Senator Lindsey Graham, Ranking Member
Questions for the Record
Keli M. Neary
Nominee to be United States District Judge for the Middle District of Pennsylvania

1. **While in the Pennsylvania Attorney General's office, you were involved in numerous high-profile and contentious 2020 election suits.**

    a. **If any cases concerning the 2024 election came before you as a judge, would you recuse yourself?**

    Response: If confirmed, pursuant to 28 U.S.C. § 455(b)(3), I would recuse myself from cases in which the Pennsylvania Office of Attorney General or any Pennsylvania agency appears as a party and in which I participated as counsel, an adviser, or a material witness concerning the proceeding or "expressed an opinion concerning the merits of the particular case." I would also strictly follow the Code of Conduct for United States Judges, the policies of the district court, and all other applicable rules regarding conflicts of interest.

2. **While in the Pennsylvania Attorney General's office, you defended numerous strict COVID-19 related orders and policies, including shutdown order, strict mask mandates for schools, and invasive contact tracing. In one September 2021 brief in a case where parents challenged a mask mandate in school, you argued that "Plaintiffs' minimal inconvenience caused by the Order is outweighed by the public's right not to be infected with a deadly virus." Your brief also stated "Plaintiffs' request demonstrates a callous disregard for the dangers of this highly contagious virus and the lives it has taken."**

    a. **In hindsight, do you stand by the positions you took in the COVID-19 litigation?**

    Response: My role during the COVID-19 litigation was not as a policy-maker, but rather as a lawyer, who was statutorily obligated to defend the Commonwealth of Pennsylvania in all civil actions brought against it. *See*, 71 P.S. § 732-204(c). If confirmed as a district court judge, I will fully and faithfully apply the precedent of the Supreme Court and Third Circuit.

    b. **Are there any positions that, in hindsight, you would have argued differently?**

    Response: Please see response to Question 2a, above.

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

Response: Yes.

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

   Response: No.

   a. **If yes, list all countries of citizenship 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.**

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

   Response: No.

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

   Response: No.

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

   Response: In general, no, because the Constitution of the United States is a domestic document. However, the Supreme Court has, on rare occasion, looked to English common law to interpret certain provisions of the Constitution. *See, e.g., Dimick v. Schiedt*, 293 U.S. 474 (1935) (holding that "common law" in the Seventh Amendment context refers to the common law of England).

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

   Response: I disagree with this statement. If confirmed as a district court judge, I will faithfully apply the law impartially and fairly, without making independent value judgments.

9. **In a concurrence in the denial of rehearing en banc in *Al–Bihani v. Obama* then-Judge Kavanaugh wrote: "international-law norms are not domestic U.S. law in the absence of action by the political branches to codify those norms." Is this a correct statement of law?**

Response: Yes. "[N]ot all international law obligations automatically constitute binding federal law enforceable in United States courts." *Medellin v. Texas*, 552 U.S. 491, 504 (2008). "The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." *Id.* at 525-26.

10. Please define the term "prosecutorial discretion."

Response: Prosecutorial discretion is "[a] prosecutor's 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." Black's Law Dictionary (12th ed. 2024).

11. 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: I am not familiar with this statement or the context in which it was made; however, generally, judges are required to follow and apply precedent. If confirmed as a district court judge, I will fully and faithfully apply precedent of the Supreme Court and Third Circuit.

12. 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.

13. 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.

14. 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: Title 28 U.S.C. § 2255 instructs that, "a prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence." Also, a sentenced prisoner may seek relief by direct appeal to the Court of Appeals pursuant to 28 U.S.C. § 1291; a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241; or a motion for compassionate release under 18 U.S.C. § 3582(c)(2).

15. **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 both Harvard and UNC, claiming the institutions' use of race-based admissions programs violate, Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. There was no factual dispute that both institutions considered race as one factor in their admissions processes. The Supreme Court held that while institutions may consider an applicant's description of how race affected their life, the subject institutions' admissions "programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points." The Court concluded the use of race as a factor in the admissions process violates the Equal Protection Clause of the Fourteenth Amendment. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023).

16. **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: Yes. As chief deputy, I was primarily responsible for reviewing applications collected by human resources, selecting candidates for interview, conducting interviews, and making hiring recommendations to the agency personnel committee. As executive deputy, I am responsible for overseeing six chiefs and two non-attorney managers as they perform the aforementioned tasks. I also participate in approximately 45 interviews per year and approve the chiefs' and non-attorney managers' recommendations to the agency personnel committee.

17. **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, sex, sexuality, or gender identity?**

Response: No.

18. **Have you ever solicited applications for employment on the basis of race, ethnicity, religion, sex, sexuality, or gender identity?**

    Response: No.

19. **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, sex, sexuality, or gender identity?**

    Response: No.

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

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

    Response: Yes, government classifications based upon race are subject to strict scrutiny. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007*); Doe ex rel. Doe v. Lower Merion School Dist.*, 665 F.3d 524, 545 (3d Cir. 2011).

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

    Response: The Supreme Court, in *303 Creative LLC v. Elenis*, held that Colorado was precluded by the First Amendment from forcing a website designer to create expressive designs that conflicted with the designer's personal beliefs. 600 U.S. 570 (2023).

22. **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. The language is correctly quoted from *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

23. **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: Government regulation of speech is "content-based" if a law applies to particular speech due to the topic discussed or the idea or message expressed. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163–64 (2015). Courts should consider whether the speech regulation "on its face" draws distinctions based on the message conveyed by the speaker. *Id*. Some distinctions may be obvious, defined by particular subject matter, and others may be more subtle, defining regulated speech by its function or purpose. *Id.* The first step in this analysis is to determine whether the law is content neutral on its face. *Id.* at 165. Only after that step should a court look to the purpose and justification for the law. *Id.*

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

Response: True threats of violence do not enjoy First Amendment protection. *Counterman v. Colorado*, 143 S. Ct. 2106, 2113 (2023). In *Counterman*, the Supreme Court determined that the "true threats" doctrine required the government to prove that an individual must have some understanding of the threatening nature of his communications in order for the speech to be outside the bounds of First Amendment protections. *Id*. The Court further held that a recklessness standard is enough; a more specific intent to threaten need not be proven by the government. *Id*.

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

Response: According to Black's Law Dictionary (12th ed. 2024), a "fact" is "[s]omething that actually exists; an aspect of reality" or "[an] actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." The Supreme Court defined "factual issues" as "basic, primary or historical facts: facts in the sense of a recital of external events and the credibility of their narrators." *Townsend v. Sain*, 372 U.S. 293, 309 (1963) (quotations omitted). The Third Circuit has adopted the Supreme Court's definition. *Berryman v. Morton*, 100 F.3d 1089, 1094 (3d Cir. 1996). *See generally, Williams v. Taylor*, 529 U.S. 362, 385 (2000) (acknowledging "that the Court has not charted an entirely clear course in this area" and that "the proper characterization of a question as one of fact or law is sometimes slippery") (quoting *Thompson v. Keohane*, 516 U.S. 99, 110–11 (1995)).

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

Response: Title 18 U.S.C. § 3553(a) lists the four purposes a judge should consider during sentencing – retribution, deterrence, incapacitation, and rehabilitation. The law does not direct that any one purpose should be given greater weight than the others. If confirmed as a district court judge, I will apply the law in a fair and impartial manner, consistent with applicable sentencing guidelines, and precedent from the Supreme Court

and Third Circuit, while also considering presentence reports and recommendations from the United States Probation Office.

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

Response: The Code of Conduct for United States Judges precludes me, a judicial nominee, from commenting on whether a Supreme Court decision was particularly well-reasoned. If confirmed as a district court judge, I will fully and faithfully apply the precedent of the Supreme Court and Third Circuit.

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

Response: The Code of Conduct for United States Judges precludes me, a judicial nominee, from commenting on whether a Third Circuit decision was particularly well-reasoned. If confirmed as a district court judge, I will fully and faithfully apply the precedent of the Supreme Court and Third Circuit.

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

Response: Title 18 U.S.C. § 1507 provides: "Whoever, 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, shall be fined under this title or imprisoned not more than one year, or both. Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt."

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from prejudging matters that could come before the courts. However, having conducted research, I found no case from the Supreme Court or Third Circuit declaring § 1507 unconstitutional Further, I note that the Supreme Court declared a similar Louisiana law valid and in doing so it "[held] that this statute on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." *Cox v. Louisiana*, 379 U.S. 559, 564 (1965).

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

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

Response: As a general matter, the Code of Conduct for United States Judges precludes me, a judicial nominee, from commenting on whether a Supreme Court decision was correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. However, because the constitutionality of desegregation in public schools is not likely to be re-litigated, I am comfortable responding and I believe this case was correctly decided.

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

Response: As a general matter, the Code of Conduct for United States Judges precludes me, a judicial nominee, from commenting on whether a Supreme Court decision was correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. However, because the constitutionality of laws prohibiting interracial marriage is not likely to be re-litigated, I am comfortable responding and I believe this case was correctly decided.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. If confirmed as a district judge, I will fully and faithfully apply *Griswold*.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. I note that *Roe* was overturned by the Court in *Dobbs v. Jackson Women's Health*, 597 U.S. 215 (2022). If confirmed as a district judge, I will fully and faithfully apply *Dobbs*.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. I note that *Planned Parenthood* was overturned by the Court in *Dobbs v. Jackson Women's Health*, 597 U.S. 215 (2022). If confirmed as a district judge, I will fully and faithfully apply *Dobbs*.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. If confirmed as a district judge, I will fully and faithfully apply *Gonzales*.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. If confirmed as a district judge, I will fully and faithfully apply *Heller*.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. If confirmed as a district judge, I will fully and faithfully apply *McDonald*.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. If confirmed as a district judge, I will fully and faithfully apply *Hosanna-Tabor*.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. If confirmed as a district judge, I will fully and faithfully apply *Bruen*.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. If confirmed as a district judge, I will fully and faithfully apply *Dobbs*.

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, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. If confirmed as a district judge, I will fully and faithfully apply *Harvard College*.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. If confirmed as a district judge, I will fully and faithfully apply *303 Creative*.

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

Response: The Supreme Court has directed that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1, 17 (2022). If confirmed as a district court judge, I will fully and faithfully apply binding precedent.

33. 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, including Brian Fallon, Christopher Kang, Tamara Brummer, Jen Dansereau, and/or Becky Bond, requested that you provide any services, including but not limited to**

research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Jen Dansereau, and/or Becky Bond,? If so, who?**

Response: No.

c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Jen Dansereau, and/or Becky Bond,? If so, who?**

Response: No, not to my knowledge.

34. **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, including, but not limited to, Rakim Brooks, Betsy Miller Kittredge, Nan Aron, Jake Faleschini, and/or Zachery Morris, requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

    b. **Are you currently in contact with anyone associated with the Alliance for Justice including, but not limited to: Rakim Brooks, Betsy Miller Kittredge, Nan Aron, Jake Faleschini, and/or Zachery Morris? If so, who?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Alliance for Justice, including, but not limited to: Rakim Brooks, Betsy Miller Kittredge, Nan Aron, Jake Faleschini, and/or Zachery Morris? If so, who?**

    Response: No, not to my knowledge.

35. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

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

Response: Not applicable.

b. **Are you currently in contact with anyone associated with Arabella Advisors, including, but not limited to: Eric Kessler, Himesh Bhise, Joseph Brooks, Isaiah Castilla, and/or Saurabh Gupta?**

Response: No.

i. **Please include in this answer anyone associated with Arabella's subsidiaries, including the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, the North Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: Not applicable.

c. **Have you ever been in contact with anyone associated with Arabella Advisors, including, but not limited to: Eric Kessler, Himesh Bhise, Joseph Brooks, Isaiah Castilla, and/or Saurabh Gupta?**

Response: No, not to my knowledge.

i. **Please include in this answer anyone associated with Arabella's subsidiaries, such as the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, the North Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: Not applicable.

36. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**

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

Response: No.

b. **Are you currently in contact with anyone associated with the Open Society Foundations, including but not limited to: George Soros, Alexander Soros, Mark Malloch-Brown, and/or Binaifer Nowrojee?**

   Response: No.

c. **Have you ever been in contact with anyone associated with the Open Society Foundations including but not limited to: George Soros, Alexander Soros, Mark Malloch-Brown, and/or Binaifer Nowrojee?**

   Response: No, not to my knowledge.

d. **Have you ever received any funding, or participated in any fellowship or similar program affiliated with the Open Society network?**

   Response: No.

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

       Response: No.

    b. **Are you currently in contact with anyone associated with Fix the Court, including, but not limited to: Gabe Roth, and/or Josh Cohen? If so, who?**

       Response: No.

    c. **Have you ever been in contact with anyone associated with Fix the Court including, but not limited to: Gabe Roth, and/or Josh Cohen? If so, who?**

       Response: No, not to my knowledge.

38. **The Raben Group is a lobbying group that "champions diversity, equity, and justice as core values that ignite our mission for impactful change in corporate, nonprofit, government and foundation work." The group prioritizes judicial nominations and its list of clients have included the Open Society Foundations, the American Civil Liberties Union, the New Venture Fund, the Sixteen Thirty Fund, and the Hopewell Fund. It staffs the Committee for a Fair Judiciary.**

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

Response: No.

b. **Are you currently in contact with anyone associated with The Raben Group, including but not limited to: Robert Raben, Donald Walker, Patty First, Joe Onek, Gara LaMarche, Steve Sereno, Dylan Tureff and/or Katherine Huffman? If so, who?**

   Response: No.

c. **Have you ever been in contact with anyone associated with The Raben Group including but not limited to: Robert Raben, Donald Walker, Patty First, Joe Onek, Gara LaMarche, Steve Sereno, Dylan Tureff, and/or Katherine Huffman? If so, who?**

   Response: No, not to my knowledge.

d. **Has anyone associated with the Raben Group offered to assist you with your nomination, including but not limited to organizing letters of support?**

   Response: No.

39. **The Committee for a Fair Judiciary "fights to confirm diverse and progressive federal judges to counter illegitimate right-wing dominated courts" and is staffed by founder Robert Raben.**
    a. **Has anyone associated with the Committee for a Fair Judiciary requested that you provide services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

    b. **Are you currently in contact with anyone associated with the Committee for a Fair Judiciary, including, but not limited to: Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, and/or Joe Onek? If so, who?**

       Response: No.

       Have you ever been in contact with anyone associated with the Committee for a Fair Judiciary, including, but not limited to: Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, and/or Joe Onek? If so, who?

       Response: No, not to my knowledge.

40. **The American Constitution Society is "the nation's foremost progressive legal organization" that seeks to "support and advocate for laws and legal systems that redress the founding failures of our Constitution, strengthen our democratic**

legitimacy, uphold the role of law, and realize the promise of equality for all, including people of color, women, LGBTQ+ people, people with disabilities, and other historically excluded communities."

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

   Response: No.

b. **Are you currently in contact with anyone associated with the American Constitution Society including, but not limited to Russ Feingold? If so, who?**

   Response: No.

c. **Have you ever been in contact with anyone associated with the American Constitution Society including, but not limited to Russ Feingold? If so, who**?

   Response: While in law school, I recall that there was a group of students who self-affiliated with the American Constitution Society, but I do not remember the names of those classmates or the extent of their involvement.

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

    Response: On October 27, 2023, Senators Bob Casey, Jr. and John Fetterman announced a judicial vacancy in the Middle District of Pennsylvania. I formally applied for the position on November 27, 2023, by submitting an application through the portal established by the senators. I interviewed with the senators' judicial selection committee on January 3, 2024. On June 11, 2024, I sent a letter to the chair of the judicial selection committee indicating my ongoing interest to serve on the bench. The chair forwarded my letter of interest to Senators Casey and Fetterman along with his endorsement. On June 26, 2024, I interviewed with Senator Fetterman's Chief Counsel. On June 27, I interviewed with Senator Casey and his executive staff. On July 1, 2024, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On July 31, 2024, the President submitted my nomination to the Senate.

42. **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.

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

Response: No.

44. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, the North Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No.

45. During or leading up to 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.

46. During or leading up to 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.

47. During or leading up to your selection process, did you talk with any officials from or anyone directly associated with The Raben Group or the Committee for a Fair Judiciary, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: No.

48. 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.

49. 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?

- **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?**

Response: Given my extensive litigation in both state and federal courts, I sought guidance from the Office of Legal Policy as to which cases were appropriate for inclusion on my questionnaire. I received the general suggestion to focus on significant matters litigated in federal court that demonstrated my breadth of trial experience in complex legal issues. I was not instructed to include or omit any specific case or category of cases. The final list of cases was personally selected by me.

50. **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 No. 41, above.

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

Response: I received Questions for the Record from the Office of Legal Policy on October 2, 2024. In preparing my responses, I reviewed necessary materials including publicly available filings, court opinions, and statutes. Using the information I gathered, I personally typed draft responses and submitted them to the Office of Legal Policy. After receiving limited input from the Office of Legal Policy, I finalized my responses and submitted them.

Senate Judiciary Committee
Nominations Hearing
September 25, 2024
Questions for the Record
Senator Amy Klobuchar

<u>Question for Keli M. Neary, to be a U.S. District Judge for the Middle District of Pennsylvania</u>

You spent the last twelve years serving with the Pennsylvania Office of Attorney General and for the last five years you have served as an Executive Deputy Attorney General. In that capacity you are responsible for providing counsel to the Attorney General, First Deputy, and Chief of Staff on all key civil law matters.

- **How have these experiences have shaped your career and how will they shape your service as a federal district court judge, if confirmed?**

Response: My career at the Pennsylvania Office of Attorney General has offered countless lessons and shaped my career in immeasurable ways. I will highlight three.

As a litigator, section chief, and division director, I learned the value of being a good listener. This skill allows me, among other things, to hear others' concerns and address them. If confirmed as a district court judge, I will continue to be a good listener, providing an environment of respect and dignity for litigants that appear before me in both criminal and civil matters, helping to resolve cases where middle ground can be reached, and overseeing trials when cases require them.

My time at the Pennsylvania Office of Attorney General has also taught me how to be a decision-maker. As an Executive Deputy Attorney General, I supervise 125 employees and make decisions about the day-to-day functioning of the Civil Law Division. These decisions range from operational and staffing needs to legal strategy and settlement authority. Good decisions require abundant research, thoughtful deliberation, and careful explanation. Yet, many decisions I make are time-sensitive, requiring me to work quickly to educate, deliberate, and decide. If confirmed as a district court judge, I will use these strong decision-making skills to adjudicate matters that come before me. I will conduct the appropriate research, engage in thoughtful deliberation, and issue clear and concise rulings, maintaining efficiency while never sacrificing quality. I will faithfully follow the Constitution and the precedent of the Supreme Court and Third Circuit.

Finally, my career at the Office of Attorney General (and before that at the Pennsylvania State Police) has shaped my view of public service. It is imperative that, as a public servant, I carry myself in a way that reflects well on the Office of Attorney General and the Commonwealth of Pennsylvania. If confirmed as a district court judge, I will continue to set high standards of behavior for myself in all settings. I will adhere to the Code of Conduct for United States Judges and fulfill all requirements to remain a member in good standing of the Pennsylvania bar.

Senator Mike Lee
Questions for the Record
Keli Marie Neary to be United States District Judge for the Middle District of Pennsylvania

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

   Response: If confirmed as a district court judge, it is my firm resolve to approach every matter with an open mind. I will treat every litigant with respect and dignity, carefully applying the facts of the matter before me to the applicable precedent of the Supreme Court and the Third Circuit.

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

   Response: In determining the meaning of a federal statute, I would first identify whether there is any Supreme Court or Third Circuit precedent addressing the specific statutory provision at issue. If no precedent exists, I would then look to the plain text of the statute, including relevant statutory definitions, and also consider any applicable canons of construction or other interpretive principles. Where appropriate and to the extent permitted by the Supreme Court and Third Circuit, I would consider persuasive authority from other courts, as well as legislative history.

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

   Response: In determining the meaning of a constitutional provision, I would first identify whether the Supreme Court or Third Circuit previously interpreted the specific constitutional provision at issue. In the rare instance that I am confronted with a constitutional issue of true first impression, I would consider the plain text of the provision at issue, as well as the method of interpretation that the Supreme Court or Third Circuit has used in the most analogous circumstance. Where appropriate, I would also consider persuasive authority from other courts.

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

   Response: When interpreting any provision of the Constitution, the text is the starting point for review and analysis. In some cases, the Supreme Court has looked to the original meaning, such as *Heller*, to interpret constitutional provisions. If confirmed as a district court judge, I will fully and faithfully apply Supreme Court and Third Circuit precedent when interpreting constitutional provisions.

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

   Response: Please see response to Question No. 2, above.

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

Response: In accordance with the Supreme Court's holding in *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 654 (2020), courts are directed to "[i]nterpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment."

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

Response: Under *Lujan v. Defenders of Wildlife*, the constitutional minimum of standing contains three elements: a plaintiff must demonstrate that (1) he or she has suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent;" (2) "there must be a causal connection between the injury and the conduct complained of" such that the injury is "fairly ... trace[able] to the challenged action of the defendant; and (3) it must be "likely" that the injury will be "redressed by a favorable decision." 504 U.S. 555, 560–61 (1992).

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

Response: It has long been established by the Supreme Court that the Necessary and Proper Clause gives Congress certain implied powers beyond those enumerated in the Constitution. *McCullough v. Maryland*, 17 U.S. 316 (1819). In particular, McCullough established that Congress may pass laws that are "necessary and proper" for the execution of its enumerated powers. *Id*. at 421 ("Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and the spirit of the Constitution, are constitutional.")

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

Response: The Supreme Court has held that the "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (quotations omitted).

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

Response: Under Supreme Court precedent, an unenumerated right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed…."

Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997). As a judicial nominee, it is not appropriate for me to comment on or prejudge matters that may come before the courts, including predicting whether unenumerated rights should be identified in the future. *See* Code of Conduct for United States Judges, Canon 3A. If I am confirmed as a district judge, I will fully and faithfully apply the precedent established by the Supreme Court of the United States and Third Circuit Court of Appeals.

10. What rights are protected under substantive due process?

Response: Fundamental rights. Please see response to Question 9, above.

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

Response: In *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court held that the right to buy or sell labor was a constitutionally protected liberty interest. However, only a few decades later, the Supreme Court began shifting away from the holding in *Lochner*. For example, in *West Coast Hotel v. Parrish*, 300 U.S. 79 (1937), the Supreme Court stated that the "essential limitation of liberty in general governs freedom of contract in particular." *Id*. at 392. "There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts or deny to government the power to provide restrictive safeguards." *Id*. And more recently, in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court held that the Constitution does not protect a right to abortion.

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

Response: In *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), the Supreme Court identified three broad categories of activity that Congress may regulate under its commerce power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) those activities that substantially affect interstate commerce.

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

Response: Under Supreme Court precedent, race, alienage, national origin, and religion are suspect classes requiring strict scrutiny. *See, e.g., San Antonio Indep. Sch. Dist. V. Rodriguez,* 411 U.S. 1 (1973); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 n.4 (1976); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: Our Constitutional structure separates governmental powers into three coequal branches, which the Supreme Court has noted is "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Morrison v. Olson*, 487 U.S. 654, 693 (1988). Put another way, our "[s]eparation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others." *Bond v. United States*, 564 U.S. 211 (2011).

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

Response: If confirmed as a district court judge and presented with this question, I will carefully review the arguments presented by the litigants, research precedent from the Supreme Court and Third Circuit, and use the information I gather to make an informed and well-reasoned decision.

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

Response: If confirmed as a district court judge, I will consider each case impartially and fairly, by relying fully and faithfully on the precedent of the Supreme Court and Third Circuit. I will not rely on my personal beliefs or opinions, including empathy.

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

Response: Both of these hypothetical outcomes conflict with the rule of law and are equally improper.

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

Response: I am not personally familiar with the statistics described by this question, therefore, I am not able to comment. If confirmed as a district court judge, I will fully and faithfully apply precedent of the Supreme Court and Third Circuit.

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

Response: "Judicial review" is defined by Black's Law Dictionary (12th ed. 2024) as "[a] court's power to review the actions of other branches or levels of government,

esp[ecially] the courts' power to invalidate legislative and executive actions as being unconstitutional." Black's Law Dictionary (12th ed. 2024) defines "judicial supremacy" as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp[ecially] U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states."

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

Response: It is my understanding that federal government officials take an oath to defend and uphold the Constitution of the United States, and they must follow Supreme Court precedent interpreting the Constitution. *Cooper v. Aaron*, 358 U.S. 1 (1958).

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

Response: The federal courts interpret and uphold the law. The courts have no power to make laws or enforce them. In addition, a court's jurisdiction is limited to the case or controversy that comes before it. Federalist 78 is a reflection of this concept that federal courts have limited jurisdiction and should not interfere with the roles of the other branches of government.

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

Response: If confirmed as a district court judge, I will fully and faithfully apply precedent from the Supreme Court and Third Circuit. If there is no binding precedent upon which to rely, I will research precedent in other jurisdictions for persuasive authority and use the information I gather to make an informed and well-reasoned decision.

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

Response: None.

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

Response: I am not familiar with this statement or the context in which it was made. "Equity" is defined by Black's Law Dictionary (12th ed. 2024) as "[f]airness; impartiality; evenhanded dealing."

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

Response: "Equity" is defined as "[f]airness; impartiality; evenhanded dealing."Black's Law Dictionary (12th ed. 2024). "Equality" is defined as "[t]he quality, state, or condition of being equal; esp[ecially] likeness in power or political status." Black's Law Dictionary (12th ed. 2024). If confirmed as a district court judge and faced with these terms in matters that come before me, I will fully and faithfully apply the precedent from the Supreme Court and Third Circuit.

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

Response: I could not find any precedent from the Supreme Court or Third Circuit that interprets the Fourteenth Amendment's Equal Protection Clause to guarantee "equity" as described in Question 24.

27. How do you define "systemic racism?"

Response: Black's Law Dictionary does not define "systemic racism" and I am not aware of a case where that term was specifically defined. If confirmed as a district court judge and this term is presented to me, I will fully and faithfully apply Supreme Court and Third Circuit in deciding any such matter.

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

Response: Black's Law Dictionary (12th ed. 2024) defines "critical race theory" as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities."

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

Response: Please see responses to Question Nos. 27 and 28, above.

30. What is the executive leadership structure of the Pennsylvania Office of the Attorney General?

Response: The Attorney General is statutorily designated head of the Pennsylvania Office of Attorney General. 71 P.S. The First Deputy is appointed to assist the Attorney General, and reports directly to the Attorney General. The First Deputy directly supervises the co-equal Executive Deputy Attorneys General of the three legal divisions of the office: Criminal, Public Protection, and Civil. I serve as the Executive Deputy of the Civil Division and report directly to the First Deputy.

31. In your time in the Pennsylvania Attorney General's Office you held at least four roles all including, in part, the title "Deputy Attorney General." Please explain each of these roles, your portfolio, the types of cases you supervised, and the differences between each?

Response: From 2012 to 2016, I served as a Deputy Attorney General III and my responsibilities included, representing and defending as clients a broad array of government agencies, officials, and employees in matters in state and federal courts and defending constitutional challenges to Pennsylvania statutes and regulations.

From 2016 to 2018, I served as a Senior Deputy Attorney General and my responsibilities increased. In the Office of Attorney General, this role can be compared to a partner-level position in a private law firm. As a Senior Deputy, I frequently partnered with less experienced attorneys to demonstrate effective ways to litigate complex cases. In this position, I supervised interns.

From 2018 to 2019, I served as the Chief Deputy Attorney General of the Civil Litigation Section. In this capacity, I reduced my litigation case load nearly 50% and took on the responsibilities of supervising, training, and mentoring a team of 28 litigators in four regional offices, across the Commonwealth of Pennsylvania. I led internal programs on electronic discovery, time management, ethical litigation practices, and strategies for motions practice. I provided one-on-one feedback related to written materials, trials, and oral arguments.

From 2019 to present, my practice expanded from civil litigation and supervision within the OAG's Civil Litigation Section to include oversight of cases and supervising, training, and mentoring attorneys and personnel across all sections of the OAG's Civil Law Division. The subject matters of my caseload expanded to also

include cases involving torts, tax appeals, appellate litigation, financial enforcement, contract and regulatory review, and administration of the Right–to–Know Law. Also, as the Executive Deputy Attorney General for the Civil Law Division, I have been responsible for informing, advising, and counseling the Attorney General, First Deputy, and Chief of Staff on all key Civil Law Division matters as well as advising on national matters and other cross–disciplinary matters that overlap with the OAG's Criminal and Public Protection Divisions. As the Executive Deputy, I continue to provide mentoring to chief deputies across a variety of subject matters, advising on case strategy, team morale management, and other aspects of supervisory mentoring. At this time, 5% of my practice remains litigation, and 95% of my practice involves supervisory, administrative, and operational responsibilities. I appear in court occasionally for oral argument on significant cases.

32. Starting from 2012 until today, were each of your new Deputy Attorney General positions a promotion?

Response: Yes.

a. Did your day-to-day duties change with each new title?

Response: Yes. Please see response to Question No. 31, above.

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

Questions for the Record for Keli Marie Neary nominated to serve as U.S. District Judge for the Middle District of Pennsylvania

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

Response: Yes.

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: Under Supreme Court precedent, an unenumerated right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed…." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). As a judicial nominee, it is not appropriate for me to comment on or prejudge matters that may come before the courts, including predicting whether unenumerated rights should be identified in the future. *See* Code of Conduct for United States Judges, Canon 3A. If confirmed as a district court judge, I will fully and faithfully apply the precedent of the Supreme Court and Third Circuit.

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: If confirmed as a district court judge, it is my firm resolve to approach every matter with an open mind. I will treat every litigant with respect and dignity, carefully applying the facts of the matter before me to the applicable precedent of the Supreme Court and the Third Circuit. I would not characterize myself as having a judicial philosophy analogous to any particular Supreme Court Justice.

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

Response: Originalism is defined as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (12th ed. 2024). I do not characterize myself as having any specific label. If confirmed as a district court judge, I will fully and faithfully apply the interpretive methods as directed in precedent of the Supreme Court and Third Circuit.

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

Response: According to Black's Law Dictionary, "living constitutionalism" is defined as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." (12th ed. 2024). Relatedly, I understand the phrase "living constitutionalist" to refer to an

individual who subscribes to the doctrine of living constitutionalism. I do not characterize myself as having any specific label and, if confirmed as a judge, I would not subscribe to any particular label in deciding cases. My role is to faithfully apply the precedent of the Supreme Court and Third Circuit on all matters that come before me, including any interpretive methodology established by precedent.

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: Yes.

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: Generally, the Supreme Court has instructed lower courts to look to original public meaning when interpreting provisions of the Constitution; however, in limited contexts, Supreme Court precedent holds that the public's current understanding of the Constitutional or of the statute is relevant when determining its meaning. For example, the Supreme Court has directed that courts look at "contemporary community standards" when evaluating obscenity under the First Amendment. *See*, *Ashcroft v. Am. C.L. Union,* 535 U.S. 564 (2002).

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

Response: No, the meaning of constitutional provisions does not change unless amended through the process set forth in Article V. The "Constitution . . . [is] intended to endure for ages to come . . . ." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 28 (2022) (citing *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819)). The Supreme Court has further explained that "[a]lthough its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id*.

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

Response: Yes, the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* is settled law.

a. **Was it correctly decided?**

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were

correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. Though *Dobbs* is settled law and binding precedent, there are a number of related cases currently being litigated, therefore, I cannot comment. If confirmed as a district court judge, I will fully and faithfully apply *Dobbs*.

10. Is the Supreme Court's ruling in *Cooper v. Aaron* settled law?

Response: Yes, the Supreme Court's ruling in *Cooper v. Aaron* is settled law.

a. Was it correctly decided?

Response: As a general matter, the Code of Conduct for United States Judges precludes me, a judicial nominee, from commenting on whether a Supreme Court decision was correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. Though *Cooper* is settled law and binding precedent, it is possible a related issue could come before the courts, therefore, I cannot comment. If confirmed as a district court judge, I will fully and faithfully apply *Cooper*.

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

Response: Yes, the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* is settled law.

a. Was it correctly decided?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. Though *Bruen* is settled law and binding precedent, there are related cases currently being litigated, therefore, I cannot comment. If confirmed as a district court judge, I will fully and faithfully apply *Bruen*.

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

Response: Yes, the Supreme Court's ruling in *Brown v. Board of Education* is settled law.

a. Was it correctly decided?

Response: As a general matter, the Code of Conduct for United States Judges precludes me, a judicial nominee, from commenting on whether a Supreme Court decision was correctly or incorrectly decided because it is possible that a related

issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. However, because the constitutionality of desegregation in public schools is not likely to be re-litigated, I am comfortable responding and I believe this case was correctly decided.

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

Response: Yes, the Supreme Court's ruling in *Students for Fair Admissions v. Harvard* is settled law.

a. Was it correctly decided?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. Though *Students for Fair Admissions* is settled law and binding precedent, there are a number of related cases currently being litigated, therefore, I cannot comment. If confirmed as a district court judge, I will fully and faithfully apply *Students for Fair Admissions*.

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

Response: Yes, the Supreme Court's ruling in *Gibbons v. Odgen* is settled law.

a. Was it correctly decided?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were correctly or incorrectly decided because it is possible that a related issue could come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. Though *Gibbons* is settled law and binding precedent, the application of the Commerce Clause continues to be litigated, therefore, I cannot comment. If confirmed as a district court judge, I will fully and faithfully apply *Gibbons*.

15. Is the Supreme Court's ruling in *Loper Bright Enterprises v. Raimondo* settled law?

Response: Yes, the Supreme Court's ruling in *Loper Bright Enterprises v. Raimondo* is settled law.

a. Was it correctly decided?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on whether Supreme Court decisions were correctly or incorrectly decided because it is possible that a related issue could

come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. Though *Loper Bright Enterprises* is settled law and binding precedent, there are a number of related cases currently being litigated, therefore, I cannot comment. If confirmed as a district court judge, I will fully and faithfully apply *Loper Bright Enterprises*.

16. Is it appropriate for courts to defer to an agency interpretation of a law when a statute is ambiguous?

Response: No. The Supreme Court recently held "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

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

Response: The Bail Reform Act of 1984 contains categories of criminal offenses that trigger the presumption of pretrial detention. The Act lists certain offenses that trigger the presumption of pretrial detention for defendants who have previously been convicted of certain offenses. 18 U.S.C. § 3142(e)(2) and (3). These offenses include particular crimes of violence, crimes for which the maximum term of imprisonment is 10 years or more as prescribed in the Controlled Substance Act or the Controlled Substances Import and Export Act, and crimes for which the maximum sentence is life imprisonment. *Id.* In addition, the presumption of pretrial detention is triggered where the judge finds that there is probable cause that the defendant committed certain drug offenses for which the maximum penalty is 10 years or more, certain firearm offenses, certain offenses involving minor victims, and offenses involving slavery and human trafficking. *Id.*

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

Response: I am unaware of Congress's policy rationale for the presumption. More generally, the Bail Reform Act makes clear that decisions about pretrial detention must focus chiefly on community safety and must reasonably assure that the criminal defendant appears for court as required by law. *See* 18 U.S.C. § 3142(e)(1). If confirmed as a district court judge, I will faithfully apply the statute along with the precedent from the Supreme Court and Third Circuit.

18. 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, several Supreme Court cases have explicitly addressed the limits to what government may impose—or may require—of private institutions. For example, in its holding in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023), the Supreme Court held that a government regulation violated the First Amendment when it compelled speech

that was against a business owner's beliefs. *See also*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (finding California's restrictions on private gatherings contained myriad exceptions and accommodations for secular activities comparable to religious activities in violation of the First Amendment's Free Exercise Clause); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 584 U.S. 617 (2018) (a public accommodations law compelling a cakemaker to design and make a cake for a same sex wedding celebration violated the Free Exercise Clause of the First Amendment where the cakemaker had sincerely held religious beliefs against same sex marriage); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (holding that the Religious Freedom Restoration Act of 1993 prohibited the government from placing a substantial burden on the religious exercise of religious organizations and small businesses, even if the burden results from a rule of general applicability, unless the government can show that the application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest).

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

Response: Both the First Amendment and the Religious Freedom Restoration Act forbid the government from discriminating against religious organizations or religious people unless the law or regulation satisfies strict scrutiny, meaning that it is narrowly tailored or the least restrictive means to achieve a compelling government interest. *See, e.g., Espinoza v. Montana Dep't of Rev.*, 591 U.S. 464, 477 (2020) (state law allowing for funding for education generally while prohibiting funding for religious schools violated the Free Exercise Clause).

20. Explain your understanding of the U.S. Supreme Court's holding and reasoning in *Tandon v. Newsom*.

Response: *Tandon v. Newsom* challenged California's Blueprint System, which it used as part of the state's mitigation of the COVID-19 pandemic. The Court held that California's restrictions on private gatherings triggered strict scrutiny; determined that California treated comparable secular activities more favorably than at home religious exercise, which likely violated the plaintiffs' free exercise rights; and granted the plaintiffs an emergency injunction pending an appeal on the merits.

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

Response: Yes. For example, under the Supreme Court's holding in *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022), the Free Exercise and Free Speech Clauses of the First Amendment protected a coach from discipline for praying in the middle of the field after a high school football game.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court reviewed a public accommodations law which required a cakemaker to design and make a cake that violated his sincerely held religious beliefs against same-sex marriage. The Court held that the public accommodations law that compelled the cakemaker to act in contravention of his sincerely held religious beliefs violated the Free Exercise Clause of the First Amendment.

23. Explain your understanding of the U.S. Supreme Court's holding and reasoning in *303 Creative LLC v. Elenis.*

Response: The Supreme Court, in *303 Creative LLC v. Elenis*, held that Colorado was precluded by the First Amendment from forcing a website designer to create expressive designs that conflicted with the designer's personal beliefs. 600 U.S. 570 (2023).

24. 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. In *Fulton v. City of Phila.*, the Supreme Court expressly confirmed that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." 593 U.S. 522, 532 (2021) (quoting *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981)).

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

Response: "It is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable." *Burwell v. Hobby Lobby*, 573 U.S. 682, 686 (2014). The Court's "narrow function . . . is to determine" whether the plaintiffs' asserted religious belief reflects "an honest conviction." *Id*. (citations omitted).

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

Response: "It is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable." *Burwell v. Hobby Lobby*, 573 U.S. 682, 686 (2014). The Court's "narrow function . . . is to determine" whether the plaintiffs' asserted religious belief reflects "an honest conviction." *Id*. (citations omitted).

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

Response: I do not speak for the Catholic Church. If confirmed as a district court judge, I will fully and faithfully apply precedent of the Supreme Court and Third Circuit.

25. 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 U.S. Supreme Court's holding and reasoning in the case.

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732 (2020), the Supreme Court held that two lay teachers who instructed students in religious studies and prepared students for participation in Church services were precluded from pursuing Title VII employment discrimination suits against religious schools. In reaching this holding, the Court revisited the "ministerial exception" to laws governing the employment relationship between religious institutions and certain key employees which was first addressed in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). The Court confirmed that the "ministerial exception," which is derived from the First Amendment, prevents civil courts from adjudicating employment-discrimination claims brought by an employee against her religious employer, when the employee carried out important religious functions but was not otherwise a "minister."

26. 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 your understanding of the U.S. Supreme Court's holding and reasoning in the case.

Response: *Fulton v. City of Phila.*, 593 U.S. 522 (2021), involved contracts for foster care services for children in the City of Philadelphia. The City stopped using Catholic Social Services ("CSS") to assist in arranging for foster care services because CSS would not certify same-sex couples as prospective foster families. The City claimed that CSS's practice violated the non-discrimination provision in the agency's contract with the City as well as a citywide ordinance. CSS argued that it holds the religious belief that marriage is a sacred bond between a man and a woman. CSS explained that certification of prospective foster families is an endorsement of their relationships, therefore, it would not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. The Supreme Court found that the City's refusal to contract with CSS under these circumstances could not survive strict scrutiny and violated the Free Exercise Clause of the First Amendment. Specifically, the Court reasoned that the City did not have a compelling interest in refusing to contract with CSS.

27. 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 U.S. Supreme Court's holding and reasoning in the case.

Response: *Carson v. Makin*, 596 U.S. 767 (2022), involved a tuition assistance program

in the State of Maine. The Supreme Court held that, because the program's "nonsectarian" requirement conditioned benefits solely due to a school's religious character, the program was subject to strict scrutiny, violated the Free Exercise Clause of the First Amendment, and could not be justified on the grounds it imposed a use-based, and not a status-based, restriction on state funds.

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

Response: in *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022), the Supreme Court held that the Free Exercise and Free Speech Clauses of the First Amendment protected a coach from discipline for praying in the middle of the field after a high school football game. The Court reasoned that the Constitution neither mandates nor permits the government to suppress such religious expression.

29. 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: *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), involved a county ordinance requiring most homes to have a modern septic system for the disposal of gray water (waste water from dishwashing, laundry, etc.). An Amish community sought an exception and offered an alternative for cleaning gray water. The Amish community argued that the ordinance mandate violated the federal Religious Land Use and Institutionalized Persons Act. In light of its decision in *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), the Supreme Court remanded the *Mast* case for further proceedings. In Justice Gorsuch's concurrence, he explained that strict scrutiny applies and demands a more precise analysis and courts must scrutinize the asserted harm of granting specific exemptions to particular religious claimants.

30. 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: Section 1507 makes it a crime to "picket or parade in or near a building housing a court of the United States . . . 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." Although I am not aware of any Supreme Court or Third Circuit precedent specifically addressing § 1507, in *Cox v. Louisiana*, 85 S. Ct. 476 (1965), the Supreme Court upheld a Louisiana statute, modeled after § 1507. If confirmed as a district court judge, I will fully and faithfully apply the statute, the Constitution, and precedent from the Supreme Court and Third Circuit.

31. 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.

32. 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.

33. 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.

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

Response: Article II, Section 2, of the Constitution governs political appointments. As a district court nominee, I cannot comment on an issue that may come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. If confirmed, I will fully and faithfully apply the precedent of the Supreme Court and Third Circuit.

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

Response: Several precedential cases generally confirm that a "racially disparate outcome" of a program or policy is insufficient, alone, to prove purposeful racial discrimination. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252,

264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464-65 (1979). In addition, a "racially disparate outcome" may be circumstantial evidence of such intent that can be considered together with other evidence of racial animus. *Penick,* 443 U.S. at 464-65; *Arlington Heights*, 429 U.S. at 265; *Washington*, 426 U.S. at 242; *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 563 (3d Cir. 2002).

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

Response: Whether Congress should change the number of justices on the Supreme Court is a policy question reserved to the legislature. As a judicial nominee, it is not appropriate for me to comment on the question of increasing or decreasing the number of justices. If confirmed as a district court judge, I will fully and faithfully apply the precedent of the Supreme Court and Third Circuit.

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

Response: No.

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

Response: The Supreme Court held that the original public meaning of the Second Amendment guarantees the right of an individual to keep and bear arms both inside and outside of the home for self-defense purposes. *See*, *New York Rifle & Pistol Ass'n, Inc., v. Bruen*, 597 U.S. 1 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

39. Explain your understanding of Justice Thomas's dissent in the U.S. Supreme Court's decision in *United States v. Rahimi*.

Response: In *United States v. Rahimi*, Justice Thomas wrote in dissent that, the test from *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), was clear in its requirement of a "distinctly similar" historical regulation. And, because the law at issue in *Rahimi* lacked any "distinctly similar" historical analogue, he would have held it unconstitutional.

40. 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*, *New York State Rifle & Pistol Association v. Bruen*, and *United States v. Rahimi*?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held the Second and Fourteenth Amendments protect a citizen's right to carry a handgun for self-defense and bans on the

possession of handguns inside the home were unconstitutional. In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 17 (2022), the Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" In *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024), the Supreme Court clarified that courts must search out historical principles, not historical twins.

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

Response: Yes. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010).

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

Response: No. Under its holding in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2130 (2022), the Supreme Court confirmed that the "Second Amendment standard accords with how we protect other constitutional rights."

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

Response: No. The Supreme Court held that "[t]he constitutional right to bear arms in public for self-defense is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *New York Rifle & Pistol Ass'n, Inc., v. Bruen*, 597 U.S. 1 (2022).

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

Response: As a judicial nominee, it is not appropriate for me to comment on or prejudge this question, as it may come before the courts. *See* Code of Conduct for United States Judges, Canon 3A. If confirmed as a district court judge, I will fully and faithfully apply the Constitution and precedent from the Supreme Court and Third Circuit. Under Article II § 3 of the Constitution, the President "shall take Care that the Laws be faithfully executed. . . ." U.S. Const., Art. II, § 3. And, the Supreme Court has held that, "[u]nder Article II, the Executive Branch possesses authority to decide how to prioritize and how aggressively to pursue legal actions against defendants who violate the law." *United States v. Texas*, 599 U.S. 670, 678 (2023) (quotations omitted).

45. Explain your understanding of what distinguishes an act of mere 'prosecutorial

discretion' from that of a substantive administrative rule change.

Response: Prosecutorial discretion is "[a] prosecutor's 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." Black's Law Dictionary (12th ed. 2024). And, an "administrative rule" is "[a]n officially promulgated agency regulation that has the force of law." *Id*. The former relates to an individual's subjective determination, whereas the latter requires adherence to a formal rule-making process.

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

Response: No.

47. Explain your understanding of 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. Dept. of Health and Human Services*, 594 U.S. 758 (2021), the Supreme Court vacated a nationwide eviction moratorium of imposed by the United States Centers for Disease Control and Prevention ("CDC") during the COVID-19 pandemic. The Court held that the petitioners had a substantial likelihood of success on the merits and explained that the Public Health Service Act, 42 U.S.C. § 264, did not provide the CDC with clear Congressional authority necessary for its action stating that "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Id.* at 764.

48. 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: As a judicial nominee, it is not appropriate for me to comment on or prejudge this question, as it may come before the courts. *See* Code of Conduct for United States Judges, Canon 3A.

49. Explain your understanding of the U.S. Supreme Court's holding and reasoning in *Trump v. United States*.

Response: In *Trump v. United States*, the Supreme Court reasoned that the separation of powers required by the Constitution necessitated a holding that "The President . . . may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts." 144 S. Ct. 2312, 2347 (2024).