Senator Lindsey Graham, Ranking Member
Questions for the Record
Ms. Molly R. Silfen
Nominee to be Judge, United States Court of Federal Claims

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 do not agree that the role of a judge is to exercise value judgments. Rather, the role of a judge on the Court of Federal Claims is to follow the law and the precedent of the Supreme Court and the Federal Circuit and to apply that law and those precedents in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits.

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 am not familiar with that quote by Judge Reinhardt. If confirmed as a judge on the Court of Federal Claims, I would take the approach that each case should be decided based on following the law and the precedent of the Supreme Court and the Federal Circuit and applying that law and those precedents in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits.

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 that quote by Justice Jackson. If confirmed as a judge on the Court of Federal Claims, I would treat the Constitution as an enduring document and interpret it based on its text and structure, applying the precedent of the Supreme Court and the Federal Circuit interpreting the relevant provisions. If faced with a provision that has not been interpreted by the Supreme Court or the Federal Circuit, where the text and structure do not resolve the question, I would use canons of construction prescribed by the Supreme Court and the Federal Circuit in interpreting similar or analogous provisions.

5. **What is implicit bias?**

Response: The Merriam-Webster dictionary defines "implicit bias" as "a bias or prejudice that is present but not consciously held or recognized." "Implicit bias." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/implicit%20bias.

6. **Is the federal judiciary affected by implicit bias?**

Response: I am not aware of studies addressing the federal judiciary's implicit biases, and I have not conducted any research into this question.

7. **Do you have any implicit biases? If so, what are they?**

Response: Should I be fortunate enough to be confirmed as a judge on the Court of Federal Claims, I would be bound by the oath that federal judges take, namely to "administer justice without respect to persons." Accordingly, I promise to treat all parties in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "attack" as, "The act of assailing either with physical violence or with sharp words." It defines "ad hominem attack" as, "A personal dig or affront; specif., the criticism of an adversary's character as opposed to the substance of the adversary's arguments." The Supreme Court, in *New York Times Co. v. Sullivan*, 376 U.S. 254, 272-73 (1964), has distinguished between criticism of an opinion and criticism of a judge, explaining that both are protected speech: "Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains half-truths and misinformation. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. … Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." *Id.* (citations and quotation marks omitted).

9. **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 Court of Federal Claims does not have a criminal docket, and it is hard to imagine a situation in which sentencing a criminal defendant would arise. Nevertheless, in the unlikely event that it became relevant to apply criminal sentencing law, I would apply the law and precedent of the Supreme Court and the Federal Circuit (to the extent

that the Federal Circuit had relevant precedent) in a fair and impartial way. It is my understanding in reviewing the federal sentencing statute, 18 U.S.C. § 3553(a), that Congress has not directed one purpose of sentencing to be favored or prioritized over any other.

10. **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 never been a judge and thus have not had occasion to employ a particular judicial philosophy. The philosophy that would guide my decisionmaking, if fortunate enough to be confirmed as a judge on the Court of Federal Claims, would be to take each case with an open mind, on its own terms and its own merits. I would study the pleadings and the facts of the case. I would study the parties' arguments and the law and precedent of the Supreme Court and the Federal Circuit, and I would apply that law and those precedents in a fair and impartial way. I would treat each case as the most important case, because it is the most important case to the parties. I would ensure that every party understands that it has been heard and its arguments have been addressed, but I would also work hard to address each case narrowly, keeping in mind the judge's role of adjudicating only the case that is before me. I have not studied whether there is one decision that best represents this philosophy but am confident that many judges take a similar approach.

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

    Response: Please see my response to Question 10.

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

    Response: Section 1507 of Title 18 of the United States Code imposes a fine, imprisonment for up to one year, or both, against "[w]hoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence."

13. **Under Supreme Court precedent, including *Cox v. Louisiana*, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?**

    Response: In *Cox v. Louisiana*, 379 U.S. 559, 561-64 (1965), the Supreme Court upheld a state statute modeled on 18 U.S.C. § 1507 against a facial constitutional challenge.

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: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. Because the legal issues presented in *Brown v. Board of Education of Topeka* are unlikely to become the subject of litigation, I am comfortable expressing my view that *Brown* was correctly decided.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. Because the legal issues presented in *Loving v. Virginia* are unlikely to become the subject of litigation, I am comfortable expressing my view that *Loving* was correctly decided.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. *Griswold v. Connecticut* is binding precedent of the Supreme Court. If confirmed, I would follow *Griswold* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overturned *Roe v. Wade*, returning the authority to regulate abortion to the people and their elected representatives. *Dobbs* is binding precedent of the Supreme Court. If confirmed, I would follow *Dobbs* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overturned *Planned Parenthood v. Casey*, returning the authority to regulate abortion to the

people and their elected representatives. *Dobbs* is binding precedent of the Supreme Court. If confirmed, I would follow *Dobbs* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. *Gonzales v. Carhart* is binding precedent of the Supreme Court. If confirmed, I would follow *Gonzales v. Carhart* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. *District of Columbia v. Heller* is binding precedent of the Supreme Court. If confirmed, I would follow *Heller* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. *McDonald v. City of Chicago* is binding precedent of the Supreme Court. If confirmed, I would follow *McDonald* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* is binding precedent of the Supreme Court. If confirmed, I would follow *Hosanna-Tabor* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. *New*

York State Rifle & Pistol Association v. Bruen is binding precedent of the Supreme Court. If confirmed, I would follow *Bruen* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. *Dobbs v. Jackson Women's Health Organization* is binding precedent of the Supreme Court. If confirmed, I would follow *Dobbs* and all other binding precedents of the Supreme Court and Federal Circuit.

15. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: No.

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

    Response: No.

16. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: Please see my response to Question 17.a.

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

Response: No.

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

Response: I recently had a conversation at a party with a friend of a friend who, I learned during our conversation, works in human resources for Arabella Advisors. This was in February 2023, before my nomination was announced, and we did not discuss anything substantive about the work of Arabella Advisors or anything about the courts or about my potential nomination to the Court of Federal Claims. I do not remember her full name.

18. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

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

       Response: No.

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

       Response: No.

19. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**
    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

    b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

       Response: No.

    c. **Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

       Response: No.

20. **Please describe the selection process that led to your nomination, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).**

    Response: In March 2022, Senator Patrick Leahy sent a letter to the White House recommending me for a position on the United States Court of Federal Claims. I am

aware that in September 2022 Senator Thom Tillis also sent a letter recommending me for a position on the United States Court of Federal Claims. On November 22, 2022, I was contacted by an attorney in the White House Counsel's Office regarding my interest in being considered for a seat on the United States Court of Federal Claims. After that date, I was in contact with officials from the Office of Legal Policy at the Department of Justice. On February 22, 2023, the President announced his intent to nominate me.

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

    Response: No.

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

    Response: No.

23. **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 recently had a conversation at a party with a friend of a friend who, I learned during our conversation, works in human resources for Arabella Advisors. This was in February 2023, before my nomination was announced, and we did not discuss anything substantive about the work of Arabella Advisors or anything about the courts or about my potential nomination to the Court of Federal Claims. I do not remember her full name.

24. **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: No.

25. **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: No.

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

Response: In March 2022, Senator Patrick Leahy sent a letter to the White House recommending me for a position on the United States Court of Federal Claims. I am aware that in September 2022 Senator Thom Tillis also sent a letter recommending me for a position on the United States Court of Federal Claims. On November 22, 2022, I was contacted by an attorney in the White House Counsel's Office regarding my interest in being considered for a seat on the United States Court of Federal Claims. After that date, I was in contact with officials from the Office of Legal Policy at the Department of Justice. On February 22, 2023, the President announced his intent to nominate me.

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

Response: I reviewed the questions and drafted my answers, conducting legal research where necessary. I submitted my draft answers to the Office of Legal Policy at the Department of Justice, who provided feedback. I revised and finalized my answers after receiving that feedback.

Written Questions for Molly Silfen
Nominee to the Court of Federal Claims
March 29, 2023

1. **As part of my responsibility as a member of this Committee to ensure the fitness of nominees, I ask each nominee to answer two questions:**

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

      Response: No.

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

      Response: No.

Senator Mike Lee
Questions for the Record
Molly Silfen, Nominee to the United States Court of Federal Claims

1. What legal experience do you think is necessary for a person to make a good Court of Federal Claims judge, and what have you done to gain this experience?

Response: Starting at the beginning of my career, for two years I was a law clerk for Judge Lourie on the Federal Circuit, where I worked on cases arising from the Court of Federal Claims, including all of the various areas of the court's jurisdiction. In my practice since then, I have focused on intellectual property cases, which represent one important area of the court's jurisdiction. My practice has involved cross-cutting issues that the Court of Federal Claims addresses, issues like administrative law, statutory interpretation, and constitutional questions. Those types of issues arise in all different areas of the court's jurisdiction. And my experience practicing in front of the Federal Circuit and understanding the records of highly technical complex cases—I have argued 20 Federal Circuit appeals and been involved in many dozens more—will serve me well on the court if I am fortunate enough to be confirmed.

2. How would you describe your judicial philosophy?

Response: I have never been a judge and thus have not had occasion to employ a particular judicial philosophy. The philosophy that would guide my decisionmaking, if fortunate enough to be confirmed as a judge on the Court of Federal Claims, would be to take each case with an open mind, on its own terms and its own merits. I would study the pleadings and the facts of the case. I would study the parties' arguments and the law and precedent of the Supreme Court and the Federal Circuit, and I would apply that law and those precedents in a fair and impartial way. I would treat each case as the most important case, because it is the most important case to the parties. I would ensure that every party understands that it has been heard and its arguments have been addressed, but I would also work hard to address each case narrowly, keeping in mind the judge's role of adjudicating only the case that is before me.

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

Response: I would interpret a federal statute based on its text and structure, applying the precedent of the Supreme Court and the Federal Circuit interpreting the relevant provision. If faced with a provision that has not been interpreted by the Supreme Court or the Federal Circuit, where the text and structure do not resolve the question, I would use canons of construction prescribed by the Supreme Court and the Federal Circuit in interpreting similar or analogous provisions.

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

Response: I would interpret a constitutional provision based on the Constitution's text and structure, applying the precedent of the Supreme Court and the Federal Circuit interpreting the relevant provision. If faced with a provision that has not been interpreted by the Supreme Court or the Federal Circuit, where the text and structure do not resolve the question, I would use canons of construction prescribed by the Supreme Court and the Federal Circuit in interpreting similar or analogous provisions. For example, the Supreme Court in certain types of constitutional questions puts a heavy emphasis on the Nation's history and tradition. *See New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2127-30 (2022); *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

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

Response: Please see my response to Question 4. In addition, the Supreme Court has looked to the original public meaning in evaluating the text of particular constitutional provisions including, for example, the Second Amendment. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: Please see my response to Question 3.

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: I understand the "plain meaning" of a constitutional provision to refer to the public understanding of the relevant language at the time of enactment. For a statute, the relevant time is also the time of enactment. *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1738 (2020). If confirmed as a judge on the Court of Federal Claims, I would follow the precedent of the Supreme Court and the Federal Circuit to determine the plain meaning of a statute or constitutional provision and the time at which that meaning is assessed.

7. What are the requirements for standing in the Court of Federal Claims?

Response: While the Court of Federal Claims is an Article I, not an Article III, court, it has adopted the standing requirements of Article III courts based at least on the reference to a "case or controversy" in the statute empowering it to enter final judgments. 28 U.S.C. § 2519; *see Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1351 n.7 (Fed. Cir. 2015) ("Although the Court of Federal Claims is an Article I tribunal, it generally adheres to traditional justiciability standards applicable to courts established under Article III."); *see also Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 889 (1991) (Non-Article III tribunals can "exercise the judicial power of the United States."). One exception is that private relief bills can

be referred to the Court of Federal Claims by Congress, and in those instances there is no independent standing requirement. *See* 28 U.S.C. § 1492. In most cases, however, where there is a standing requirement, the plaintiff must show that it has an injury in fact that is fairly traceable to the conduct of the United States and that is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Figueroa v. United States*, 466 F.3d 1023, 1029 (Fed. Cir. 2006).

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

Response: In *McCulloch v. Maryland*, 17 U.S. 316, 323-24 (1819), the Supreme Court held that Congress has certain unenumerated powers that are implicit in its authority to carry out its enumerated powers, under the Necessary and Proper Clause of Article I. In general, though, the Constitution sets out enumerated, not plenary, powers of Congress.

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

Response: Under binding precedents of the Supreme Court, Congress need not reference a specific enumerated power in enacting a law. *See, e.g.*, *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 570 (2012) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." (quotation marks and citations omitted)). If a party has raised a question about the constitutionality of a statute, I would research the law and precedent of the Supreme Court and the Federal Circuit on the question and apply that precedent to the case before me, keeping in mind the judge's role of adjudicating only the case that is before me.

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

Response: The Supreme Court has held that certain unenumerated rights are protected under the Constitution, including the right to privacy in the home, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to marry, *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015); the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); and the right to travel interstate, *Saenz v. Roe*, 526 U.S. 489, 498 (1999). The test for determining whether an unenumerated right is fundamental under the Constitution asks whether the right is deeply rooted in the Nation's history and tradition; is implicit in the concept of ordered liberty; and contains a careful description of the asserted liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997); *see also Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022).

11. What rights are protected under substantive due process?

Response: The Supreme Court has held that substantive due process protects individuals against laws that exceed the limits of government authority, namely, certain unenumerated rights. Those unenumerated rights include the right to privacy in the home, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to marry, *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015); the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); and the right to travel interstate, *Saenz v. Roe*, 526 U.S. 489, 498 (1999).

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

Response: The Supreme Court has distinguished unenumerated rights that are protected, as discussed in my answers to Questions 10 and 11, from economic rights addressed in *Lochner v. New York*, and has overruled *Lochner*. *See Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). The Supreme Court has also overruled the cases—*Roe v. Wade* and *Planned Parenthood v. Casey*—that protected a substantive due process right to abortion, returning the authority to regulate abortion to the people and their elected representatives. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). Should I be confirmed to the Court of Federal Claims, I would apply all binding precedents of the Supreme Court and the Federal Circuit.

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

Response: The Supreme Court has explained that, under the Commerce Clause, Congress may regulate (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even if the threat comes only from intrastate activities; and (3) activities that substantially affect interstate commerce. *United States v. Morrison*, 529 U.S. 598, 609 (2000). In *Morrison* and *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court set out limits of Congress's powers under the Commerce Clause.

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

Response: The suspect classes are race, religion, national origin, and alienage. In determining whether a group qualifies as a suspect class, the Supreme Court looks at whether the group is a "discrete and insular minority." *United States v. Carolene Products Co.*, 304 U. S. 144, 152-53 n.4 (1938). The Supreme Court has further explained that the "underlying rationale" of suspect classes "is that, where legislation affects discrete and insular minorities, the presumption of constitutionality fades

because traditional political processes may have broken down." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974).

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

Response: The Supreme Court has recognized the centrality of checks and balances, and separation of powers, to our system of government, describing the separation of powers as "at the heart of our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 119 (1976). "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Id.* at 122. In that spirit, the Supreme Court "has held that executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution. The Court has held that the President may not execute and exercise legislative authority belonging only to Congress." *Id.* at 123 (citations omitted). Separation of powers is also why the judicial branch's powers are limited to deciding cases and controversies. *Clapper v. Amnesty International U.S.A.*, 568 U.S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.").

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

Response: In reviewing a separation-of-powers question, I would follow the text and structure of the Constitution and the precedent of the Supreme Court and the Federal Circuit, all of which bind the Court of Federal Claims.

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

Response: As a judge on the Court of Federal Claims, my job would be to apply the law and precedent of the Supreme Court and the Federal Circuit, and to apply that law and those precedents in a fair and impartial way. I would take each case with an open mind, on its own terms and its own merits. I would ensure that every party understands that it has been heard and its arguments have been addressed, but I would also work hard to address each case narrowly, keeping in mind the judge's role of adjudicating only the case that is before me.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "judicial review" as, "A court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional." It defines "judicial supremacy" as, "The 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."

19. 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: I am not familiar with this quotation from President Lincoln. Every branch of government has the foremost obligation to follow the Constitution; all elected officials and judicial officers take an oath to uphold the Constitution. An important part of that obligation is respecting the Constitution's separation of powers, which provides the judicial branch with the power to decide cases and controversies. Moreover, the Supreme Court has made clear that elected officials must respect the decisions of the judicial branch. *See, e.g.*, *Cooper v. Aaron*, 358 US 1, 18 (1958).

20. What role does precedent play in the opinions of a Court of Federal Claims judge?

Response: A judge on the Court of Federal Claims is bound by the precedent of the Supreme Court and the Federal Circuit. If I were fortunate enough to be confirmed, I would follow that precedent.

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: The courts play a narrow role in our constitutional system, limited to deciding cases and controversies. *Clapper v. Amnesty International U.S.A.*, 568 U.S. 398, 408-09 (2013). Courts maintain their role and the limits on their power by applying the law and precedent of the Supreme Court and—in the case of the Court of Federal Claims—the Federal Circuit, and applying that law and those precedents in a fair and impartial way. Courts also maintain those limits by addressing each case narrowly, keeping in mind the judges' role of adjudicating only the case that is before them. And courts maintain those limits by explaining their decisions clearly.

22. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should

a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: A judge on the Court of Federal Claims has the duty to apply the law and precedent of the Supreme Court and the Federal Circuit, and to apply that law and those precedents in a fair and impartial way. I would apply any precedent that squarely addresses the issue in the case. In the absence of precedent squarely addressing the issue in the case, I would use canons of construction prescribed by the Supreme Court and the Federal Circuit in interpreting similar or analogous provisions. In all cases, I would also work hard to address each case narrowly, keeping in mind the judge's role of adjudicating only the case that is before me.

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: The Court of Federal Claims does not have a criminal docket, and it is hard to imagine a situation in which sentencing a criminal defendant would arise. Nevertheless, in the unlikely event that it became relevant to apply criminal sentencing law, I would apply the law and precedent of the Supreme Court and the Federal Circuit (to the extent that the Federal Circuit had relevant precedent) in a fair and impartial way. *See* 18 U.S.C. § 3553(a); United States Sentencing Guideline § 5H1.10.

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

Response: I am not familiar with this quotation or its context. In the legal context, Black's Law Dictionary (11th ed. 2019) defines "equity" as "[f]airness; impartiality; 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 "equity" as "[f]airness; impartiality; evenhanded dealing." It defines "equality" as "[t]he quality, state, or condition of being equal; esp., likeness in power or political status."

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

Response: The Equal Protection Clause of the Fourteenth Amendment guarantees that "[n]o state shall make or enforce any law which shall … deny to any person within its jurisdiction the equal protection of the laws." If confirmed, I would apply all Supreme Court and Federal Circuit precedents regarding the scope and contours of the Equal Protection Clause.

27. How do you define "systemic racism?"

Response: I do not have a personal definition of "systemic racism." If I were fortunate enough to be confirmed as a judge on the Court of Federal Claims, I promise to treat all parties in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits.

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

Response: Black's 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: The terms "critical race theory" and "systemic racism" are different terms, but I have not studied either one and do not have a personal definition of either one. Please also see my responses to Questions 27 and 28.

30. The Court of Federal Claims has been called "the keeper of the Nation's conscience" and the "People's court." How do you see the court fulfilling such a role? How do you see yourself fulfilling this role if you are confirmed?

Response: The Court of Federal Claims originated in 1855 to waive the sovereign immunity of the United States in a number of circumstances and hold the government accountable for its actions. In 1861, President Lincoln successfully urged Congress to give the court authority to render binding judgments, arguing, "It is as much the duty of the Government to render prompt justice against itself, in favor of its citizens, as it is to administer the same between private individuals." In that important tradition, I would view my role as requiring both prompt attention to all cases and taking each case with an open mind, on its own terms and its own merits, in a fair and impartial way. On promptness, I had the honor of serving for two years as a law clerk for Judge Lourie on the Federal Circuit, and he routinely emphasized the importance of prompt decisionmaking as critical to rendering justice. I would work to emulate that approach. On taking each case with an open mind, I have litigated both for and against the United States government, zealously representing clients on both sides, and as a law clerk I learned from an impartial adjudicator addressing cases between the government and private individuals. I would work to emulate Judge Lourie's openminded, fair, and impartial approach to each case.

Senator Josh Hawley
Questions for the Record

Molly Silfen
Nominee, U.S. Court of Federal Claims

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

   Response: No.

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

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

   Response: I would interpret a constitutional provision based on the Constitution's text and structure, applying the precedent of the Supreme Court and the Federal Circuit interpreting the relevant provision. If faced with a provision that has not been interpreted by the Supreme Court or the Federal Circuit, where the text and structure do not resolve the question, I would use canons of construction prescribed by the Supreme Court and the Federal Circuit in interpreting similar or analogous provisions. For example, the Supreme Court in certain types of constitutional questions puts a heavy emphasis on the Nation's history and tradition. *See New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2127-30 (2022); *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

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

   Response: I would interpret a legal text based on its text and structure, applying the precedent of the Supreme Court and the Federal Circuit interpreting the relevant provision. If faced with a provision that has not been interpreted by the Supreme Court or the Federal Circuit, where the text and structure do not resolve the question, I would use canons of construction prescribed by the Supreme Court and the Federal Circuit in interpreting similar or analogous provisions. The Supreme Court "permit[s] resort to legislative history only when necessary to interpret ambiguous statutory text." *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 187 n.8 (2004). The Supreme Court has also explained that some types of legislative history are more probative than others; for example, the Supreme Court has explained that full committee reports have greater probative value than statements of individual members of Congress. *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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 directed that not all legislative history should be treated the same. If the circumstance called for looking to legislative history based on Supreme Court and Federal Circuit precedent, I would follow the precedent of the Supreme Court and Federal Circuit in the emphasis they place on legislative history. For example, the Supreme Court has explained that full committee reports have greater probative value than statements of individual members of Congress. *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: I would follow the precedent of the Supreme Court and Federal Circuit in determining whether it is appropriate to consult the laws of foreign nations when interpreting provisions of the U.S. Constitution. I am not aware of a circumstance in which either court consults the laws of foreign nations for interpreting the U.S. Constitution.

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: The Federal Circuit does not have a criminal docket, and I am not aware of a Federal Circuit case that applies the Eighth Amendment's prohibition on cruel and unusual punishment. Further, the "Court of Federal Claims does not have jurisdiction over claims arising under the Eighth Amendment, as the Eighth Amendment is not a money-mandating provision." *Trafny v. United States*, 503 F.3d 1339, 1340 (Fed. Cir. 2007) (quotation marks omitted). Nevertheless, the Supreme Court applies a test that asks whether the protocol presents "a substantial risk of serious harm" and whether there is "an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (marks omitted).

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: "The Court of Federal Claims does not have jurisdiction over claims arising under the Eighth Amendment, as the Eighth Amendment is not a money-mandating provision." *Trafny v. United States*, 503 F.3d 1339, 1340 (Fed. Cir. 2007) (quotation marks omitted). Nevertheless, the answer is yes. *Glossip v. Gross*, 576 U.S. 863, 878 (2015).

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: The Federal Circuit does not have a criminal docket, and I am not aware of a Federal Circuit case that addresses DNA analysis for habeas corpus petitioners. Further, "the habeas statute does not list the Court of Federal Claims among those courts empowered to grant a writ of habeas corpus, and the trial court therefore is without power to entertain [a party's] petition." *Ledford v. United States*, 297 F.3d 1378, 1381 (Fed. Cir. 2002). Nevertheless, the Supreme Court does not recognize such a right. *District Attorney's Office for Third Judicial District. v. Osborne*, 557 U.S. 52, 72 (2009).

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: The Court of Federal Claims does not have a criminal docket, and it is hard to imagine a situation in which these death-penalty issues would arise. Nevertheless, in the unlikely event that it became relevant to apply these laws, I would apply the law and precedent of the Supreme Court and the Federal Circuit (to the extent that the Federal Circuit had relevant precedent) in a fair and impartial way.

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: It is unlikely that the Court of Federal Claims would be addressing a state governmental action, as its jurisdiction is limited to federal money-mandating statutes. Nevertheless, in the unlikely event that it became relevant to apply these laws, under the Free Exercise Clause in particular, the Supreme Court has held that, if a law is facially neutral and generally applicable, in general, it "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Churck of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-32 (1993). But if the law is not neutral, or not generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* A law is not neutral if its "object or purpose … is the suppression of religion or religious conduct," *id.* at 533, or if its enforcement was motivated by hostility to religion, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729-31 (2018); *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2422 n.1 (2022). A law is not generally applicable if it provides individual exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021), or if it treats religious conduct less favorably than comparable secular conduct, comparing

the governmental interests at issue, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97 (2021).

The Supreme Court has addressed religious freedom claims against federal laws under the Free Exercise Clause of the Constitution, the Religious Freedom Restoration Act (RFRA), and the Religious Land Use and Institutionalized Persons Act (RLUIPA). In cases where RFRA or RLUIPA applies, the Supreme Court applies strict scrutiny, even if the law is facially neutral and generally applicable, if it substantially burdens the free exercise of religion. *Burwell v. Hobby Lobby*, 573 U.S. 682, 694-96, 705 (2014). The Supreme Court requires the government to show a compelling government interest and to use the least restrictive available means to achieve that interest. *Id*.

If faced with a free exercise question, I would apply the law and precedent of the Supreme Court and the Federal Circuit in a fair and impartial way.

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: Please see my response to Question 8.

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: I am not aware of any precedent from the Federal Circuit on evaluating the sincerity of a person's religious belief, as the Federal Circuit is a court of limited jurisdiction. The Supreme Court asks whether the belief is not pretextual, *Burwell v. Hobby Lobby*, 573 U.S. 682, 717 n.28 (2014), and "whether [it is], in [the person's] own scheme of things, religious," *United States v. Seeger*, 380 U.S. 163, 185 (1965). A belief is "religious" if it is a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by ... God." *Id.* at 176.

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: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects the individual right to keep and bear arms, and that includes the right of an ordinary, law-abiding citizen to keep a firearm in his house. The Supreme Court has since held that the right to bear arms is a fundamental right, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and that it is rooted in the Nation's history and tradition and also applies outside the

house, *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022).

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: I understand that statement, in context, to mean that Congress has the authority under the Constitution, particularly under the Fourteenth Amendment, to make laws and enact policies that affect the right to contract, as shown in the Nation's history of enacting policies that affect the right to contract, and that the courts' policy preferences should not interfere with that authority vested in Congress.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. The Supreme Court has overruled *Lochner v. New York*, 198 U.S. 45 (1905). *See Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). If confirmed, I would faithfully apply the law of the Supreme Court and the Federal Circuit to any question involving contracts and the Fourteenth Amendment.

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: The Supreme Court had not explicitly overruled *Korematsu v. United States*, 323 U.S. 214 (1944), until 2018. But the Court explained that *Korematsu* was wrong the day it was written and had been shown in the many decades since to be wrong.

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: No. Two particular cases, *Lochner* and *Korematsu*, have been overruled, as discussed in my responses to Questions 12 and 13.

a. If so, what are they?

Please see my response to Question 14 above.

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?
b. If not, please explain why you disagree with Judge Learned Hand.
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 to 15.a-c: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. Any personal opinion I may have about the market share that might lead to an antitrust violation has not factored into any position I have taken in litigation and would not factor into any decision I would make as a judge on the Court of Federal Claims. Moreover, it is unlikely that the Court of Federal Claims would be addressing a claim under, for example, the Sherman Act, as its jurisdiction is limited to federal money-mandating statutes. If the issue were to arise, I would faithfully apply the law of the Supreme Court and the Federal Circuit to any question involving antitrust law or monopolistic market share. The Supreme Court has explained that there is no particular minimum market share that constitutes a monopoly. *Times-Picayune Publishing Corp. v. United States*, 345 U.S. 594, 612 (1953).

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

Response: Black's Law Dictionary (11th ed. 2019) defines "federal common law" as, "The body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law."

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?

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

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

Response to 17.a-b: I would interpret a legal text based on its text and structure, applying the precedent of the Supreme Court and the Federal Circuit interpreting the relevant provision. The Supreme Court has explained that, for a state constitution, courts should follow the interpretation of that state's highest court. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). Sometimes, but not always, that process would result in identical provisions being interpreted identically. The Supreme Court has explained that "[w]ithin our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution." *Mills v. Rogers*, 457 U.S. 291, 300 (1982). Thus, a state's highest court may "impose, based on the State's Constitution, any additional protections … it deems appropriate." *Florida v. Powell*, 559 U.S. 50, 59 (2010).

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. Because the legal issues presented in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), are unlikely to become the subject of litigation, I am comfortable expressing my view that *Brown* was correctly decided.

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

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

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

Response to 19.a-b: The Court of Federal Claims is a court of limited jurisdiction, and its jurisdiction is limited to suits for money damages. It is therefore rare that the Court of Federal Claims will issue injunctions at all. Where the Court of Federal Claims issues injunctions is generally in the context of issuing preliminary injunctions in bid protest cases, where the government is enjoined from undertaking a particular course of action until the court has had a chance to rule. In general, injunctions are addressed in Federal Rule of Civil Procedure 65. My past experience with injunctions is in the context of patent infringement cases, where 35 U.S.C. § 283 permits a court to issue an injunction to prevent patent infringement. Those injunctions by their nature must have nationwide effect, as the patent right is a nationwide right. In any case, I would apply the law and precedent of the Supreme Court and the Federal Circuit on any injunction

issue. I would also work hard to address each case narrowly, keeping in mind the judge's role of adjudicating only the case that is before me.

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: Please see my response to Question 19.

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

Response: The Founders envisioned a federalist system, in which certain powers are delegated to the federal government, and any powers not delegated to the federal government are reserved to the individual states. Like the separation of powers among the three branches of government, that distribution of power ensures that no single government has too much power over the people it represents. That is why, for example, the Supreme Court has developed a significant body of law deferring to state court decisions on substantive questions of state law, when a federal court is sitting in diversity. *E.g.*, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

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

Response: Several Supreme Court cases address federal courts abstaining in deference to state court adjudication. Under *Younger v. Harris*, 401 U.S. 37, 43-44, 53-54 (1971), when there are concurrent federal and state court proceedings, the federal court should not call into question the state court proceedings by deciding a federal constitutional question because "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against goodfaith attempts to enforce it."

Under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 498-501 (1941), a federal court should avoid deciding a federal constitutional question when the case can be decided by interpreting the state law in a way that would avoid the federal constitutional question. In the case where "a definitive ruling on the state issue would terminate the controversy," the courts can and should avoid constitutional adjudication. *Id.* at 498.

Under the *Rooker-Feldman* doctrine, a federal court should avoid sitting in review of a state court unless explicitly authorized by Congress. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923) ("If the [state court's] decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. … Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character." (citations omitted)); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983) ("[T]he United States District Court is without authority to review final determinations of the District of Columbia Court of

Appeals in judicial proceedings. Review of such determinations can be obtained only in" the Supreme Court).

Under *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943), a federal court should abstain when its consideration of a state regulatory scheme "so clearly involves basic problems of [state] policy that equitable discretion should be exercised to give the [state] courts the first opportunity to consider them." In some circumstances, such as where there is a dispute over the meaning of a state statute governing an issue with particular interest to that state like eminent domain, a federal court should seek the state courts' interpretation before proceeding. *See Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25, 28-29 (1959) ("The special nature of eminent domain justifies a district judge … to ascertain the meaning of a disputed state statute from the only tribunal empowered to speak definitively—the courts of the State under whose statute eminent domain is sought to be exercised—rather than himself make a dubious and tentative forecast.").

Under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), a federal court should abstain from deciding a question, in favor of a concurrent state court proceeding, based on "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Id.* (marks omitted).

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

Response: The Court of Federal Claims is a court of limited jurisdiction, and its jurisdiction is limited to suits for money damages. It is therefore rare that the Court of Federal Claims will issue injunctions at all. Where the Court of Federal Claims issues injunctions is generally in the context of issuing preliminary injunctions in bid protest cases, where the government is enjoined from undertaking a particular course of action until the court has had a chance to rule. The Supreme Court has explained that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). I would apply the law and precedent of the Supreme Court and the Federal Circuit on any injunction issue.

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

Response: The Supreme Court has held that substantive due process protects individuals against laws that exceed the limits of government authority, such as certain unenumerated rights. Those unenumerated rights include the right to privacy in the home, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to marry, *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015); the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); and the right to travel interstate, *Saenz v. Roe*, 526 U.S. 489, 498 (1999).

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: Please see my response to Question 8.

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

Response: No, the right to free exercise of religion is broader than the freedom of worship. The Supreme Court has explained that free exercise "protect[s] the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2421 (2022).

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

Response: Please see my response to Question 8.

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

Response: Please see my response to Question 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: Please see my response to Question 8. In addition, RFRA applies to all federal laws. *Burwell v. Hobby Lobby Stores Inc.*, 573 U.S. 682, 695 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 n.1 (2006); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). RFRA thus applies to federal laws governing areas like employment and education and prohibits the government from "substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Hobby Lobby*, 573 U.S. at 705 (marks and emphasis omitted).

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

Response: 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 Court of Federal Claims does not have a criminal docket, and it is hard to imagine a situation in which the issue of the threshold for conviction of a criminal defendant would arise. Nevertheless, in the unlikely event that it became relevant to apply this law, I would apply the law and precedent of the Supreme Court and the Federal Circuit (to the extent that the Federal Circuit had relevant precedent) in a fair and impartial way.

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

Response to 27.a-c: The Court of Federal Claims does not have a criminal docket, and it is hard to imagine a situation in which these issues would arise. "[T]he habeas statute does not list the Court of Federal Claims among those courts empowered to grant a writ of habeas corpus, and the trial court therefore is without power to entertain [a party's] petition." *Ledford v. United States*, 297 F.3d 1378, 1381 (Fed. Cir. 2002). Nevertheless, in the unlikely event that it became relevant to apply the law of habeas corpus, I would apply the law and precedent of the Supreme Court and the Federal Circuit (to the extent that the Federal Circuit had relevant precedent) in a fair and impartial way.

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?

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

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

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

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

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.

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 to 28.a-g: The Federal Circuit issues nonprecedential opinions when "a precedential opinion would not add significantly to the body of law," and when the decision is not addressing an issue of first impression, establishing a new rule of law, or otherwise addressing a significant legal issue. Federal Circuit Internal Operating Procedures, ¶¶ 3, 4; *see* Fed. Cir. R. 32.1(b). Nevertheless, the Federal Rules of Appellate Procedure and the Federal Circuit's rules allow parties to cite nonprecedential decisions. Fed. R. App. P. 32.1; Fed. Cir. R. 32.1(c). I would consider nonprecedential opinions of the Federal Circuit to be relevant authority, consistent with the Federal Rules of Appellate Procedure, and I would not prohibit litigants from citing nonprecedential opinions.

29. In your legal career:

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

Response: I have taken one case to trial as first chair, and I have been first chair in two other district court cases, one of which was decided on summary judgment and the other of which was voluntarily dismissed by the plaintiff without prejudice. In the case I took to a weeklong trial, I was in charge of trial preparation, pretrial motions, the opening statement, direct and cross-examination of witnesses, moving for judgment as a matter of law, closing argument, and all post-trial briefing, among other things.

b. How many have you tried as second chair?

Response: I have been second chair in nine district court cases from the beginning to judgment. Those ended in summary judgment or judgment on the administrative record. I have also been second chair in an additional five cases that involved significant discovery and briefing but ended in other ways, such as settlement, or when I left the law firm before the case ended.

c. How many depositions have you taken?

Response: I have taken one deposition of the key expert witness in a district court litigation. I have been significantly involved in preparation for a few other depositions, preparing outlines and questions.

d. How many depositions have you defended?

Response: I have been significantly involved in the defense of depositions, where I helped prepare the witnesses for the process, but I have not defended any depositions.

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

Response: I have presented oral argument in twenty-three appeals before federal courts of appeals. (Twenty of those were before the Federal Circuit, and the other three were before the D.C. and Eighth Circuits.) I have additionally been counsel on at least sixty more briefs in the federal courts of appeals, including the Supreme Court.

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

Response: I have not argued any appeals before a state appellate court.

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

Response: I was first chair in a pro bono case at the Social Security Administration. I was also first chair in a pro bono case at the Department of Veterans Affairs. I was second chair in a patent case at the International Trade Commission, where I participated in briefing and in a claim construction hearing. I have also appeared before the U.S. Patent and Trademark Office in at least one inter partes reexamination. I have appeared dozens of times before the U.S. Patent and Trademark Office, in connection with prosecution of patent applications.

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

Response: I have been counsel on dispositive motions in approximately eleven district court cases.

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

Response: I was counsel on motions in limine and motions to exclude evidence, and responses to motions to exclude evidence and motions for late-stage depositions, in the case I tried as first chair. I also was counsel on motions to

compel and responses to motions to compel production of evidence in several other cases, and I presented oral argument on one of those motions to compel.

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?

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

Response: I spent five years at a law firm tracking billable hours. I do not have access to those records, but as I recall, I billed about 2050 hours per year, and I spent about 60 hours per year on legal work for pro bono clients. I also volunteered as an adjunct professor at George Mason Law School (now the Antonin Scalia Law School) and volunteered regularly for committees of bar associations such as the Federal Circuit Bar Association and the American Intellectual Property Law Association.

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

a. What do you understand this statement to mean?

Response: I am not familiar with this quotation from Justice Scalia. Faithfully interpreting the law sometimes results in an undesirable outcome. Any personal opinions I may have have not factored into any position I have taken in litigation and would not factor into any decision I would make as a judge on the Court of Federal Claims. Upholding the rule of law is a crucial and systemic good in itself, important for maintaining the legitimacy of the courts and our whole system of government. That eclipses any personal opinions I may have in any particular case. Assuming this is what Justice Scalia also meant by this statement, I agree with it.

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?

b. Do you agree or disagree with this statement?

Response to 32.a-b: I am generally familiar with this quotation from Chief Justice Roberts. I believe that the role of a judge on the Court of Federal Claims is to follow the law and the precedent of the Supreme Court and the Federal Circuit and to apply that law and those precedents in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits. Any personal opinions I may have have not factored into any position I have taken in litigation and would not factor into any decision I would make as a judge on the Court of Federal Claims. Assuming this is what Chief Justice Roberts also meant by this statement, I agree with it.

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?

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

Response to 33.a-b: I am not familiar with this quotation from Justice Holmes. I believe that the role of a judge on the Court of Federal Claims is to follow the law and the precedent of the Supreme Court and the Federal Circuit and to apply that law and those precedents in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits. Assuming this is what Justice Holmes also meant by this statement, I agree with it.

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

Response: No.

a. If yes, please provide appropriate citations.

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: *The Foundling*, by Ann Leary; *The Weekend*, by Charlotte Wood; and *The Road Taken*, by Senator Patrick Leahy.

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

Response: I do not have a personal definition of "systemic racism." If I were fortunate enough to be confirmed as a judge on the Court of Federal Claims, I promise to treat all parties in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits.

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

Response: Since I began working for the federal government in 2013, it has consistently been an honor to stand up in court and represent the United States. Public service has been integral to my career, and I would be honored to continue my public service as a judge on the Court of Federal Claims.

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

a. How did you handle the situation?

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

Response to 39.a-b: Yes, I have taken positions in litigation that conflicted with my personal views. I have addressed them the way I address every case—I zealously represented the interests of my client. Any personal opinions I may have have not factored into any position I have taken in litigation and would not factor into any decision I would make as a judge on the Court of Federal Claims.

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

Response: I frequently read the work of Professors Dennis Crouch, Jonas Anderson, and Jorge Contreras, all of whom write about intellectual property law issues.

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

Response: There is no individual Federalist Paper that has most shaped my view of the law.

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

Response: I recently argued an appeal for the government, *Hyatt v. Hirshfeld*, 16 F.4th 855 (Fed. Cir. 2021), which the government lost. The Federal Circuit's opinion not only addressed the parties' arguments, but it did so while acknowledging that it was a close case and that there was merit to both sides' arguments. I would hope to emulate that kind of humility in decisionmaking, acknowledging the merits of both sides' arguments (where both sides had in fact advanced meritorious arguments) while still making the hard decisions. In general, I have learned the most and rethought my positions the most in cases in which the arguments I advanced were not adopted by the court.

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

Response: This question implicates issues that are currently pending in litigation. Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. Recently, in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court returned the authority to regulate abortion to the people and their elected representatives. Litigation over abortion remains pending. *E.g.*, *Alliance for Hippocratic Medicine v. U.S. Food and Drug Administration*, No. 2:22-cv-223 (N.D. Tex.). *Dobbs* is binding precedent of the Supreme Court. If confirmed, I would follow *Dobbs* and all other binding precedents of the Supreme Court and Federal Circuit.

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: No.

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?
b. Amazon?
c. Google?
d. Facebook?
e. Twitter?

Response to 46.a-e: I do not hold any shares in any of these companies outside of large diversified index funds. My assets are listed in my Financial Disclosure Report and Net Worth Statement submitted to the Committee.

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

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

Response: I have never authored a brief that was filed without my name on it. I have occasionally worked on briefs that were filed in court without my name on them. Those were briefs for the United States in *Return Mail, Inc. v. United States Postal Service*, 139 S. Ct. 1853 (2019), *reversing* 860 F.3d 1350 (Fed. Cir. 2017); an amicus brief for Senator Patrick Leahy in *Apple Inc. v. Qualcomm Inc.*, 142 S. Ct. 2868 (2022); an amicus brief for the United States in *Hawkins v. Community Bank of Raymore*, 136 S. Ct. 1072 (2016); and briefs for the United States in *Hyatt v. Office of Management and Budget*, 998 F.3d 423 (9th Cir. 2021), *affirming* 611 F. Supp. 3d 1051 (D. Nev. 2020), *on remand from* 908 F.3d 1165 (9th Cir. 2018), *reversing* 2017 WL 3974996 (D. Nev. Sept. 8, 2017). I have at times reviewed other briefs of colleagues and offered suggestions, where my name has not appeared on those briefs.

48. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

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: In testifying under oath, I have a duty of candor, and I take that duty very seriously. I have provided candid and truthful answers to these questions and all of the Committee's questions, to the best of my ability, consistent with Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees.

Questions from Senator Thom Tillis
for Molly Rebecca Silfen
Nominee to the United States Court of Federal Claims

1. Please describe your understanding of the workload of the Federal Claims Court. If confirmed, how do you intend to manage your caseload?

Response: During the fiscal year ending September 30, 2022, the Court of Federal Claims disposed of 627 complaints and 1,231 vaccine petitions. The total amount of money claimed was over $14 billion. U.S. Court of Federal Claims Statistical Report for the Fiscal Year Oct. 1, 2021 – Sept. 30, 2022. The cases include subject areas such as intellectual property, government contracts, bid protests, takings, military and civilian pay, tax, and Vaccine Act cases. The cases are assigned to the judges at random. Rule of the Court of Federal Claims 40.1(a). While this is a significant workload, I am accustomed to handling a heavy docket of multiple technical, complex cases at once. Starting at the beginning of my career, for two years I was a law clerk for Judge Lourie on the Federal Circuit, where I worked on cases arising from the Court of Federal Claims, including all of the various areas of the court's jurisdiction. In my practice since then, I have focused on intellectual property cases, which represent one important area of the court's jurisdiction. My practice has involved cross-cutting issues that the Court of Federal Claims addresses, issues like administrative law, statutory interpretation, and constitutional questions. Those types of issues arise in all different areas of the court's jurisdiction. And my experience practicing in front of the Federal Circuit and understanding the records of highly technical complex cases—I have argued 20 Federal Circuit appeals and been involved in many dozens more—will serve me well on the court if I am fortunate enough to be confirmed.

2. The Federal Claims jurisdiction is based upon subject matter rather than geographic location. How has your background prepared you to address the variety of issues, including appeals from administrative agencies, which you will hear?

Response: Please see my answer to Question 1. Additionally, I have spent more than seven years representing administrative agencies, primarily the United States Patent and Trademark Office, in court and, before that, represented private clients against the federal government. My cases have been in trial courts around the country, at the Federal Circuit, and in the Supreme Court, and they have addressed numerous issues of administrative law such as agency rulemaking and adjudication, the Appointments Clause and Federal Vacancies Reform Act, the Paperwork Reduction Act, the Freedom of Information Act, agency interpretation of statutory terms, collateral attacks on agency decisionmaking, reviewability of agency decisions, statutes of limitations, and many more.

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

Response: Yes. Any personal opinions I may have have not factored into any position I have taken in litigation and would not factor into any decision I would make as a judge

on the Court of Federal Claims. The role of a judge on the Court of Federal Claims is to follow the law and the precedent of the Supreme Court and the Federal Circuit and to apply that law and those precedents in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits.

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

Response: Yes, it does sometimes result in an undesirable outcome. Any personal opinions I may have have not factored into any position I have taken in litigation and would not factor into any decision I would make as a judge on the Court of Federal Claims. Upholding the rule of law is a crucial and systemic good in itself, important for maintaining the legitimacy of the courts and our whole system of government. That eclipses any personal opinions I may have in any particular case.

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

Response: No.

6. Please share your understanding of how intellectual property related matters come before the U.S. Court of Federal Claims.

Response: When a private party believes the United States is practicing technology that would infringe a patent or copyright he owns, that party cannot sue the United States in district court for patent infringement. Instead, his remedy is in the Court of Federal Claims, where the United States has waived sovereign immunity, and he can sue for damages under 28 U.S.C. § 1498. Intellectual property cases are an important and growing area of the Court of Federal Claims' jurisdiction. *See* https://www.law360.com/articles/1441884/record-award-shows-claims-court-s-rising-role-in-ip-matters. I have worked on patent cases involving the Court of Federal Claims, including *Return Mail, Inc. v. U.S. Postal Service*, 139 S. Ct. 1853 (2019), where the dispute between the parties originated in the Court of Federal Claims, and have worked on Court of Federal Claims appeals when I was clerking on the Federal Circuit.

7. What are your thoughts regarding the importance of intellectual property rights, specifically related to patents?

Response: Intellectual property was so important to our Nation's Founders that they wrote it directly into the Constitution: Congress has the explicit power to "promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." I have spent my career working on intellectual property issues, from helping patent applicants apply for patents to licensing and litigating patents and trademarks to working on intellectual property issues on the Senate Intellectual Property Subcommittee.

8. What are your thoughts on the USPTO Patent Trial and Appeal Board (PTAB) and the role it currently plays in our intellectual property laws?

Response: I have spent seven years litigating on behalf of the federal government, most of them on behalf of the United States Patent and Trademark Office. I have also, before that, litigated against the United States Patent and Trademark Office. The agency has a heavy workload—more than 8,000 patent examiners issue more than 6,000 patents per week. Since at least 1836, there has been a process for patent applicants to challenge initial decisions, in a body that eventually became the Patent Trial and Appeal Board. There has also always been a process for the public to challenge patentability decisions, initially in court and, since 1981, also in the body that eventually became the Patent Trial and Appeal Board. The Supreme Court has held that this ability for the government to reconsider its decisions on granting patents does not violate Article III or the Seventh Amendment of the Constitution. *Oil States Energy v. Greene's Energy Group*, 138 S. Ct. 1365, 1373, 1379 (2018).

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

Response: As with any area of law, if faced with a question of patent eligibility, I would apply the law and the precedent of the Supreme Court and the Federal Circuit. Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. The issue of patent eligibility is currently pending before the Supreme Court on certiorari, *Interactive Wearables, LLC, v. Polar Electro Oy*, S. Ct. No. 21-1281; *Tropp v. Travel Sentry, Inc.*, S. Ct. No. 22-22. I cannot comment on how I would interpret and apply 35 U.S.C. § 101. I'll note, though, that any personal opinion I may have on the state of eligibility jurisprudence has not factored into any position I have taken in litigation and would not factor into any decision I would make as a judge on the Court of Federal Claims.

10. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: Please see my response to Question 9.

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

a. What experience do you have with copyright law?

Response: When I was working for the Senate Intellectual Property Subcommittee, I worked closely with several Senate offices on copyright legislation that focused on revisions to the Digital Millennium Copyright Act that would address online copyright infringement and liability for online service providers. On behalf of Senator Leahy, for whom I worked at the time, I worked with stakeholders from all different parts of the copyright community and developed legislation to try to address concerns from across the board. That work gave me a firsthand view of the current state of copyright law and how it is working in practice. That experience also solidified my view of the distinction between a judge and a policymaker; if confirmed as a judge on the Court of Federal Claims, I would follow the law and the precedent of the Supreme Court and the Federal Circuit on any issue involving the application and interpretation of copyright law.

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

Response: Please see my response to Question 11.a.

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

Response: Please see my response to Question 11.a.

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

Response: As an Associate Solicitor at the United States Patent and Trademark Office, I was a principal agency attorney on multiple cases involving the interaction between the Free Speech Clause of the First Amendment and intellectual property. I represented the agency in *In re Tam*, 785 F.3d 567 (Fed. Cir. 2015), *rev'd by* 808 F.3d 1321 (Fed. Cir. 2015) (en banc), *aff'd sub nom. Matal v. Tam*, 137 S. Ct. 1744 (2017), and *In re Brunetti*, 877 F.3d 1330 (Fed. Cir. 2017), *aff'd sub nom. Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

12. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it

from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

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

Response: I would interpret a legal text based on its text and structure, applying the precedent of the Supreme Court and the Federal Circuit interpreting the relevant provision. If faced with a provision that has not been interpreted by the Supreme Court or the Federal Circuit, where the text and structure do not resolve the question, I would use canons of construction prescribed by the Supreme Court and the Federal Circuit in interpreting similar or analogous provisions. The Supreme Court "permit[s] resort to legislative history only when necessary to interpret ambiguous statutory text." *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 187 n.8 (2004). The Supreme Court has also explained that some types of legislative history are more probative than others; for example, the Supreme Court has explained that full committee reports have greater probative value than statements of individual members of Congress. *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: Please see my response to Question 12.a. In addition, there are instances where the Supreme Court and Federal Circuit defer to an agency interpretation of a federal statute. That deference is limited to circumstances in which Congress intended for the agency to have authority to define or interpret a term, where the term is ambiguous, and where the agency's definition or interpretation is reasonable or, in some circumstances, persuasive. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). While the U.S. Copyright Office is not an executive-branch agency but is instead an agency of the legislative branch, the above test nevertheless applies. *See Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 477-80 (6th Cir. 2015) (collecting cases from other circuits), *aff'd* 580 U.S. 405 (2017); *Capitol Records, LLC v. Vimeo*, 826 F.3d 78, 93 (2d Cir. 2016).

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

Response: If confirmed as a judge on the Court of Federal Claims, I would follow the law and the precedent of the Supreme Court and the Federal Circuit on any issue involving the application and interpretation of the copyright laws, including the level of notice that is required for online service providers. Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation; accordingly, I cannot comment on how I would address this particular situation.

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

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

Response: Please see my responses to Questions 11.a and 12.a.

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

Response: If I am fortunate enough to be confirmed as a judge on the Court of Federal Claims, I will be bound by the precedent of the Supreme Court and the Federal Circuit, and I will faithfully apply that precedent in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits.