served as a District Court Judge for the District of Delaware—where you also previously served as a Magistrate Judge for three years—and just this year finished a seven-year tenure as the Chief Judge.**

    a. **What about your fourteen years on the bench in the District of Delaware has prepared you for the specialized docket of appeals that the Federal Circuit hears?**

    Response: In my more than 11 years as a District Judge, and my three years before that as a Magistrate Judge, I have handled over more than 6,000 cases, including more than 2,400 patent cases. I have presided over 94 trials, including 63 patent trials. Many of my non-patent cases involve complex litigation, including antitrust, securities fraud, bankruptcy appeals, and contract and other disputes between corporations. I have also sat by designation with the Federal Circuit, giving me some direct experience with the diverse, non-patent subject matter docket of that Court. I have written more than 2,100 opinions for the District Court and two for the Federal Circuit when I sat by designation. I have spoken approximately 100 times at patent-related conferences and continuing legal education programs, and from that experience – as well as my seven years as Chief Judge of the District of Delaware – I have interacted regularly with judges of the Federal Circuit. All of this experience would, I believe, make me extremely well-prepared for the specialized docket of appeals the Federal Circuit hears.

    b. **Can you provide an overview of the types of patent matters you have presided over?**

    Response: The more than 2,400 patent cases that I have presided over involve a broad range of subject matters in science and technology, including pharmaceuticals (cases brought under the Hatch-Waxman Act and the Biosimilars Price Competition and Innovation Act), computer hardware and software, consumer electronics, medical devices, biotechnology, mechanical and engineering devices, manufacturing processes, and industrial designs. In presiding over these patent cases, I have been frequently confronted with both procedural and substantive legal matters in all aspects of patent law, including infringement, validity, and damages.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Leonard Philip Stark
Judicial Nominee to the United States Circuit Court of Appeals for the Federal Circuit

1. **In the context of federal case law, what is super precedent? Which cases, if any, count as super precedent?**

   Response: To my knowledge, neither the Supreme Court nor the Federal Circuit has used or defined the term "super precedent." In my 14 years as a District Judge and Magistrate Judge, I have not used or encountered this term. If confirmed, I will faithfully apply all applicable Supreme Court and Federal Circuit precedent, without elevating any precedential decisions over others.

2. **You can answer the following questions yes or no:**

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

      Response: I follow all U.S. Supreme Court precedents. As a judge, it is improper for me to comment on any issues that may come before me, so as a general matter, I do not comment on the correctness of U.S. Supreme Court precedents. However, it is unlikely that *de jure* racial segregation in schools or miscegenation laws would be reimposed in the United States, so like prior judicial nominees, I can state that I believe *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

j. Was *Sturgeon v. Frost* correctly decided?

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

k. Was *Rust v. Sullivan* correctly decided?

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

l. Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided?

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

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

Response: I am not familiar with Judge Jackson's statement or the context in which it was made. The Constitution is an enduring document that sets forth the principles that govern our nation. The Constitution does not change unless amended pursuant to Article V.

4. Should paying clients be able to influence which pro bono clients engage a law firm?

Response: I have not worked at a law firm since 2001, when I completed four years as a litigation associate in the Delaware office of Skadden, Arps, Slate, Meagher & Flom

LLP. As a sitting judge and a nominee for another judgeship, it would not be appropriate for me to comment on decisions law firms make about which clients they represent.

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

   Response: I am not sure exactly what the question is referring to by the term "social 'equity.'" Unless the text of a constitutional provision or statute, or binding precedent of the Supreme Court or Court of Appeals, requires otherwise, I cannot envision a circumstance in which a judicial decision should take into account principles of "social 'equity.'"

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

   Response: I am not familiar with this quote and do not know its source or the context in which it was made. Judges should apply binding precedents to the facts before them to decide the issues presented by a case.

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

   Response: The Supreme Court has held that parents have the right to direct their children's education. *See Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("[Plaintiff's] right thus to teach and the right of parents to engage [Plaintiff] so to instruct their children, we think, are within the liberty [of the Fourteenth Amendment]."); *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("[W]e have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to have children . . . [and] to direct the education and upbringing of one's children . . . .") (internal citations omitted).

8. **How are scientific disputes about questions of fact resolved in federal courts?**

   Response: Typically, for example in a patent case, parties present expert testimony and extensive factual evidence in an effort to persuade the factfinder – a judge during a bench trial or in certain pretrial proceedings, such as claim construction hearings; a jury in a case tried to a jury – of the correctness of their position on a scientific dispute. The factfinder then applies the pertinent standard of proof (beyond a reasonable doubt, clear and convincing, or preponderance of the evidence) to the evidence it credits to find the facts.

9. Is whether a specific substance causes cancer in humans a scientific question?

Response: I do not believe this is an issue that either the Supreme Court or the Federal Circuit has addressed. Typically, issues pending before a court are referred to as questions of law or questions of fact (or mixed questions of law and fact). The Third Circuit – the Court of Appeals in which the District of Delaware, where I now sit, is located – has had occasion to review cases considering the admissibility of expert evidence on the issue whether an individual's cancer was caused by a particular substance. *See, e.g.*, *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 783-86 (3d Cir. 1996) (affirming district court's refusal to strike expert testimony about radiation being most likely cause of particular cancer); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 758 (3d Cir. 1994) (referring to whether PCBs cause cancer as "falsifiable hypothesis"); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (holding that "abuse of discretion is the proper standard by which to review a district court's decision to admit or exclude scientific evidence").

10. Is when a "fetus is viable" a scientific question?

Response: In *Planned Parenthood v. Casey*, 505 U.S. 833, 860 (1992), the Supreme Court noted that "advances in neonatal care have advanced viability to a point somewhat earlier" than in 1973. The Court further noted that viability occurred at approximately 28 weeks at the time of *Roe*, occurred at approximately 23 to 24 weeks at the time of *Casey*, and may occur "at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future." *Id*. The Supreme Court did not state whether this is a scientific and/or other type of question.

11. Is when a human life begins a scientific question?

Response: In *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), the Supreme Court stated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." The Supreme Court did not state whether this is a scientific and/or other type of question.

12. Can someone change his or her biological sex?

Response: My understanding is that there are medical procedures to change one's biological sex.

13. Does the president have the power to remove senior officials at his pleasure?

Response: The Supreme Court has explained that, "as a general matter, the Constitution gives the President the authority to remove those who assist him in carrying out his duties." *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020)

(internal quotation marks omitted). The Court has recognized two exceptions to the President's power to remove officials who wield executive power on his behalf. First, Congress has the power to form "expert agencies led by a *group* of principal officers" subject to removal only for good cause; second, Congress may provide tenure protection for "*inferior* officers with narrowly defined duties." *Id.* at 2192. If faced with a case involving the President's power to remove a senior official from office, I would consider applicable constitutional, statutory, and regulatory provisions, as well as binding precedent.

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

Response: I understand this question to be related to policy, which are matters for the legislative and executive branch and not the judiciary. As a sitting District Court judge and nominee to the Federal Circuit, it would be inappropriate for me to express a personal opinion or weigh into a public policy debate.

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

Response: Please see my response to Question 14.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008), the Supreme Court declined to adopt a single standard of review. The ban on handguns in the home at issue in *Heller* failed any standard of scrutiny applied to enumerated constitutional rights. *See id.* at 628-29. In *Heller*, the Supreme Court stated that rational basis review could not apply, but left open whether intermediate or strict scrutiny should apply to any particular regulation. The Supreme Court further held that "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and provided examples of presumptively valid regulations of firearms: (1) prohibitions on possession by "felons and the mentally ill"; (2) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings"; and (3) "laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27.

I am not aware of the Federal Circuit addressing whether a regulation or proposed legislation infringes on Second Amendment rights. The Third Circuit – the Court of Appeals in which the District of Delaware, the Court on which I currently sit, is located – has adopted a two-step framework for evaluating whether a challenged regulation or law infringes on the rights protected by the Second Amendment. *See, e.g.*, *United States v.*

Marzzarella, 614 F.3d 85 (2010). First, the Court determines whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. *See id.* at 89. Then the Court determines which means-end scrutiny to apply and applies it. *See id.*

If confirmed to the Federal Circuit and a Second Amendment challenge were presented to me, I would apply Supreme Court precedent and, if necessary, would consider persuasive authority from other Courts of Appeal.

17. Under the Religious Freedom Restoration Act the federal government cannot "substantially burden a person's exercise of religion."

a. Who decides whether a burden exists on the exercise of religion, the government or the religious adherent?

Response: The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b). The courts decide whether there is a burden on the exercise of religion under RFRA. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014) (concluding that contraceptive mandate forcing plaintiffs to pay "an enormous sum of money" is clearly "a substantial burden on those beliefs").

b. How is a burden deemed to be "substantial[]" under current caselaw? Do you agree with this?

Response: In *Hobby Lobby*, 573 U.S. at 720-26, the Supreme Court focused on two factors to find there was a substantial burden on the plaintiffs: (1) non-compliance with the contraceptive mandate would create "severe" economic costs for plaintiffs; and (2) compliance caused the objecting party to violate its sincere religious beliefs. The Court warned that the job of a federal court is "narrow" on the second factor – only "'to determine' whether the line drawn reflects 'an honest conviction.'" *Id.* at 725 (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981)).

As a District Judge and a nominee to the Federal Circuit, it would not be appropriate for me to comment on whether I agree with current caselaw. As either a District Judge or Circuit Judge I will continue to follow binding Supreme Court and Court of Appeals precedent.

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

Response: I am not familiar with this quote and do not know the context in which it was made. Judges should apply binding precedents to the facts before them to decide the issues presented by a case. Federal judges should strive always to fulfill their judicial oath to "administer justice without respect to persons, and do equal right to the poor and to the rich," and also to "faithfully and impartially discharge and perform all the duties incumbent upon" them "under the Constitution and laws of the United States." 28 U.S.C. § 453.

19. Please describe your understanding of the Supreme Court and Federal Circuit precedents concerning the public use requirement of the Fifth Amendment's Takings Clause.

Response: In *Kelo v. City of New London*, 545 U.S. 469, 477 (2005), the Supreme Court considered the question of "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment." The Court held that the government would "no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party." *Id.* The Court also emphasized that the government would not "be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 478. On the scope of the "public purpose" requirement, the Court declined to "adopt a new bright-line rule that economic development does not qualify as a public use." *Id.* at 484. Instead, the Court explained that "[w]ithout exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field." *Id.* at 480. The Court further recognized that "the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances." *Id.* at 482. Thus, the Court concluded that "public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Id.* at 483.

The Federal Circuit has cited *Kelo* on at least four occasions. *See McCutchen v. United States*, 14 F.4th 1355, 1363 (Fed. Cir. 2021); *Siegler v. Sorrento Therapeutics, Inc.*, 2021 WL 3046590, at *10 (Fed. Cir. July 20, 2021); *Biosig Instruments, Inc. v. Nautilus, Inc.*, 783 F.3d 1374, 1380 n.2 (Fed. Cir. 2015); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008). In several cases, the Federal Circuit has held that "[p]roperty seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause." *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008); *see also Acadia Tech., Inc. v. United States*, 458 F.3d 1327

(2006). Therefore, the limits on exercise of the police power are "largely imposed by the Due Process Clause" and not the Takings Clause. *AmeriSource*, 525 F.3d at 1154.

20. Please describe your understanding of the Supreme Court and Federal Circuit precedents concerning limitations on "pretextual" takings under the Fifth Amendment's Takings Clause.

Response: For my understanding of the Supreme Court precedent on "pretextual" takings, *Kelo v. City of New London*, please see my response to Question 19. I am not aware of the Federal Circuit having addressed the issue.

21. Does the Fifth Amendment's Takings Clause apply to patents revoked by the United States Patent and Trademark Office?

Response: The Supreme Court has expressed "no doubt" that the grant of a patent confers upon the patentee a property right subject to the Takings Clause of the Constitution. *See James v. Campbell*, 104 U.S. 356, 357-58 (1881). In *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365 (2018), the Supreme Court considered constitutional challenges to *inter partes* review (IPR) proceedings, which permit the United States Patent and Trademark Office (PTO) to reconsider and cancel an already-issued patent claim. The Court concluded that IPR proceedings do not violate Article III of the Constitution or the Seventh Amendment, but warned that the decision "should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause." *Id.* at 1379.

In *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 605 (Fed. Cir. 1985), the Federal Circuit held that retroactive application of *ex parte* reexaminations did not violate the Due Process Clause of the Fifth Amendment, the Seventh Amendment, or Article III. Applying the reasoning of *Patlex*, the Federal Circuit in *Joy Technologies, Inc. v. Manbeck*, 959 F.2d 226 (Fed. Cir. 1992), rejected the argument that *ex parte* reexamination and subsequent cancellation of patent claims constituted a taking even though no reexamination mechanisms had existed when the patent-in-suit had been granted by the PTO. More recently, in *Celgene Corp. v. Peter*, 931 F.3d 1342, 1362 (Fed. Cir. 2019), *cert. denied*, 141 S. Ct. 132 (2020), the Federal Circuit held that "retroactive application of IPR proceedings to pre-AIA [America Invents Act] patents is not an unconstitutional taking under the Fifth Amendment." The Federal Circuit reasoned that patent owners have had "the expectation that the PTO could reconsider the validity of issued patents on particular grounds, applying a preponderance of the evidence standard," and that the IPR proceedings do not "differ from the pre-AIA review mechanisms significantly enough, substantively or procedurally, to effectuate a taking." *Id.* at 1358, 1363.

If confirmed to the Federal Circuit, I would faithfully apply all controlling precedent to the cases that come before me, including those precedents cited in this response.

22. The Fifth Amendment to the Constitution states that "private property [shall not] be taken for public use, without just compensation." Under Federal Circuit and Supreme Court precedent, to what extent might this limit Congress' taxing power?

Response: The Supreme Court has held that taxation does not constitute a taking of private property for public use. *See Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013); *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989); *Mobile Cnty. v. Kimball*, 102 U.S. 691, 703 (1880).

For retroactive taxation to be a taking, it must be "so arbitrary as to constrain to the conclusion that it was not the exertion of taxation." *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916); *Nichols v. Coolidge*, 274 U.S. 531, 542-43 (1927). Further, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), although a plurality of Justices concluded that the enactment of the Coal Act – which imposed retroactive financial liabilities on coal companies – resulted in an unconstitutional taking, five Justices disagreed. Those five Justices reasoned that the Coal Act did not constitute a taking, as it only imposed a "general liability," and did not target "a specific property interest" or depend on any "particular property for the operation of its statutory mechanisms." *Id.* at 543 (Kennedy, J., concurring in the judgment and dissenting in part); *see also id.* at 555 (Breyer, J., dissenting).

Applying these principles, the Federal Circuit has found that "while a taking may occur when a specific fund of money is involved, the mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001) (*en banc*); *see also, e.g.*, *United States Shoe Corp. v. United States*, 296 F.3d 1378, 1383-84 (Fed. Cir. 2002) (finding that Harbor Maintenance Tax was not taking in violation of Fifth Amendment because it "served the rational purpose of maintaining the ports"); *NationsBank of Texas, N.A. v. United States*, 269 F.3d 1332, 1337 (Fed. Cir. 2001) (finding retroactive increase in maximum estate tax rate was not taking because retroactive extension encompassed only "short and limited periods required by the practicalities of producing national legislation").

23. Under Federal Circuit and Supreme Court precedent, does the federal government effect a taking by requiring that property be modified or destroyed?

Response: A plaintiff pursuing a takings claim must establish a protected property interest for purposes of the Fifth Amendment. *See McCutchen v. United States*, 14 F.4th 1355, 1358 (Fed. Cir. 2021). In *McCutchen*, the Federal Circuit determined that a Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Final Rule did not effect a taking of bump-stock-type devices by requiring the devices' destruction or surrender to ATF. *See*

id. at 1364-65. This was due, at least in part, to the fact that gun owners' property right in continued possession or transferability was "inherently limited by . . . a very specific statutory prohibition on possession and transfer of certain devices . . . together with a congressional authorization of a . . . valid agency interpretation of that prohibition." *Id.* at 1358.

More generally, the Supreme Court has held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (stating test for whether regulation constitutes taking "focuses directly upon the severity of the burden that government imposes upon private property rights"). The Supreme Court has identified two scenarios in which regulatory actions are generally considered *per se* takings. First, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), the Court held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." Second, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), the Court determined that a taking happens "where regulation denies all economically beneficial or productive use of land."

Outside these two categories, regulatory takings challenges are governed by *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). In *Penn Central*, the Supreme Court emphasized there is no set formula for determining whether a regulatory taking has occurred; instead, courts should engage in "ad hoc, factual inquiries" based on several factors: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Id.* at 124.

The Federal Circuit has applied the tests reflected in *Loretto*, *Lucas*, and *Penn Central* in various circumstances to determine whether the federal government effected a taking by requiring that property be modified or destroyed. *See, e.g.*, *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260 (Fed. Cir. 2009) (finding that United States Department of Agriculture salmonella regulations, requiring diversion of eggs to breaker egg market and reducing eggs' market value, did not effect regulatory taking); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008) (finding that Bureau of Reclamation directive requiring implementation of fish ladder and diversion of water towards fish ladder and away from canal did constitute regulatory taking); *Maritrans Inc. v. United States*, 342 F.3d 1344 (Fed. Cir. 2003) (finding that double hull requirement of Oil Pollution Act of 1990 did not effect regulatory taking of single hull tank barges).

24. Is the right to petition the government a constitutionally protected right?

Response: Yes. The First Amendment to the U.S. Constitution 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."

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

Response: Fighting words are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). These include "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971). Symbolic speech does not constitute fighting words unless it is likely to be seen as "a direct personal insult or an invitation to exchange fisticuffs." *Texas v. Johnson*, 491 U.S. 397, 409 (1989).

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

Response: The U.S. Supreme Court has held that the First Amendment "permits a State to ban a true threat." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (internal quotation marks omitted). "True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* (internal quotation marks omitted).

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

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

Response: No.

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

Response: No.

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

Response: No.

28. 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.

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

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

Response: No.

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

Response: No.

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

Response: No.

30. **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.

31. **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.

32. Please describe the selection process that led to your nomination to be a circuit judge, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).

Response: From approximately January through September 2021, I was periodically in touch with Senator Chris Coons. In particular, on May 9, 2021 and September 25, 2021, I spoke with Senator Coons about the possibility of being nominated for a federal appellate judgeship. On June 11, 2021, I had a similar conversation with Senator Tom Carper. In June 2021, I also reached out to an attorney in the White House Counsel's Office about my interest in being considered for a potential vacancy on the United States Court of Appeals for the Federal Circuit. On September 25, 2021, I was contacted by the White House Counsel's Office about being considered for a possible nomination to the Federal Circuit. Later that day, I was put in contact with attorneys from the Office of Legal Policy at the Department of Justice. On September 28, 2021, I was interviewed by attorneys from the White House Counsel's Office. Since that time, I have been in contact with officials from the White House Counsel's Office and the Office of Legal Policy. On November 3, 2021, the President announced his intent to nominate me. On December 1, 2021, the Senate Judiciary Committee held a hearing on my nomination.

33. 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.

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

Response: No.

35. 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.

36. 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.

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

Response: After reviewing the questions, I conducted necessary research and then drafted responses. I asked others, on my staff and at the Department of Justice's Office of Legal Policy, to review my draft responses. Thereafter, I finalized the answers. The answers provided are my own.

Senator Marsha Blackburn
Questions for the Record to Hon. Leonard Stark
Nominee for the Federal Circuit

1. **What is your approach to statutory interpretation? Do you always start with the text?**

   Response: In my 14 years as a District Judge and Magistrate Judge, I have presided over many cases that involved the interpretation of a federal statute. In each instance, my approach is to begin with the statutory text; if it is unambiguous with respect to the issue in dispute, then the text is dispositive. If there remains a dispute, I then carefully consider any binding Supreme Court and Court of Appeals precedent – including the respective courts' precedent on the appropriate method of statutory interpretation – and, if necessary, I might consider (as persuasive but not binding authority) appellate precedent from outside my Circuit and also District Court opinions. If the conclusion is still uncertain at that point in the analysis, I will apply canons of statutory construction and might consider legislative history.

2. **Do you believe the meaning of the Constitution changes over time?**

   Response: The Constitution is an enduring document that sets forth the principles that govern our nation. The Constitution does not change unless amended pursuant to Article V. The Supreme Court has recognized in some circumstances that, although the core principles embodied in the Constitution do not change, their application may be impacted by contemporary values and understandings. *See Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 492-93 (1954) ("In approaching this problem [of segregation in schooling], we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."). As a District Judge today – and it would be the same if I am confirmed to the Federal Circuit – I follow the decisions of the Supreme Court and the precedential decisions of the Court of Appeals for the Circuit in which I sit.

3. **What does judicial activism mean to you?**

   Response: My understanding is that the term "judicial activism" is typically used to refer to the act of injecting a judge's personal views into the judicial decision-making process, which is not appropriate. I believe judges are charged with interpreting and applying the law impartially, with fidelity to precedent, statutes, and the Constitution, as well as the record in the case viewed through the proper standard of review. That is how I have approached cases during my 14 years as a District Judge and Magistrate Judge and it is how I would continue to conduct myself if confirmed to the Federal Circuit.

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

Questions for the Record for Leonard Philip Stark, Nominee for the Federal Circuit

I. Directions

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

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

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

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

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

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

II. Questions

1. Earlier this year you made a statement about the limited power of federal judges. You said, "Federal judges certainly do not have unlimited power. We are subject to the rule of law, to the facts that are presented to us, to applying the law as made by Congress."

a. Why is it important for a judge to be subject to the rule of law?

Response: You are referring to a quote contained in the Federal Judicial Center's video, "What Is Judicial Impartiality? Judges Explain How They Apply the Law"

(Sept. 14, 2021). In the federal government, judges have an important but limited role: to apply governing law – including the U.S. Constitution, federal statutes, and precedential decisions of the Supreme Court and the Courts of Appeals – to the facts of the specific case before them, deciding only the issues presented by the case.

b. Can you give an example where you set aside your personal opinion and reached an outcome that federal law required?

Response: In my more than 14 years as a federal judge, I have presided over more than 6,000 cases. I decide cases based on the applicable law and the facts of the case before me, not based on any personal opinion I might have.

2. You coauthored a law review article in 2003 about another judge's judicial method—Judge Stapleton, who you clerked for after law school. Your article focused on how Judge Stapleton approached difficult legal questions where Supreme Court precedent was split.

a. After looking at the article, I know what you think Judge Stapleton's judicial method was. How would you describe your judicial method to approach those kind of difficult cases where Supreme Court precedent is split?

Response: You are referring to the article, "Judge 'The Game by the Rules': An Appreciation of the Judicial Philosophy and Method of Walter K. Stapleton," published in the *Delaware Law Review*, which I co-authored with William T. Allen, a former Chancellor of the Delaware Court of Chancery, and Leo E. Strine, Jr., another former Chancellor and later Chief Justice of the Delaware Supreme Court. If I were to confront a difficult case where Supreme Court precedent is split, I would do my best to understand and harmonize all applicable Supreme Court precedent, as well as binding precedents of the applicable Court of Appeals (which currently for me is the Third Circuit, as I sit as a District Judge in the District of Delaware), and apply it to the facts of the case before me. I would also give careful consideration to the arguments of the parties to the case and the authorities cited by them.

b. The article you coauthored focused on Judge Stapleton's decision in *Planned Parenthood v. Casey*, in which he applied the undue burden standard of review that the Supreme Court then adopted. When would you be willing to create or adopt a new standard of review that has not yet been adopted by a majority of justices on the Supreme Court?

Response: In the more than 2,100 opinions I have written as a District Judge and Magistrate Judge, I do not believe I have ever had to consider creating or adopting a new standard of review that has not yet been adopted by a majority of the Justices of the Supreme Court. If I were to confront a case in which a party asked me to do so, I would thoroughly examine all analogous decisions of the Supreme Court, as well as

binding precedents of the Court of Appeals and persuasive decisions outside of my Circuit and from District Courts.

3. Now that you have spent nearly fifteen years on the bench, how would you characterize your judicial philosophy thus far? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.

Response: Starting with an open mind, I thoroughly review and analyze the briefs and arguments to understand the parties' positions; analyze all of the applicable law; and study the factual record before me, all to decide the issues presented by the case. I try to carefully explain how I reached my decision so the parties are confident their views have been considered and they have been treated fairly. Because I do not identify with a particular "philosophy," and I have not studied the judicial philosophies of Supreme Court Justices, I do not know which Justice's philosophy is most analogous to mine.

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

Response: Black's Law Dictionary defines originalism as follows: "The doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." I have never used the term "originalist" (or any other term) to describe my interpretive method.

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

Response: Black's Law Dictionary defines "living constitutionalism" as the "doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." I have never used the term "living constitutionalist" (or any other term) to describe my interpretive method.

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: As a District Judge today – and it would be the same if I am confirmed to the Federal Circuit – I follow the decisions of the Supreme Court and the precedential decisions of the Court of Appeals for the Circuit in which I sit. The Supreme Court has looked to original public meaning in interpreting certain constitutional provisions, such as the Second Amendment, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and the

Sixth Amendment, in *Crawford v. Washington*, 541 U.S. 36 (2004). Where the Supreme Court or a precedential decision of the Court of Appeals in which I sit requires that I apply the original public meaning of the Constitution, I do so and will continue to do so.

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: As a District Judge today – and it would be the same if I am confirmed to the Federal Circuit – I follow the decisions of the Supreme Court and the precedential decisions of the Court of Appeals for the Circuit in which I sit. I follow, and will continue to follow, Supreme Court precedent regarding the interpretive methods to be used when confronting questions of constitutional and statutory meaning. *See, e.g.*, *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President."); *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (holding courts should be "guided by the principle that [t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning") (internal quotation marks omitted).

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

Response: The Constitution is an enduring document that sets forth the principles that govern our nation. The Constitution does not change unless amended pursuant to Article V. The Supreme Court has recognized in some circumstances that, although the core principles embodied in the Constitution do not change, their application may be impacted by contemporary values and understandings. *See Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 492-93 (1954) ("In approaching this problem [of segregation in schooling], we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."). As a District Judge today – and it would be the same if I am confirmed to the Federal Circuit – I follow the decisions of the Supreme Court and the precedential decisions of the Court of Appeals for the Circuit in which I sit.

9. In 2012, you were presented with a case by citizens of Sussex County who sought a preliminary injunction to stop their city council from opening meetings by reciting the Lord's Prayer. When deciding whether to grant an injunction, you weighed the alleged harm to the plaintiffs of having to hear a prayer that offended them against the alleged harm to the council members of not being able to start their meetings with the Lord's Prayer.

a. When weighing the alleged harms to the parties, it seems like you agreed that the plaintiffs would be more harmed by having to listen to a prayer that offended them than the council members would be harmed by not being allowed to pray as they desired. Why did you find that being offended is a more serious harm than not being able to recite the Lord's Prayer in this case?

Response: In *Mullin v. Sussex County, Delaware*, 861 F. Supp. 2d 411 (D. Del. 2012), the plaintiffs sought a preliminary injunction to enjoin members of the Sussex County Council from beginning each Council session by reciting The Lord's Prayer. The parties agreed that the case required me to apply the Supreme Court's decision in *Marsh v. Chambers*, 463 U.S. 783, 786 (1983), and assess whether the plaintiffs had met their burden to show all of the required elements for a preliminary injunction: "'(1) the plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the plaintiff; (3) granting the injunction will not result in irreparable harm to the defendant; and (4) granting the injunction is in the public interest,'" *Mullin*, 861 F. Supp. 2d at 418 (quoting *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999). I carefully and impartially evaluated each of these factors based on the record the parties created. As for the harm factors specifically, I cited Supreme Court and Third Circuit precedents holding that loss of First Amendment freedoms protected by the Establishment Clause, "for even minimal periods of time, unquestionably constitutes irreparable injury," and explained that the defendants' injury – which they contended was losing "the guidance in performance of their duties that they now receive by reciting The Lord's Prayer" – could be remedied by opening meetings with a prayer that was not always the same, single prayer associated with Protestant Christianity. *See Mullin*, 861 F. Supp. 2d at 427-28. I found the harm to the defendants could be remedied in any of the many ways other legislatures around the country had proceeded, consistent with the First Amendment. *See, e.g.*, *Marsh*, 463 U.S. at 793-94 (finding nonsectarian legislative prayers to be constitutional); *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1271 (11th Cir. 2008) (finding sectarian legislative prayers to be constitutional where given by volunteer leaders of different religions on rotating basis).

b. You pointed out in your opinion that the council members could instead open meetings with a nonsectarian prayer or a moment of silence. Yet you did not view this as an irreparable harm. Why did you not consider it harmful for the government to require individuals—even public servants— to pray a different prayer or substitute a moment of silence for prayer?

Response: I did not conclude that requiring public servants to pray a different prayer or substitute a moment of silence for prayer would not be harmful. Instead, as the legal standards required, I considered whether the harm from such an injunction would be irreparable, and I concluded this harm would not be irreparable. Instead, the harm to the defendants could be remedied in any of the many ways other legislatures

around the country had proceeded, consistent with the First Amendment. *See, e.g.*, *Marsh*, 463 U.S. at 793-94 (finding nonsectarian legislative prayers to be constitutional); *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1271 (11th Cir. 2008) (finding sectarian legislative prayers to be constitutional where given by volunteer leaders of different religions on rotating basis).

c. In your order, you paused the preliminary injunction for a month in hopes that the parties would find a mutually agreeable resolution that could preserve the council's practice of opening meetings with prayer in a way that is consistent with constitutional law. You made that decision *sua sponte*, without a request by either party. Why did you believe it important for the parties to find an agreement that could still involve a legislative prayer?

Response: I stayed my preliminary injunction order for a month to permit Sussex County to continue with the practice it had followed for six years – beginning its sessions by reciting The Lord's Prayer – for a short additional period while the parties worked with one of our Court's Magistrate Judges to pursue a mutually-agreeable resolution of the case. In presiding over the case and reviewing the many decisions across the country addressing the constitutionality of legislative prayers, I observed that in many instances, the invocations offered at the start of legislative sessions had been found to be constitutional. I thought it was important to create an opportunity for the parties in my case to "attempt to agree upon how to preserve the Council's practice of opening its meetings with a prayer but to do so in a manner that is consistent with the United States and Delaware Constitutions." *Mullin*, 861 F. Supp. 2d at 429. With the assistance of Magistrate Judge Sherry R. Fallon, the parties eventually reached an agreement and asked me to dismiss the case.

d. Two years after your decision in this case, the Supreme Court decided *Town of Greece v. Galloway*, where it held that prayer offered by members of the clergy before town board meetings was consistent with the First Amendment because there is a long tradition of opening legislative sessions with prayer in this country. Indeed, we open the Senate every day with a prayer. Would you have decided this case differently after *Town of Greece*?

Response: Without the benefit of briefing and oral argument, as well as a record that would likely be different today than it was nearly a decade ago when I decided the *Mullin* case, it is difficult to say whether I would have decided the case differently with the benefit of the Supreme Court's decision in *Town of Greece v. Galloway*, 572 U.S. 565 (2014). In *Town of Greece*, the Supreme Court found no violation of the Establishment Clause where the town officials made repeated efforts to invite religious leaders from multiple religions to offer prayers at the start of government meetings; despite those efforts, in practice the prayers given were almost always Christian prayers. In *Mullin*, by contrast, the parties agreed that for six years every session of the County Council began with the same prayer – the Protestant version of

The Lord's Prayer – and there was no record of any effort to vary the prayer on any occasion. *Town of Greece* explained that "*Marsh*, indeed, requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer." 572 U.S. at 585. Thus, if the *Mullin* challenge were to arise today, the parties would likely not agree (as they did when I was handling the case) that the Court's task was to determine whether The Lord's Prayer was a distinctly Christian prayer; they would likely ask the Court to undertake a different inquiry on a different record.

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

Response: Yes. I am aware that the Supreme Court has issued a number of opinions discussing the limits on government's ability to regulate private institutions, including religious organizations and small businesses operated by observant owners, including *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). If confirmed, in any case presenting a question like this, I will hear from the parties, research the relevant law, make factual findings as appropriate, and apply the law to the facts consistent with binding precedent.

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

Response: The government may not act in a manner that is "hostile to the religious beliefs of affected citizens" or that "passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n,* 138 S. Ct. 1719, 1731 (2018). The Supreme Court has further stated, "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Any such Free Exercise claims are to be evaluated under strict scrutiny. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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

Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court held that the religious entity-applicants were entitled to a preliminary injunction to enjoin the enforcement of an executive order limiting occupancy on attendance at religious events in certain zones. The Court held that the applicants made a "strong showing" that the challenged restrictions violated "the minimum requirement of neutrality" to religion and, therefore, would likely prove a violation of the Free Exercise Clause of the First Amendment. *Id.* at 66. The Court then found that the challenged restrictions, if enforced, would cause irreparable harm, and that the government had not shown that granting the applications would harm the public. *See id.* at 67-68.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), the Supreme Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise;" therefore, "the government has the burden to establish that [such a] challenged law satisfies" the strict scrutiny test. The Court further held that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id*. The Court added that "litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants remain under a constant threat that government officials will use their power to reinstate the challenged restrictions." *Id*. at 1297 (internal quotation marks omitted).

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that while Colorado could incidentally infringe on the free exercise of religion by enacting a neutral law of general applicability, the Colorado Civil Rights Division had demonstrated an overt and impermissible hostility to religion through its enforcement of the challenged law and, therefore, violated the Free Exercise Clause. More broadly, the Supreme Court explained that the government must treat impartially the justification for refusing to comply with a facially neutral law, which burdens religion. *See id.* at 1724. The neutrality requirement is not met when a free

exercise defense is adjudicated by a body that is "hostile to the religious beliefs of affected citizens" or acts "in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Id.* at 1731.

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

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

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

Response: As a sitting District Judge, and as a nominee to the Federal Circuit, it would be inappropriate to offer an opinion about an issue that may come before me. I would follow all applicable Supreme Court and binding Court of Appeals precedent on any such issue, were it to arise before me as a District Judge or as a Federal Circuit Judge.

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

Response: The U.S. Supreme Court has held that people with sincere beliefs that their religion prevents or requires certain action are entitled to invoke the Free Exercise Clause, without a judicial evaluation of the validity of their interpretations. *See Frazee*, 489 U.S. at 833-34.

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

Response: I do not believe so.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court held that the "ministerial exception" to laws governing the employment relationship between a religious institution and certain employees barred two teachers' employment discrimination claims against Catholic elementary schools. The Court found that the "ministerial exception," which is grounded in the Religion Clauses of the First Amendment and had been articulated in *Hosanna-Tabor Evangelical Lutheran*

Church & School v. EEOC, 565 U.S. 171 (2012), was not limited to individuals who have formal titles or who satisfy academic requirements. *See Our Lady of Guadalupe School*, 140 S. Ct. at 2063-64. The Court affirmed that the First Amendment "protects the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 2055 (internal quotation marks omitted).

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021), the Supreme Court held that Philadelphia's refusal to contract with Catholic Social Services (CSS) for the provision of foster care services unless CSS agreed to certify same-sex couples as foster parents violates the Free Exercise Clause of the First Amendment. The Court found the City's non-discrimination requirement was not generally applicable and, thus, was subject to strict scrutiny. *See id.* at 1877-80. The City failed to meet its burden because it could not show a compelling interest in denying an exception to CSS. *See id.* at 1881-82.

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

Response: In Justice Gorsuch's concurrence in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), he highlighted several issues the lower courts and administrative authorities may consider on remand in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Justice Gorsuch noted that analysis of governmental interests must be "precise," rather than "broadly formulated." *Mast*, 141 S. Ct. at 2432. He also stated that the exemptions given to other groups and given by other jurisdictions should be given due weight. *See id.* at 2432-33. Finally, he found that the government must prove that rules are narrowly tailored "with evidence" and are not "based on certain assumptions." *Id.* at 2433.

20. If you are to join the Federal Circuit, and supervise along with your colleagues the court's human resources programs, will it be appropriate for the court to provide its employees trainings which include the following:

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

Response: I am not aware of any such training at my current court, the content of training provided by the Federal Circuit, or what role, if any, I would have in determining the content of training provided by the Federal Circuit, if confirmed. All training provided by federal courts should be consistent with the Constitution and

laws of the United States and should be designed to promote the sound and impartial administration of justice.

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

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

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 Question 20(a).

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

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

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

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

22. Is the criminal justice system systemically racist?

Response: I have heard the term "systemic racism" and understand it generally to refer to discriminatory and racial disparities in policies and practices designed to, or having the effect of, creating and maintaining racial inequalities. I believe the term is used in a manner that does not apply to discrete instances of discrimination by individual actors. As a District Judge for more than 11 years, I have handled more than 400 criminal cases, which has included sentencing approximately 200 defendants. In these cases, I am not called upon to evaluate larger issues of race and the law. Instead, my duty is to evaluate individual cases and controversies fairly and impartially, without regard to race. I have not been presented with a case requiring me to consider whether the criminal justice system is "systematically racist."

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

Response: Pursuant to the Appointments Clause of the Constitution, the President is delegated the authority, with the advice and consent of the Senate, to make appointments to political positions. U.S. Constitution, Art. II, § 2, cl. 2. As a judge and a judicial nominee, it is not for me to comment on what is appropriate or (outside the context of a

specific case if brought before me) constitutional for the President and Senate to consider in relation to political appointments.

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

Response: As a U.S. District Judge, I am bound by U.S. Supreme Court precedent regardless of that Court's size or composition. The same would be true if I am confirmed to sit on the Federal Circuit. For these reasons, it would be inappropriate for me to comment on whether the size of that Court should be changed.

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

Response: Yes. In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court concluded "[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." Subsequently, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the right to keep and bear arms is applicable to the states.

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

Response: No.

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

Response: No.

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

Response: As set forth in Article II of the Constitution, the executive power is vested in the President. In particular, Article II, Section 3 of the Constitution requires that the President "take Care that the Laws be faithfully executed." The Supreme Court has recognized that in undertaking this duty, the executive branch has broad discretion with respect to enforcement decisions. *See Wayte v. United States*, 470 U.S. 598, 607 (1985). "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis courts are competent to undertake." *Id*.

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

Response: I am unaware of any Supreme Court, Federal Circuit, or Third Circuit precedent that definitively answers this question, and the issue has not come before me as a District Judge. As a sitting judge and a judicial nominee, I do not wish to prejudge any issue that might come before me. If a question were to come before me (either as a District Judge or Federal Circuit Judge) as to whether an act constituted prosecutorial discretion or a substantive rule change, I would carefully consider the record and the arguments presented by the parties, and would impartially and faithfully research and apply any applicable Supreme Court and Court of Appeals precedent to the record.

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

Response: The federal death penalty is codified at 18 U.S.C. § 3591. It would require appropriate legislation duly passed by Congress and signed into law by the President to amend the current criminal code regarding the availability of capital punishment for certain offenses. However, Article II of the Constitution grants the President the "Power to grant Reprieves and Pardons for Offenses against the United States" in individual cases.

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

Response: In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court vacated the district court's stay pending appeal of the district court's grant of summary judgment in favor of the Alabama Association of Realtors (AAR). The district court had agreed with the AAR and concluded that the Centers for Disease Control and Prevention (CDC) lacked statutory authority to impose a nationwide eviction moratorium, but the district court had also stayed the effect of its ruling nullifying the eviction moratorium. The Supreme Court found that "the applicants are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority [under 42 U.S.C. § 264(a)]." *Id.* at 2486. The Supreme Court further found that the moratorium has put the applicants "at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery." *Id.* at 2489. Accordingly, the Supreme Court eliminated the moratorium.

32. Please answer the following regarding the Hatch Act:

a. Do you believe the law is too difficult to interpret and apply to modern technologies? Why or why not?

Response: The Hatch Act generally prohibits civil service employees of the Executive Branch of the federal government from engaging in political activity in the course of performing their jobs. *See United States v. Nat'l Treasury Emps. Union*,

513 U.S. 454, 471 (1995) ("Congress effectively designed the Hatch Act to combat demonstrated ill effects of Government employees' partisan political activities."); *Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1309 (Fed. Cir. 2003) ("The Hatch Act prohibits certain government employees from engaging in certain political activities."). As the Federal Circuit has explained, "the Hatch Act prohibits federal employees from using their official authority or influence to interfere with an election, solicit or receive political contributions, be candidates for public office in partisan elections, solicit or discourage political activity while on duty, in a government office, wearing an official uniform, or using a government vehicle." *Dolinsky v. Dep't of Homeland Sec.*, 372 F. App'x 85, 90 (Fed. Cir. 2010) (internal quotation marks omitted). In the more than 6,000 cases I have handled during my 14 years as a District Judge and Magistrate Judge, I am unaware of any that have presented an issue arising under the Hatch Act.

Pursuant to 28 U.S.C. § 1295(a)(9), the Federal Circuit has jurisdiction over appeals from a final order or final decision of the Merit Systems Protection Board, which can include appeals involving interpretation and application of the Hatch Act. Because the issue this question is asking about could come before me if I am confirmed, it would not be appropriate for me to opine outside the context of a specific case. To the extent the question is asking about my policy views, I am further unable to answer. Any policy views I may have do not affect my decisionmaking as a District Judge and likewise would not do so if I am confirmed to the Federal Circuit. If I am confirmed to the Federal Circuit, I will follow all binding precedent, of the Supreme Court and the Federal Circuit, in all areas, including issues relating to the Hatch Act.

b. Do you believe the law has the effect of discouraging agencies from reporting on violations? If so, why do you think that may be?

Response: Please see my response to Question 32(a).

c. In your view, does the law raise any constitutional concerns? Explain.

Response: Please see my response to Question 32(a).

d. What do you see as the major challenges or difficulties associated with the law?

Response: Please see my response to Question 32(a).

e. Do you believe the law needs reforming? If so, how do you recommend it ought to be reformed?

Response: Please see my response to Question 32(a).

f. Is Congress or the Judiciary best equipped to reform or revise provisions of the Hatch Act?

Response: Please see my response to Question 32(a).

33. Explain the *Feres* doctrine. Are there any limitations on *Feres* that allow an Armed Service member to sue the United States under the Federal Tort Claims Act? What are they?

Response: The Supreme Court in *Feres v. United States*, 340 U.S. 135, 146 (1950), held that the United States is not liable under the Federal Tort Claims Act (FTCA) for injuries to military personnel that "arise out of or are in the course of activity incident to service." In *United States v. Johnson*, 481 U.S. 681 (1987), the Supreme Court extended the *Feres* doctrine to cases in which the servicemember is injured in the performance of their military duties due to the alleged negligence of a *civilian* government employee. A year later, in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 506 (1988), the Supreme Court further extended the immunity doctrine to government contractors where "the Federal Government's interest in the procurement of equipment is implicated by suits . . . even though the dispute is one between private parties." Courts have held the doctrine does not apply where the alleged wrongdoing "in no way implicate[s] the function or authority of the military," *Durant v. Neneman*, 884 F.2d 1350, 1353 (10th Cir. 1989), or where the claimant's conduct does not "implicate military discipline in any meaningful way," *Schoenfeld v. Quamme*, 492 F.3d 1016, 1025 (9th Cir. 2007).

Further, although not under the FTCA, the National Defense Authorization Act for Fiscal Year 2020 created an administrative procedure by which servicemembers can seek compensation for personal injury or death caused by military health care providers' malpractice.

34. In *Matal v. Tam*, the U.S. Supreme Court was asked to decide whether the Disparagement Clause of the Lanham Act, which prohibits trademarks that disparage members of a racial or ethnic group, is invalid under the Free Speech Clause of the First Amendment. Explain your understanding of the Court's holding and reasoning in this case.

Response: The lead singer of "The Slants," Simon Tam, applied for federal registration of his band's name as a trademark, but the U.S. Patent and Trademark Office denied his application under 15 U.S.C. § 1052(a), which prohibits the registration of disparaging marks. The Supreme Court held that this disparagement clause is facially unconstitutional under the Free Speech Clause of the First Amendment. Writing for the Court, Justice Alito explained that trademarks are private speech, not government speech. Beyond that point, the Court's reasoning split into two opinions, each of which garnered the votes of four Justices. Justice Alito and three Justices went on to explain that the Court's subsidized-

speech cases and the government-program doctrine did not provide persuasive bases for deciding the issue before the Court. Concurring in part and concurring in the judgment, Justice Kennedy and three other Justices reasoned that application of the disparagement clause involved viewpoint discrimination, triggering heightened scrutiny.

35. Explain the U.S. Supreme Court's holding in *Star Athletica v. Varsity Brands* and your understanding of what the appropriate test is to determine whether a feature of a "useful article" is copyrightable under the Copyright Act.

Response: In *Star Athletica v. Varsity Brands*, 137 S. Ct. 1002 (2017), the Supreme Court explained that a feature of a design for a useful article is copyrightable if two requirements are met: (i) the feature may be perceived as a two-dimensional or three-dimensional work of art that is separate from the useful article, and (ii) the feature could be protected as a pictorial, graphic, or sculptural work (whether by itself or otherwise fixed in a tangible medium of expression) if separately imagined. Applying this test, the Supreme Court held that decorations on cheerleading uniforms were features with pictorial, graphic, or sculptural characteristics. If those features were imagined separately from the uniforms, they would be two-dimensional works of art that are eligible for copyright protection. Accordingly, the Supreme Court held that the uniforms' features were copyrightable.

36. Explain your understanding of the Federal Circuit's decision in *Vanda Pharmaceuticals v. West-Ward Pharmaceuticals*.

Response: In *Vanda Pharmaceuticals v. West-Ward Pharmaceuticals*, 887 F.3d 1117 (Fed. Cir. 2018), the Federal Circuit upheld the validity of Vanda's method of treatment claims and rejected a challenge that the claims were directed to nonpatentable subject matter under 35 U.S.C. § 101. In a split decision, the majority determined that the asserted claims were eligible at step one of the *Mayo*/*Alice* framework, as the claims were directed to "a specific method of treatment for specific patients using a specific compound at specific doses to achieve a specific outcome." *Id.* at 1136. The majority distinguished Vanda's method of treatment claims from those found ineligible for patenting by the Supreme Court in *Mayo* because Vanda's claims did not recite a natural law but, rather, a new application of a drug (iloperidone) to treat a particular disease (schizophrenia). In dissent, then-Chief Judge Prost took the view that the claims were directed to a natural law at step one and contained no inventive concept at step two.

37. Explain the U.S. Supreme Court's holding in *United States v. Arthrex, Inc.*

Response: In *United States v. Arthrex*, 141 S. Ct. 1970 (2021), the Supreme Court held that administrative patent judges (APJs) are principal officers who must be appointed by the President with the Senate's advice and consent. Writing for the Court, Chief Justice Roberts explained that the unreviewable power exercised by APJs during inter partes review is incompatible with their appointment by the Secretary of Commerce to an inferior office. To cure the Appointments Clause violation, the Court rendered inoperative the statutory restrictions preventing the Director of the USPTO from reviewing final APJ

decisions during inter partes review. Justice Breyer concurred, approving of the remedy but disagreeing with the underlying holding. Justice Gorsuch concurred in part and dissented in part, reasoning that the appropriate remedy was to invalidate the statutory scheme and allow Congress to fix the defect. Justice Thomas dissented, concluding that the APJs were inferior officers, and in any event the appropriate remedy even based on the majority's reasoning was to vacate the APJs' decisions.

38. In *Google v. Oracle America*, the U.S. Supreme Court was tasked with deciding whether copyright protection extends to a software interface, and if so, whether Google's use of a software interface (Java API) in the context of creating a new computer program constitutes fair use under copyright law. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Google v. Oracle America*, 141 S. Ct. 1183 (2021), the Supreme Court assumed, without deciding, that a software interface may be subject to copyright protection. Proceeding under that assumption, the Court considered the four factors outlined in the fair use statute, 17 U.S.C. § 107, to evaluate whether a secondary use is a fair use under copyright law; doing so, it found Google's limited copying of the Java API constituted a fair use. First, the Court concluded that Google's use was unlikely to undermine the general copyright protection provided by Congress for computer programs. Second, the use was transformative, copying only what was necessary to enable programmers to work in a different computing environment with a familiar programming language. Third, Google's copying of a very limited percentage of the entire API weighed in favor of finding fair use. Fourth, Google's new smartphone platform was not a market substitute for Java SE. Justice Thomas dissented, arguing the Court should have addressed whether Oracle's code is subject to copyright protection and explaining he would have held Google's use was not fair given its economic impact on Oracle.

39. Explain the U.S. Supreme Court's three main holdings in *Maine Community Health Options v. United States*.

Response: In *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020), the Supreme Court reviewed appeals from the Federal Circuit and from the U.S. Court of Federal Claims. In these cases, health insurers had sued the United States under the Tucker Act for breach of contract, seeking reimbursement for losses suffered as a result of participating in unprofitable health care exchanges under the Affordable Care Act (ACA). The Supreme Court's three main holdings were: (1) the plain language of the applicable statute established that Congress had created an obligation to pay participating insurers according to a statutory reimbursement program (Risk Corridors program); (2) Congress did not impliedly repeal the statutory obligation imposed on the government by passing appropriations riders; and (3) the insurance carriers properly brought suit under the Tucker Act in the Court of Federal Claims, since the claims fell within the Tucker Act's waiver of government immunity.

Senator Josh Hawley
Questions for the Record

Judge Leonard Stark
Nominee, U.S. Court of Appeals for the Federal Circuit

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

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

    Response: I am not familiar with this quotation or the context in which it was given. Instead, I have an approach to handling all cases before me. Starting with an open mind, I thoroughly review and analyze the briefs and arguments to understand the parties' positions; analyze all of the applicable law; and study the factual record before me, all to decide the issues presented by the case. I try to carefully explain how I reached my decision so the parties are confident their views have been considered and they have been treated fairly.

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

    Response: Please see my response to Question 1(a).

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

    Response: Abstention is a doctrine whereby courts may, or in some cases must, refuse to adjudicate a case if doing so would potentially intrude upon the power of another court. *See Voda v. Cordis Corp.*, 476 F.3d 887, 905 (Fed. Cir. 2007) ("Abstention doctrines embody the general notion that federal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest, for example where abstention is warranted by considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration.") (internal quotation marks omitted). There are several general kinds of abstention, some of which have been applied or at least recognized by the Federal Circuit.

    Pursuant to the *Colorado River* abstention doctrine, in "exceptional" circumstances federal courts may exercise their discretion to abstain from deciding a case when there is parallel litigation in both federal and state courts. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976); *see also Warsaw Orthopedic, Inc. v. Sasso*, 977 F.3d 1224, 1230 (Fed. Cir. 2020) (noting courts should not stay or dismiss federal proceeding pursuant to *Colorado River* doctrine if federal proceeding includes claim over which federal courts have exclusive jurisdiction), *cert. denied*, 141 S. Ct. 2799

(2021), and *cert. denied*, 141 S. Ct. 2800 (2021); *Profile Mfg., Inc. v. Kress*, 22 F.3d 1106 (Fed. Cir. 1994) (applying *Colorado River* abstention doctrine).

The *Burford* abstention doctrine provides that federal courts may abstain from deciding an essentially local issue arising out of a complex state regulatory scheme where the case presents difficult state law questions bearing on significant policy concerns and where adjudication in federal court would interfere with state efforts to develop and implement coherent public policy. *See Burford v. Sun Oil Co*., 319 U.S. 315 (1943); *see also HIF Bio, Inc. v. Yung Shin Pharms. Indus. Co.*, 508 F.3d 659, 667 (Fed. Cir. 2007) (noting *Burford* abstention doctrine), *rev'd sub nom. Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009).

Under the *Wilton*/*Brillhart* abstention doctrine, district courts have significant discretion to dismiss or stay claims seeking declaratory relief, even though they have subject matter jurisdiction over such claims. *See Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995); *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942); *see also Warsaw Orthopedic*, 977 F.3d at 1230 (Fed. Cir. 2020).

The *Younger* abstention doctrine provides that federal courts should abstain from hearing cases involving federal issues being litigated in state court where: (1) there is an ongoing state proceeding; (2) the claim implicates important state interests; and (3) the state proceedings provide an adequate opportunity to raise the federal claims. Exceptions to the *Younger* doctrine apply where the state proceeding is brought in bad faith or as part of a pattern of harassment, or if the law in question is patently unconstitutional. *See Younger v. Harris*, 401 U.S. 37 (1971). To my knowledge, the Federal Circuit has not applied the *Younger* abstention doctrine.

Under the *Pullman* abstention doctrine, federal courts should abstain from adjudicating the constitutionality of an ambiguous state statute until the state courts have had a reasonable opportunity to consider it. The doctrine applies where: (1) the case presents both state and federal constitutional grounds for relief; (2) the proper resolution of the state ground is not clear; and (3) the disposition of the state ground could obviate the adjudication of the federal constitutional ground. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). To my knowledge, the Federal Circuit has not applied the *Pullman* abstention doctrine.

Thibodaux abstention arises where state proceedings involve unresolved issues of state law that are of great importance to the state and where federal adjudication would infringe on state sovereignty. *See La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). To my knowledge, the Federal Circuit has not applied the *Thibodaux* abstention doctrine.

Although not an abstention doctrine, the *Rooker-Feldman* doctrine prohibits federal courts from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgements rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v.*

Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005); *see also Betts v. United States*, 667 F. App'x 771, 772 (Fed. Cir. 2016).

Similarly, the adequate and independent state ground doctrine provides that when a litigant petitions the Supreme Court to review the judgment of a state court which rests upon both federal and state law, the Supreme Court does not have jurisdiction over the case if the state ground is adequate to support the judgment and is independent of federal law. *See Michigan v. Long*, 463 U.S. 1032 (1983). To my knowledge, the Federal Circuit has not applied the adequate and independent state ground doctrine.

Finally, the *Erie* doctrine mandates that a federal court called upon to resolve a dispute not directly implicating a federal question, such as when sitting in diversity jurisdiction, must apply state substantive law and federal procedural law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *see also Core Labs. LP v. Spectrum Tracer Servs., L.L.C.*, 532 F. App'x 904, 908 (Fed. Cir. 2013).

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

   Response: No.

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

      Response: Not applicable.

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

   Response: As a District Judge today – and it would be the same if I am fortunate enough to be confirmed as a Judge on the Federal Circuit – I follow the decisions of the Supreme Court and the precedential decisions of the Court of Appeals for the Circuit in which I sit. The Supreme Court has looked to original public meaning in interpreting certain constitutional provisions, such as the Second Amendment, in *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008), and the Sixth Amendment, in *Crawford v. Washington*, 541 U.S. 36, 42-43 (2004). Where the Supreme Court or a precedential decision of the Court of Appeals in which I sit requires that I apply the original public meaning of the Constitution, I will do so.

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

   Response: I follow all binding Supreme Court and Court of Appeals precedent, including precedent on how to interpret legal texts. The Supreme Court has repeatedly stated, "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568

(2005). Therefore, in cases requiring me to interpret a legal text, I begin with the text itself. If the text is unambiguous on the issue before me, it is dispositive and the analysis is complete. *See Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016). If the text is ambiguous, then I next look to binding precedents of the Supreme Court and the pertinent Court of Appeals (the Third Circuit for me now, as I sit as a District Judge in the District of Delaware; the Federal Circuit if I am confirmed to sit on that court), and I follow those precedents. If, after these steps, there is still no answer to the issue presented by the case, I will consider opinions of other Courts of Appeals (as persuasive but not binding authority) and also decisions of District Courts. I will also apply canons of statutory construction and, at this point in the analysis, may consider legislative history. I would do so with caution, recognizing the Supreme Court has stated that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil*, 545 U.S. at 568.

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

Response: I follow all binding Supreme Court and Court of Appeals precedent, including precedent on legislative history. In *Garcia v. United States*, 469 U.S. 70, 76 (1984), the Supreme Court explained that "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation" (internal quotation marks omitted). The Supreme Court has also stated that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983). Further, the Supreme Court has cautioned that legislative history may give "unrepresentative committee members – or, worse yet, unelected staffers and lobbyists – both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Exxon Mobil*, 545 U.S. at 568. Thus, the Supreme Court has "eschewed reliance on the passing comments of one Member and casual statements from the floor debates." *Garcia*, 469 U.S. at 76 (internal citation omitted).

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

Response: I follow all binding Supreme Court and Court of Appeals precedent, including precedent on when it is appropriate to consult the laws of foreign nations when interpreting the Constitution. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 592-95 (2008), the Supreme Court looked to English common law from the time prior to ratification when interpreting the Second Amendment.

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

   Response: As a court of limited jurisdiction without a criminal docket, the Federal Circuit has not developed a legal standard governing execution protocol. The Supreme Court in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), affirmed that the *Baze-Glossip* test governs claims asserting that a method of execution violates the Eighth Amendment's prohibition on cruel and unusual punishment. Under that test, a claimant must identify a "feasible and readily implemented alternative method of execution" that would "significantly reduce a substantial risk of severe pain" and which the state has refused to adopt without a legitimate reason. *Id.* at 1125.

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

   Response: Yes. In *Glossip v. Gross*, 576 U.S. 863, 878 (2015), the Supreme Court explained that a claimant challenging an execution protocol under the Eighth Amendment must "establish the existence of a known and available alternative method of execution that would entail a significantly less severe risk" of pain.

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

   Response: Not to my knowledge. The Supreme Court in *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 72-74 (2009), held there is no substantive due process right to DNA analysis of evidence to prove innocence. The Federal Circuit is a court of limited jurisdiction without a criminal docket and has not addressed this issue.

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

   Response: No.

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

Response: To survive a constitutional challenge under the Free Exercise Clause of the First Amendment, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Instead, the law need only be rationally related to a legitimate governmental interest. *See Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 876-82 (1990). In the absence of these elements, however, the law is subject to strict scrutiny and must be narrowly tailored to serve a compelling state interest. *See Church of the Lukumi*, 508 U.S. at 531-32.

A facially neutral law is not necessarily neutral. For instance, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Id.* at 533. Additionally, the Supreme Court has stated that "government regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Further, a law is not generally applicable if it authorizes the government to grant unrestricted discretionary exemptions. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). Moreover, a government defending the application of a neutral law of general applicability may not base its defense on hostility to a religion or religious viewpoint. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729-31 (2018).

The Religious Freedom Restoration Act of 1993 (RFRA), applicable to the federal government, provides further protection for the free exercise of religion. The RFRA provides that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," except if it demonstrates that the application of that burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. §§ 2000bb-1(a), (b).

I will follow all of these Supreme Court precedents if confronted with a Free Exercise challenge either as a District Judge or if confirmed to the Federal Circuit. As the Federal Circuit is a court of limited subject matter jurisdiction, I do not believe there are any Federal Circuit precedents responsive to this question.

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

Response: Please see my response to Question 10.

Additionally, the Supreme Court has long held that the Free Exercise Clause is a foundational and fundamental constitutional right. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940). Therefore, state laws that discriminate against a religious group or religious belief are subject to strict scrutiny review, which requires that the state demonstrate: (1) a compelling governmental interest in the regulation, and (2) the regulation is narrowly

tailored to the meet the needs of the compelling interest. There must be no less restrictive alternative available to meet the compelling need identified. The Supreme Court has adjudicated numerous cases involving claims of state action discrimination against religious groups or beliefs. *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993).

I will follow all of these Supreme Court precedents if confronted with a Free Exercise challenge either as a District Judge or if confirmed to the Federal Circuit. As the Federal Circuit is a court of limited subject matter jurisdiction, I do not believe there are any Federal Circuit precedents responsive to this question.

12. 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: In the more than 6,000 cases I have handled over the past 14 years as a District Judge and Magistrate Judge, I do not believe I have ever been asked to issue a nationwide (or universal) injunction and I have not granted such relief. The Supreme Court has noted that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Furthermore, "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). While the Supreme Court has upheld nationwide injunctions when they are necessary to grant relief to the parties, *see Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017) (upholding portion of preliminary injunction with respect to parties and similarly situated nonparties), the authority for a District Judge to enter a nationwide injunction has also been the subject of further consideration by at least several members of the Supreme Court, *see, e.g.*, *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599-600 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2428-29 (2018) (Thomas, J., concurring).

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

Response: As the Federal Circuit is a court of limited subject matter jurisdiction, I do not believe there are any Federal Circuit precedents responsive to this question. The Supreme Court has held that when evaluating a Free Exercise challenge courts should not determine whether "religious beliefs are mistaken or insubstantial" but should undertake only the "narrow function" of determining whether a religious belief reflects "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

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

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

Response: In his dissent, Justice Holmes explained that "a Constitution is not intended to embody a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). I believe the quote reflects Justice Holmes' belief that the Fourteenth Amendment did not enact the specific economic view set out in the *Lochner* majority opinion. *See Lochner*, 198 U.S. at 64 ("[T]he freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.").

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

Response: As a District Judge and a nominee to the Federal Circuit, I am bound to follow binding Supreme Court precedent. My understanding is that much of *Lochner* was abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) ("There is no absolute freedom to do as one wills or to contract as one chooses.").

15. 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 not familiar with this quote or the context in which it was made. Nevertheless, I understand it to mean that judges should impartially and faithfully discharge their duties without consideration of their personal opinions as to the results. I have striven to fulfill my duties in this manner for more than 14 years as a District Judge and Magistrate Judge and would continue to do so if confirmed to the Federal Circuit.

16. In *Trump v. Hawaii*, the Supreme Court overruled *Korematsu v. United States*, 323 U.S. 214 (1944), saying that the decision—which had not been followed in over 50 years—had "been overruled in the court of history." 138 S. Ct. 2392, 2423 (2018). What is your understanding of that phrase?

Response: My understanding of that phrase comports with Chief Justice Roberts' statement that *Korematsu* was "gravely wrong the day it was decided," and the Court's finding that *Korematsu* was a mistaken decision. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

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

a. If so, what are they?

Response: The Supreme Court establishes binding precedents that all lower courts, including the Federal Circuit and the District of Delaware, must follow. The Supreme Court also determines when its own precedents are no longer good law. As a District Judge, or if I am confirmed to the Federal Circuit, it is my duty to follow what the Supreme Court says, including when that Court decides to overrule one of its own precedents. Any personal views I may have are not relevant to my judicial decision-making.

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

Response: Yes, without exception.

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

a. Do you agree with Judge Learned Hand?

Response: In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992), the Supreme Court held that evidence of more than 80% of market share was "sufficient to survive summary judgment" under the standard for a finding of monopoly power. As a sitting District Court judge and a judicial nominee, I believe it is generally inappropriate for me to offer an opinion regarding the correctness of any particular court decisions, including those made by Judge Learned Hand. If confirmed, I would faithfully apply all controlling precedent to the cases that came before me, regardless of any personal view, just as I have done for 14 years as a District Judge and Magistrate Judge presiding over more than 6,000 cases.

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

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

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

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

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

Response: In *Rodriguez v. Federal Deposit Insurance Corp.*, 140 S. Ct. 713, 717 (2020), the Supreme Court explained that "federal common law plays a necessarily modest role," comprised of "only limited areas . . . in which federal judges may appropriately craft the rule of decision," such as "admiralty disputes and certain controversies between States." The Supreme Court emphasized that to "claim a new area for common lawmaking, strict conditions must be satisfied," including "one of the most basic: In the absence of congressional authorization, common lawmaking must be 'necessary to protect uniquely federal interests.'" *Id.* (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

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

Response: Generally, the interpretation of a state constitutional provision is a matter of state law. Federal courts must defer to the decisions of the highest court in the state whose constitution the federal court is interpreting. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

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

Response: Generally, yes, but as noted in my response above, a state's highest court has the authority to interpret its own state's constitutional provisions. This makes it at least possible that a state court may interpret the identical language in the state's constitution differently than the U.S. Supreme Court has interpreted identical language in the U.S. Constitution. In interpreting the federal constitutional provision, however, the state would be bound to follow the precedent of the U.S. Supreme Court.

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

Response: Generally, yes. The Supremacy Clause, U.S. Const. Art. VI cl. 2, provides that the U.S. Constitution is "the Supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This means that protections granted by the U.S. Constitution are binding on states, "notwithstanding" what a state's constitution provides.

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

Response: As a District Judge and nominee to the Federal Circuit, I am bound to follow all Supreme Court precedent, regardless of any personal view I may have. It is also not appropriate for me to comment on any issues that may come before me. However, it is unlikely that de jure racial segregation in schools will come before federal courts. Thus, like prior judicial nominees, I can state that I believe *Brown v. Board of Education* was correctly decided.

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

Response: Please see my response to Question 12.

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

Response: Please see my response to Question 12.

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

Response: Please see my response to Question 12.

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

Response: Federalism, which is the division of powers between the federal government and the States, plays a crucial role in our constitutional system. As the Supreme Court stated in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

The Supreme Court has further explained that the "federal system established by our Constitution preserves the status of the States in two ways." *Alden v. Maine*, 527 U.S. 706, 714 (1999). "First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Id.* "Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of the concept of a central government that would act upon and through the States in favor of a system in which the State and Federal Governments would exercise concurrent authority over the people – who were, in Hamilton's words, the only proper objects of government." *Id.* (internal quotation marks omitted).

24. What case or legal representation are you most proud of?

Response: I am proud of all the work I did as a lawyer, including my four years as a corporate litigation associate in the Delaware office of Skadden, Arps, Slate, Meagher & Flom LLP and my five years as an Assistant United States Attorney for the District of Delaware. One case that stands out in my memory was a proposed fraud prosecution in which I agreed to the defense lawyer's request for a pre-charge proffer and, after extensive questioning and other investigation, the case agents, my supervisors, and myself all agreed it would not be the best exercise of prosecutorial discretion to proceed with a criminal matter.

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

Response: Please see my response to Question 2.

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

Response: As a judge, it is not for me to request relief, so my analysis is limited to assessing whether a party before me seeking any type of relief has made the necessary showing to warrant an award of such relief. In general, injunctive relief may not be warranted where any harm to the injured party is fully compensable by money damages. The Supreme Court has stated that injunctive relief is most appropriate when there is "irreparable injury and inadequacy of legal remedies." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). As a District Judge, and it would be the same if I am confirmed to the Federal Circuit, I will follow all binding precedent, including on issues of damages and injunctive relief.

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

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

Response: Please see my responses to Questions 10, 11, and 13.

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

Response: The Supreme Court has not identified the difference in meaning, if any, between free exercise of religion and freedom of worship. For example, in *Lee v. Weisman*, 505 U.S. 577, 591 (1992), the Supreme Court referred to the right protected by the Free Exercise Clause of the First Amendment as the

"freedom to worship." Similarly, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), the Supreme Court listed the rights protected by the First Amendment as including "free speech, a free press, [and] freedom of worship and assembly." On the other hand, on at least several occasions the Supreme Court has discussed the First Amendment right as "the right to the free exercise of religion," *McDaniel v. Paty*, 435 U.S. 618, 620 (1978); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (describing Free Exercise claim by reference to "free exercise of religion").

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 responses to Questions 10, 11, and 13.

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

Response: Please see my responses to Questions 10, 11, and 13.

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

Response: The Supreme Court has explained 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 & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (internal citation and quotation marks omitted).

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: Yes. The citations are provided below:

Knights of Columbus Star of the Sea Council 7297 v. City of Rehoboth Beach, 506 F. Supp. 3d 229 (D. Del. 2020).
Parkell v. Senato, 2019 WL 1435883 (D. Del. Mar. 31, 2019).
Winter v. Mills, 2019 WL 1317620 (D. Del. Mar. 22, 2019).
Parkell v. Frederick, 2018 WL 1377100 (D. Del. Mar. 19, 2018).
Parkell v. Linsey, 2017 WL 3485817 (D. Del. Aug. 14, 2017).
Desmond v. Phelps, 2015 WL 5138269 (D. Del. Sept. 1, 2015).

Williams v. Delaware, 2015 WL 4592230 (D. Del. July 30, 2015).
Gordon v. Scarborough, 2013 WL 1145754 (D. Del. Mar. 18, 2013).
Mullin v. Sussex Cty., 861 F. Supp. 2d 411 (D. Del. 2012).
Owens-Ali v. Pennell, 2012 WL 174401 (D. Del. Jan. 19, 2012).

28. Under American law, a criminal defendant cannot be convicted unless found to be guilty "beyond a reasonable doubt." On a scale of 0% to 100%, what is your understanding of the confidence threshold necessary for you to say that you believe something "beyond a reasonable doubt." Please provide a numerical answer.

Response: I am not aware of any Supreme Court precedent that assigns a numerical percentage for determining the reasonable doubt standard. Instead, the Supreme Court stated in *Illinois v. Gates*, 462 U.S. 213, 235 (1983), that "an effort to fix some general, numerically precise degree of certainty" to standards of proof "may not be helpful."

As a District Judge, I have presided over more than a dozen criminal trials, and in each one I have instructed the jury on the reasonable doubt standard with an instruction along the lines of the following:

> Proof beyond a reasonable doubt does not mean proof beyond all possible doubt or to a mathematical certainty. Possible doubts or doubts based on conjecture, speculation, or hunch are not reasonable doubts. A reasonable doubt is a fair doubt based on reason, logic, common sense, or experience. It is a doubt that an ordinary reasonable person has after carefully weighing all of the evidence, and is a doubt of the sort that would cause him or her to hesitate to act in matters of importance in his or her own life. It may arise from the evidence, or from the lack of evidence, or from the nature of the evidence.

The Federal Circuit is a court of limited subject matter jurisdiction and does not handle criminal cases.

29. The Supreme Court has held that a state prisoner may only show that a state decision applied federal law erroneously for the purposes of obtaining a writ of habeas corpus under 28 U.S.C. § 2254(d) if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

a. Do you agree that if there is a circuit split on the underlying issue of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents"?

Response: The Supreme Court has explained "[i]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a

specific legal rule that has not been squarely established by this Court." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotation marks omitted). Thus, a "federal court may grant habeas relief only if a state court violated clearly established Federal law, as determined by the Supreme Court of the United States." *Dunn v. Reeves*, 141 S. Ct. 2405, 2410-11 (2021) (internal quotation marks and emphasis omitted). "This wide latitude means that federal courts can correct only extreme malfunctions in the state criminal justice system. And in reviewing the work of their peers, federal judges must begin with the presumption that state courts know and follow the law." *Id.* at 2411 (internal citation and quotation marks omitted). As a District Judge, and it would be the same if I am confirmed to the Federal Circuit, I would follow these and all Supreme Court precedents.

b. In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?

Response: Please see my response to Question 29(a).

c. If you disagree with either of these statements, please explain why and provide examples.

Response: Please see my response to Question 29(a).

30. In your legal career:

a. How many cases have you tried as first chair?

Response: As an Assistant United States Attorney (AUSA), I tried one criminal jury trial as first chair, with no other attorney assisting me.

b. How many have you tried as second chair?

Response: As a litigation associate at Skadden, Arps, Slate, Meagher & Flom LLP (Skadden), I was second chair for one bench trial and I was part of an extensive team of lawyers handling another bench trial. As an AUSA, I was second chair for one criminal jury trial.

c. How many depositions have you taken?

Response: To the best of my recollection, as a litigation associate at Skadden I took approximately 10 depositions. As an AUSA, I took at least two or three depositions.

d. How many depositions have you defended?

Response: To the best of my recollection, at Skadden I defended approximately two dozen depositions.

e. How many cases have you argued before a federal appellate court?

Response: As an AUSA, I argued five cases before the United States Court of Appeals for the Third Circuit. I briefed additional federal appeals, both as an AUSA and as an associate at Skadden, that either were not argued or were argued by other attorneys.

f. How many cases have you argued before a state appellate court?

Response: I have never argued before a state appellate court. As an associate at Skadden, I helped brief approximately five appeals to the Delaware Supreme Court, that either were not argued or were argued by other attorneys.

g. How many times have you appeared before a federal agency, and in what capacity?

Response: To the best of my recollection, the only occasions I appeared before a federal agency were: (i) at Skadden, I defended a corporation and many of its officers and employees in connection with a confidential investigation by the United States Securities and Exchange Commission; and (ii) in law school I represented a federal inmate in her hearing before the United States Parole Commission.

h. How many dispositive motions have you argued before trial courts?

Response: To the best of my recollection, I argued approximately five dispositive motions in federal court as an AUSA.

i. How many evidentiary motions have you argued before trial courts?

Response: To the best of my recollection, I argued one discovery motion in the Delaware Court of Chancery while I was at Skadden and argued at least a dozen evidentiary motions (including motions to suppress evidence in a criminal case) in the United States District Court for the District of Delaware while I was an AUSA.

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

Response: In law school, I wrote and published two articles relating to presidential nomination contests and ballot access. In each, I explored arguments that might be made for and against the constitutionality of: (1) the presidential nomination system which allows the same two states (Iowa and New Hampshire) to play a disproportionately influential role to the potential detriment of voters in states holding primaries and caucuses later in the schedule; and (2) certain laws in New York and Delaware relating to which presidential candidates would be placed on the ballot for these respective states' presidential primaries.

a. If yes, please provide appropriate citations.

Response: The citations are listed below:

Note, "The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?", 15 Yale L. & Pol'y Rev. 327 (1996).

"You Gotta Be On It To Be In It: State Ballot Access Laws and Presidential Primaries," 5 George Mason L. Rev. 137 (1997).

32. 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.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court held that the Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and are "implicit in the concept of ordered liberty" (internal quotation marks omitted). In *Glucksberg*, the Court recognized that the "liberty" protected by the Due Process Clause includes the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v.Soc'y of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); and to abortion, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). *Glucksberg* also noted that the Court had "assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment." 521 U.S. at 720 (citing *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278-79 (1990)). Subsequent to

Glucksberg, the Supreme Court has articulated a right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999), and the right of same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

Response: I have heard the term "systemic racism" and understand it generally to refer to discriminatory and racial disparities in policies and practices designed to, or having the effect of, creating and maintaining racial inequalities. I believe the term is used in a manner that does not apply to discrete instances of discrimination by individual actors. As a District Judge and Magistrate Judge for more than 14 years, I have handled more than 6,000 cases. In these cases, I am not called upon to evaluate larger issues of race and the law. Instead, my duty is to evaluate individual cases and controversies fairly and impartially, without regard to race. I have not been presented with a case requiring me to consider whether the entire nation is "systemically racist."

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

Response: I represented clients for nearly a decade, split between Skadden and the United States Attorney's Office. Although I have been a judge for the past 14 years, and I cannot recall a specific instance in which my client's litigation position conflicted with my personal views, I believe this did happen on occasion.

a. How did you handle the situation?

Response: In all cases I handled as a lawyer, I diligently and zealously advocated on behalf of my client by making good faith, legally supported arguments, regardless of my personal views.

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

Response: Yes.

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

Response: Federalist 78, "The Judiciary Department," which sets out the proper role of the judiciary. No judge can or should impose his or her will in contradiction to the Constitution or controlling law. Judges do not make the law or enforce the law, but instead handle actual cases or controversies that are before them.

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

Response: As a sitting District Judge and a nominee to the Federal Circuit, it would not be appropriate for me to offer a personal opinion on this question, which may be pending

in court at this time and/or may come before a court. Whether I remain a District Judge or am confirmed to the Federal Circuit, I will follow all binding precedent, including Supreme Court precedent on abortion, regardless of any personal view I may have. Under current law, the Supreme Court is focused on viability. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court concluded "[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." Accordingly, the Court found unconstitutional the District of Columbia's ban on handguns at home. *See id.*

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: Yes. As a District Judge, I have authored the following opinions:

Doe v. Wilmington Hous. Auth., 880 F. Supp. 2d 513 (D. Del. 2012).

United States v. Woodson, 2013 WL 817071 (D. Del. Mar. 5, 2013).

Also, when I sat by designation with the Third Circuit, I joined the majority opinion in *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied*, 572 U.S. 1100 (2014).

39. 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: The only other occasion on which I have testified under oath was at my confirmation hearing to be a District Judge on April 22, 2010. Video of the hearing is available at https:/www.judiciary.senate.gov/meetings/nominations-2010-04-22.

40. 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.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: While I have no recollection of ever doing this, it is possible that I participated in drafting or editing parts of briefs when I was an associate at Skadden (1997-2001) or an AUSA (2002-2007) and my name was not listed on the brief that was filed. I cannot recall this occurring and, therefore, I cannot list any cases in which this might have occurred.

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

Response: Please see my response to Question 42.

43. Have you ever confessed error to a court?

Response: To the best of my recollection, no.

a. If so, please describe the circumstances.

Response: Please see my response to Question 43.

44. 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: The Constitution requires the Senate to play an important role, providing advice and consent, in the process of appointing federal judges. Therefore, as a nominee, I have endeavored to be as candid as possible, while still adhering to my oath as a sitting federal judge and complying with the canons of judicial conduct that apply to federal judges and nominees for a federal judgeship.

Senator Mike Lee
Questions for the Record
Leonard Stark, nominated to be United States Circuit Judge for the Federal Circuit

1. How would you describe your judicial philosophy?

Response: Starting with an open mind, I thoroughly review and analyze the briefs and arguments to understand the parties' positions; analyze all of the applicable law; and study the factual record before me, all to decide the issues presented by the case. I try to carefully explain how I reached my decision so the parties are confident their views have been considered and they have been treated fairly.

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

Response: In my 14 years as a District Judge and Magistrate Judge, I have presided over many cases that involved the interpretation of a federal statute. In each instance, my approach is to begin with the statutory text; if it is unambiguous with respect to the issue in dispute, then the text is dispositive. If there remains a dispute, I then carefully consider any binding Supreme Court and Court of Appeals precedent – including the respective courts' precedent on the appropriate method of statutory interpretation – and, if necessary, I might consider (as persuasive but not binding authority) appellate precedent from outside my Circuit and also District Court opinions. If the conclusion is still uncertain at that point in the analysis, I will apply canons of statutory construction and might consider legislative history.

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

Response: In my 14 years as a District Judge and Magistrate Judge, I have presided over many cases that involved the interpretation of a constitutional provision. In each instance, my approach is to begin with the text of the constitutional provision; if it is unambiguous with respect to the issue in dispute, then the text is dispositive. If there remains a dispute, I then carefully consider any binding Supreme Court and Court of Appeals precedent – including the respective courts' precedent on the appropriate method of constitutional interpretation – and, if necessary, I might consider (as persuasive but not binding authority) appellate precedent from outside my Circuit and also District Court opinions.

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

Response: As I stated in response to Question 3, the starting point in any interpretation of the Constitution is the text of the constitutional provision at issue. Where the Supreme Court or the applicable Court of Appeals – the Third Circuit for me now, as I sit as a District Judge in the District of Delaware; the Federal Circuit if I am confirmed to sit on that court – has examined the original meaning of a

constitutional provision, I employ that approach. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) ("We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment."); *Crawford v. Washington*, 541 U.S. 36, 42-43 (2004) ("The Constitution's text [i.e., the Sixth Amendment] does not alone resolve this case. . . . We must therefore turn to the historical background of the [Confrontation] Clause to understand its meaning.").

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: In general, I understand the term "plain meaning" to refer to the public understanding of the statute or constitutional provision at the time of enactment.

6. What are the constitutional requirements for standing?

Response: The constitutional requirements for standing are injury-in-fact, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

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

Response: The Supreme Court has identified certain classifications as inherently suspect, such as race, nationality, and alienage. *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) ("But the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.").

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

Response: Separation of powers and checks and balances – that is, placement of legislative power in Congress, executive power in the President, and judicial power in the courts, resulting in each branch having certain powers that limit the exercise of a power by another branch – play key roles in our constitutional structure. They ensure that no one branch of the federal government becomes too powerful and, thereby, help protect the rights of individuals and States. *See generally Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring) ("To that end [the Founders] rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity.").

9. 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: As either a District Judge or Federal Circuit judge, I would begin with the text of the Constitution and analyze it in conjunction with controlling precedent, including any precedent in which one branch of government assumed an authority not granted to it by the text of the Constitution. Some examples in which the Supreme Court has found that a branch exceeded its constitutional authority are *United States v. Morrison*, 529 U.S. 598, 619 (2000) (holding that Commerce Clause did not provide Congress with authority to enact civil remedy provision of Violence Against Women Act), and *United States v. Lopez*, 514 U.S. 549, 551-52 (1995) (holding Congress exceeded its power to legislate under Commerce Clause when it passed Gun-Free School Zones Act).

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

Response: A judge should faithfully apply the law to the facts of a case without injecting his or her personal views into consideration of the case. This is what I have done for more than 14 years as District Judge and Magistrate Judge and I would continue to do so as a Federal Circuit judge, if confirmed.

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

Response: Both invalidating a law that is constitutional and upholding a law that is unconstitutional are undesirable.

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

Response: I understand "judicial review" to be the doctrine described by the Supreme Court in *Marbury v. Madison*, 5 U.S. 137, 177 (1803), in which the Supreme Court described the judiciary's role as being to "say what the law is." As *Marbury* further explained: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." *Id.* Although I am less familiar with the concept of "judicial supremacy," I understand it to describe a view that only the Supreme Court has authority to interpret the Constitution. By contrast, judicial review recognizes a role for the legislative and executive branches to interpret the Constitution, while also requiring these branches to follow the judgments of the Supreme Court in particular cases.

13. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."

How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: As a sitting federal judge and a nominee for another federal judgeship, it is not appropriate for me to comment on how elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions.

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

Response: Federalist 78 is entitled "The Judiciary Department" and reminds judges of the proper role of the judiciary. No judge can or should impose his or her will in contradiction to the Constitution or controlling law. Judges do not make the law or enforce the law, but instead handle actual cases or controversies that are before them. Hamilton's words are important for judges to keep in mind also as a reminder that all who litigate are entitled to be treated fairly and impartially, to have their arguments carefully considered, and to have a clear explanation as to why their dispute was resolved in the manner the court decided.

15. 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: Lower court judges, including district and circuit court judges, are duty-bound to follow Supreme Court precedent and prior circuit court precedent that is on point for an issue, regardless of whether they agree with that precedent. To the extent the precedent does not address the issue at hand, then lower court judges should explain why the precedent is distinguishable and seek to identify analogous authority that may be instructive on the issue. Judges should exercise judicial restraint to address the issues that are properly before the court.

Questions from Senator Thom Tillis
for Leonard Philip Stark
Nominee to be United States Circuit Judge for the Federal Circuit

1. **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: In the years since the Supreme Court issued its opinions in *Alice Corp. Pty. Ltd. v. CLS Bank International*, 573 U.S. 208 (2014), and *Mayo Collaborative Services v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012), the District of Delaware has experienced a substantial increase in the number of motions challenging whether asserted patents are directed to patentable subject matter under 35 U.S.C. Section 101. I have resolved more than 100 such motions. Because I have so many of these motions, and because the Federal Circuit has issued numerous opinions in this area, I developed what I call "101 Days," in which I hear argument on similar Section 101 motions in multiple cases all on the same day and I try to rule on those motions from the bench that same day. I have also sat by designation with the Federal Circuit and, when I did so, I authored a unanimous opinion for the Court affirming a district court's grant of a motion finding patent claims to be not eligible for patenting. *See Mortg. Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314 (Fed. Cir. 2016).

   I do not feel it would be appropriate for me to express a personal opinion on the current state of eligibility jurisprudence. Section 101 issues are pending before me as District Judge. Appeals from Section 101 decisions I have made are likely pending in the Federal Circuit. And the Federal Circuit's partial affirmance of another 101 decision of mine is pending before the Supreme Court, which has called for the views of the Solicitor General on whether to grant a writ of certiorari. *See Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 309 F. Supp. 3d 218 (D. Del. 2018), *aff'd in part, vacated in part, and remanded*, 967 F.3d 1285 (Fed. Cir. 2020). If confirmed to the Federal Circuit, I will follow binding precedents of the Supreme Court and the Federal Circuit on Section 101, just as I have done as a District Judge.

2. **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 noted in my response to Question 1, I have resolved more than 100 motions raising challenges to whether claims of certain patents were directed to nonpatentable subject matter. Because my docket currently includes more than 200 patent cases, I have additional Section 101 issues pending in front of me. The Federal Circuit is reviewing or will review some of my Section 101 decisions and the Supreme Court is currently considering whether to grant a writ of certiorari in one case in which I granted a Section 101 motion. *See Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 309 F. Supp. 3d 218 (D. Del. 2018), *aff'd in part, vacated in part, and remanded*, 967 F.3d 1285 (Fed. Cir. 2020). For these reasons, I do not feel it would be appropriate for me to answer hypotheticals about how I would rule with respect to certain types of patent claims.

The Supreme Court has set forth a two-step framework for "distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts." *Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208, 217 (2014) (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012)). A court must first "determine whether the claims at issue are directed to one of those patent-ineligible concepts." *Id.* If the court determines that the claims are directed to a patent-ineligible concept, the court must then "consider the elements of each claim both individually and 'as an ordered combination' to determine whether the additional elements 'transform the nature of the claim' into a patent-eligible application." *Id.* (quoting *Mayo Collaborative Servs.*, 132 S. Ct. at 1297, 1298).

As a District Judge, I have done my best to apply this two-part test on the many occasions I have been presented with a Section 101 challenge to patent claims. If I am confirmed to the Federal Circuit, I will continue to do my best to apply all binding precedent of the Supreme Court and the Federal Circuit, including in relation to Section 101.

Because I would not want to give the impression that I have prejudged matters that might come before me, I must decline to provide my thoughts on how I would view any of the hypotheticals about which you have asked.

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

c. *HumanGenetics* Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics* Company wants to patent a human gene or fragment that

contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?

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

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

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

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

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

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

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

g. ***BioTechCo*** **discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should** ***BioTechCo*** **be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if** ***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: Please see my response to Question 2(a).

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

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

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

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

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

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

Response: Please see my responses to Questions 1 and 2(a) above.

4. **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 the patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.**

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

Response: In the District of Delaware, the Court in which I now sit, all cases are randomly assigned to one of our four active District Judges. There is no ability for

litigants to choose their judge. I am aware that in larger districts, and particularly those in which there are multiple divisions, vicinages, or courthouses, litigants might be able to, in effect, choose a judge by choosing in which division, vicinage, or courthouse to file their case.

As a sitting District Court judge, who lacks detailed knowledge of any District other than my own, and as a nominee to the Federal Circuit, which has before it – and will likely continue to have before it – appeals and mandamus petitions presenting issues relating to venue, it would not be appropriate for me to state an opinion on whether the issues you ask about are a problem.

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

Response: Please see my response to Question 4(a).

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

Response: I am not sure what you mean by the term "forum selling." In my 14 years as a District Judge and Magistrate Judge, I have never taken any steps with the intention of attracting a particular type of case or litigant. I have instead sought to fairly and efficiently consider all the cases that appear on my docket.

d. If so, please explain your reasoning.

Response: Please see my response to Question 4(a).

5. 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: In 2017, the Supreme Court issued its opinion in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1517 (2017), holding that "a domestic corporation 'resides' only in its State of incorporation for purposes of the patent venue statute," 28 U.S.C. § 1400(b). (I had presided over the District Court litigation in the *TC Heartland* case.) Since that time, many district courts have seen an increase in the number of motions to dismiss or transfer venue. As I currently have over 200 patent cases on my docket in the District of Delaware, venue issues are pending before me all the time. My decisions are subject to review by the Federal Circuit. Also, as the question points out, there have been many mandamus petitions

filed in the Federal Circuit relating to venue, some of which remain pending; it is likely that additional petitions will be filed in the future. Therefore, both as a District Judge and a nominee to the Federal Circuit, I do not feel it would be appropriate for me to express an opinion on your concerns. Nor do I feel I should tell the Federal Circuit what it should do.

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 5(a).

6. 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: Please see my responses to Questions 4(a) and 5(a).

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

Response: Please see my responses to Questions 4(a) and 5(a).

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

Response: Please see my responses to Questions 4(a) and 5(a).

7. 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: Please see my responses to Questions 4(a) and 5(a).

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

Response: Please see my responses to Questions 4(a) and 5(a).