Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Cristal Brisco
Nominee to be United States District Judge for the Northern District of Indiana

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 am not familiar with that statement, but I disagree with it. The work of judges is governed by the Constitution. Judges are duty-bound to apply the law faithfully and impartially, including the binding precedents of higher courts. "Value judgments" have no place in judicial decision-making.

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

   Response: Such an approach is inconsistent with my judicial oath and philosophy. Lower court judges are duty-bound to apply binding precedent. As a sitting state court judge for the last five years, I have impartially decided cases based on the facts and the law, with strict adherence to precedent and would continue to do so if confirmed.

3. **According to your Committee Questionnaire, you were a member of the Indiana Commission on Equity and Access in the Court from 2021 to 2022. In 2022 the Commission issued a *Final Report of the Commission on Equity and Access in the Court System.* Among other things, the report recommended providing DEI training for juries and encouraged Indiana courts to implement mandatory "cultural humility" trainings.**

   a. **Do you agree with these recommendations?**

   Response: The Indiana Supreme Court created a bipartisan 22-member Commission on Equity and Access in the Court System comprised of members from all 3 branches of government. For one year, the Indiana Attorney General, state senators and representatives, trial court judges, a representative from the Office of the Governor, retired Justices of the Indiana Supreme Court, private practitioners, prosecutors, public defenders, and representatives from the Indiana State Bar Association met monthly to engage in thoughtful discussions about equal justice and access in the court system. I accepted the Indiana Supreme Court's invitation to join the Commission and participated in several meetings, but I did not author the Report or its recommendations.

   The Report defines "cultural humility" as "the practice of challenging biases and prejudices in the workplace including one's own as we all carry unconscious bias regardless of how we identify." *Indiana Commission on Equity and Access Final Report*, p. 13 (Dec. 2022). As a sitting state court judge, I foster a workplace and courtroom environment where everyone is treated with respect. I understand that the people before me are real people with real disputes who call on the Court to listen and decide. Accordingly, parties are heard; everyone is treated

with dignity; and civility does not languish. If confirmed, I would conduct myself in the same fair and impartial manner.

The Indiana Supreme Court has the authority to determine whether to implement diversity, equity, and inclusion ("DEI") training for state court juries, including the content of any such training. The Indiana Supreme Court also has authority to determine whether to implement the Report's recommendation to "require annual training which covers civility, cultural humility, and identity awareness for the state's [Office of Judicial Administration], judicial officers and court staff[,]" including the content of any such training. As a sitting state court judge, I would be bound by the Indiana Supreme Court's decision.

b. What would DEI training for juries look like?

Response: I did not author the Report or its recommendations. The Indiana Supreme Court has the authority to determine whether to implement DEI training for state court juries, including the content of any such training.

c. What is the current status of these recommendations?

Response: It is my understanding that the recommendations are under review by the Indiana Supreme Court.

4. As Corporation Counsel for the City of South Bend, in 2017 you signed the city onto an amicus brief which called President Trump's Executive Order preventing U.S. entry from certain countries of concern "misguided" and "unconstitutional."

a. Why did you add the city to the amicus brief?

Response: The city's Chief Executive, the Mayor, determined that joining the amicus brief would be in the best interests of the residents of South Bend. In service to my then-client, the City of South Bend, and at the direction of the Mayor, the city joined approximately 30 cities as a signatory to the amicus brief. I did not author the brief. I reviewed the brief and provided my city-employment signature block for inclusion in the brief. As an advocate, I had a duty to advance my client's interests. As a judge, I am a neutral arbiter.

5. Do you consider a law student's public endorsement of or praise for an organization listed as a "Foreign Terrorist Organization," such as Hamas or the Popular Front for the Liberation of Palestine, to be disqualifying for a potential clerkship in your chambers? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "no."

Response: Yes. If a job applicant publicly endorsed or praised an organization listed as a "Foreign Terrorist Organization," that fact would be disqualifying for a position in my chambers.

6. **In the aftermath of the brutal terrorist attack on Israel on October 7, 2023 the president of New York University's student bar association wrote "Israel bears full responsibility for this tremendous loss of life. This regime of state-sanctioned violence created the conditions that made resistance necessary." Do you consider such a statement, publicly made by a law student, to be disqualifying with regards to a potential clerkship in your chambers? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "no."**

   Response: Yes. Please see my response to Question 5.

7. **Please describe the relevant law governing how a prisoner in custody under sentence of a federal court may seek and receive relief from the sentence.**

   Response: Notwithstanding the fact that the sentence of a prisoner in federal custody may be appealed and modified pursuant to the provisions of 18 U.S.C. § 3742(a), a prisoner may also seek and receive relief from the sentence pursuant to 28 U.S.C. § 2255 and 18 U.S.C. § 3582(c).

   Section 2255 governs petitions for habeas corpus relief. It permits a prisoner to move the court which imposed the sentence to vacate, set aside, or correct the sentence. It requires a finding that the prisoner's "sentence was imposed in violation of the Constitution or the laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack."

   Section 3582(c) requires a court finding that "extraordinary and compelling reasons" warrant a reduction from the sentence, or a finding that the prisoner is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for which the prisoner is currently imprisoned, and a determination by the Director of the Bureau of Prisons that the prisoner is not a danger to the safety of any other person or the community, as provided under 18 U.S.C § 3142 and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission. Section 3582(c) also provides that "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C.§ 994(o), upon motion of the defendant . . . the court may reduce the term of imprisonment, after considering the factors set forth in 18 U.S.C. § 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

8. **Please explain the facts and holding of the Supreme Court decisions in *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*.**

   Response: *Students for Fair Admissions v. University of North Carolina* and *Students for Fair Admissions v. Harvard* were consolidated for oral argument, but the U.S. Supreme Court issued separate opinions. Students for Fair Admissions ("SFFA") sued University of North Carolina ("UNC") alleging that use of race as a factor in admissions violated the Equal Protection Clause

of the Fourteenth Amendment. UNC admitted to considering race as a factor in admissions, but argued that race is one of many factors and the process itself adhered to the test outlined in *Grutter v. Bollinger*, 539 U.S. 306 (2003). The district court ruled that UNC's admissions policy survived strict scrutiny and was consistent with Supreme Court precedent as announced in *Grutter*. The district court's decision was appealed to the Fourth Circuit, but that appeal was held in abeyance when the Supreme Court announced it would grant review.

In the *Harvard* case, SFFA alleged that Harvard used race in its admissions process in violation of Title VI of the Civil Rights Act of 1964. Harvard, like UNC, admitted that it used race as one of many factors in its admissions process and asserted that the process itself adhered to the test outlined in *Grutter*. The district court ruled in favor of Harvard. SFFA appealed and the First Circuit affirmed.

The U.S. Supreme Court held that race-based admissions programs in place at Harvard and UNC violated the Equal Protection Clause of the Fourteenth Amendment. It held that both schools needed to meet strict scrutiny for their race-based admissions policies. The schools' claimed educational interest in using race as a factor was not a compelling interest for purposes of satisfying strict scrutiny. Moreover, their policies were not narrowly tailored to achieve those ends.

9. Have you ever participated in a decision, either individually or as a member of a group, to hire someone or to solicit applications for employment?

Response: Yes.

If yes, please list each job or role where you participated in hiring decisions.

Response: My seventeen years of legal experience includes employment at Barnes and Thornburg LLP, the City of South Bend, Saint Mary's College - Notre Dame, and the Indiana state judiciary. As an associate attorney at Barnes & Thornburg, I participated in interview panels for summer associate positions, first-year associate positions, and lateral hires. I provided my candidate evaluations to the firm's Hiring Partner for his/her consideration in the hiring decision.

As Corporation Counsel for the City of South Bend, I interviewed finalists for positions within the legal department. I collaborated with the human resources department and the City Attorney to reach hiring decisions. I also participated in interview panels for certain mayoral appointments and provided my evaluation of the candidates to the Mayor's Chief of Staff, Deputy Chief of Staff, and Mayor.

As a state court judge, I have interviewed finalists for student internships and staff positions. I collaborated with the court administrator and my judicial colleagues in reaching hiring decisions.

10. Have you ever given preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?

Response: No.

11. Have you ever solicited applications for employment on the basis of race, ethnicity, religion, or sex?

Response: My seventeen years of legal experience includes employment at Barnes and Thornburg LLP, the City of South Bend, Saint Mary's College - Notre Dame, and the Indiana state judiciary. My current and former employers make efforts to recruit diverse applicants for job openings by including Equal Employment Opportunity language in their job postings. Additional efforts include sharing the job postings with the Indiana Conference for Legal Education Opportunity ("ICLEO") Program whose mission is to "assist Indiana minority, low-income, and educationally disadvantaged scholars to pursue a law degree in Indiana." Employment decisions were not made on the basis of race, ethnicity, religion, or sex.

12. Have you ever worked for an employer (such as a law firm) that gave preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?

Response: To the best of my knowledge, none of my employers used such preferences.

If yes, please list each responsive employer and your role at that employer. Please also describe, with respect to each employer, the preference given. Please state whether you played any part in the employer's decision to grant the preference.

13. Under current Supreme Court and Seventh Circuit precedent, are government classifications on the basis of race subject to strict scrutiny?

Response: Yes. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023).

14. Please explain the holding of the Supreme Court's decision in *303 Creative LLC v. Elenis*.

Response: In *303 Creative LLC v. Elenis*, the U.S. Supreme Court held that the First Amendment exists to protect an "uninhibited marketplace of ideas" so as to include an inability of the government to force or otherwise compel individuals to express certain ideals that the government prefers, specifically those in contravention of an individual's religious freedom. 143 S. Ct. 2298, 2311 (2023).

15. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), Justice Jackson, writing for the Court, said: "*If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in*

***politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein*.**"

Is this a correct statement of the law?

Response: Yes. In *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2311 (2023), in concluding that the government-mandated speech in that case violated the First Amendment, the U.S. Supreme Court relied on portions of the quoted language from *Barnette* as set forth in your question.

16. How would you determine whether a law that regulates speech is "content-based" or "content-neutral"? What are some of the key questions that would inform your analysis?

Response: I would look to the text of a law purported to regulate speech and apply U.S. Supreme Court and Seventh Circuit precedent. Generally, a "content-based" regulation imposes limitations upon free speech or expression based specifically on the substance of the message being communicated. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). However, government is free to pass "content-neutral" laws that regulate the time, place and manner of speech. *See City of Austin v. Reagan Nat. Advertising of Austin*, 142 S. Ct. 1464, 1473 (2022). Some of the key questions that would inform my analysis include whether the law singles out a specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter (*Id*. at 1472); the extent to which the law addresses the time, place, and manner of speech (*Id*. at 1473); and whether "there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction" (*Id*. at 1475-76).

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

Response: "True threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'" *Counterman v. Colorado*, 143 S. Ct. 2106, 2114 (2023) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)). In *Counterman*, the U.S. Supreme Court set the standard for determining whether a statement is not protected speech under the true threats doctrine. It held that the First Amendment requires proof that the defendant had some subjective understanding of the threatening nature of his statements. *Id*. at 2113-19. A mental state of recklessness is sufficient because "[i]t offers enough 'breathing space' for protected speech, without sacrificing too many of the benefits of enforcing laws against true threats." *Id*. at 2119 (quoting *Elonis v. United States*, 575 U.S. 732, 748 (2015) (internal quotation marks omitted)).

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

Response: The Seventh Circuit, following the U.S. Supreme Court, has stated that a question of law "typically concerns the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Brown v. Smith,* 827 F.3d 609, 613 (7th Cir. 2016) (citation omitted). A question of fact, on the other hand, concerns "basic, primary, or historical facts." *Thompson v. Keohane*, 516 U.S. 99, 110 (1995) (internal quotation marks and citation omitted). The line

between a question of fact and a question of law is "slippery," however. *Id.* at 111. In cases where the line is unclear, a district court should look to precedent and considerations about the proper scope of authority between a judge and a jury. *See, e.g.*, *United States v. Gaudin*, 515 U.S. 506, 514 (1995).

19. Which of the four primary purposes of sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important?

Response: 18 U.S.C. § 3553(a) requires judges to impose sentences that are "sufficient, but not greater than necessary to promote" the four primary purposes of sentencing – retribution, deterrence, incapacitation, and rehabilitation. If confirmed, I would be duty-bound to evaluate all the 3553(a) factors. My personal beliefs have no role in any sentencing decision. Neither the U.S. Supreme Court or Congress has specified that any of the four primary purposes is more important than the others.

20. Please identify a Supreme Court decision from the last 50 years that you think is particularly well-reasoned and explain why.

Response: As a judicial nominee, I am prohibited from commenting on whether a U.S. Supreme Court decision was well-reasoned. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply binding U.S. Supreme Court precedent.

21. Please identify a Seventh Circuit judicial opinion from the last 50 years that you think is particularly well-reasoned and explain why.

Response: As a judicial nominee, I am prohibited from commenting on whether a Seventh Circuit opinion was well-reasoned. *See* Code of Conduct for United States Judges, Canon 3A(6). If confirmed, I would faithfully apply binding Seventh Circuit precedent.

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

Response: 18 U.S.C. § 1507 prohibits conduct committed 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."

23. Is 18 U.S.C. § 1507 constitutional?

Response: In *Cox v. Louisiana*, 379 U.S. 559 (1965), the U.S Supreme Court upheld a state statute that was almost identical to 18 U.S.C.§ 1507, however I am unaware of any U.S. Supreme Court or Seventh Circuit precedent that has addressed the constitutionality of 18 U.S.C. § 1507. As a judicial nominee, it would be improper for me to answer further because the issue could come before me if I have the honor of being confirmed as a district court judge.

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

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

Response: As a judicial nominee, it generally is improper for me to comment on whether I believe a U.S. Supreme Court case was "correctly decided." *See* Code of Conduct for United States Judges, Canon 3A(6). However, consistent with the practice of past judicial nominees, I can state that *Brown v. Board of Education* was correctly decided because the issue of de jure segregation is highly unlikely to be relitigated again.

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

Response: As a judicial nominee, it generally is improper for me to comment on whether I believe a U.S. Supreme Court case was "correctly decided." *See* Code of Conduct for United States Judges, Canon 3A(6). However, consistent with the practice of past judicial nominees, I can state that *Loving v. Virginia* was correctly decided because the issue of interracial marriage is highly unlikely to be relitigated again.

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

Response: As a judicial nominee, I am prohibited from commenting on whether I believe a U.S. Supreme Court case was "correctly decided." *See* Code of Conduct for United States Judges, Canon 3A(6). I can state that *Griswold v. Connecticut* is binding Supreme Court precedent, which I would follow if confirmed as a District Court Judge.

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

Response: As a judicial nominee, I am prohibited from commenting on whether I believe a U.S. Supreme Court case was "correctly decided." *See* Code of Conduct for United States Judges, Canon 3A(6). I can state that *Roe v. Wade* is no longer binding Supreme Court precedent, and I would follow the binding precedent set in *Dobbs v. Jackson Women's Health Organization* if confirmed as a District Court Judge.

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

Response: As a judicial nominee, I am prohibited from commenting on whether I believe a U.S. Supreme Court case was "correctly decided." *See* Code of Conduct for United States Judges, Canon 3A(6). I can state that *Planned Parenthood v. Casey* is no longer binding Supreme Court precedent, and I would follow the binding precedent set in *Dobbs v. Jackson Women's Health Organization* if confirmed as a District Court Judge.

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

Response: As a judicial nominee, I am prohibited from commenting on whether I believe a U.S. Supreme Court case was "correctly decided." *See* Code of Conduct for United States Judges,

Canon 3A(6). I can state that *Gonzales v. Carhart* is binding Supreme Court precedent, which I would follow if confirmed as a District Court Judge.

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

Response: As a judicial nominee, I am prohibited from commenting on whether I believe a U.S. Supreme Court case was "correctly decided." *See* Code of Conduct for United States Judges, Canon 3A(6). I can state that *District of Columbia v. Heller* is binding Supreme Court precedent, which I would follow if confirmed as a District Court Judge.

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

Response: As a judicial nominee, I am prohibited from commenting on whether I believe a U.S. Supreme Court case was "correctly decided." *See* Code of Conduct for United States Judges, Canon 3A(6). I can state that *McDonald v. City of Chicago* is binding Supreme Court precedent, which I would follow if confirmed as a District Court Judge.

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

Response: As a judicial nominee, I am prohibited from commenting on whether I believe a U.S. Supreme Court case was "correctly decided." *See* Code of Conduct for United States Judges, Canon 3A(6). I can state that *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* is binding Supreme Court precedent, which I would follow if confirmed as a District Court Judge.

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

Response: As a judicial nominee, I am prohibited from commenting on whether I believe a U.S. Supreme Court case was "correctly decided." *See* Code of Conduct for United States Judges, Canon 3A(6). I can state that *New York State Rifle & Pistol Association v. Bruen* is binding Supreme Court precedent, which I would follow if confirmed as a District Court Judge.

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

Response: As a judicial nominee, I am prohibited from commenting on whether I believe a U.S. Supreme Court case was "correctly decided." *See* Code of Conduct for United States Judges, Canon 3A(6). I can state that *Dobbs v. Jackson Women's Health* is binding Supreme Court precedent, which I would follow if confirmed as a District Court Judge.

l. Were *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* correctly decided?

Response: As a judicial nominee, I am prohibited from commenting on whether I believe a U.S. Supreme Court case was "correctly decided." *See* Code of Conduct for United States Judges, Canon 3A(6). I can state that *Students for Fair Admissions, Inc. v. University of North Carolina*

and Students for Fair Admissions, Inc. v. President & Fellows of Harvard College are binding Supreme Court precedent, which I would follow if confirmed as a District Court Judge.

m. Was *303 Creative LLC v. Elenis* correctly decided?

Response: As a judicial nominee, I am prohibited from commenting on whether I believe a U.S. Supreme Court case was "correctly decided." *See* Code of Conduct for United States Judges, Canon 3A(6). I can state that *303 Creative LLC v. Elenis* is binding Supreme Court precedent, which I would follow if confirmed as a District Court Judge.

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

Response: In evaluating whether a regulation or statutory provision infringes on Second Amendment rights, I would apply the U.S. Supreme Court's holding in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). Specifically, a government restriction on the right to keep and bear arms is unconstitutional if the restriction is inconsistent with America's historical tradition of firearms regulation. If the Second Amendment's plain text covers the regulated conduct, the conduct is presumptively protected, and the government bears the burden of showing that the regulation is consistent with history and tradition. Only if the government shows that the regulation is consistent with or analogous to historical regulations can the regulation be constitutional. I would faithfully follow *Bruen* and all other binding U.S. Supreme Court and Seventh Circuit precedent.

26. 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? If so, who?

Response: No.

c. Have you ever been in contact with anyone associated with Demand Justice? If so, who?

Response: No.

27. 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? If so, who?

Response: No.

c. Have you ever been in contact with anyone associated with Demand Justice? If so, who?

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

29. 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.

30. 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? If so, who?

Response: No.

c. Have you ever been in contact with anyone associated with Fix the Court? If so, who?

Response: No.

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

Response: On May 12, 2023, Senator Todd Young's general counsel contacted me about a vacancy on the United States District Court for the Northern District of Indiana. On May 17, 2023, I was interviewed by Senator Young's general counsel and chief of staff, and Senator Mike Braun's general counsel. On May 23, 2023, I submitted a candidate intake form to Senator Young's general counsel and Senator Braun's general counsel. On June 4, 2023, an attorney from the White House Counsel's Office advised me that I was being considered for a vacancy on the United States District Court for the Northern District of Indiana. On June 5, 2023, I interviewed with attorneys from the White House Counsel's Office. Since June 9, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On

July 6, 2023, I was interviewed by Senator Braun and his general counsel. On November 15, 2023, the President announced his intent to nominate me.

32. 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.

33. 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.

34. 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: No.

35. 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.

36. 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.

37. Since you were first approached about the possibility of being nominated, did anyone associated with the Biden administration or Senate Democrats give you advice about which cases to list on your committee questionnaire?

Response: No.

a. If yes,
i. Who?
ii. What advice did they give?
iii. Did they suggest that you omit or include any particular case or type of case in your questionnaire?

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

Response: On May 12, 2023, Senator Todd Young's general counsel contacted me about a vacancy on the United States District Court for the Northern District of Indiana. On May 17, 2023, I was interviewed by Senator Young's general counsel and chief of staff, and Senator Mike Braun's general counsel. On May 23, 2023, I submitted a candidate intake form to Senator Young's general counsel and Senator Braun's general counsel. On June 4, 2023, an attorney from the White House Counsel's Office advised me that I was being considered for a vacancy on the United States District Court for the Northern District of Indiana. On June 5, 2023, I interviewed with attorneys from the White House Counsel's Office. Since June 9, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On July 6, 2023, I was interviewed by Senator Braun and his general counsel. On November 15, 2023, the President announced his intent to nominate me.

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

Response: First, I reviewed the questions. Next, I reviewed my notes and study outline that I had prepared in advance of the December 13, 2023 judiciary committee hearing. Then, I conducted legal research. I used my notes, study outline, and additional research to draft written answers. I submitted my draft answers to the Office of Legal Policy at the Department of Justice. I received limited feedback, then finalized and submitted my answers.

Senator Hirono's Written Questions for Cristal Brisco,
Nominee to be United States Court District Judge for the Northern District of Indiana
December 13, 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
Cristal C. Brisco, Nominee for District Court Judge for the Northern District of Indiana

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

   Response: I recognize that the work of judges is governed by the Constitution. I firmly believe that my role is to apply the law faithfully and impartially, which is separate and distinct from the policy-making role that is reserved for Congress. As a sitting superior court judge, I approach every case with an open mind, consider the parties' arguments, independently research the governing law, apply binding precedent of higher courts, and use clear language in my orders so that the parties and public can understand the reasoning for my decisions. If I am confirmed, I would retain this same judicial philosophy.

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

   Response: I would first research whether the U.S. Supreme Court or Seventh Circuit has interpreted the federal statute at issue. I would apply the higher courts' holdings (if any) regarding the statutory interpretation. If there was no binding precedent, I would examine the statute's text. If the text is unambiguous, I would apply the plain meaning of the text, giving it controlling weight. If the text is ambiguous, I would study the structure of the statute, consider how terms have been used elsewhere in the statute, and would examine dictionaries from the time the statute was enacted. I would also consider non-binding precedent from other Circuit Courts of Appeals and district courts, as well as legislative history as authorized by the U.S. Supreme Court or the Seventh Circuit.

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

   Response: When deciding a case that turned on the interpretation of a constitutional provision, I would examine the text and binding U.S. Supreme Court and Seventh Circuit precedent. I would follow the precedent's method of interpretation used in examining the particular constitutional provision.

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

   Response: The U.S. Supreme Court has applied the original meaning of the text when interpreting various constitutional provisions. *See, e.g., New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I would faithfully apply U.S. Supreme Court and Seventh Circuit precedent's methods of interpretation used in examining the particular constitutional provision.

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

   Response: Please see my response to Question 2. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985).

6. **Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?**

   Response: The "plain meaning" of a statute or constitutional provision refers to the public understanding of the relevant language at the time of enactment, subject to controlling U.S. Supreme Court or Seventh Circuit precedent. *See, e.g., Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1750 (2020); *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008).

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

   Response: "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338; U.S. Const. art. III, § 2. The constitutional requirements for standing are: (1) that the plaintiff has suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent;" (2) that the asserted injury is "fairly traceable" to the defendant's action(s); and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

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*, the U.S. Supreme Court held that the Necessary and Proper Clause of the Constitution grants Congress implied powers necessary to implement its enumerated powers. 17 U.S. 316 (1819); U.S. Const. art. I, § 8, cl. 18. (Congress has the power "to make all Laws which shall be necessary and proper for carrying into Execution," the powers otherwise vested by the Constitution). In *NFIB v. Sebelius*, the U.S. Supreme Court recognized that "[a]lthough the Clause gives Congress authority to 'legislate on that vast mass of incidental powers which must be involved in the constitution,' it does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." 132 S. Ct. 2566, 2591 (2012) (quoting *McCulloch* at 411, 421).

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

   Response: To evaluate the constitutionality of a law that does not reference a specific Article I enumerated power, I would follow U.S. Supreme Court and Seventh Circuit precedent. In *United States v. Comstock*, the Supreme Court held that to evaluate "whether the Necessary and

Proper Clause grants Congress the legislative authority to enact a particular federal statute," courts should determine "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." 560 U.S. 126, 134 (2010).

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

Response: Yes. The U.S. Supreme Court has held the Due Process Clauses of the Fifth and Fourteenth Amendments protect certain rights that are not expressly enumerated in the Constitution, including but not limited to: the right to marital privacy and use of contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to interracial marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); the right for unmarried couples to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); the right for same-sex couples to engage in sexual intimacy, *Lawrence v. Texas*, 539 U.S. 558 (2003); and the right for same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

11. What rights are protected under substantive due process?

Response: The U.S. Supreme Court held that the provision for "liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments includes and protects certain fundamental rights which are, objectively, "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022); *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). Additionally, please see my response to Question 10.

12. If you believe substantive due process protects some personal rights such as a right to contraceptives, 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 U.S. Supreme Court held that substantive due process protects unenumerated rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). The U.S. Supreme Court has recognized an unenumerated right to use contraceptives, and that the government's regulation of that right may be subjected to heightened scrutiny. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Regarding unenumerated economic rights such as those at stake in *Lochner v. New York*, the U.S. Supreme Court has held that the government's regulation of such rights must be rationally related to a legitimate government interest. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). The U.S. Supreme Court overturned *Lochner v. New York* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). If confirmed, I would be bound to follow U.S. Supreme Court and Seventh Circuit precedent.

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

Response: In *United States v. Lopez*, the U.S. Supreme Court held that Congress's power under the Commerce Clause is limited to "three broad categories of activity": (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities that substantially affect interstate commerce[.]" 514 U.S. 549, 558-59 (1995).

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

Response: The U.S. Supreme Court has defined "suspect class" as a group that "as a historical matter" has "been subjected to discrimination" who "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group," and are "a minority or politically powerless." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). The U.S. Supreme Court has held that race, religion, national origin, and alienage are suspect classes under the Constitution. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: The Framers of the U.S. Constitution believed deeply in the principles of separation of powers and checks and balances. The two principles work together, serving as a foundational component of our government. In Federalist 51, James Madison explained that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of others." The Federalist No. 51 (James Madison).

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: If presented with a dispute in which one branch assumed an authority not granted to it by the text of the Constitution, I would approach the case with an open mind, consider the parties' arguments, and apply binding U.S. Supreme Court and Seventh Circuit precedent. *See, e.g., Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012) (political question doctrine); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (concerning the separation of powers between the President, Congress, and the judiciary); *Marbury v. Madison*, 5 U.S. 137 (1803).

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

Response: Empathy should not play a role in a judge's decision-making because a judge is duty-bound to apply the law to the facts, setting aside the judge's emotions or personal beliefs. A judge should possess a judicial temperament that is civil, dignified, and exhibits reverence for the legal process and respect for the individuals who appear before her.

18. Which is worse; invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: Both outcomes are equally undesirable.

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

Response: I do not have an opinion as to what accounts for the change your question describes, however I can affirmatively state that the work of judges is governed by the Constitution. I firmly believe that my role is to apply the law faithfully and impartially, and not to engage in the policy-making role that is reserved for Congress in promoting the People's will. If confirmed, I would apply the law to the individual cases before me.

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

Response: Black's Law Dictionary defines "judicial review" as the courts' "power to review the actions of other branches of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional." *Judicial Review*, Black's Law Dictionary (4th pocket ed. 2011); *See Marbury v. Madison*, 5 U.S. 137 (1803). Black's Law Dictionary defines "judicial supremacy" as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations are binding on the coordinate branches of the federal government and the states." *Judicial Supremacy*, Black's Law Dictionary (4th pocket ed. 2011).

21. 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: Article VI makes the Constitution the supreme law of the land. U.S. Const. art. VI. Elected officials are committed by oath to support the Constitution. *Id*., cl. 3. "It is emphatically the province and duty of the judicial department to say what the law is. The federal judiciary is supreme in the exposition of the law of the Constitution." *Cooper v. Aaron*, 358 U.S. 1, 4 (1958). Accordingly, elected officials shall respect and follow duly rendered judicial decisions. *Id*. at 18.

22. 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: When judging, it is important to keep in mind that the work of judges is governed by the Constitution. A judge's role is to apply the law faithfully and impartially. It is a role separate and distinct from both the policy-making role that is reserved for Congress in promoting the People's will, and the enforcement role of the Executive.

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

Response: Judges should use judicial restraint, which is "[t]he principle that, when a court can resolve a case based on a particular issue, it should do so, without reaching unnecessary issues." *Judicial restraint*, Black's Law Dictionary (4th pocket ed. 2011). If confirmed as a district court judge, I would be duty-bound to follow binding U.S. Supreme Court and Seventh Circuit precedent and would only decide issues before me.

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

Response: None. When sentencing an individual defendant in a criminal case, a judge may only consider the factors set forth in 18 U.S.C. § 3553(a), including the relevant Sentencing Commission policy statements. Congress, through its passage of the Sentencing Reform Act directs the Sentencing Commission to ensure that the guidelines and policy statements are "entirely neutral" as to five characteristics – race, sex, national origin, creed, and socioeconomic status. *See* 28 U.S.C. § 994(d). A defendant's "race, sex, national origin, creed, religion, and socio-economic status" are characteristics that "are not relevant in the determination of a sentence." U.S.S.G. § 5H1.10 (2023).

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

Response: I am not familiar with the quoted statement or the context in which it was given. Black's Law Dictionary defines "equity" as "[f]airness; impartiality; evenhanded dealing." *Equity*, Black's Law Dictionary (4th pocket edition, 2011). If I have the privilege of being confirmed and am presented with a case that turns on the definition of "equity," I would evaluate

the text of the applicable document (if any), consider the parties' arguments, and apply binding U.S. Supreme Court and Seventh Circuit precedent.

26. Without citing Black's Law Dictionary, do you believe there is a difference between "equity" and "equality?" If so, what is it?

Response: The Oxford American Dictionary defines "equity" as "the quality of being fair and impartial." *Equity*, Oxford American Dictionary (2010). While "equality" is defined as "the state of having the same rights, opportunities, or advantages as others." *Equality*, Oxford American Dictionary (2010). If a case required me to decide the difference between "equity" and "equality," I would consider the parties' arguments, independently research the applicable law, and faithfully apply U.S. Supreme Court and Seventh Circuit precedent.

27. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 25)?

Response: The Fourteenth Amendment's Equal Protection Clause states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. I am not aware of any U.S. Supreme Court or Seventh Circuit precedent that has considered the term "equity" as defined in Question 25. If confirmed, I would follow U.S. Supreme Court and Seventh Circuit precedent in interpreting Fourteenth Amendment issues.

28. Without citing Black's Law Dictionary, how do you define "systemic racism?"

Response: The term "systemic racism" is not a term that I have addressed as a sitting superior court judge or litigated as a member of the state and federal bar. I have, however, defended employers against claims of "pattern-or-practice discrimination" under Title VII of the Civil Rights Act of 1964. A pattern-or-practice case is a type of lawsuit where the plaintiff alleges that the defendant has engaged in discriminatory activities systematically. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). Cambridge Dictionary defines "systemic racism" as "policies and practices that exist throughout a whole society or organization, and that result in and support a continued unfair advantage to some people and unfair or harmful treatment of others based on race." *Systemic Racism*, Cambridge Dictionary (2022).

29. Without citing Black's Law Dictionary, how do you define "critical race theory?"

Response: "Critical race theory" is not a theory I have studied nor a term that I have addressed as a sitting superior court judge or litigated as a member of the state and federal bar. Merriam-Webster Dictionary defines "critical race theory" as "a group of concepts (such as the idea that race is a sociological rather than biological designation, and that racism pervades society and is fostered and perpetuated by the legal system) used for examining the relationship between race and the laws and legal institutions of a country and especially the United States." *Critical race theory*, Merriam-Webster (2022).

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

Response: Please see my responses to Questions 28 and 29.

31. In 2022, and as a member of the Indiana Commission on Equity and Access in the Court System, you contributed to the Commission's *Final Report*. Within the report, the Commission recommended "Equity and Inclusion training for juries." Is it appropriate for officials within the judiciary to promote and enforce partisan ideological trainings as a prerequisite for jury service?

Response: The Indiana Supreme Court created a bipartisan 22-member Commission on Equity and Access in the Court System comprised of members from all 3 branches of government. For one year, the Indiana Attorney General, state senators and representatives, trial court judges, a representative from the Office of the Governor, retired Justices of the Indiana Supreme Court, private practitioners, prosecutors, public defenders, and representatives from the Indiana State Bar Association met monthly to engage in thoughtful discussions about equal justice and access in the court system.

I accepted the Indiana Supreme Court's invitation to join the Commission and participated in several meetings, but I did not author the Report or its recommendations. The Indiana Supreme Court has the authority to determine whether to implement diversity, equity, and inclusion training for state court juries, including the content and purpose of any such training.

32. Pursuant to the Indiana Commission on Equity and Access Final Report, which individual or organization determines the curriculum for equity and inclusion training for juries, and what is the desired outcome? Should a potential juror be dismissed or considered less-qualified to serve on a jury if that potential juror does not ascribe to the messaging of the "equity and inclusion" instructors?

Response: Please see my response to Question 31.

33. What is your definition of an "inclusion nudge," as referenced in the previously mentioned 2022 Commission *Final Report*?

Response: The Indiana Supreme Court created a bipartisan 22-member Commission on Equity and Access in the Court System comprised of members from all 3 branches of government. For one year, the Indiana Attorney General, state senators and representatives, trial court judges, a representative from the Office of the Governor, retired Justices of the Indiana Supreme Court, private practitioners, prosecutors, public defenders, and representatives from the Indiana State Bar Association met monthly to engage in thoughtful discussions about equal justice and access in the court system.

I accepted the Indiana Supreme Court's invitation to join the Commission and participated in several meetings, but I did not author the Report or its recommendations. The Report defines "inclusion nudges" as "simple acts and practices that can have a profound impact on those in the legal system." *Indiana Commission on Equity and Access Final Report*, p. 16 (Dec. 2022). It states that "[a] few examples include: Courthouse art that is reflective of a diverse community[;] [e]nsure court staff and judicial officers take the time to learn and pronounce names correctly[;]

[e]ncourage judicial officers to match their client's wardrobe. One judge in Ohio shared that during his drug court, he never wears a robe, is usually in jeans, and sits at the same level as those in his court." *Id*. According to the Report "[t]he point of 'inclusion nudges' is to make court participants feel comfortable with the process. Parties may not like the courtroom, but if treated as individuals, they may trust the system a bit more." *Id*.

The Justices of the Indiana Supreme Court will decide whether to accept or reject the recommendations. As a sitting superior court judge, I would be bound by the Indiana Supreme Court's decision.

34. The 2022 Commission *Final Report* recommends that the state "[r]equire annual training which covers civility, cultural humility, and identity awareness . . .." How do you define cultural humility? Do you believe that all cultures must humble themselves, or do some cultures need to be humbled more than others?

Response: As stated in response to Questions 31-33, I accepted the Indiana Supreme Court's invitation to join the Commission and participated in several meetings, but I did not author the Report or its recommendations. The Report defines "cultural humility" as "the practice of challenging biases and prejudices in the workplace including one's own as we all carry unconscious bias regardless of how we identify." *Indiana Commission on Equity and Access Final Report*, p. 13 (Dec. 2022). As a sitting superior court judge, I foster a workplace and courtroom environment where everyone is treated with respect. I understand that the people before me are real people with real disputes who call on the Court to listen and decide. Accordingly, parties are heard; everyone is treated with dignity; and civility does not languish. If confirmed, I would conduct myself in the same fair and impartial manner.

Senator John Kennedy
Questions for the Record

Cristal C. Brisco

1. **Are there any circumstances under which it is justifiable to sentence a criminal defendant to death? Please explain.**

   Response: Yes. Congress and the Indiana General Assembly, as expressed by statute, have determined that for crimes under certain circumstances, it is justifiable to sentence a criminal defendant to death. The U.S. Supreme Court upheld the death penalty as constitutional in *Gregg v. Georgia*, 428 U.S. 153 (1976).

   a. **Should a judge's opinions on the morality of the death penalty factor into the judge's decision to sentence a criminal defendant to death in accordance with the laws prescribed by Congress and the Eighth Amendment?**

   Response: No. A judge's role as governed by the Constitution is to apply the law faithfully and impartially. It is a role separate and distinct from the policy-making role that is reserved for Congress.

2. **Is the U.S. Supreme Court a legitimate institution?**

   Response: Yes.

3. **Is the current composition of the U.S. Supreme Court legitimate?**

   Response: Yes.

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

   Response: I recognize that the work of judges is governed by the Constitution. I firmly believe that my role is to apply the law faithfully and impartially, which is separate and distinct from the policy-making role that is reserved for Congress. As a sitting superior court judge, I approach every case with an open mind, consider the parties' arguments, independently research the governing law, apply binding precedent of higher courts, and use clear language in my orders so that the parties and public can understand the reasoning for my decisions. If I am confirmed, I would retain this same judicial philosophy.

5. **Is originalism a legitimate method of constitutional interpretation?**

   Response: Yes. The U.S. Supreme Court often employs originalism in interpreting the Constitution. *See, e.g., New York State Rifle and Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

6. **If called on to resolve a constitutional question of first impression with no applicable precedents from either the U.S. Supreme Court or the U.S. Courts of Appeals, to what sources of law would you look for guidance?**

   Response: The U.S. Supreme Court has interpreted various constitutional provisions by studying the text and attempting to ascertain the original meaning of the words used as understood by the public at the time of our country's founding. Therefore, if called on to resolve a constitutional question of first impression with no applicable precedents from either the U.S. Supreme Court or the U.S. Courts of Appeals, I would resolve the question by interpreting the Constitution consistent with that same approach as well as by employing any other method of constitutional interpretation as directed by the U.S. Supreme Court or Seventh Circuit.

7. **Is textualism a legitimate method of statutory interpretation?**

   Response: Yes. *See, e.g., Bostock v. Clayton County v. Georgia*, 140 S. Ct. 1731 (2020); *Carcieri v. Salazar*, 555 U.S. 379 (2009).

8. **When is it appropriate for a judge to look beyond textual sources when determining the meaning of a statute or provision?**

   Response: When determining the meaning of a statute or provision, I would first research whether the U.S. Supreme Court or Seventh Circuit has interpreted the federal statute at issue. Then, I would apply the higher courts' holdings (if any) regarding the statutory interpretation. If there was no binding precedent, I would examine the statute's text. If the text is unambiguous, I would apply the plain meaning of the text, giving it controlling weight. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose"). If the text is ambiguous, I would study the structure of the statute, consider how terms have been used elsewhere in the statute, and would examine dictionaries from the time the statute was enacted.

9. **Does the meaning (rather than the applications) of the U.S. Constitution change over time? If yes, please explain the circumstances under which the U.S. Constitution's meaning changes over time and the relevant constitutional provisions.**

   Response: The Constitution is an enduring document. Its meaning is fixed and does not change over time, subject to controlling U.S. Supreme Court precedent. *See New York State Rifle and Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). "[T]he Founders created a Constitution . . . 'intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.' Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id*. (quoting *McCulloch v. Maryland,* 17 U.S. 316, 415 (1819)).

10. Please summarize Part II(A) of the U.S. Supreme Court's decision in *Brown v. Davenport*, 596 U.S. 118 (2022).

Response: Part II(A) of *Brown v. Davenport* provides an account of the historical background of the writ of habeas corpus. The writ of habeas corpus developed through common law for a variety of functions. Most notably, it permitted courts to compel the monarchs to explain why they detained subjects summarily and indefinitely and ensure they received adequate process. However, the writ of habeas corpus was not available to challenge a final conviction from a court having proper jurisdiction over the criminal action. When this writ was transferred to the United States, courts generally recognized that habeas was available for jurisdictional defects but not mere errors. In *Brown v. Allen*, 344 U.S. 443 (1953), the U.S. Supreme Court expanded habeas review by allowing federal courts to review more closely state court proceedings for constitutional error. This ruling greatly expanded the number of habeas petitions before the federal courts.

11. Please summarize Part IV of the U.S. Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023).

Response: In Part IV of *Students for Fair Admissions, Inc. v. Harvard,* the U.S. Supreme Court held that specific race-based admissions programs in place at Harvard and the University of North Carolina violated the Equal Protection Clause of the Fourteenth Amendment. It held that the schools needed to meet strict scrutiny for their race-based admissions policies. The schools' claimed educational interest in using race as a factor was not a compelling interest for purposes of satisfying strict scrutiny. Moreover, their policies were not narrowly tailored to achieve those ends.

12. Please summarize Part III of the U.S. Supreme Court's decision in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

Response: In Part III of *303 Creative LLC v. Elenis*, a free-speech case, the U.S. Supreme Court held that a wedding website designer was engaged in pure speech, protected by the First Amendment, in creating wedding websites. Therefore, the Court held that Colorado's public accommodation law would unconstitutionally compel speech if it required the website designer to create wedding websites for same-sex couples against her own religious beliefs.

13. Please summarize Part II of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* (2022).

Response: In Part II of *Dobbs,* the U.S. Supreme Court undertook an extensive historical review of the right to liberty under the Due Process Clause of the Fourteenth Amendment. The Supreme Court ultimately held that all substantive rights must be "guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty," and that on these grounds, "the Fourteenth Amendment does not protect the right to an abortion."

14. Please summarize Part III of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

Response: In Part III of *Dobbs,* the U.S. Supreme Court analyzed the power that *stare decisis* had in determining whether the Supreme Court's prior holdings in *Roe v. Wade* and *Casey v. Planned Parenthood* should be upheld. The Court in *Dobbs* used five factors when determining whether *stare decisis* should be used in applying prior Supreme Court precedent: the nature of the prior precedent's error, the quality of its reasoning, the "workability" of the rules the precedent created, its disruptive effect on other areas of the law, and the reliance interests in the prior precedent. After weighing each factor individually, the Court ultimately held that "traditional stare decisis factors do not weigh in favor of retaining *Roe* or *Casey*."

15. Please describe the legal rule employed in *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021), and explain why the U.S. Supreme Court sided with the Petitioner.

Response: *Rivas-Villegas v. Cortesluna* involved the rule in Section 1983 cases that an officer is entitled to qualified immunity if the officer's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White v. Pauly*, 137 S. Ct. 548, 551 (2017). It specifically addressed the doctrine in the context of the Fourth Amendment's prohibition of the use of excessive force. Because a determination of excessive force is particularly fact-bound, the officer was entitled to qualified immunity when neither the Circuit Court nor the respondent identified any U.S. Supreme Court case that held similar actions to be use of excessive force and only one Circuit precedent was cited, which was distinguishable.

16. When is it appropriate for a district judge to issue a nationwide injunction? Please also explain the legal basis for issuing nationwide injunctions and the relevant factors a district judge should consider before issuing one.

Response: Federal Rule of Civil Procedure 65 governs injunctions; however, whether or when it is appropriate for a district court to issue a nationwide injunction is highly debated.

To my knowledge, neither the U.S. Supreme Court or Seventh Circuit has ruled on the constitutionality of nationwide injunctions. In a concurring opinion in *Trump v. Hawaii*, Justice Thomas stated "[i]f district courts have any authority to issue universal injunctions, that authority must come from a statute or the Constitution. No statute expressly grants district courts the power to issue universal injunctions. So the only possible bases for these injunctions are a generic statute that authorizes equitable relief or the courts' inherent constitutional authority. Neither of those sources would permit a form of injunctive relief that is '[in]consistent with our history and traditions.'" 138 S. Ct. 2392, 2425 (2018) (internal citation omitted). In *City of Chicago v. Barr*, the Seventh Circuit stated that "both historical and current practice lends support to a determination that the courts possess the authority to impose injunctions that extend beyond the parties before the court. The propriety of such an injunction, in a given case, is another matter." 961 F.3d 882, 916 (7th Cir. 2020).

17. Is there ever a circumstance in which a district judge may seek to circumvent a published precedent of the U.S. Court of Appeals under which it sits or the U.S. Supreme Court?

Response: No.

18. If confirmed, please describe what role U.S. Supreme Court dicta would play in your decisions.

Response: Statements or observations made by a judge about a case which merely appear on the record and do not embody the court's decision are dicta. Dicta is not law and has no binding precedent for future cases. Therefore, in reviewing U.S. Supreme Court and Seventh Circuit cases, it is imperative to distinguish between the cases' dicta and holdings. I would ensure that my decisions are based on U.S. Supreme Court and Seventh Circuit holdings, and not dicta.

19. To the best of your recollection, please list up to 10 cases in which you served as lead counsel in a bench trial in federal district court or a case tried before a jury in federal district court.

Response: As a state court judicial officer, I have presided over approximately 200 bench trials and two jury trials. Prior to joining the state judiciary, I gained extensive experience in federal court, however that experience does not include serving as lead counsel in a bench trial in federal district court or a case tried before a jury in federal district court.

20. When reviewing applications from persons seeking to serve as a law clerk in your chambers, what role if any would the race and/or sex of the applicants play in your consideration?

Response: I would cast a wide net in the distribution of the job posting to make sure that opportunities for clerkships are available to individuals with a variety of backgrounds so that there is a large pool of qualified applicants to choose from. I would not consider the race and/or sex of the applicants in making a hiring decision.

21. Please list all social-media accounts you have had during the past 10 years with Twitter/X, Facebook, Reddit, Instagram, Threads, TikTok, and LinkedIn and the approximate time periods during which you had the account. If the account has been deleted, please explain why and the approximate date of deletion.

Response: Twitter/X (one account, appx. 2022 – Present); Facebook (one account, appx. 2010 – Present); Instagram (one account, appx. 2018 – Present); and LinkedIn (one account, appx. 2010 – Present).

22. Why should Senator Kennedy support your nomination?

Response: It would be an honor and privilege to serve my country as an Article III judge. I recognize that the work of judges is governed by the Constitution. I firmly believe that my role is to apply the law faithfully and impartially, which is separate and distinct from the policy-making role that is reserved for Congress. As a sitting state court judge, I approach every case with an open mind, consider the parties' arguments, independently research the governing law, apply binding precedent of higher courts, and use clear language in my orders so that the parties

and public can understand the reasoning for my decisions. If I am confirmed, I would retain this same judicial philosophy.

My seventeen years of legal experience (including five years of service on the state court bench) make me well-prepared to meet the challenges and responsibilities of an Article III judge. Having represented a wide range of clients and interests in the private, public, and nonprofit sectors, I know what it takes to litigate cases. My broad-based experience enables me to analyze and resolve even novel legal issues adeptly, and with confidence. Litigants and counsel appreciate my recall of the record, understanding of the governing law, effective management of the courtroom while maintaining and promoting civility and decorum, and ability to resolve disputes with well-reasoned legal analysis in a timely manner. From the time I joined the state judiciary on June 16, 2018, to the date of my nomination on November 27, 2023, none of my decisions had been reversed. Additionally, on December 12, 2023, the American Bar Association's Standing Committee on the Federal Judiciary advised that it is of the unanimous opinion that I am "Well Qualified" to serve on the United States District Court for the Northern District of Indiana.

My reputation for professional competence and integrity has earned the support of both of my home state senators, Senators Young and Braun. It would be an honor and privilege to receive Senator Kennedy's support as well.

Questions from Senator Thom Tillis
for Cristal C. Brisco nominee to be United States District Judge for the Northern District of Indiana

1. **Can a judge's personal views and background benefit them in interpreting and applying the law, or would you say that they are irrelevant?**

   Response: A judge's personal views are irrelevant and have no place in adjudicating cases. A judge's professional background can, in a limited sense, help her meet the challenges and responsibilities of the job. For example, my seventeen years of legal experience (including five years of service in the state judiciary) enable me to analyze and resolve even novel legal issues adeptly, and with confidence. My experience does not obfuscate my duty to approach each case with an open mind, listen to the parties' arguments, research and study the law, apply the law to the facts, and impartially decide cases. It does, however, instill confidence in the public that I am well-qualified to properly interpret and apply the law.

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

   Response: Impartiality is an expectation for every judge. Canon 3 of the Code of Conduct for United States Judges provides "[a] judge should perform the duties of the office fairly, impartially, and diligently."

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

   Response: Black's Law Dictionary defines "judicial activism" as "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu[ally] with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent." *Judicial Activism*, Black's Law Dictionary (4th pocket ed. 2011). Judicial activism is contrary to the rule of law and inappropriate, and I would not allow my personal views to guide my decisions as a judge.

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

   Response: No. The work of judges is governed by the Constitution. I firmly believe that my role is to apply the law faithfully and impartially, and not to engage in the policy-making role that is reserved for Congress and the Indiana General Assembly.

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

   Response: Judges have a duty to decide cases based on the facts and law. Concern as to whether a litigant or nonparty may view the judge's decision as an "undesirable outcome" has no place in the judge's decision-making process. Notwithstanding this fact, judges also have a responsibility to ensure that litigants can fully present their facts and arguments, that everyone in the judicial process is treated with civility and respect, and to issue well-reasoned decisions grounded in the

law. Fulfilling those responsibilities is essential to our system of justice and oftentimes helps the litigant who did not prevail better accept the outcome.

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

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

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

   Response: In private practice and as Corporation Counsel for the City of South Bend, I gained significant experience with qualified immunity cases through my representation of law enforcement personnel and departments. I recognize the role of an advocate is distinct from the role of a judge. If confirmed as a district court judge, I would approach each case with an open mind, review the facts, listen to the parties' arguments, and follow binding U.S. Supreme Court and Seventh Circuit precedent.

   In *Rivas-Villegas v. Cortesluna*, the Supreme Court held that "[q]ualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 142 S. Ct. 4, 6 (2021). To determine whether qualified immunity attaches, "[t]his inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id*.

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

   Response: Two of my siblings have spent their entire careers in law enforcement. This fact affords me a unique insight into law enforcement's commitment to maintain civil society and the rule of law, despite the ever-present risk of personal harm. However, as a judge and judicial nominee, it would not be appropriate for me to opine on qualified immunity jurisprudence. In *Malley v. Briggs*, the U.S. Supreme Court stated "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." 475 U.S. 335, 341 (1986). If confirmed, I would evaluate each qualified immunity case on an individual basis by assessing the parties' arguments based on the facts and applicable U.S. Supreme Court and Seventh Circuit precedent.

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

   Response: Please see my response to Question 8.

10. What are your thoughts regarding the importance of ensuring that all IP rights are in fact enforced?

Response: As a judicial nominee, I am unable to answer this question because it is an issue for the executive and legislative branches to consider. If confirmed, I would be bound to follow the Patent and Copyright Clause of the U.S. Constitution (U.S. Const. art. I, § 8, cl. 8), as well as all binding U.S. Supreme Court, Seventh Circuit, and Federal Circuit precedent.

11. In the context of patent litigation, in some judicial districts plaintiffs are allowed to request that their case be heard within a particular division. When the requested division has only one judge, this allows plaintiffs to effectively select the judge who will hear their case. What are your thoughts on this practice, which typically is referred to as "forum shopping" and/or "judge shopping?"

Response: In the Northern District of Indiana, cases are randomly assigned to District Judges and Magistrates Judges pursuant to Local Rule. *See* N.D. Ind. L.R. 40-1. The "assignment sequence is confidential." *Id*. Random case assignments likely forecloses a litigant's ability to engage in "forum shopping" or "judge shopping" in the Northern District of Indiana.

12. 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 shambles. What are your thoughts regarding the Supreme Court's patent eligibility jurisprudence?

Response: As a judicial nominee, it would not be appropriate for me to opine on U.S. Supreme Court jurisprudence involving issues that could come before me. I would follow all binding U.S. Supreme Court, Seventh Circuit, and Federal Circuit precedent.