Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Ann Marie McIff Allen
Nominee to be United States District Judge for the District of Utah

1. **Are you a citizen of the United States?**

   Response: Yes.

2. **Are you currently, or have you ever been, a citizen of another country?**

   Response: No.

   a. **If yes, state countries and dates of citizenship.**
   b. **If you are currently a citizen of a country besides the United States, do you have any plans to renounce your citizenship?**
      i. **If not, please explain why.**

3. **Is it appropriate for a federal judge to consider an immutable characteristic of an attorney when deciding whether to grant oral argument? If yes, please describe in which circumstances such consideration would be appropriate.**

   Response: No.

4. **Is it appropriate for a federal judge to consider an immutable characteristic of an attorney when deciding whether to grant additional oral argument time? If yes, please describe in which circumstances such consideration would be appropriate.**

   Response: No.

5. **Is it ever appropriate to consider foreign law in constitutional interpretation? If yes, please describe in which circumstances such consideration would be appropriate.**

   Response: No.

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

   Response: Disagree. As a district court judge I will not impose any personal views I may have; I will impartially apply the Constitution, as interpreted by the precedent which is binding upon me, to the facts of the cases before me.

7. **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: No. As a district court judge my duty is to apply the precedent of the Supreme Court to the cases before me. This statement does not reflect that judicial philosophy.

8. **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.

9. **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.

10. **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: (1) direct appeal; (2) collateral proceeding, i.e. habeas petition. *See* 28 U.S.C. § 2255 ("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.") Also, under 18 U.S.C. § 3582(c) prisoners of the age of 70 or older who have served 30 or more years, can under some limited circumstances have their sentence reduced; the court must find "extraordinary and compelling reasons" warranting a reduction and the Director of the Bureau of Prisons must determine that the prisoner is not a danger to the safety of any other person or the community. *Id.* Finally, "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" petition may be made for a reduction. *Id.*

11. 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 sued Harvard College over its admissions process which considered applicants' race, arguing this violated Title VI of the Civil Rights Act of 1964; suit was also brought against the University of North Carolina over the consideration of race in its admissions process, with the argument against this state school including an Equal Protection Fourteenth Amendment challenge. The Supreme Court ruled that both schools' consideration of race in admissions violated Equal Protection. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 213-25 (2023). The Court held that strict scrutiny applies to race-based admissions and that such admissions failed, under strict scrutiny, to comply with Equal Protection Clause standards, thus leading to the conclusion that Title VI of the Civil Rights Act was being violated. *Id.* The Court held that the race-based admissions were not based on a compelling interest nor were they narrowly tailored to the interest asserted as justifying them. Specifically, the Court held that while Harvard asserted commendable goals, the connection of the race-based admissions to those goals was not coherent enough to satisfy strict scrutiny. *Id.* at 214-15. Additionally, the race-based admissions failed to satisfy strict scrutiny because they did not avoid utilizing race as a negative stereotype, *see id.* at 218, and because they lacked a rational ending point, *see id.* at 225.

12. 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?

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

Response: As general counsel for Southern Utah University, I participated in the hiring of several staff members.

13. 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.

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

Response: No.

15. 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: Not to my knowledge.

16. Under current Supreme Court and Tenth 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).

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

Response: In *303 Creative LLC v. Elenis*, the Supreme Court held that designing a website celebrating marriage is speech protected by the First Amendment of the Constitution; a state law compelling the website designer to create speech which ran contrary to the designer's own beliefs violated the designer's First Amendment rights. 600 U.S. 570, 573 (2023).

18. 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. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), remains good law and binding precedent. In *303 Creative LLC v. Elenis*, the Supreme Court relied on portions of this quoted language from the *Barnette* case; the Court held in *303 Creative LLC* that the government's mandating of certain speech through enforcement of a state anti-discrimination law against a web-site designer, violated the First Amendment. 143 S. Ct. 2298, 2311 (2023)

19. 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: "Content-based" regulation focuses on the message communicated. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "Content-neutral" regulation focuses not on the message but on other items such as the time, place and manner of the speech. *See*

City of Austin v. Reagan Nat. Advertising of Austin, 142 S. Ct. 1464, 1473 (2022). Key questions could include the following: does the law treat specific subject matter differently from other subject matter? *Id.* at 1472; is the law purporting only to regulate items such as time, place and manner, while the actual purpose thereof is to impermissibly target the content? *Id.* at 1475-76.

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

Response: In the case of *Counterman v. Colorado*, the Supreme Court defined a "true threat" as a "serious expression conveying that a speaker means to commit an act of unlawful violence," 143 S. Ct. 2106, 2114 (2023) (internal quotations and citations omitted); the Court thus defined the test for determining whether a statement is unprotected speech by the First Amendment, under the true threats doctrine. The test requires proof that the speaker had some subjective understanding of the threatening nature of his statements, though recklessness suffices. *Id*. at 2113-19.

21. Under Supreme Court and Tenth 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: Questions of fact ask "who did what, when or where, how or why." *U.S. Bank N.A. v. Vill. at Lakeridge, LLC.*, 583 U.S. 387, 394 (2018). Questions of law entail primarily legal work to answer, asking how the law should be applied or interpreted. *See id.*; Black's Law Dictionary (11th ed. 2019). In *United States v. Abouselman*, the Tenth Circuit Court of Appeals explained that questions of fact involve factual inquiry; question of law involve consideration of legal principles. 976 F.3d 1146, 1154-55 (10th Cir. 2020).

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

Response: In 18 U.S.C. § 3553, Congress sets forth the law, principles, and purposes of federal sentencing; the factors listed in the question above are not ranked in this statute. If confirmed as a district court judge, I will consider all of the § 3553 factors in making an individualized decision to formulate a sentence that is "sufficient, but not greater than necessary" to achieve the statutory sentencing purposes." *See* 18 U.S.C. § 3553(a); *Gall v. United States*, 552 U.S. 38, 49-50 (2007). I will apply this law impartially, rather than inject my personal beliefs.

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

Response: As a federal district court 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.

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

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

25. 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."

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

Response: As a nominee to the federal district court, it would not be appropriate for me to express an opinion on the constitutionality of Section 1507 because a case regarding this could come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed I would follow binding precedent.

I will note that in the case of *Cox v. State of Louisiana*, the Supreme Court upheld a Louisiana state statute that deals with matters arguably related to those matters dealt with in 18 U.S.C. § 1507; in that case the Supreme Court held that "picketing and parading—is subject to regulation even though intertwined with expression and association." 379 U.S. 559, 563 (1965).

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

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

Response: Yes. Although under Canon 3(A)(6) of the Code of Conduct for United States Judges, I am precluded, as a judicial nominee, from commenting on whether a particular U.S. Supreme Court decision was correctly decided, the constitutionality of racial segregation in schools is not likely to come before the

courts again; accordingly, I can state my opinion that *Brown v. Board of Education* was correctly decided.

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

Response: Yes. Although under Canon 3(A)(6) of the Code of Conduct for United States Judges, I am precluded, as a judicial nominee, from commenting on whether a particular U.S. Supreme Court decision was correctly decided, the unconstitutionality of laws prohibiting interracial marriage is not likely to come before the courts again; accordingly, I can state my opinion that *Loving v. Virginia* was correctly decided.

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).

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). This case was overturned by *Dobbs*.

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). This case was overturned by *Dobbs*.

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).

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.

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.

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.

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.

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.

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.

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.

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

Response: In the cases of *Heller* and *McDonald*, the Supreme Court recognized an individual's right to keep and bear arms. *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U. S. 742 (2010). The Court held that the government must demonstrate that a regulation is consistent with the Nation's historical tradition of firearm regulation in order to be constitutional. *See Heller*, 554 U.S. at 627; *see also New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

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

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

b. Are you currently in contact with anyone associated with Demand Justice? If so, who?

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

Response to all subparts: No.

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

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

b. Are you currently in contact with anyone associated with the Alliance for Justice? If so, who?

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

Response to all subparts: No.

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

a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
b. **Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.**
c. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**
d. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response to all subparts: No.

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

    Response to all subparts: No.

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

    Response to all subparts: No.

34. 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: In August 2022, I was contacted by Senator Mike Lee's office with an invitation to interview with him and some of his staff members regarding the judicial vacancy in the U.S. District Court for the District of Utah. I attended the interview on August 26, 2022. I was also contacted by Senator Mitt Romney's office in August 2022 with an invitation to meet with his chief legal counsel to discuss the same position. That meeting occurred on August 31, 2022. In January 2023, I was again contacted by Senator Romney's office and invited to meet with him and some of his staff members, which I did on January 25, 2023. In March 2023, I was contacted by the White House Counsel's Office and invited to interview. That interview occurred on March 8, 2023. In late September 2023, I was contacted by the White House Counsel's Office, informing me that they wanted to take next steps in the vetting process for the position.

Since September 29, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On December 19, 2023, the President announced his intent to nominate me.

35. 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.

36. 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.

37. 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.

38. 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.

39. 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.

40. 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?**

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

Response: Please see Response to Question 34.

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

Response: On January 31, 2024, I received questions from the committee through the Department of Justice Office of Legal Policy. I read the questions and prepared draft answers, after reviewing the facts and the law. I submitted the draft to the Office of Legal Policy, which provided limited feedback. I then finalized my answers.

Senator Hirono Questions for the Record for the January 24, 2024, Hearing in the Senate Judiciary Committee entitled "Nominations."

QUESTIONS FOR ANN MARIE MCIFF ALLEN

Sexual Harassment

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:

QUESTIONS:

1. **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.

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

   Response: No.

Senator Jon Ossoff
Questions for the Record for Judge Ann Marie McIff Allen
January 24, 2024

1. **Will you pledge to faithfully apply the law without bias and without regard for your personal policy or political preferences?**

   Response: Yes.

2. **How will you approach First Amendment cases?**

   Response: I will apply binding precedent in cases involving First Amendment rights. Instructively, the Amendment begins with the words, "Congress shall make no law…", suggesting that strict or other heightened forms of scrutiny are generally warranted when evaluating laws (or other governmental actions) which may infringe upon speech, religious, and other rights found in the First Amendment. In any case involving the First Amendment that comes before me, I will be impartial and will apply the law to the facts without bias or agenda.

   a. **In your view, why are First Amendment protections of freedom of speech, publication, assembly, and exercise of religion vital in our society?**

      Response: They are core rights, vital to liberty, rooted in our history as a nation, and essential to personal freedom, to mutual peaceful co-existence with others, and to maintaining a proper boundary around governmental power. *See, e.g., West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("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.")

3. **In your experience, why is it critical that indigent defendants have access to public defense under the Sixth Amendment right to counsel and precedent set in *Gideon v. Wainwright*?**

   Response: In my experience as judge, prosecutor, and public defender, the right of indigent defendants to public defender representation is critical to the actualization of rights for all rather than just for those with means, and is essential for the orderly administration of justice. The complexity of the process requires expertise and professional assistance for indigent defendants; sometimes that means advising and assisting as they take responsibility for wrongdoing, with the public defender helping to bring balance to the resolution process including sentencing; sometimes that means providing trial counsel to uphold the presumption of innocence and enforce the burden of proof upon the state. These are healthy, affirming roles which benefit all of society by keeping the rights protected in Constitution vital and active in the system. *See Gideon v.*

Wainwright, 372 U.S. 335, 344 (1963) ("From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.")

4. **In your experience, what are the challenges faced by parties in civil or criminal proceedings for whom English is not their first language?**

   Response: Without competent interpreters, parties in civil or criminal proceedings are unable to meaningfully participate, and are at risk of having legal steps taken without understanding and knowledge, and against their interest, and even sometimes contrary to the truth and to the interests of justice.

   a. **What do you see as the role of language access in courts in protecting due process rights and ensuring access to justice?**

      Response: Language access in the courts is an indispensable, fundamental starting point for procedural fairness and due process. This benefits not only those with language interpretation needs, but the system—protecting its integrity and basic quality of justice.

Senator Mike Lee
Questions for the Record
Ann Marie McIff Allen, Nominee for District Court Judge for the District of Utah

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

   Response: My judicial philosophy as a trial court judge is to impartially adjudicate the cases and controversies that are brought before me. I apply the law to the facts. I follow the binding precedent of the Supreme Court and the Tenth Circuit Court of Appeals. I treat all counsel and litigants with respect and dignity, and uphold the law.

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

   Response: I would apply any binding precedent from the Supreme Court or Tenth Circuit Court of Appeals to a case before me concerning the interpretation of a federal statute. In the absence of binding precedent, I would read the language of the operative provisions of the statute itself. If their meaning is unambiguous, no further inquiry is necessary. *See Woods v. Standard Ins. Co.*, 771 F.3d 1257, 1265 (10th Cir. 2014) (when language is clear, court ordinarily ends its analysis). I would examine the context of the provision within the statute, applying canons of construction. Next, I would turn to persuasive authority, including case law from other jurisdictions and secondary legal sources. Legislative history can also be a source of information, though ascertaining the meaning of a statute from legislative history can be difficult, given the multi-faceted, varied, and often inconsistent data that is found within such history. *See Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 568 (2005).

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

   Response: I would apply any binding precedent from the Supreme Court or the Tenth Circuit Court of Appeals, or in the absence of binding precedent, I would examine any persuasive authority, such as case law from other circuits. I would examine the normal and ordinary meaning of the text as it would have been understood at the time of ratification. *See District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).

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

   Response: The text and original meaning of a constitutional provision play a key role in interpreting the Constitution. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 576 (2008); *Crawford v. Washington*, 541 U.S. 36, 42 (2004). If confirmed as a federal district court judge, I will look to the text and original meaning of constitutional provisions, and will follow binding precedent of the Supreme Court and the Tenth Circuit Court of Appeals.

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

   Response: I would look first to the plain language of the text of a statute to determine its meaning, and if, having done so, I determine that the meaning is unambiguous, then no further inquiry is necessary. *See Woods v. Standard Ins. Co.*, 771 F.3d 1257, 1265 (10th Cir. 2014) (when language is clear, court ordinarily ends its analysis). If the language remains ambiguous, I would examine the context of the provision, applying canons of construction. I would follow any binding caselaw bearing on the question. Next, I would turn to persuasive authority including caselaw from other jurisdictions.

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. *See District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).

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

   Response: The constitutional requirements for standing arise under Article III of the Constitution; a plaintiff must present to the federal court a "case or controversy" over which it can exercise federal question or diversity jurisdiction. The plaintiff must have suffered an injury in fact traceable to the challenged conduct and subject to being redressed by the suit. *See 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: The Constitution provides Congress with certain enumerated powers in Article I, Section 8; the Supreme Court held in *McCulloch v. Maryland* that the enumeration of certain powers "necessarily implies the grant of all usual and suitable means for the execution" of those enumerated powers. 17 U.S. 316, 324 (1819). This does not provide for "great substantive and independent power, which cannot be implied as incidental to…or used as a means of executing…" the enumerated powers. *Id.* at 411.

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 enacted without reference to a specific constitutional enumerated power, I would first look to any binding Supreme Court or Tenth Circuit Court of Appeals precedent. Also, in *United States v. Comstock*, the Supreme Court set forth a test for determining whether, under the Necessary and Proper Clause of Article I, Section 8, Congress has authority under the Constitution to enact the law in question;

specifically, courts must ascertain "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." 560 U.S. 126, 134 (2010). *See National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 570 (2012) ("The constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise") (internal quotation and citation omitted).

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

Response: The Supreme Court has held that the Fifth and the Fourteenth Amendments' Due Process Clauses protect some rights that are "not mentioned in the Constitution," specifically those that are "deeply rooted in this Nation's history and tradition" and that are "implicit in the concept of ordered liberty." *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (discussing the test for determining what rights are within the meaning of substantive due process but holding that the right to assisted suicide is not). The Supreme Court has held that those include, among others, the right to marry a person of a different race, *see Loving v. Virginia*, 388 U.S. 1 (1967); the right to obtain contraceptives, *see Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to engage in consensual sexual conduct, *see Lawrence v. Texas*, 539 U.S. 558 (2003); and the right of same-sex couples to marry, *see Obergefell v. Hodges*, 576 U.S. 644 (2015).

11. What rights are protected under substantive due process?

Response: The Supreme Court has interpreted the Fifth and the Fourteenth Amendments as protecting certain rights that are within the meaning of substantive due process because they are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (discussing the test for determining what rights are within the meaning of substantive due process but holding that the right to assisted suicide is not). The Supreme Court has held that the rights protected under substantive due process include, among others: the right to marry a person of a different race, *see Loving v. Virginia*, 388 U.S. 1 (1967); the right to obtain contraceptives, *see Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to engage in consensual sexual conduct, *see Lawrence v. Texas*, 539 U.S. 558 (2003); and the right of same-sex couples to marry, *see Obergefell v. Hodges*, 576 U.S. 644 (2015).

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: If confirmed as a district court judge, I will follow the precedent of the United States Supreme Court and the Tenth Circuit Court of Appeals. The Supreme Court has overruled *Lochner v. New York*. *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (discussing subsequent history of *Lochner*, stating that the *Lochner* doctrine that "authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely" has "long since been discarded.") Since overruling *Lochner*, the Supreme Court has held that

certain other rights are within the meaning of substantive due process; the test which the Supreme Court has articulating for determining which rights are found within substantive due process is whether the right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (discussing the test for determining what rights are within the meaning of substantive due process but holding that the right to assisted suicide is not).

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

Response: The Supreme Court has defined the limits on Congress' power under the Commerce Clause by defining three categories of activity as to which the power may be constitutionally exercised: "the use of the channels of interstate commerce"; "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and "those activities that substantially affect interstate commerce…" *See United States v. Lopez*, 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: A "suspect class" has been defined by the Supreme Court as a group that has historically been "subjected to discrimination" and which exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group," and which are "a minority or politically powerless." *See Lyng v. Castillo*, 477 U.S. 635, 638 (1986). Race, religion, national origin, and alienage have been found by the Supreme Court to constitute suspect classes under the Constitution. *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

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

Response: Separation of powers and checks and balances play vital and indispensable roles in our constitutional structure. Separating power into three different branches helps to protect against any one arm of government -- or the factions that may control them -- becoming too powerful and thus being enabled to infringe on the liberty of the people. Checks and balances further curtail the power of each branch by making even those powers they separately hold subject to the necessary involvement and balancing counterpoint of the other branches. Checks and balances also increase the chances for mutual pursuit of compromise and the common interest, in that no one branch can accomplish its tasks without some interplay of the other branches. In summary, as James Madison explained, 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 encroachment 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: As a district court judge, I would apply the binding precedent of the Supreme Court and the Tenth Circuit Court of Appeals, and would uphold the Constitution. The Supreme Court has held that the "separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch." *United States v. Lopez*, 514 U.S. 549, 552 (1995).

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

Response: Empathy, as a quality of judicial temperament relating to showing respect for and listening to litigants and counsel, is good. Empathy, in the sense of feeling sorry for litigants or counsel, or being reluctant to enforce the law, or injecting personal feelings or bias into a case, is anathema to the judicial role and cannot be indulged.

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

Response: Both are unacceptable.

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: While this is an interesting phenomenon, I have not studied this issue closely such that I could explain it or comment on it. If confirmed, I will apply the binding precedent of the Supreme Court and the Tenth Circuit Court of Appeals. I will apply the law impartially to the facts of the cases before me.

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

Response: "Judicial review" is defined by Black's Law Dictionary (11th ed. 2019) as the judicial "power to review the actions of other branches or levels of government." "Judicial supremacy" is defined by Black's Law Dictionary (11th ed. 2019) as a "doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review…are binding on the coordinate branches of the federal government and the states."

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: Under Article VI, the Constitution (and federal laws made in pursuance thereof) is the supreme law of the land, and all officials within the legislative and executive branches as well as all judges -- on both the federal and state levels -- are required to swear an oath to support the Constitution. Since *Marbury v. Madison*, the Supreme Court has engaged in constitutional review of the acts of the coordinate branches. 5 U.S. 137 (1803). "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 are required to follow duly rendered judicial decisions. *Id.* This creates within the judiciary a responsibility to engage in this role with care and restraint; the bottom line of this discussion is that judges must be humble and avoid activism; they must resolve the cases and controversies brought before them by impartially applying the law to the facts. The power they wield is preserved only by fealty to the Constitution (the original will of the people) and is ultimately dependent on the respect that humility, restraint, and careful adherence to the Constitution engenders and perpetuates (because the Court is not vested with the executive power).

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: Judges do not have will in that they do not have the power to make policy (this is for the legislative branch). Judges do not have force in that they do not have the power to enforce (this is for the executive branch). They only have judgment – the power to resolve cases and controversies that arise under the law. Judges play their constitutional role well when they do not seek to legislate from the bench, and when they realize they are not the executors of power; with this humble and restrained approach, they will effectively exercise judgment to resolve cases and controversies as the Constitution grants them power to do.

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

Response: If confirmed, I will perform the role of a district court judge with restraint, not seeking opportunities to impose any agenda. I will look to and faithfully apply binding Supreme Court and Tenth Circuit Court of Appeals precedent.

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. "Race, sex, national origin, creed, religion, and socio-economic status" are not relevant "in the determination of a sentence." *See* 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 unfamiliar with the statement referenced in the question. If confirmed, my approach as a district court judge would be to be impartial and to apply binding precedent to the facts of the case before me.

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

Response: I have not developed my own specific definitions for these words. I am aware that equity can mean different things in different contexts. Without making any kind of policy or political statement, to me, equality means rights afforded across the board. The centrality of equality in our legal system is symbolized by the words engraved on the West Pediment of the Supreme Court: "Equal Justice Under Law." If confirmed, my approach as a district court judge would be to be impartial and to apply binding precedent to the facts of the case before me.

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

Response: The Equal Protection Clause states, "No State shall…deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. I am unaware of any U.S. Supreme Court or Tenth Circuit precedent that applies or interprets the term "equity" as that term is used in Question 25. If confirmed, I would follow the binding precedent of the Supreme Court and the Tenth Circuit Court of Appeals.

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

Response: I have not developed my own specific definition for this term. If confirmed, I will apply binding precedent to all allegations of racial discrimination that would come before me.

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

Response: I have not developed my own specific definition for this theory. I am aware that this term means different things to different people. I am not aware of any Supreme Court or Tenth Circuit Court of Appeals decisions that define or apply this theory. If confirmed, my approach as a district court judge would be to be impartial and to apply binding precedent to the facts of the case before me.

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

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

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

Questions for the Record for Ann Marie McIff Allen, nominated to be United States District Judge for the District of Utah

1. Is racial discrimination wrong?

Response: Yes. It also violates federal statutes and the Constitution. *See* 42 U.S.C. § 2000e *et seq*. (Title VII); U.S. Const. amend. XIV, § 1 (Equal Protection).

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

Response: The Supreme Court has held that the Fifth and the Fourteenth Amendments' Due Process Clauses protect some rights that are "not mentioned in the Constitution," specifically those that are "deeply rooted in this Nation's history and tradition" and that are "implicit in the concept of ordered liberty." *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (discussing the test for determining what rights are within the meaning of substantive due process but holding that the right to assisted suicide is not). I do not have a personal belief as to rights that can or should be identified in the future, and if I did, as a judge and nominee for the federal district court, I am prohibited from expressing an opinion regarding matters that could come before me. Code of Conduct for United States Judges, Canon 3(A)(6).

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

Response: My judicial philosophy as a trial court judge is to impartially adjudicate the cases and controversies that are brought before me. I apply the law to the facts. I follow the binding precedent of the Supreme Court and the Tenth Circuit Court of Appeals. I treat all counsel and litigants with respect and dignity, and uphold the law. I have not researched the philosophies of justices on the Warren, Burger, Rehnquist, and Roberts Courts to determine which of the justices has a philosophy that is most analogous with mine. As a district court judge, I would follow the binding precedent of the Supreme Court and the Tenth Circuit Court of Appeals.

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

Response: The text and original meaning of a constitutional provision play a key role in interpreting the Constitution, and the Supreme Court has often used this interpretative approach to resolve certain constitutional matters. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 576 (2008); *Crawford v. Washington*, 541 U.S. 36,

42 (2004). Black's Law Dictionary (11th ed. 2019) defines "originalism" as a "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." As a trial court judge, I do not ascribe to any particular label or agenda other than applying binding precedent and impartially applying the law to the facts of the cases that come before me. The Supreme Court has held that as part of examining constitutional provisions, that courts should examine the normal and ordinary meaning of the text as it would have been understood at the time of ratification. *See Heller*, 554 U.S. at 576. I will follow binding precedent of the Supreme Court and the Tenth Circuit Court of Appeals.

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

Response: I do not have a definition formulated in my own mind for the term "living constitutionalism." It is defined in Black's Law Dictionary as the idea that the Constitution "should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." I do not characterize myself in terms of any particular label or agenda; I will apply binding precedent to cases brought before me, impartially and in accordance with the law and facts in that case. I will note that binding precedent in some areas of constitutional jurisprudence calls for an assessment of contemporary standards, for example in defining cruel and unusual punishment or obscenity. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 560-561 (2005) (courts are to evaluate evolving standards of decency to determine if punishments are cruel and unusual); *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 574 (2002) (courts are to evaluate contemporary community standards when assessing whether speech is obscenity).

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

Response: If I were presiding over a case involving a constitutional question which presented an issue of first impression with no applicable precedent from either the Supreme Court or the Tenth Circuit Court of Appeals, I would start by examining the plain language of the provision. I would apply interpretive principles used by Supreme Court and Tenth Circuit precedent which include consideration of the original public meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008) (constitutional rights are to be given the scope they were understood to have when the people adopted them.) I would also apply canons of construction and consider persuasive authority including federal appellate courts' interpretations of similar issues.

7. Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?

Response: The Supreme Court has directed that provisions are to be given the scope they were understood to have when the people adopted them. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008). As a trial court judge, I apply binding precedent to cases brought before me, impartially and in accordance with the law and facts in that case. I will note that binding precedent in some areas of constitutional jurisprudence calls for an assessment of contemporary standards, for example in defining cruel and unusual punishment or obscenity. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 560-561 (2005) (courts are to evaluate evolving standards of decency to determine if punishments are cruel and unusual); *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 574 (2002) (courts are to evaluate contemporary community standards when assessing whether speech is obscenity).

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

Response: As the United States Supreme Court has stated, the Constitution's "meaning is fixed according to the understandings of those who ratified it…" *New York State Rifle and Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). Its fixed meaning can be applied to "circumstances beyond those the Founders specifically anticipated." *Id.* To change the Constitution, it must be amended per Article V.

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

Response: Yes. It is binding precedent.

a. Was it correctly decided?

Response: As a nominee for a lower federal court, I am precluded from commenting on the correctness of Supreme Court precedents. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If fortunate to be confirmed, I would be dutybound to apply all binding Supreme Court precedent.

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

Response: Yes. It is binding precedent.

a. Was it correctly decided?

Response: As a nominee for a lower federal court, I am precluded from commenting on the correctness of Supreme Court precedents. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If fortunate to be confirmed, I would be dutybound to apply all binding Supreme Court precedent.

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

Response: Yes. It is binding precedent.

a. Was it correctly decided?

Response: Yes. Although under Canon 3(A)(6) of the Code of Conduct for United States Judges, I am precluded, as a judicial nominee, from commenting on whether a particular U.S. Supreme Court decision was correctly decided, the constitutionality of racial segregation in schools is not likely to come before the courts again; accordingly, I can state my opinion that *Brown v. Board of Education* was correctly decided.

12. Is the Supreme Court's ruling in *Students for Fair Admissions v. Harvard* settled law?

Response: Yes. It is binding precedent.

a. Was it correctly decided?

Response: As a nominee for a lower federal court, I am precluded from commenting on the correctness of Supreme Court precedents. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If fortunate to be confirmed, I would be dutybound to apply all binding Supreme Court precedent.

13. Is the Supreme Court's ruling in *Gibbons v. Ogden* settled law?

Response: Yes. It is binding precedent. Note the Supreme Court's recent decision in *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1152 (2023) (citing *Gibbons*).

a. Was it correctly decided?

Response: As a nominee for a lower federal court, I am precluded from commenting on the correctness of Supreme Court precedents. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If fortunate to be confirmed, I would be dutybound to apply all binding Supreme Court precedent.

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

Response: The Bail Reform Act of 1984 provides that there is a presumption in favor of pretrial detention if a defendant is charged with drug trafficking punishable by 10+ years imprisonment, certain firearm or other destructive device offenses, certain terrorism / violent offenses; certain slavery / human trafficking offenses; and certain offenses against minors. *See* 18 U.S.C. § 3142.

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

Response: In the case of *United States v. Salerno,* the Supreme Court observed that in passing the Bail Reform Act, Congress "perceived pretrial detention as a potential solution to a pressing societal problem" and "[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal." 481 U.S. 739, 747 (1987).

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

Response: Yes. First, the Free Exercise Clause has been interpreted as limiting what government may impose upon private institutions: (A) government must act in a manner free of hostility or bias against religious beliefs, *see Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); (B) law or other governmental action will be subjected to strict scrutiny if not neutral toward religion and generally applicable, *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); and (C) religious institutions' autonomy regarding internal management decisions central to their religious mission, including hiring of key role-players, is protected, *see Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). Second, federal legislation such as the Religious Freedom Restoration Act impose identifiable limits which dovetail with Free Exercise strict scrutiny protections. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751 (2014).

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

Response: Religious discrimination is prohibited by the Free Exercise Clause of the First Amendment. The Supreme Court has repeatedly found laws or other governmental actions unconstitutional where they restricted free exercise and lacked neutrality or were not generally applicable. See, e.g., *Carson v. Makin*, 142 S. Ct. 1987 (2021); *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (strict scrutiny applied to restriction that treated secular activity more favorably than religious activity); *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1731 (2018).

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

Response: In the case of *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme

Court held that a preliminary injunction which enjoined the enforcement of an executive order, that has restricted capacity at worship services, was appropriate. The Court reasoned that the religious entities would likely succeed on the merits because "statements made in connection with the challenged rules can be viewed as targeting" the religious entities; because the restrictions were not neutral in that they treated religious entities more harshly than non-religious entities; and because, under strict scrutiny analysis, the restrictions were not narrowly tailored to combatting COVID spread. 141 S. Ct. 63, 66-67 (2020). Further, infringing on Religious Free Exercise rights constituted irreparable injury, and the state had failed to show that not enforcing the capacity restrictions would harm the public. *Id.* at 67-68.

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

Response: In *Tandon v. Newsom*, the Supreme Court held that the religious at-home gatherings were entitled to protection, via preliminary injunction, against being shut down by California state COVID-19 restrictions. The Court reasoned that government regulations were not neutral nor generally applicable if they treated some comparable secular activity more favorably than religious activity, 141 S. Ct. 1294, 1296 (2021); that the fact that some comparable secular activities were being treated as poorly as religious activities, did not mean the restrictions were neutral, particularly because the restrictions focused on why people gathered, *id.*; that because the restrictions were not neutral nor generally applicable, their constitutionality would be evaluated under a strict scrutiny standard, and that plaintiffs were likely to succeed on the merits under such a standard -- thus they were entitled to injunctive relief pending appeal, *id.* at 1296-98.

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

Response: Yes, Americans have the right to their religious beliefs outside the walls of their houses of worship and homes. *See, e.g., Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022).

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

Response: In the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court held that Colorado's Civil Rights Commission violated the Free Exercise Clause by treating religious objections with hostility while treating the objections of others more favorably, 138 S. Ct. 1719 (2018); the Commission did not comply with the Free Exercise Clause's requirement of religious neutrality because it was hostile to the cakeshop owner's religious objections to creating cakes for same-sex couples. *Id.* at 1729; and the Commission had engaged in disparate treatment of the shop owner in comparison to other shop owners who had objected to making cakes with messages which those owners believed were discriminatory. *Id.*

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

Response: Yes. The Supreme Court has held that an individual's religious beliefs are constitutionally protected as long as they are sincere, regardless of whether they are consistent with the teachings of the religious tradition with which they affiliate. *See Frazee v. Illinois Dep't of Employee Sec*., 109 S. Ct. 1514 (1989); *see also Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 720 (2014) (sincerely held religious beliefs are protected).

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

Response: Yes. As long as religious beliefs are sincerely held, they are constitutionally protected. *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 720 (2014). The "Court's narrow function…is to determine whether the plaintiffs' asserted religious belief reflects an honest conviction." *Id*. at 725 (internal quotation marks and citations omitted).

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

Response: Yes. As long as religious beliefs are sincerely held, they are constitutionally protected. *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 720 (2014). The "Court's narrow function…is to determine whether the plaintiffs' asserted religious belief reflects an honest conviction." *Id*. at 725 (internal quotation marks and citations omitted).

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

Response: As a judicial nominee, it would not be appropriate for me to opine on religious doctrine. If fortunate to be confirmed, when considering cases in this area of constitutional law, my "narrow function…is to determine whether the plaintiffs' asserted religious belief reflects an honest conviction." *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 725 (2014) (internal quotation marks and citations omitted). It would not be my role to engage in a judicial analysis or to make findings regarding what any church's doctrines or teaching are or are not.

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

Response: In the case of *Our Lady of Guadalupe School v. Morrissey-Berru*, the

Supreme Court applied the "Ministerial Exception" to employees hired based on ability to develop and promote the Catholic faith and engage in religious teaching; the First Amendment protects religious entities' internal governance decisions as to vital religious duties. 140 S. Ct. 2049, 2060 (2020).

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

Response: In the case of *Fulton v. City of Philadelphia*, the Supreme Court held that the Free Exercise rights of Catholic Social Services (CSS), which had contracted with Philadelphia for many years to place children in foster care, were infringed upon when Philadelphia stopped working with CSS because it would not place children with same-sex couples. 141 S. Ct. 1868, 1881-82 (2020). The City's new policy led to it not placing children through CSS, even though the policy included mechanisms for exceptions; this lack of neutrality toward CSS triggered strict scrutiny, under which the policy was found to be unconstitutional because the policy was not only not narrowly tailored to the asserted interest of maximizing foster care placements—it actually undermined this interest. *Id.*

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

Response: In the case of *Carson v. Makin*, the Supreme Court held that Maine's tuition assistance program violated the Free Exercise Clause because the program's "nonsectarian" requirement excluded religious schools. 142 S. Ct. 1987, 1998 (2022) (state payment of tuition for certain students at private schools so long as the schools were not religious constituted discrimination against religion). Applying strict scrutiny, the Court held that Maine's program did not survive because the interest of disestablishment did not justify religious exclusions from generally available public benefits. *Id.*

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

Response: In the case of *Kennedy v. Bremerton School District,* the firing of a high school football coach after he knelt and prayed at midfield after games was held to have violated the coach's Free Exercise and Free Speech rights, as the prayer was private speech, unattributed to his coaching, and not conducted in the presence of his student athletes. 142 S. Ct. 2407, 2424 (2022). The Court also opined that the prayers did not violate the Establishment Clause because there was no government coercion involved and should be considered in light of historical practice; this analysis was more lenient --

more accommodating of religion -- than the prior test it replaced, found in *Lemon v. Kurtzman*, 493 U.S. 602 (1971).

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

Response: In the case of *Mast v. Fillmore* County, government officials insisted Amish farmers utilize modern technologies or risk jail and fines, and even the loss of their farms. Concurring in the order vacating the Minnesota state appellate court's ruling, Justice Gorsuch stated that pursuant to the Religious Land Use and Institutionalized Persons Act, the government's actions would be reviewed under strict scrutiny -- the state would have to show a compelling interest and that the restrictions were narrowly tailored, 141 S. Ct. 1868, 2432 (2021); general governmental interests would not be considered compelling given the exemptions granted to numerous other groups, and infringement on sincerely held religious beliefs would be prohibited unless it was the "last resort." *Id.* at 2433.

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

Response: As a nominee for a lower federal court, I am precluded from commenting on the correct interpretation of Section 1507 in this regard because a case regarding this could come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed I would follow binding precedent.

Without commenting on this specific fact scenario or related hypotheticals, I will note that in the case of *Cox v. State of Louisiana*, the Supreme Court upheld a Louisiana state statute that deals with matters arguably related to those matters dealt with in 18 U.S.C. § 1507; in that case the Supreme Court held that "picketing and parading—is subject to regulation even though intertwined with expression and association." 379 U.S. 559, 563 (1965).

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: Yes.

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

Response: Yes.

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

Response: The Constitution's Appointments Clause in Article II provides authority to the President, with advice and consent of the Senate, to make political appointments. As a nominee to the federal district court, it would not be appropriate for me to comment on what the President and Senate should consider in exercising their constitutional authority. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

32. If a program or policy has a racially disparate outcome, is this evidence of either purposeful or subconscious racial discrimination?

Response: The Supreme Court has held that in some circumstances, disparate impact claims may be cognizable under certain federal antidiscrimination laws. *See, e.g., Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc*., 576 U.S. 519, 539 (2015) (but not addressing subconscious racial discrimination). However, the Court has held that disparate impact is not a valid theory upon which to pursue an Equal Protection claim. *See Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

33. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.

Response: As a nominee for a lower federal court, I am precluded from commenting on

the appropriate number of justices on the U.S. Supreme Court. If fortunate to be confirmed, I would faithfully apply the decisions of the Supreme Court, and the number of Justices sitting on that Court would have no direct bearing on my work as a lower court judge.

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

Response: No.

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

Response: The Supreme Court has held that the Second Amendment protects an individual's right to bear arms, based in part upon the Court's holding that the original public meaning of the text of the Second Amendment recognizes an individual right to keep and bear arms. *See District of Columbia v. Heller*, 554 U.S. 50 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010); *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). The Supreme Court has also held that restrictions on Second Amendment rights are impermissible unless the government demonstrates that they are consistent with the Nation's historical tradition of firearms regulation. *Bruen at* 2126.

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

Response: In the cases of *Heller* and *McDonald*, the Supreme Court recognized an individual's right to keep and bear arms. *District of Columbia v. Heller*, 554 U. S. 570 (2008), and *McDonald v. Chicago*, 561 U. S. 742 (2010). The Court held that the government must demonstrate that a regulation is consistent with the Nation's historical tradition of firearm regulation in order to be constitutional. *See Heller,* 554 U.S. at 627; *see also New York State Rifle & Pistol Association v. Bruen, 142 S*. Ct. 2111, 2126 (2022).

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

Response: Yes. *See District of Columbia v. Heller*, 554 U.S. 570, 602 (2008); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

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

Response: No. The Second Amendment right to bear arms is "not a 'second-class right.'" *New York State Rifle and Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

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

Response: No. The Second Amendment right to bear arms is "not a 'second-class right.'" *New York State Rifle and Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

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

Response: Article II of the Constitution dictates that the executive "shall take Care that the Laws be faithfully executed." The Supreme Court has held that the executive branch has discretion regarding decisions relating to enforcement. *See Wayte v. United States*, 470 U.S. 598, 607 (1985). As a nominee for the federal district court, I am precluded from expressing an opinion or commenting regarding issues that could come before me. If I am confirmed, I will apply the law impartially to the facts before me, and will faithfully apply binding precedent from the Supreme Court and Tenth Circuit Court of Appeals.

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

Response: Black's Law Dictionary defines prosecutorial discretion as the "power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." A substantive administrative rules change is not an act of discretion but a legally authorized and formally executed change in the law. Substantive administrative rule changes must be in according with the relevant authorizing act and must comport with the Administrative Procedures Act. *See* 5 U.S.C. § 551-559; *see also MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 225 (1994).

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

Response: No. Under federal law, a defendant is eligible for the death penalty if the jury finds one or more statutory intent factors as set forth in 18 U.S.C. § 3591(a)(2), and one or more statutory aggravating factor as set forth in 18 U.S.C. § 3592(c). *See Jones v. United States*, 527 U.S. 373, 376–377 (1999). In the case of *Gregg v. Georgia*, the Supreme Court held that the death penalty is not unconstitutional. 428 U.S. 153, 169 (1976).

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

Response: In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the Association of Realtors challenged the nationwide

eviction moratorium for residential rental properties imposed by the CDC. At the district court level, the moratorium was vacated but that decision was stayed as HHS appealed. The Supreme Court lifted the stay, which meant that the vacating of the moratorium became the law of the case at that point; the Supreme Court stated that it expected "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance," *id.* at 2489, and stated further, "It is up to Congress, not the CDC, to decide whether the public interest merits further action here," *id*. at 2490.

44. Is it appropriate for a prosecutor to publicly announce that they are going to prosecute a member of the community before they even start an investigation as to that person's conduct?

Response: If a prosecutor had no evidence or information regarding a person's involvement in a crime, then no, it would not be appropriate; I say this as a general comment without any reference to any specific, actual scenario. As a judge and a nominee for the federal bench, I would not comment on any particular prosecutor's announcements unless the prosecutor's case came before me and this issue became relevant, at which time I would apply the law to the facts in an impartial manner.

Senator John Kennedy
Questions for the Record

Ann Marie McIff Allen

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

   Response: A defendant is eligible for the death penalty if the jury finds one or more statutory intent factors as set forth in 18 U.S.C. § 3591(a)(2), and one or more statutory aggravating factors as set forth in 18 U.S.C. § 3592(c). *See Jones v. United States*, 527 U.S. 373, 376–377 (1999). In the case of *Gregg v. Georgia*, the Supreme Court held that the death penalty is not unconstitutional. 428 U.S. 153, 169 (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.

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: My judicial philosophy as a trial court judge is to impartially adjudicate the cases and controversies that are brought before me. I apply the law to the facts. I follow the binding precedent of the Supreme Court and the Tenth Circuit Court of Appeals. I treat all counsel and litigants with respect and dignity, and uphold the law.

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

   Response: Yes. The Supreme Court employs originalism, such as in the case of *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008). *See also Currier v. Virginia*, 138 S. Ct. 2144, 2153 (2018) ("This Court's contemporary double jeopardy cases confirm what the text and history suggest.")

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: If I were presiding over a case involving a constitutional question which presented an issue of first impression with no applicable precedent from either the Supreme Court or the Court of Appeals, I would start by examining the plain language of the provision. I would apply interpretive principles used by Supreme Court and Tenth Circuit precedent which include consideration of the original public meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 634-35 (constitutional rights are to be given the scope they were understood to have when the people adopted them.) I would then look to persuasive authority regarding related issues, and I would look to canons of construction where appropriate.

7. Is textualism a legitimate method of statutory interpretation?

Response: Yes. *See, e.g., Carcieri v. Salazar*, 555 U.S. 379 (2009); *Woods v. Standard Ins. Co*., 771 F.3d 1257, 1265 (10th Cir. 2014) (when language is clear, court ordinarily ends its analysis).

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

Response: When the plain language of a particular provision is ambiguous, a district court may apply tools of statutory construction, such as considering the provision's statutory context and related provisions surrounding the specific provision in question, to aid in ascertaining the meaning. *See Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997). I would follow binding precedent interpreting the statute or analogous statutes. But going beyond textual sources is only appropriate if the text of the statute does not reveal its meaning. *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… [O]rdinary meaning of that language accurately expresses the legislative purpose.")

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: As the United States Supreme Court has stated, the Constitution's "meaning is fixed according to the understandings of those who ratified it…" *New York State Rifle and Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). Its fixed meaning can be applied to "circumstances beyond those the Founders specifically anticipated." *Id.* To change the Constitution, it must be amended per Article V.

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 the U.S. Supreme Court's decision in *Brown v. Davenport*, contains a history of habeas corpus. 596 U.S. 118, 127-29 (2022). Initially in England,

habeas was not a means to challenge the correctness of a conviction, but merely to examine whether the court in which the conviction occurred had jurisdiction. The Supreme Court expanded the scope of habeas review to include examination for constitutional error, *see Brown v. Allen*, 344 U.S. 443 (1953), which lead to a greater number of habeas petition filings.

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: Part IV of *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* sets forth the Supreme Court's holding that strict scrutiny applies to race-based admissions and that such admissions failed, under strict scrutiny, to comply with Equal Protection Clause standards (thus leading to the conclusion elsewhere in the opinion that Harvard was violating Title VI of the Civil Rights Act). 600 U.S. 181, 213-25 (2023). The Court held that the race-based admissions were not justified by a compelling interest nor were they narrowly tailored to the interest asserted as justifying them. Specifically, the Court held that while Harvard asserted commendable goals, the connection of the race-based admissions to those goals was not coherent enough to satisfy strict scrutiny. *Id.* at 214-15. Additionally, the race-based admissions failed to satisfy strict scrutiny because they did not avoid utilizing race as a negative stereotype, *see id.* at 218, and because they lacked a rational ending point, *see id.* at 225.

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: Part III of the U.S. Supreme Court's decision in *303 Creative LLC v. Elenis* contains the holding that designing a website celebrating marriage is speech protected by the First Amendment of the Constitution; a state law compelling the website designer to create speech which ran contrary to the designer's own beliefs violated the designer's First Amendment rights. 600 U.S. 570, 573 (2023).

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

Response: Part II of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Org*. contains the Court's articulation of the test for determining when an asserted right is protected by the Fourteenth Amendment's Due Process Clause. The opinion provides that such Due Process protection applies when the right at issue is "guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty," and is part of a broader entrenched right supported by other precedents. 597 U.S. 215, 234-50. Part II also sets forth the Court's application of that test to the right to obtain an abortion, and contains the Court's conclusion that this right does not meet this test and thus is not protected by the Fourteenth Amendment's Due Process Clause. *Id.* at 250-57.

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: Part III of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* contains the Court's discussion of the test for when precedent may be overturned, and the Court's application of that test to the *Dobbs* decision in its overturning of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). 597 U.S. 215, 263-90. The test is comprised of five factors: the nature of the precedent's error, the quality of its reasoning, the "workability" of the rules created by the precedent, the precedent's disruptive effect on other areas of the law, and reliance interests in the precedent. *Id.* The Court concluded that these factors did not weigh in favor of retaining *Roe* or *Casey*. *Id.* at 290.

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: The legal rule employed in *Rivas-Villegas v. Cortesluna* provides that a governmental official who is sued under 42 U.S.C. § 1983, for damages caused by alleged excessive use of force in violation of the Fourth Amendment, is entitled to qualified immunity if the official's conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known"; and that this standard is not met when the facts do not present an "obvious case" and "if existing precedent does not place the constitutional question beyond debate." 595 U.S. 1, 5-8. The Court held that in the instant case, precedent was distinguishable and therefore did not provide the officer notice that the specific use of force was unlawful. Thus, the officer was entitled to qualified immunity. *Id.* at 8.

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 empowers a district court judge to issue an injunction when the standard set forth therein is met; however, this rule does not address nationwide injunctions nor provide authority, or a test, for the issuance of a nationwide injunction. In *Trump v. Hawaii*, Justice Thomas in a concurring opinion stated, "If 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).

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: Dicta are not binding precedent, so dicta would not play a role in my decisions as such. I would follow binding precedent. *See Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935) (dicta do not constitute binding precedent, but may be considered if "sufficiently persuasive").

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 district court judge I have presided over dozens of trials, including bench and jury trials, in civil and criminal cases (including murder, child abuse, and other kinds of cases). As a lawyer I have tried dozens of cases as sole counsel on my side of the courtroom, including bench and jury trials, in civil and criminal cases, in state district court. Although I have appeared as counsel in federal district court, I have not tried any cases 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: None.

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: Facebook (one account, not public – only accessible to friends, appx. 2017 – Present); Instagram (one account, not public – only accessible to friends, appx. 2017 – Present); LinkedIn (one account, appx. 2017 – Present); and Twitter/X (one account, I have never posted or reacted to any post, appx. 2013 – Present).

22. Why should Senator Kennedy support your nomination?

Response: I have served as a trial court judge, prosecutor, public defender (in both state and federal court), and private attorney for more than twenty years. I have presided over and handled as counsel (in almost all cases as the sole lawyer on my side of the

courtroom) many bench and jury trials. My experience is broad and practical. I have experience with federal law, both as it applies in our state courts through parallel rules of procedure and evidence, and as constitutional issues have been incorporated as applicable to the state; additionally, I served as a university general counsel where many federal law issues had to be mastered and directly navigated. It is important, in my view, that judges who understand and respect the states -- while also having exposure and experience with federal legal issues -- have the opportunity to move on to the federal bench, so that the federal judiciary has within its ranks jurists who have that state background which is so essential to properly understanding and respecting federalism. My judicial philosophy is practical and restrained. I am committed to applying the law impartially to the facts of the cases before me, without agenda or activism.