Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Jeffrey Irvine Cummings
Nominee to be United States District Judge for the Northern District of Illinois

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

   Response: I disagree with this statement. It is imperative for a judge to follow Supreme Court and circuit precedent regarding the interpretation of the Constitution regardless of the judge's personal value judgments.

2. **When asked why he wrote opinions that he knew the Supreme Court would reverse, Judge Stephen Reinhardt's stock response was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

   Response: I do not agree that it is appropriate for a federal judge to knowingly write opinions that the judge believes will be reversed by the Supreme Court. As a sitting United States Magistrate Judge and a judicial nominee, it is my duty to follow Supreme Court and circuit precedent when preparing opinions.

3. **Please define the term "living constitution."**

   Response: Black's Law Dictionary (11th ed. 2019) defines "living constitution" as a constitution whose interpretation and application can vary over time according to changing circumstances and changing social values.

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

   Response: I am not familiar with Justice Brown Jackson's statement or with her views on a "living constitution." In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), the Supreme Court emphasized that the Founders created a Constitution that was intended to endure with a meaning that is fixed according to the understanding of those who ratified it. *Id.*, at 2132. As a sitting Federal Magistrate Judge and a judicial nominee, it is my duty to construe and apply the Constitution in accordance with Supreme Court and circuit precedent.

5. **Under Supreme Court and Seventh Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?**

Response: According to Black's Law Dictionary (11th ed. 2019), a fact is something that actually exists and facts include not just tangible things, actual occurrences, and relationships, but also states of mind such as intentions. The Supreme Court and Seventh Circuit have recognized that the appropriate methodology for distinguishing questions of fact from questions of law has been elusive and that the Supreme Court has yet to arrive at a rule or principle that will unerringly distinguish a factual finding from a legal conclusion. *See Miller v. Fenton*, 474 U.S. 104, 113-14 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982); *Gekas v. Att'y Registration & Disciplinary Comm'n of Supreme Ct. of Illinois*, 793 F.2d 846, 849-50 (7th Cir. 1986). Judges consider fact/law distinctions drawn in prior decisions in similar cases and practical considerations regarding the allocation of decision-making authority between judge and jury in determining whether something is a question of fact or question of law in the case before them. *Id.*

6. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

   Response: I follow the guidance provided by the Seventh Circuit's decision in *Resol. Of Jud. Misconduct Complaints about Dist. Judge Lynn Adelman*, 965 F.3d 603, 609 (7th Cir. 2020), in which the Court of Appeals draws a distinction between criticisms of the professional reasoning of a judge on the one hand and personal attacks on the professionalism and integrity of a judge on the other.

7. **Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?**

   Response: The principle that has and will guide my approach to sentencing defendants will be to follow the law faithfully and to apply the law in a fair and neutral manner to the facts and circumstances of each defendant's case. I will follow binding precedent from the Supreme Court and the Seventh Circuit, apply the factors outlined in 18 U.S.C. § 3553(a) and the relevant provisions of the United States Sentencing Guidelines, and consider the presentence reports of the United States Probation Department, the plea agreement (if any), the presentencing memorandums of the parties, victim impact statements (if any), and any pre-sentence statements from the defendant. Congress has instructed 18 U.S.C. § 3553(a) that judges consider all four purposes of sentencing without assigning one purpose more weight than another.

8. **Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: I have not read Supreme Court decisions with the objective of determining how the decisions exemplify my own judicial philosophy. In my four years as a United States Magistrate Judge, I have approached each case with an open mind, treated all litigants, witnesses, and attorneys with dignity and respect, and applied Supreme Court and Seventh Circuit precedent and applicable constitutional provisions and statutes to the case after listening to the evidence and arguments presented by the parties.

9. **Please identify a Seventh Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: I have not read Seventh Circuit decisions with the objective of determining how the decisions exemplify my own judicial philosophy. In my four years as a United States Magistrate Judge, I have approached each case with an open mind, treated all litigants, witnesses, and attorneys with dignity and respect, and applied Supreme Court and Seventh Circuit precedent and applicable constitutional provisions and statutes to the case after listening to the evidence and arguments presented by the parties.

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

Response: I understand that 18 U.S.C. § 1507 prohibits a person acting with the intent of interfering with, obstructing, or impeding the administration of justice or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, from picketing or parading in or near a building housing a federal court, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer. The statute further prohibits a person acting with such intent from using any sound-truck or similar device to demonstrate in or near any such building or residence.

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

Response: I am unaware of any Supreme Court decision that has considered the constitutionality of 18 U.S.C. § 1507. The Supreme Court rejected a facial constitutional challenge to an analogous Louisiana state statute in *Cox v. State of Louisiana*, 379 U.S. 559, 564 (1965). I cannot express an opinion as to whether 18 U.S.C. § 1507 is constitutional on its face. As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before me as a district judge.

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

Response: Under the "fighting words" doctrine, freedom of speech, though not absolute, is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). To qualify as "fighting words," speech must be nothing less than an invitation to exchange fisticuffs. *Texas v. Johnson*, 491 U.S. 397, 408 (1989).

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

Response: The First Amendment permits states to ban "true threats," which encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals. *Virginia v. Black*, 538 U.S. 343, 359-60 (2003). The speaker need not actually intend to carry out the threat. *Id.*

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

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

Response: Yes. I believe that I can appropriately express this opinion under the Code of Conduct for United States Judges because the unconstitutionality of laws requiring racial segregation is so well-settled that it is unlikely that I will ever be asked to adjudicate the issue in the future.

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

Response: Yes. I believe that I can appropriately express this opinion under the Code of Conduct for United States Judges because the unconstitutionality of laws banning interracial marriage is so well-settled that it is unlikely that I will ever be asked to adjudicate the issue in the future.

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

Response: As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding the correctness or incorrectness of any judicial opinion, including Supreme Court precedent, when issues raised by the opinion may come before me as a district judge. Therefore, I cannot express an opinion as to whether this particular case was correctly decided.

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

Response: See my answer to Question 14(c). I further note that the Supreme Court overruled *Roe v. Wade*, in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022). Consequently, *Roe* is no longer good law.

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

Response: See my answer to Question 14(c). I further note that the Supreme Court overruled *Planned Parenthood v. Casey*, in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022). Consequently, *Casey* is no longer good law.

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

Response: See my answer to Question 14(c).

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

Response: See my answer to Question 14(c).

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

Response: See my answer to Question 14(c).

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

Response: See my answer to Question 14(c).

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

Response: See my answer to Question 14(c).

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

Response: See my answer to Question 14(c).

15. **What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?**

Response: The legal standard for determining whether or not a regulation or statutory provision infringes on Second Amendment rights is set forth in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022). In *Bruen*, the Supreme Court held that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct and, to justify the regulation in question, the government must demonstrate that the regulation in question is consistent with the Nation's historical tradition of firearm regulation. *Id.*, at 2126.

16. **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?**
    b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**
    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

    Response to Question 16 and all subparts: No.

17. **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?**
    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?**
    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 to Question 17 and all subparts: No.

18. **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?**
    b. **Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.**
    c. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known**

subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

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

Response to Question 18 and all subparts: No.

19. **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?**
    b. **Are you currently in contact with anyone associated with the Open Society Foundations?**
    c. **Have you ever been in contact with anyone associated with the Open Society Foundations?**

    Response to Question 19 and all subparts: No.

20. **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?**
    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?**
    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 to Question 20 and all subparts: No.

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

    Response: On October 25, 2021, I submitted an application to the Judicial Screening Committee established by United States Senators Richard Durbin and Tammy Duckworth for a position on the United States District Court for the Northern District of Illinois. The Screening Committee interviewed me on November 23, 2021. I was interviewed by

Senator Durbin on November 30, 2021, and by Senator Duckworth on December 8, 2021. A member of Senator Durbin's staff thereafter informed me that my name would be submitted to the White House for further consideration. On December 16, 2021, Senators Durbin and Duckworth wrote a letter to President Biden submitting my name, along with six others, as candidates for his consideration. On October 17, 2022, I interviewed with several attorneys from the White House Counsel's Office. Since that time, I have been in contact with attorneys from the Office of Legal Policy at the Department of Justice and the White House Counsel's Office. I also spoke again with Senator Durbin's staff on January 9, 2023. On January 18, 2023, the President announced his intent to nominate me.

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

    Response: I did not talk with anyone affiliated with the organization Demand Justice during my selection process and I am unaware of anyone doing so on my behalf.

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

    Response: I did not talk with anyone affiliated with the American Constitution Society during my selection process and I am unaware of anyone doing so on my behalf.

24. **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, or any other such Arabella dark-money fund that is still shrouded.**

    Response: I did not talk with anyone affiliated with Arabella Advisors or its known subsidiaries during my selection process and I am unaware of anyone doing so on my behalf.

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

    Response: I did not talk with anyone affiliated with the Open Society Foundations during my selection process and I am unaware of anyone doing so on my behalf.

26. **During your selection process did you talk with any officials from or anyone directly associated with Fix the Court, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: I did not talk with anyone affiliated with Fix the Court during my selection process and I am unaware of anyone doing so on my behalf.

27. **List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding your nomination.**

Response: On October 17, 2022, I interviewed with several attorneys from the White House Counsel's Office. Since that time, I have been in contact with attorneys from the Office of Legal Policy at the Department of Justice and the White House Counsel's Office regarding my nomination and the confirmation process.

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

Response: On February 22, 2023, these questions were provided to me by the Office of Legal Policy at the Department of Justice. I reviewed these questions, researched the relevant case law, and drafted my own answers. I provided my answers to attorneys from the Office of Legal Policy who reviewed my answers and provided me with feedback. The final answers are my own.

Senator Mike Lee
Questions for the Record
Jeffrey Cummings, Nominee to the United States District Court for the Northern District of Illinois

1. How would you describe your judicial philosophy?

Response: In my four years as a United States Magistrate Judge, I have approached each case with an open mind, treated all litigants, witnesses, and attorneys with dignity and respect, and applied Supreme Court and Seventh Circuit precedent and applicable constitutional provisions and statutes to the case after listening to the evidence and arguments presented by the parties. I make an effort to explain all of my decisions in a manner that the attorneys and parties can readily understand.

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

Response: I would consult the text of the statute and the Supreme Court and Seventh Circuit decisions that have construed the statute. If binding precedent resolved the question of statutory interpretation, I would be duty-bound to apply it. If there was no precedential authority, I would consider persuasive decisions from other circuits and district courts that have construed the statute in question, apply tools of statutory construction, and consider cases that have interpreted statutes with similar text. Finally, I might also consider legislative history as a guide in interpreting ambiguous statutory text. *See Bostock v. Clayton Cnty., Georgia*, 140 S.Ct. 1731, 1749 (2020); *Garcia v. United States*, 469 U.S. 70, 76 (1984) (reiterating "that the authoritative source for finding the Legislature's intent lies in the Committee Report on the bill.").

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

Response: I would consult the text of the constitutional provision and the Supreme Court and Seventh Circuit decisions that have construed the provision. If binding precedent resolved the question of constitutional interpretation, I would be duty-bound to apply it. If there was no precedential authority, I would consider persuasive decisions from other circuits and district courts that have interpreted the constitutional provision in question.

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

Response: With respect to many constitutional provisions, the Supreme Court has reaffirmed that the text of a constitutional provision should be given meaning according to the public understanding of the provision at the time it was adopted. *See, e.g., New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2132, 2136

(2022) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (Sixth Amendment).

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: I would consult the text of the statute and the Supreme Court and Seventh Circuit decisions that have construed the statute. I would also construe the text of the statute "in accord with the ordinary public meaning of its terms at the time of its enactment." *See Bostock v. Clayton Cnty., Georgia*, 140 S.Ct. 1731, 1738 (2020).

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: See my answer to Question 5.

6. What are the constitutional requirements for standing?

Response: To meet the constitutional requirements for standing, a plaintiff must establish: (1) an injury in fact, i.e., an invasion of a legally protected interest which is concrete, particularized and actual or imminent; (2) that the injury has to be fairly traceable to the challenged action of the defendant; and (3) that it is likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

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

Response: The Necessary and Proper Clause in Article I, Section 8 of the Constitution grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." In *McCullough v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that Congress's power to incorporate a federal Bank of the United States was implied by the Constitution.

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

Response: I would follow Supreme Court and Seventh Circuit precedent including the decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 535 (2012), which reiterated that if no enumerated power authorizes Congress to pass a certain law, that law may not be enacted. Even so, "'the question of the constitutionality of action taken by Congress does not depend on recitals of the power

which it undertakes to exercise.'" *Id*., at 570, *quoting Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).

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

Response: The Supreme Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendment protect certain fundamental rights that are so deeply rooted in our history and tradition that they are essential to the nation's scheme of ordered liberty. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2246 (2022). Such rights include: (1) the right to marry a person of a different race; (2) the right to marry while in prison; (3) the right to obtain contraceptives; (4) the right to reside with relatives; (5) the right to make decisions about the education of one's children; (6) the right not to be sterilized without consent; (7) the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures; (8) the right to engage in private, consensual sexual acts; and (9) the right to marry a person of the same sex. *Id.*, at 2257-58.

10. What rights are protected under substantive due process?

Response: See my answer to Question 9.

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

Response: As a sitting United States Magistrate Judge and a judicial nominee, I have (and will) faithfully follow Supreme Court and Seventh Circuit precedent on issues concerning substantive due process. I note that both *Lochner v. New York* and *Roe v. Wade* are no longer good law. *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2242 (2022).

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

Response: The Supreme Court has held that Congress's power under the Commerce Clause is limited to: (1) regulating the use of channels of interstate commerce; (2) regulating and protecting the instrumentalities of interstate commerce; and (3) regulating those activities having a substantial relation to interstate commerce. *United States v. Lopez*, 514 U.S. 558-59 (1995).

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

Response: The Supreme Court has considered several factors in determining whether a particular group qualifies as a "suspect class" including whether: (1) they have been

subjected to discrimination; (2) they exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (3) they are a minority or politically powerless. The Supreme Court has recognized that race, religion, national origin, and alienage are suspect classifications. *See Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

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

Response: Separation of powers and checks and balances are one of the key features of our Constitution. Each branch of government (the legislature, the executive, and the judiciary) has its own role as specified by Articles I, II, and III and the structure is designed to prevent the concentration of too much power in any one branch.

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

Response: I would apply Supreme Court and Seventh Circuit precedent and applicable constitutional provisions to resolve the case after listening to the evidence and arguments presented by the parties.

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

Response: As a sitting United States Magistrate Judge, I consider and decide cases with an open mind by considering the evidence, the arguments of the parties, the applicable constitutional and statutory provisions, applicable Supreme Court and Seventh Circuit precedent, and persuasive decisions by other courts if there is no binding precedent. On occasion, the ability to put myself in the shoes of others (what some may call empathy) has guided the exercise of my discretion in appropriate circumstances – for example, when deciding whether to extend a discovery or a brief filing deadline based upon the personal extenuating circumstances of the party or attorney seeking the extension.

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

Response: Both outcomes are equally undesirable and should be avoided at all costs.

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

Response: I have not researched this particular issue. I will continue my practice of applying all Supreme Court and Seventh Circuit precedent to the issues that are raised in the cases pending before me.

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

Response: Judicial review refers to the courts' power to review legislative and executive acts, as recognized in *Marbury v. Madison*, 5 U.S. 137 (1803). I understand judicial supremacy to refer to the idea that the Supreme Court should be viewed as the authoritative interpreter of the Constitution and that the Court's decisions should be deemed as binding on the other branches of government and the states unless a constitutional amendment or subsequent Supreme Court decision overrules them.

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

Response: All elected officials in the United States are bound by the oath to support the Constitution and to follow the decisions of the Supreme Court interpreting the Constitution.

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

Response: It is important for a judge to remember that a judge's role is to apply the law to the facts in the specific case before the judge, and not to serve as a policymaker.

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

Response: It is not for a district court judge to call into question precedent. Instead, a district court judge is duty-bound to review the facts and evidence and to faithfully apply all Supreme Court and Seventh Circuit precedent to each case.

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

Response: When sentencing criminal defendants as a United States Magistrate Judge, I have faithfully applied the factors set forth in 18 U.S.C. § 3553(a). Any consideration of the defendant's group identity(ies) is not appropriate. I will continue this practice if I am confirmed as a district judge.

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

Response: I am not familiar with the definition of "equity" that is quoted above and the Code of Conduct for United States Judges precludes me from expressing an opinion regarding a policy statement made by elected officials because doing so might call into question my impartiality regarding such a matter. Blacks's Law Dictionary (11th ed. 2019), defines equity as "fairness, impartiality, and evenhanded dealing."

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

Response: Black's Law Dictionary (11th ed. 2019), defines "equality" as "[t]he quality, state, or condition of being equal; esp., likeness in power or political status." See my answer to Question 24 for a definition of equity.

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

Response: The Fourteenth Amendment guarantees each person "the equal protection of the laws" but the Amendment does not contain the term "equity" or the definition of equity that is quoted above in Question 24.

27. How do you define "systemic racism?"

Response: The phrase "systemic racism" means different things to different people. I understand systemic racism to mean patterns, practices, or policies within various institutions that disproportionately impact people based on race.

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

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

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

Response: See my answers to Question 27 and Question 28.

Senator Josh Hawley
Questions for the Record

Jeffrey Cummings
Nominee, U.S. District Court for the Northern District of Illinois

1. **Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?**
   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: No.

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

   Response: The Supreme Court has recently reaffirmed that the text of a constitutional provision should be given meaning according to the public understanding of the provision at the time it was adopted. See *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2132, 2136 (2022).

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

   Response: The Supreme Court requires me to look at the plain language of the statutory text. If there is no ambiguity, the inquiry ends there. When the statutory text is clear and unambiguous, there is no need to rely on legislative history. The Supreme Court has indicated that it may be appropriate to consider legislative history as a guide in interpreting ambiguous statutory text. *See Bostock v. Clayton Cnty., Georgia*, 140 S.Ct. 1731, 1749 (2020). I would follow Supreme Court and Seventh Circuit precedent on this issue.

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

      Response: The Supreme Court has held that contemporaneous official committee reports are more authoritative than casual statements from the floor debates. *See Garcia v. United States*, 469 U.S. 70, 76 (1984). I would follow this precedent.

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

      Response: While the Supreme Court has occasionally consulted English common law, *see New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2136 (2022), I would only consider laws of a foreign nation when authorized by the Supreme Court and the Seventh Circuit.

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

Response: Under the Supreme Court precedent, a plaintiff raising an Eighth Amendment cruel and unusual punishment challenge to an execution protocol must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1125 (2019); *Glossip v. Gross*, 576 U.S. 863, 877-78 (2015). In *Woods v. Buss*, 496 F.3d 620, 623 (7th Cir. 2007), the Seventh Circuit held that a plaintiff bringing an Eighth Amendment challenge to the means of execution must demonstrate both that there is an objectively serious deprivation and the deprivation was done with deliberate indifference.

5. 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: See my answer to Question 4.

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

Response: No.

7. 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.

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

Response: The Supreme Court has held that a state 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 religion. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520, 531 (1993). However, a facially neutral government

law cannot be applied with hostility to a religion or religious viewpoint unless the government satisfies strict scrutiny by showing that its restrictions on religion serve a compelling interest and are narrowly tailored. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1729-32, 1734 (2018).

9. 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: The standard is strict scrutiny. In *Carson v. Makin*, 142 S.Ct. 1987, 1996 (2022), the Supreme Court reaffirmed that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits. In *Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2421-22 (2022), the Supreme Court held that a plaintiff who carries his burden of showing that a governmental entity has burdened his sincere religious practice pursuant to a policy that is not neutral and generally applicable will prove a First Amendment violation unless the government can satisfy strict scrutiny by showing that its course was justified by a compelling state interest and was narrowly tailored in support of that interest. In *Tandon v. Newsom*, 141 S.Ct. 1294, 1296-98 (2021), the Supreme Court held that government regulations are not neutral and generally applicable and trigger strict scrutiny whenever they treat any comparable secular activity more favorably than a religious exercise. In *Espinoza v. Montana Dep't of Revenue*, 140 S.Ct. 2246, 2254-55, 2260-61 (2020), the Supreme Court held that a state need not subsidize private education but once it does so, it cannot disqualify some private schools solely because they are religious.

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

Response: The Free Exercise Clause protects an individual's religious beliefs so long as they are sincerely held. In *Frazee v. Ill. Dept' of Emp. Sec.*, 489 U.S. 829, 833-34 (1989), the Supreme Court held that sincerely held religious beliefs are protected by the Free Exercise Clause regardless of whether they are consistent with the mainstream of their religious membership. Indeed, religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protections. *Thomas v. Review Board of the Indiana Emp't Security Division*, 450 U.S. 707, 714 (1981).

11. 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: *Heller* supports the proposition that the Second Amendment protects an individual's right to keep and bear arms.

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

Response: No.

12. 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 dissenting opinion in *Lochner*, Justice Holmes expressed the view 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 agree that the text of the Fourteenth Amendment does not reference, endorse, or enact any particular economic theory.

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

Response: The decision in *Lochner* has been abrogated and is no longer good law. *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

13. 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: I understand this phrase to mean that the *Korematsu* decision "was gravely wrong on the day it was decided, has been overruled in the court of history, and – to be clear – has no place in law under the Constitution." *Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018) (internal quotation marks omitted).

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

Response: I am unaware of any such Supreme Court opinions.

a. If so, what are they?

Response: See my answer to Question 14.

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

Response: Yes.

15. 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 Tech. Servs. Inc.*, 504 U.S. 451, 481 (1992), the Supreme Court held that evidence showing that a manufacturer controlled 80-95% of the service market was sufficient to survive summary judgment under the monopoly standard of § 2 of the Sherman Act. I am duty-bound to follow all Supreme Court and Seventh Circuit precedent as to whether a particular market share constitutes a monopoly.

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

Response: See my answer to Question 15(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: In *Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451, 481 (1992), the Supreme Court held that evidence showing that a manufacturer controlled 80-95% of the service market was sufficient to survive summary judgment under the monopoly standard of § 2 of the Sherman Act. In *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666-67 (7th Cir. 1987), the Seventh Circuit held that in § 2 cases "a substantial percentage of sales is usually at least 50%." I am duty-bound to follow all Supreme Court and Seventh Circuit precedent as to whether a particular market share constitutes a monopoly.

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

Response: It is my understanding that federal common law exists in only the few and restrictive enclaves where a federal court is compelled to consider federal questions that cannot be answered from federal statutes alone. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 89-90 (2d Cir. 2021) (citing *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) and *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)). In other words, federal common law is a necessary expedient that permits federal courts to address issues of national concern until Congress provides a more permanent solution. *Id.*

17. 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: A state's constitutional provision is to be interpreted consistent with the decisions of the state's highest court. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (the views of the state's highest court with respect to state law are binding on the federal courts).

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

Response: See my answer to Question 17.

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

Response: The highest court of a state may interpret a state constitutional provision that is identical to the federal constitution in a manner that provides greater (but not lesser) protection than that provided under the United States Constitution.

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

Response: Yes. I believe that I can appropriately express this opinion under the Code of Conduct for United States Judges because the unconstitutionality of laws requiring racial segregation is so well-settled that it is unlikely that I will ever be asked to adjudicate the issue in the future.

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

Response: Yes.

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

Response: The source of the legal authority to issue nationwide injunctions comes from the power of federal courts to grant equitable relief and remedies and Federal Rule of Civil Procedure 65. *See, e.g., City of Chicago v. Barr*, 961 F.3d 882, 912-16 (7th Cir. 2020).

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

Response: Nationwide injunctions can be appropriate where it is necessary to provide complete relief to plaintiffs, to protect similarly-situated nonparties, and

to avoid the chaos and confusion that comes from a patchwork of injunctions. *City of Chicago v. Barr*, 961 F.3d 882, 916-17 (7th Cir. 2020).

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

Response: See my answer to Question 19(b).

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

Response: Federalism is intended to ensure a healthy balance of power between the States and the Federal Government in order to reduce the risk of tyranny and abuse form either front. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

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

Response: There are several legal doctrines that specify the circumstances under which a federal court should abstain from resolving a pending legal question in deference to adjudication by a state court:

First, *Pullman* abstention is warranted where there is a substantial uncertainty as to the meaning of the state law and there exists a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling. *Int'l Coll. Of Surgeons v. City of Chicago*, 153 F.3d 356, 365 (7th Cir. 1998).

Second, *Buford* abstention is appropriate in two situations: (1) federal courts should abstain from deciding difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; and (2) where the exercise of federal review would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *Id.*, at 361-62.

Third, *Colorado River* abstention applies where the district court: (1) determines that concurrent state and federal actions are parallel; and (2) exceptional circumstances justify abstention. *Adkins v. VIM Recycling, Inc.,* 644 F.3d 483, 498, 500-01 (7th Cir. 2011) (citing ten non-exclusive factors that might demonstrate the existence of exceptional circumstances).

Fourth, *Younger* abstention requires federal courts to abstain from enjoining ongoing state proceedings that are: (1) judicial in nature; (2) implicate important state interests; (3) offer an adequate opportunity for review of constitutional claims; and (4) so long as no extraordinary circumstances (like bias or harassment) exist which weigh against abstention. *FreeEats.com, Inc. v. Indiana*, 502 F.3d 590, 596 (7th Cir. 2007).

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

Response: There is no categorical answer to this question because the advantages and disadvantages of awarding damages versus injunctive relief depend upon the facts and circumstances of each particular case.

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

Response: The Supreme Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendment protect certain fundamental rights that are so deeply rooted in our history and tradition that they are essential to the nation's scheme of ordered liberty. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2246 (2022) (citing cases). Such rights include: (1) the right to marry a person of a different race; (2) the right to marry while in prison; (3) the right to obtain contraceptives; (4) the right to reside with relatives; (5) the right to make decisions about the education of one's children; (6) the right not to be sterilized without consent; (7) the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures; (8) the right to engage in private, consensual sexual acts; and (9) the right to marry a person of the same sex. *Id.*, at 2257-58 (citing cases).

25. 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: See my answers to Questions 8 and 9.

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

Response: In *Lee v. Weisman*, 505 U.S. 577, 591 (1992), the Supreme Court held that the Free Exercise Clause embraces not only a freedom of worship but also a freedom of conscience.

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: In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014), the Supreme Court considered whether the federal government mandate demanded that persons engage in conduct that seriously violated their religious beliefs and whether the failure to comply with the mandate would subject them to severe

economic consequences in determining whether the substantial burden standard has been met.

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: See my answer to Question 10.

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

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

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

Response: No.

26. 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: The Supreme Court has held that the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course but it has recognized that "reasonable doubt" defies easy explication. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). The Seventh Circuit has held that trial courts should not attempt to define reasonable doubt because the phrase is self-explanatory and an attempt to define it presents a risk without any real benefit. *United States v. Reynolds*, 64 F.2d 292, 298 (7th Cir. 1995). I am unaware of any decision that has quantified reasonable doubt in a numerical fashion and I am presently unable to do so myself.

27. 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 and Third Circuit have suggested that a circuit split on the underlying issue might show that fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents. *See White v. Woodall*, 572 U.S. 415, 422 n.3 (2014); *Dennis v. Secretary, Pennsylvania Dept. of Corrections*, 834 F.3d 263, 310 n.27 (3d Cir. 2016). As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that might come before me.

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: As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that might come before me.

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

Response: See my answers to Questions 27(a) and 27(b).

28. U.S. Courts of Appeals sometimes issue "unpublished" decisions and suggest that these decisions are not precedential. *Cf.* Rule 32.1 for the U.S. Court of Appeals for the Tenth Circuit.

a. Do you believe it is appropriate for courts to issue "unpublished" decisions?

Response: Yes. Seventh Circuit Rule 32.1(b) provides that the Court of Appeals can issue unpublished decisions. I am bound by this rule, I commit to follow it, and it would be otherwise inappropriate for me to opine on the rules created by a higher court.

b. If yes, please explain if and how you believe this practice is consistent with the rule of law.

Response: See my answer to Question 28a.

c. If confirmed, would you treat unpublished decisions as precedential?

Response: I would treat the unpublished decisions consistently with Seventh Circuit Rule 32.1(b), which regards such decisions as non-precedential.

d. If not, how is this consistent with the rule of law?

Response: See my answer to Question 28d.

e. If confirmed, would you consider unpublished decisions cited by litigants when hearing cases?

Response: Yes.

f. Would you take steps to discourage any litigants from citing unpublished opinions? *Cf.* Rule 32.1A for the U.S. Court of Appeals for the Eighth Circuit.

Response: No.

g. Would you prohibit litigants from citing unpublished opinions? *Cf.* Rule 32.1 for the U.S. Court of Appeals for the District of Columbia.

Response: No.

29. In your legal career:

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

Response: Five.

b. How many have you tried as second chair?

Response: Three.

c. How many depositions have you taken?

Response: Over the course of my twenty-nine years of private practice with my law firm, I have taken dozens of depositions. I do not know the precise number.

d. How many depositions have you defended?

Response: Over the course of my twenty-nine years of private practice with my law firm, I have defended dozens of depositions. I do not know the precise number.

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

Response: I have argued eleven times before a federal appellate court.

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

Response: I have argued three cases before a state appellate court and one case before a state supreme court.

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

Response: In my twenty-nine years of private practice with my law firm, I appeared before the Equal Employment Opportunity Commission on numerous occasions to represent clients at fact finding conferences and mediations. I do not recall the precise number of times that I appeared before the EEOC.

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

Response: In my twenty-nine years of private practice with my law firm, I have briefed and argued dozens of dispositive motions before trial courts. I do not recall the precise number of such arguments.

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

Response: In my twenty-nine years of private practice with my law firm, I have briefed and argued dozens of evidentiary motions before trial courts. I do not recall the precise number of such arguments.

30. If any of your previous jobs required you to track billable hours:

a. What is the maximum number of hours that you billed in a single year?

Response: The maximum number of hours that I billed in a single fiscal year was approximately 2,100 to 2,200 hours.

b. What portion of these were dedicated to pro bono work?

Response: I do not recall the portion of my hours that were devoted to pro bono work during that year. Most of my time was spent on a federal bench trial that involved 48 trial days that was spread out over a six-month period of time.

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that judges who follow the law and apply precedent must sometimes make decisions that they do not personally like or agree with.

32. Chief Justice Roberts said, "Judges are like umpires. Umpires don't make the rules, they apply them."

a. What do you understand this statement to mean?

Response: I do not know what Chief Justice Roberts meant by this remark. I understand the statement to mean that judges do not create constitutional provisions and statutes and that their job instead is to apply the constitutional provisions and statutes.

b. Do you agree or disagree with this statement?

Response: I agree that judges do not create constitutional provisions and statutes and that the role of judges is to apply the constitutional provisions and statutes.

33. When encouraged to "do justice," Justice Holmes is said to have replied, "That is not my job. It is my job to apply the law."

a. What do you think Justice Holmes meant by this?

Response: I do not know what Justice Holmes meant by this remark. I understand the remark to mean that a judge's duty is to apply the law without regard to the judge's personal sense of doing justice.

b. Do you agree or disagree with Justice Holmes? Please explain.

Response: I agree that it is a judge's duty to apply applicable law and to follow binding precedent when deciding cases.

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

Response: To the best of my knowledge, no.

a. If yes, please provide appropriate citations.

Response: See my answer to Question 34.

35. 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.

36. What were the last three books you read?

Response: Spearhead: An American Tank Gunner, His Enemy, and a Collision of Lives in World War II; Straight Pepper Diet; and Hop On Pop.

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

Response: Consideration of this question is one for academics and policymakers who have had the benefit of research with appropriate data. As a sitting United States Magistrate Judge, I am duty-bound to follow the precedent of the Supreme Court and Seventh Circuit in all cases, including those which concern racial discrimination. I will continue to follow this practice if I am confirmed as a district judge.

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

Response: I am most proud of my representation of civil rights/employment discrimination plaintiffs and whistleblowers who brought legal action to vindicate their rights.

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

Response: No.

a. How did you handle the situation?

Response: See my answer to Question 39.

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

Response: Yes.

40. What three law professors' works do you read most often?

Response: I do not regularly read works by law professors.

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

Response: I studied the Federalist Papers during the early to mid-1980s when I was in college. I cannot say, at this time, which of the Federalist Papers most shaped my views on the law.

42. What is a judicial opinion, law review article, or other legal opinion that made you change your mind?

Response: I enjoy reading judicial opinions and other legal articles and I almost always learn something new from the opinions and articles that I read. The information that I

learn helps shape my thoughts and views on issues but I cannot at present identify an opinion or article that made me change my mind about an issue.

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

Response: I am not aware of any Supreme Court or Seventh Circuit precedent on this question. *See Dobbs v. Jackson's Women's Health Organization*, 142 S.Ct. 2228, 2284 (2022) (declining to express any view regarding when a State should regard prenatal life as having rights or legally cognizable interests or as if and when prenatal life is entitled to any of the rights enjoyed after birth). As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding an issue such as this that might come before me as a district judge.

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

Response: I have provided testimony under oath on one prior occasion. I sat for a deposition in or around 1985 because I was a witness to events relating to a civil lawsuit filed by one of my law school classmates against a now-closed bar in Chicago. I do not recall if a transcript of the deposition was prepared and I do not have access to it.

45. 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.

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

a. Apple?
Response: Yes.

b. Amazon?
Response: Yes.

c. Google?
Response: No.

d. Facebook?
Response: No.

e. Twitter?
Response: No.

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

Response: I have never authored a brief that was filed in a court without my name on it. Consistent with the practice of my prior law firm, I have edited briefs that were filed in court without my name on it. My firm would frequently circulate briefs amongst our litigators for review and edits even if the litigators had not filed an appearance on the case.

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

Response: I practiced law with my law firm for 29 years prior to becoming a United States Magistrate Judge and I cannot identify every situation where I edited a brief that was filed with a court without my name on it. That said, I do recall editing and providing input on briefs that lead to the decisions cited below:

Martin v. F.E. Moran, Inc., 2018 WL 1565597 (N.D. Ill. Mar. 30, 2018);
O'Brien v. Caterpillar, Inc., 2017 WL 3780278 (N.D. Ill. Aug. 31, 2017);
Freeman v. Grain Processing Corp., 895 N.W.2d 105 (Iowa 2017);
Davis v. Cintas Corp., 717 F.3d 476 (6th Cir. 2013);
Fanslow v. Chicago Mfg. Center, Inc., 384 F.3d 469 (7th Cir. 2004);
Petersen v. Gibson, 372 F.3d 862 (7th Cir. 2004);
Lang v. Kohl's Food Stores, Inc., 217 F.3d 919 (7th Cir. 2000);
Bravos v. Commonwealth Edison Co., 1998 WL 601791 (N.D. Ill. Sept. 9, 1998);
Schuler v. Abbott Laboratories, 639 N.E.2d 144 (Ill.App. 1993);
King v. General Elec. Co., 960 F.2d 617 (7th Cir. 1992).

48. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

Response: No.

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

Response: I understand that nominees must answer all questions truthfully and to the best of their ability consistent with the Code of Conduct for United States Judges. I have done my best to be as candid as possible consistent with this standard.

Nomination of Jeffrey Irvine Cummings
to be United States District Judge for the Northern District of Illinois
Questions for the Record
Submitted February 22, 2023

QUESTIONS FROM SENATOR COTTON

1. **Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?**

   Response: No.

2. **Was *D.C. v. Heller*, 554 U.S. 570 (2008) rightly decided?**

   Response: As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding the correctness or incorrectness of any judicial opinion, including Supreme Court precedent, when issues raised by the opinion may come before me as a district judge. If I were confirmed, I would fully and faithfully follow *District of Columbia v. Heller*, 554 U.S. 570 (2008), and other binding precedent from the Supreme Court and Seventh Circuit.

3. **Is the Second Amendment right to keep and bear arms an individual right belonging to individual persons, or a collective right that only belongs to a group such as a militia?**

   Response: "[T]he Second Amendment conferred an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

4. **Has your understanding of the Second Amendment changed at all as a result of the Supreme Court's holding in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ____ (2022)? If so, how?**

   Response: My understanding of the operative test under the Second Amendment has been clarified by the Supreme Court's holding in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022). In *Bruen*, the Supreme Court held that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct and, order to justify the regulation in question, the government must demonstrate that the regulation in question is consistent with the Nation's historical tradition of firearm regulation. *Id.*, at 2126.

5. **In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ____ (2022), the Supreme Court ruled that, to justify a regulation restricting Second Amendment rights, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." How would you, as a judge, go about determining the "historical tradition" of acceptable firearm regulation in the United States?**

   Response: In *Bruen*, the Supreme Court stated that "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality." *Bruen*, 142 S.Ct. at 2131. I would follow the Supreme Court's direction.

6. **Do you believe that judges should respect Congress's legislative choices regarding the sentencing of criminals under federal law, including the choice of whether to apply sentencing reductions retroactively?**

   Response: Yes.

7. **Do you believe that finality and predictability are important in federal criminal sentencing? Why or why not?**

   Response: Courts have recognized that finality and predictability are important in federal criminal sentencing. *See, e.g., Johnson v. United States*, 544 U.S. 295, 309 (2005) ("[T]he United States has an interest in the finality of sentences imposed by its own courts."); *Hawkins v. United States*, 724 F.3d 915, 918 (7th Cir. 2013) (noting the "social interest in the finality of judicial decisions, including sentences."); *United States v. Matthews*, 278 F.3d 880, 886 (9th Cir. 2002) (noting that "predictability and consistency" are goals in sentencing); *United States v. Chin Chong*, 2014 WL 4773978, at *15 (E.D.N.Y. Sept. 24, 2014) ("Uniformity and predictability [in sentencing] will provide more effective general deterrence.").

8. **Does the president have unilateral authority to categorically ignore immigration laws established by Congress?**

Response: Response: As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before me as a district judge.

9. What is your understanding of the Citizenship Clause of the Fourteenth Amendment?

Response: I understand the Citizenship Clause of the Fourteenth Amendment to provide that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

10. Do you believe that the Citizenship Clause of the Fourteenth Amendment contains any exceptions? If so, please describe who you believe to be excluded from birthright citizenship.

Response: To my knowledge, the only exception to the Citizenship Clause of the Fourteenth Amendment is for a child born on United States soil to a foreign diplomat possessing diplomatic immunity because that child is not born subject to the jurisdiction of the United States within the meaning of the Fourteenth Amendment. *See Muthana v. Pompeo*, 985 F.3d 893, 903 (D.C. Cir. 2021).

11. Is it unlawful for an agent of state government to actively assist any individual in breaking federal immigration law?

Response: As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before me as a district judge.

12. Is it unlawful for an agent of state government to actively shield or hide an individual from lawful federal immigration enforcement?

Response: As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before me as a district judge.

13. Please describe what you believe to be the limits of the Environmental Protection Agency's authority according to the terms of the Supreme Court's ruling in *West Virginia v. Environmental Protection Agency*, 597 U.S. ____ (2022).

Response: In *West Virginia v. Environmental Protection Agency*, the Supreme Court held that Congress did not grant the Environmental Protection Agency the authority to devise emissions caps based on the "generation shifting" approach taken in the agency's Clean Power Plan, which purported to regulate power plants' emissions of carbon dioxide to address climate change by restructuring the American energy market to shift the energy generation mix at grid level from coal and natural gas fired plants to renewables. *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2610, 2616 (2022).

14. Please describe what you believe to be the Supreme Court's holding in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____ (2022).

Response: In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court held that: (1) the Constitution makes no explicit reference to abortion; (2) the right to abortion is not implicitly protected by any constitutional provision, including the Due Process Clause of the Fourteenth Amendment; and (3) laws regulating abortion are entitled to a strong presumption of validity and must be sustained if there is a rational basis on which the legislature could have thought that the laws would serve legitimate state interests. *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2242-43, 2284 (2022).

15. Please describe what you believe to be the Supreme Court's holding in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

Response: In *Tandon v. Newsom*, the Supreme Court held that: (1) 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; (2) whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the government interest that justifies the regulation at issue; (3) the government has the burden to establish that the challenged law satisfies strict scrutiny; and (4) even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. *Tandon v. Newsom*, 141 S.Ct. 1294, 1296-1297 (2021).

16. What is your understanding of the fiduciary duties owed by investment firms to their investors?

Response: Under the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.*, as amended, the fiduciary duty of an investment firm consists of a duty of care and a duty of loyalty to its investor clients.

17. Do federal drug scheduling actions pursuant to the Controlled Substances Act preempt state or local laws that purport to 'legalize' substances contrary to their federal drug control status?

Response: Courts have held that the Controlled Substances Act preempts state laws that purport to legalize marijuana. *See, e.g., Krumm v. Holder*, 2009 WL 1563381, at *9 (D.N.M. May 27, 2009) ("The CSA does not contemplate that state legislatures' determinations about the use of a controlled substance can be used to bypass the CSA's rescheduling process."); *Forest City Residential Management, Inc., ex rel. Plymouth Square Ltd. Dividend Hous. Ass'n v. Beasley*, 71 F.Supp.3d 715, 727 (E.D. Mich. 2014) (holding that the Controlled Substances Act preempted Michigan's medical marijuana law).

18. Under what circumstances, if any, do you believe that it is appropriate for courts to order attorneys to break attorney-client privilege?

Response: Courts can force attorneys to break the attorney-client privilege if the crime-fraud exception applies. *See, e.g., In re Grand Jury Subpoena*, 2 F.4th 1339, 1344-52 (11th Cir. 2021). Courts can also force attorneys to break the attorney-client privilege if the client has waived the privilege or consents to the disclosure of privileged communications.

19. What is your understanding of the current state of the law regarding the executive privilege of the president of the United States?

Response: My understanding of the current state of the law regarding the executive privilege of the President of the United States is stated in the District of Columbia Circuit's decision in *Trump v. Thompson*, 20 F.4th 10 (D.C. Cir. 2021). In this decision, the court explained that the executive privilege allows a President to protect from disclosure documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential. The privilege applies not only to materials viewed by the President directly, but also to records solicited and received by the President or the President's immediate White House advisers who have broad and significant responsibility for advising the President. The executive privilege is a qualified one that may be overcome by a strong showing of need by another

institution of government. The privilege can be waived and may also give way in the face of other strong constitutional values. *Id.*, at 25-26.

20. Please describe what you believe to be the Supreme Court's holding in *United States v. Taylor*, 596 U.S. ____ (2022).

Response: In *United States v. Taylor*, the Supreme Court held that an attempted Hobbs Act robbery did not qualify as a "crime of violence" under 18 U.S.C § 924(c)(3)(A). *United States v. Taylor*, 142 S.Ct. 2015, 2021-2026 (2022).

21. If an individual is ordered deported by our immigration courts, and the individual has exhausted all appeals, should the court's deportation order be carried out, or ignored?

Response: I am not familiar with the circumstances that this question may be referring to but court orders should not be ignored.

22. What is your view of arbitration as a litigation alternative in civil cases?

Response: Arbitration, when freely chosen by both parties, can be a cost-effective alternative to litigation and can lead to more expeditious resolution of disputes.

23. Please describe what you believe to be the Supreme Court's holding in *Kennedy v. Bremerton*, 597 U.S. ____ (2022).

Response: In *Kennedy v. Bremerton School District*, the Supreme Court held that: (1) a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise Clause; (2) a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not neutral or generally applicable; and (3) should a plaintiff make the requisite showing, courts will find a First Amendment violation unless the government can satisfy strict scrutiny by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. *Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2421-22 (2022).

24. Please describe what you believe to be the Supreme Court's holding in *Torres v. Texas Department of Public Safety*, 597 U.S. ____ (2022).

Response: In *Torres v. Texas Department of Public Safety*, the Supreme Court held that by ratifying the Constitution, the states agreed that their sovereignty would yield to the

national power to raise and support the armed forces, and thus Congress could exercise this power to authorize private damages suits against nonconsenting states pursuant to the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 *et seq*. *Torres v. Texas Department of Public Safety*, 142 S.Ct. 2455, 2460-69 (2022).

25. Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.

Response: On February 22, 2023, these questions were provided to me by the Office of Legal Policy at the Department of Justice. I reviewed these questions, researched the relevant case law, and drafted my own answers. I provided my answers to attorneys from the Office of Legal Policy who reviewed my answers and provided me with feedback. The final answers are my own.

26. Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please identify the department or agency with which those officials are employed.

Response: No.

Senator John Kennedy
Questions for the Record

Mr. Jeffrey Cummings

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

   Response: In my four years as a United States Magistrate Judge, I have approached each case with an open mind, treated all litigants, witnesses, and attorneys with dignity and respect, and applied Supreme Court and Seventh Circuit precedent and applicable constitutional provisions and statutes to the case after listening to the evidence and arguments presented by the parties. I make an effort to explain all of my decisions in a manner that the attorneys and parties can readily understand.

2. **Do you believe the meaning of the Constitution is immutable or does it evolve over time?**

   Response: In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), the Supreme Court emphasized that the Founders created a Constitution that was intended to endure with a meaning that is fixed according to the understanding of those who ratified it. *Id.*, at 2132. As a sitting Federal Magistrate Judge and a judicial nominee, it is my duty to construe and apply the Constitution in accordance with Supreme Court and circuit precedent.

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

   Response: As a sitting United States Magistrate Judge, I would look beyond the clear text of a statute only to ascertain whether there is any Supreme Court or Seventh Circuit precedent to follow on the statutory issue in question. I will follow the same practice if I am confirmed as a district judge.

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

   Response: I am unaware of any Supreme Court or Seventh Circuit that endorses the proposition that statements made by a president should be considered as part of the legislative history when a court construes a statute.

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

   Response: In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 80-88 (1980), the Supreme Court held that a state law may limit a private shopping center owner's ability

to restrict speech on its own property. In particular, a state, in the exercise of its police power, may adopt reasonable restrictions on private property so long as restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision. *Id.*, at 81.

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

   Response: The Supreme Court has held that the phrase "the people" as used in the First, Second, Fourth, Ninth, and Tenth Amendments refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). The Seventh Circuit, in reliance on *Verdugo-Urquidez*, has held that a non-citizen alien may enjoy rights under the Fourth Amendment if they can show substantial connections with the United States. *United States v. Meza-Rodriguez*, 798 F.3d 664, 670-71 (7th Cir. 2015).

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

   Response: The Supreme Court has recognized the sovereign power of the United States to conduct searches of any person crossing the border without regard to individualized suspicion or the rights that might otherwise be provided by the Fourth Amendment. *See United States v. Ramsey*, 431 U.S. 606, 616-17 (1977). Outside of the border context, the Seventh Circuit has held that a non-citizen alien may enjoy rights under the Fourth Amendment if they can show substantial connections with the United States. *United States v. Meza-Rodriguez*, 798 F.3d 664, 670-71 (7th Cir. 2015).

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

   Response: I am not aware of any Supreme Court or Seventh Circuit precedent on this question. *See Dobbs v. Jackson's Women's Health Organization*, 142 S.Ct. 2228, 2284 (2022) (declining to express any view regarding when a State should regard prenatal life as having rights or legally cognizable interests or as if and when prenatal life is entitled to any of the rights enjoyed after birth). As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before me as a district judge.

9. **A federal district court judge in Washington, DC recently suggested that the Thirteenth Amendment may provide a basis for the right to abortion in light of the Supreme Court's decision in *Dobbs v. Jackson Women's Health*.**

a. Do you agree?

Response: As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before me as a district judge.

b. Is it ever appropriate for a lower court judge to imply the existence of a constitutional right despite the existence of controlling precedent to the contrary?

Response: No. As a sitting United States Magistrate Judge, I have not done so and I would not do so if I am confirmed as a district court judge. I am duty-bound to follow applicable Supreme Court and Seventh Circuit precedent.

10. Is there ever an appropriate circumstance in which a district court judge ignores or circumvents precedent set by the circuit court within which it sits or the U.S. Supreme Court?

Response: No. As a sitting United States Magistrate Judge and a judicial nominee, I am duty-bound to follow applicable Supreme Court and Seventh Circuit precedent.

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

Response: In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Supreme Court upheld the validity of a voter identification statute and held that such statutes are not *per se* unconstitutional. However, some voter identification statutes have since been struck down as void and illegal after courts found that they violated constitutional and/or statutory provisions that bar racial discrimination. *See, e.g., Veasey v. Abbott*, 830 F.3d 216, 264-65 (5th Cir. 2016) (en banc) (affirming finding that Texas' photo identification law discriminated against African-American and Hispanic voters in violation of Section 2 of the Voting Rights Act); *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 223-41 (4th Cir. 2016), *cert. denied*, 137 S.Ct. 1399 (2017) (striking down North Carolina's photo identification law on the grounds that it was enacted with the intent to discriminate against African-American voters in violation of the Fourteenth Amendment and Section 2 of the Voting Rights Act).

12. Please describe the analysis will you use, if confirmed, to evaluate whether a law or regulation infringes on an individual's rights under the Second Amendment in light of the Supreme Court's opinion in *Bruen*.

Response: In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), the Supreme Court held that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct and that the

government must demonstrate that the regulation in question is consistent with the Nation's historical tradition of firearm regulation in order to justify the regulation. *Id.*, at 2126. The Supreme Court further stated that "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality." *Bruen*, 142 S.Ct. at 2131. I would follow the Supreme Court's direction in assessing whether a law or regulation violated an individual's rights under the Second Amendment.

13. The Supreme Court relies on a list of factors to determine whether overturning precedent is prudent in the context of stare decisis.

a. How many factors are necessary to provide a special justification for overturning precedent?

Response: In *Janus v. Am. Fed'n of State, Cnty., & Num. Emps., Council 31*, 138 S.Ct. 2448, 2478-79 (2018), the Supreme Court identified five factors that should be taken into account in deciding whether to overrule a past decision: (1) the quality of the past decision's reasoning; (2) the workability of the rule it established; (3) its consistency with other related decisions; (4) developments since the decision was handed down; and (5) reliance on the decision. To my knowledge, the Supreme Court has not specified how many of these factors must apply before the Court will overturn one of its prior decisions.

b. Is one factor alone ever sufficient?

Response: See my answer to Question 13a.

14. Please explain the difference between judicial review and judicial supremacy.

Response: Judicial review refers to the courts' power to review legislative and executive acts, as recognized in *Marbury v. Madison*, 5 U.S. 137 (1803). Black's Law Dictionary (11th ed. 2019) defines "judicial supremacy" as a "doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states."

15. Does the Ninth Amendment protect individual rights or does it provide structural protection applicable to the people?

Response: In his concurring opinion in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), Justice Thomas observed that "certain Bill of Rights provisions prevent federal interference in state affairs and are not readily construed as protecting rights that belong to individuals. The Ninth and Tenth Amendments are obvious examples…." *Id.*, at 851 n.20 (Thomas, J., concurring in part).

16. Under former U.S. Supreme Court Justice Stephen Breyer's view of 'active liberty', is the Ninth Amendment evolving?

Response: The Supreme Court has made clear in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111, 2132 (2022), that the Constitution is an enduring document with a meaning that is fixed according to the historical understanding at the time it was enacted.

17. Are the Bill of Rights informative for understanding the meaning of the Ninth Amendment or should it be interpreted independently of the other amendments?

Response: Congress has construed the Ninth Amendment with reference to the other Amendments in the Bill of Rights. See my answer to Question 6.

18. Is Founding-era history useful for understanding the meaning of the Ninth Amendment?

Response: See my answer to Question 16.

19. The First, Second, Fourth, Ninth, and Tenth Amendments reference "the people."

a. Who is included within the meaning of *'the people*'?

Response: See my answer to Question 6.

b. Is the term's meaning consistent in each amendment?

Response: In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-66 (1990), the Supreme Court indicated that excludable aliens are not entitled to First Amendment rights.

20. Does 'the people' capture non-citizens or illegal immigrants within the meaning of any amendment?

Response: See my answers to Question 6 and Question 7.

21. In *Washington v. Glucksberg,* 521 U.S. 702 (1997), the Supreme Court determined that the right to assisted suicide is not a fundamental liberty interest protected by the Fourteenth Amendment since its practice has been offensive to our national traditions and practices. Do evolving social standards of acceptance for practices like assisted suicide suggest that the meaning of the Due Process Clause changes over time?

Response: The Supreme Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendment protect certain fundamental rights that are so deeply rooted in our history and tradition that they are essential to the nation's scheme of ordered liberty. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2246 (2022) (citing cases). The meaning of the Due Process Clause does not change over time.

22. Could the Privileges or Immunities Clause within the Fourteenth Amendment a source of unenumerated rights?

Response: In his concurring opinion in *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022), Justice Thomas indicated that the Supreme Court has not yet decided "whether the Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution." *Id.*, at 2302 (Thomas, J., concurring) (emphasis in original). As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before me as a district judge.

23. Is the right to terminate a pregnancy among the 'privileges or immunities' of citizenship?

Response: In his concurring opinion in *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022), Justice Thomas opined that even if the Privileges or Immunities Clause "does protect unenumerated rights, the Court has conclusively demonstrated that abortion is not one of them." *Id.*, at 2302 (Thomas, J., concurring). As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before me as a district judge.

24. What is the original holding of *Chevron*? How have subsequent cases changed the *Chevron* doctrine?

Response: The Chevron doctrine requires a court to grant deference to an agency's reasonable construction of an ambiguous statute even if the agency's reading differs from what the court believes is the best statutory interpretation. *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see National Cable &*

Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 1014-15 (2005) (Scalia, J., dissenting) ("*Mead* drastically limited the categories of agency action that would qualify for deference under *Chevron*."). The Chevron doctrine is now arguably impacted by the Major Questions doctrine. *See W. Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587, 2607-10, 2016 (2022).

25. How does the judicial branch decide when an agency exercised more authority than Congress delegated or otherwise exercised its rulemaking powers?

Response: To determine whether a federal agency has acted within its legally delegated authority in promulgating a rule, courts employ the Chevron analysis, inquiring first whether Congress has spoken directly to the precise issue presented, in which case the court defers to the unambiguously expressed intent of Congress. *Building Owners and Managers Ass'n Intern. v. F.C.C.*, 254 F.3d 89, 93-94 (D.C. Cir. 2001). If the delegating legislation is silent or ambiguous with respect to the specific issue at hand, the court inquires whether the agency reasonably exercised its discretion in construing the statute. *Id.*

26. How does the Constitution limit the powers of Congress? Please provide examples.

Response: As the Supreme Court has recognized, the Constitution confers on Congress not plenary legislative power but only certain enumerated powers and all other legislative power is reserved for the States as the Tenth Amendment confirms. *See, e.g, Murphy v. National Collegiate Athletic Association*, 138 S.Ct. 1461, 1476 (2018). Moreover, Articles II and III of the Constitution reserve certain powers to the executive and judicial branches.

27. Please describe the modern understanding and limits of the Commerce Clause.

Response: The congressional power under the Commerce Clause is complete in itself and may be exercised to the utmost extent and without limits other than what are provided in the constitution. *United States v. Schaffner*, 258 F.3d 675, 678 (7th Cir. 2001). In determining whether Congress has stayed within the limits of that power, judicial review of congressional determinations is limited and deferential. *Id.* Nevertheless, it is still the province of the Court to determine whether Congress has exceeded its enumerated powers. *Id.,* at 679. In *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), the Supreme Court has held that Congress's power under the Commerce Clause is limited to: (1) regulating the use of channels of interstate commerce; (2) regulating and protecting the instrumentalities of interstate commerce; and (3) regulating those activities having a substantial relation to interstate commerce.

28. Please provide an example of activity Congress cannot regulate under the Commerce Clause.

Response: In *United States v. Lopez*, 514 U.S. 549, 551 (1995), the Supreme Court held that Congress exceeded its authority under the Commerce Clause when it passed a statute that prohibited the possession of guns in local school zones because this activity was not economic activity that substantially affected interstate commerce.

29. Should Due Process in the Fourteenth Amendment and Fifth Amendment be interpreted differently? Please explain.

Response: The Supreme Court has consistently held that the same or similar analysis applies to both the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See Thornton v. Commissioner of Social Security*, 570 F.Supp.3d 1010, 1034-35 (W.D. Wash. 2020) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217-18 (1995)); *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 235-236 (4th Cir. 2022).

30. In *Gundy v. United States*, 588 U.S. ___ (2019), justices in dissent indicated willingness to limit the non-delegation doctrine, arguing that Congress can only delegate authority that is non-legislative in nature. Does the Constitution limit the power to define criminal offenses to the legislative branch?

Response: As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before me as a district judge.

31. Please describe how courts determine whether an agency's action violated the Major Questions doctrine.

Response: The Supreme Court set forth the applicable standard in *W. Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (2022). Under the Major Questions doctrine, administrative agencies must be able to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance. *Id.*, at 2607-10, 2016.

32. Please describe your understanding and limits of the anti-commandeering doctrine.

Response: The Supreme Court has described the anti-commandeering doctrine as the expression of a fundamental structural decision incorporated into the Constitution, namely, the decision to withhold from Congress the power to issue orders directly to the States. *Murphy v. National Collegiate Athletic Association*, 138 S.Ct. 1461, 1475-76 (2018).

33. Does the meaning of 'cruel and unusual change over time? Why or why not?

Response: The Supreme Court has held that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Kennedy v. Louisiana*, 554 U.S. 407, 419-20 (2008) (same, citing cases).

34. Is the death penalty constitutional?

Response: Yes.

35. Can Congress require a federal prosecutor to convene a grand jury for someone charged with criminal contempt of Congress if prosecutorial discretion belongs to the executive branch?

Response: As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before me as a district judge.

36. Please describe which presidential aides, if any, are entitled to "absolute immunity" from congressional subpoenas.

Response: As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before me as a district judge.

37. Do private social media companies create any type of forum that protects speech against restrictions in the context of the First Amendment?

Response: As a sitting United States Magistrate Judge and a judicial nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before me as a district judge.

38. How does the Supremacy Clause interact with the Adequate and Independent State grounds doctrine?

Response: The Supremacy Clause and the Adequate and Independent State grounds doctrine help preserve the balance between federal and state relations. Under the Independent and Adequate State grounds doctrine, the Supreme Court will hear a case from state court only if the state court judgment is challenged on the basis of federal law.

The Supreme Court will refuse jurisdiction of an appeal from state court and decline to review a question of federal law decided by the state court if it finds that there is an adequate and independent non-federal ground to support the state court judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This is so because the Supreme Court has recognized that the views of the state's highest court with respect to state law are binding on the federal courts. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

39. Please explain why the Fifth Amendment's Due Process Clause does not require the federal government to provide notice and a hearing to an individual before their name is added to the no-fly list.

Response: In *Kashem v. Barr*, 941 F.3d 358, 380-81 (9th Cir. 2019), the Ninth Circuit held that the Government's use of a reasonable suspicion standard in determining whether to place individuals on the no-fly-list satisfied procedural due process in light of the Government's urgent interest in combatting terrorism and the public's manifest interest in aviation safety. After an individual is placed on the no-fly-list, due process requires that the affected individual be informed of the official action, be given access to unclassified evidence on which the official actor relied, and be afforded an opportunity to rebut that evidence. *Id.*, at 384.

40. What's the textual source of the different standards of review for determining whether state laws or regulations violate constitutional rights?

Response: The textual source for the different standards of review (*i.e.,* rational basis, intermediate scrutiny, and strict scrutiny) is the Equal Protection Clause and the level of scrutiny depends upon the nature of the rights that are placed at stake by the state law or regulation at issue.

41. Please describe the legal basis that allows federal courts to issue universal injunctions.

Response: The source of the legal authority to issue nationwide injunctions comes from the power of federal courts to grant equitable relief and remedies and Federal Rule of Civil Procedure 65. *See, e.g., City of Chicago v. Barr*, 961 F.3d 882, 912-16 (7th Cir. 2020).