Senator Dick Durbin
Ranking Member, Senate Judiciary Committee
Written Questions for Joshua Michael Divine
Nominee to be U.S. District Judge for the Eastern and Western Districts of Missouri
June 11, 2025

1. You previously argued that state-administered literacy tests should be a requirement for voting. Specifically, you stated that individuals who "aren't informed about issues or platforms…have no business voting."

Such tests are a racist relic of the Jim Crow era. They were routinely used to prevent immigrants and minorities from exercising their right to vote and were rightly banned by the Voting Rights Act of 1965.

You called these tests "not a bad thing."

a. Do you still believe that state-administered literacy tests should be a requirement for voting?

Response: The premise of the question and the characterization of the article are not correct. The article in question expressly condemns Jim Crow literacy tests. Jim Crow literacy tests were gerrymandered, abused, and enforced unevenly to deny Americans the right to vote. They were used particularly to target black Americans, but also were used to target people like my ancestors, Italian Americans. I have never advocated any form of Jim Crow literacy test.

The article, written when I was a teenager, was consistent with the Civil Rights Act of 1964 and the Voting Rights Act of 1965, which banned Jim Crow literacy tests but permitted devices that did not have the same history of abuse. After the Supreme Court unanimously held that literacy tests are constitutional so long as they are not applied in a discriminatory way, *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 53 (1959), the Civil Rights Act and Voting Rights Act temporarily prohibited literacy tests in States with a history of abuse, but not in other jurisdictions. "[T]he Civil Rights Act of 1964 allowed for the use of literacy tests as a qualification, so long as the test was administered to every individual and conducted in writing." Paulette Brown, *The Civil Rights Act of 1964*, 92 Wash. U. L. Rev. 527, 534 (2014); 52 U.S.C. § 10101(a)(2)(c). That Act restricted Jim Crow tests that had been administered arbitrarily and unevenly. The Voting Rights Act went further, banning the tests, but only in jurisdictions that had employed tests previously and where "less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964." 52 U.S.C. § 10303(a)–(b). The Voting Rights Act expressly permitted

literacy tests in all other jurisdictions. The article written when I was a teenager expressed ideas consistent with those landmark pieces of legislation.

It was not until years after the Civil Rights Act and Voting Rights Act that Congress passed legislation prohibiting the use of those tests nationwide, in all jurisdictions and regardless of whether the tests were in writing. 52 U.S.C. § 10501. As a teenager in college, I was aware that the Civil Rights Act and the Voting Rights Act had banned some tests while permitting others. I was not aware of the later amendments. I learned about the more recent law in law school. Tests are illegal now, and I have never advocated any form of test (including the ones that the Civil Rights Act and Voting Rights Act permitted) since that article.

In 2016, President Trump attributed one of his primary election wins, in part, to the "poorly educated." He stated, "I love the poorly educated."

b. Do you believe that the "poorly educated" supporters to whom President Trump referred should have been required to pass a literacy test in order to cast their ballots?

Response: See above.

2. You represented Missouri in its attempts to challenge access to mifepristone, one of two drugs used for medication abortions and miscarriage management. You initially filed a motion in the U.S. District Court for the Northern District of Texas to intervene in a case filed by private plaintiffs who sought a preliminary injunction ordering the Food and Drug Administration to withdraw or suspend access to mifepristone.

Last year, the Supreme Court unanimously held that the private plaintiffs lacked standing. You are now trying to revive the case to limit access to mifepristone despite decades of peer-reviewed research showing that the drug is safe.

In your amended complaint, you cited a study suggesting that access to abortion medication is "depressing expected birth rates for teenaged mothers in Plaintiff States" and claimed that Missouri would be injured because a loss of potential population would lead to "diminishment of political representation" and "loss of federal funds."

a. Do you believe it is bad that teenage pregnancy rates are declining in your state?

Response: The question mischaracterizes the legal filing, which discusses an increase in the abortion rate, not the pregnancy rate. The State has not taken the position that the question suggests. The goal of the lawsuit filed by the State of Missouri is to reinstate safety precautions that the FDA had for decades deemed necessary until President Biden's administration rescinded them. Regardless of differences people have over the abortion issue, everybody should want the risks

to women to be as minimal as possible. The lawsuit thus seeks to reinstate longstanding safety precautions.

b. Do you believe that teenagers should be forced to give birth to benefit Missouri's coffers and its representation in Congress?

Response: See above.

3. You previously referred to yourself as a "zealot" for the anti-choice movement and wrote that "because we know a genetically unique human comes into existence at fertilization, abortion should not be ethically permitted."

Last November, Missouri voters passed a ballot initiative that amended the state's constitution to legalize abortion until fetal viability.

Do you believe this ballot initiative was unethical?

Response: In November 2024, Missouri voters enacted the ballot initiative in question, with 51% voting in favor. As you stated in the March 26, 2025, committee hearing, government attorneys have a "zealous" duty to advocate the government's positions. And as a government attorney, I have exercised my duty. Before the amendment was even certified, I filed a brief in court acknowledging that passage of the amendment would mean that Missouri's statutory prohibition on abortion no longer could be enforced. The brief also said that the State would defend other statutes and regulations, such as the requirement that abortion facilities sterilize instruments and stabilize women's vital signs before discharging women to drive home. To the extent the question asks for political or policy views, the judicial code of conduct prohibits any judicial nominee from providing political or policy views.

4. In 2024, you posted on social media that you were "the staffer who put pen to paper on initial text" for Senator Hawley's *No TikTok on Government Devices Act*. You also referred to the Supreme Court's unanimous opinion upholding the law mandating that Chinese technology company ByteDance divest from TikTok as a "huge decision."

a. Do you still support the removal of TikTok from federal government devices?

Response: The No TikTok on Government Devices Act was passed by Congress in 2022. While I publicly expressed views on this topic as recently as last year, the judicial code of conduct prohibits any judicial nominee from providing political or policy views today.

b. Do you still support requiring ByteDance to divest from TikTok?

Response: See above.

c. Does TikTok represent a privacy or security threat to Americans from the Chinese Communist Party?

Response: See above.

5. In 2011, you wrote that moral opposition to homosexuality "simply means those persons are opposed to any form of sex that goes against the biological design of procreation and the nurturing of a family. This includes homosexuality, adultery, bestiality, fornication, polygamy, and all other forms of sex that do not take place in a monogamous-marriage setting."

a. Do you believe that sexual relations between two consenting adults of the same sex are comparable to bestiality?

Response: The question mischaracterizes the article, which argued that those things are *not* the same, the opposite of what the question suggests. The article was written in response to commentary on campus that sharply criticized Muslims, Catholics, and Mormons and asserted that members of those faiths equated those things and thus were bigoted. The article argued that it is wrong to assume people of faith are bigoted simply because one does not understand their theology. The Supreme Court in the *Obergefell* decision agreed, saying that opposition to same-sex marriage "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world."

b. If confirmed, will you commit to upholding the Supreme Court's recognition of the Constitutional right to same-sex marriage in *Obergefell v. Hodges*?

Response: If confirmed, I commit to following all binding precedent of the Supreme Court, including the *Obergefell* decision, as well as all binding precedent of the Eighth Circuit.

6. In July 2016, you argued in favor of Supreme Court expansion following the death of Justice Antonin Scalia. Specifically, you stated that the Supreme Court "need not consist of nine members or even an *odd* number of members" and suggested that Congress creating a Court with an even number of justices would "create a more legitimate and less politicized institution."

a. Do you still support Supreme Court expansion?

Response: The question does not capture the thesis of the article, which expressed openness to the idea of a Supreme Court with an even number of justices, including an even number fewer than 9 (such as 6 or 8). The judicial code of conduct prohibits any judicial nominee from providing political or policy views.

b. Do you still believe that an even number of Supreme Court justices would allow the Court to be perceived as "more legitimate and less politicized?"

Response: See above.

7. In your Senate Judiciary Questionnaire, you noted that you "supervised discovery" while representing the state in *Blackmon v. Missouri*.

a. Did your office respond to all discovery requests made by the plaintiffs in this case?

Response: As is common in litigation, the State moved for a protective order so that the State would not have to provide discovery that the State believed to be wasteful and disproportionate to the needs of the case. The State asked for that order relieving the obligation to provide discovery because the State felt it was unnecessary and inefficient to spend taxpayer resources on discovery given the State's pending dispositive motion for judgment on the pleadings, which would resolve the entire case on purely legal issues. The court partly agreed and partly disagreed. It agreed that the State did not have to provide some of the discovery requested, but it ordered the State to provide other discovery requested, which the State did. Ultimately, the court ended up granting judgment on the pleadings for the State, proving in the end that the State was right that spending resources on discovery in the meantime was wasteful.

b. Did the Missouri circuit court ultimately order you to produce discovery materials requested by the plaintiffs in this case after they filed a motion to compel?

Response: See above.

8. According to your Senate Judiciary Questionnaire, you have participated in numerous panels and conferences held out of state since becoming Missouri Solicitor General. For example, since January 2023, you apparently have participated in Federalist Society events in Connecticut, Indiana, Alabama, Colorado, Illinois, Kentucky, Ohio, and California; a Separation of Powers Institute event in the District of Columbia; and a Heritage Foundation Event in the District of Columbia.

a. Was any of the out-of-state travel for events listed on your Senate Judiciary Questionnaire done at state taxpayer expense?

Response: No. Travel for each event was paid for through personal funds or by the organization that extended the invitation.

b. If yes, what was the justification for Missouri taxpayers funding your out-of-state travel?

Response: See above.

c. **If yes, did you receive any form of pre-travel authorization or file any post-travel expense reports? Did you comply with all relevant state laws addressing travel by public officials at state taxpayer expense?**

Response: See above.

9. **Did President Trump lose the 2020 election?**

Response: President Biden was certified as the victor and served as the 46th President of the United States.

10. **Where were you on January 6, 2021?**

Response: I served as a law clerk in the Supreme Court during the OT2020 term. I was in the Supreme Court building working that day.

11. **Do you denounce the January 6 insurrection?**

Response: As I am not a politician and was rarely using social media at the time, I have never expressed a public position on the events of January 6. The Supreme Court in *Trump v. Anderson* heard arguments about whether an insurrection occurred that day and ultimately concluded that States could not forcibly remove President Trump from the ballot. To the extent the question asks for personal political views, the judicial code of conduct prohibits any judicial nominee from providing political or policy views.

12. **Do you believe that January 6 rioters who were convicted of violent assaults on police officers should have been given full and unconditional pardons?**

Response: The Supreme Court has been clear in *United States v. Klein* and other cases that the pardon power is one of the President's most plenary powers. The decision whether to extend a pardon belongs to the President in his discretion. To the extent the question asks for personal political or policy views, the judicial code of conduct prohibits any judicial nominee from providing political or policy views.

13. The Justice Department is currently defending the Trump Administration in a number of lawsuits challenging executive actions taken by the Administration. Federal judges—both Republican and Democratic appointees—have enjoined some of these actions, holding that they are illegal or unconstitutional. Alarmingly, President Trump, his allies, and even some nominees before the Senate Judiciary Committee have responded by questioning whether the executive branch must follow court orders.

a. What options do litigants—including the executive branch—have if they disagree with a court order?

Response: Litigants have many options, including criticizing the order and appealing it. In some circumstances, defying a court order is necessary to appeal it, as Justice Sotomayor's majority opinion in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), recognizes.

b. Do you believe a litigant can ever lawfully defy an order from a lower federal court? If yes, in what circumstances?

Response: Treatises and cases have identified a number of circumstances where compliance with a court order is not required, such as if the court lacked jurisdiction or if compliance was impossible. *E.g.*, 17 Corpus Juris Secundum Contempt §§ 56–65. The Supreme Court has identified additional circumstances, such as where an order must be violated to be appealed. As Justice Sotomayor's opinion for the Court put it, "Another long-recognized option is for a party to defy a disclosure order and incur court-imposed sanctions." *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 111 (2009). "Such sanctions allow a party to obtain postjudgment review without having to reveal its privileged information. Alternatively, when the circumstances warrant it, a district court may hold a noncomplying party in contempt. The party can then appeal directly from that ruling, at least when the contempt citation can be characterized as a criminal punishment." *Id.*

c. Under the separation of powers, which branch of the federal government is responsible for determining whether a federal court order is lawful?

Response: Each government official in each branch takes an oath to uphold the Constitution and the laws of the United States. There is a history of executive officials who believe a court order is unlawful to refuse to extend that court order to other potential litigants. President Lincoln took that position with respect to the *Dred Scott* case. The judiciary has authority to adjudicate cases and controversies between different parties.

14. District judges have occasionally issued non-party injunctions, which may include "nationwide injunctions" and "universal injunctions."

a. Are non-party injunctions constitutional?

Response: The Supreme Court is actively considering this issue and is expected to issue a ruling this month. If I am confirmed to be a lower court judge, I will follow the Supreme Court's ruling.

b. Are non-party injunctions a legitimate exercise of judicial power?

Response: See above.

c. Is it ever appropriate for a district judge to issue a non-party injunction? If so, under what circumstances is it appropriate?

Response: See above.

d. As a litigator, have you ever sought a non-party injunction as a form of relief? If so, please list each matter in which you have sought such relief.

Response: In many cases, my client has sought vacatur under the Administrative Procedure Act. That is typically considered different than a non-party injunction issued purportedly under a court's equitable authority. I cannot recall a case where the client specifically requested a non-party injunction rather than just generically injunctive relief. There have been cases where there was a dispute between the parties about what relief was obtained. In *Missouri v. Biden*, 24A173, for example, the Federal Government took the position that the States had been granted a nationwide injunction. The States disagreed, pointing to language in the Eighth Circuit stating that the court had tailored injunctive relief to provide the States full relief. The Supreme Court ultimately (and unanimously) sided with the States over the Federal Government.

15. At any point during your selection process, did you have any discussions with anyone—including individuals at the White House, the Justice Department, or any outside groups—about loyalty to President Trump? If so, please provide details.

Response: No.

16. Does the U.S. Constitution permit a president to serve three terms?

Response: Section 1 of the Twenty-Second Amendment states, in part, "No person shall be elected to the office of the President more than twice…." I have not reviewed any case law or other authorities addressing or interpreting this Amendment, nor formed an opinion on how it might apply to any particular facts. To the extent the question asks about political disputes, it would be improper for a judicial nominee to promise or forecast how he or she would rule in a case that might come before him or her.

17. When, if ever, may a lower court depart from Supreme Court precedent?

Response: Controlling Supreme Court precedent is binding in all cases. Lower courts should not depart from controlling Supreme Court precedent.

18. When, in your opinion, would it be appropriate for a circuit court to overturn its own precedent?

Response: As a district court nominee, I will not be called upon to overturn circuit court precedent. Circuit courts should follow the standards set in case law for determining whether to overturn their own precedent.

19. When, in your opinion, would it be appropriate for the Supreme Court to overrule its own precedent?

Response: As a district court nominee, I will not be called upon to overturn Supreme Court precedent. The Supreme Court should follow the standards set in case law for determining whether to overturn its own precedent.

20. Please answer yes or no as to whether the following cases were correctly decided by the Supreme Court:

a. ***Brown v. Board of Education***

Response: As dozens of nominees have said before, it is almost always improper for judicial nominees to give a thumbs-up or thumbs-down to Supreme Court precedent. To my knowledge, the only two exceptions to this general rule against opining on the merits of Supreme Court cases are *Brown* and *Loving*. I agree that both those decisions were correctly decided.

b. ***Plyler v. Doe***

Response: See above.

c. ***Loving v. Virginia***

Response: See above.

d. ***Griswold v. Connecticut***

Response: See above.

e. ***Trump v. United States***

Response: See above.

f. ***Dobbs v. Jackson Women's Health Organization***

Response: See above.

g. ***New York State Rifle & Pistol Association, Inc. v. Bruen***

Response: See above.

h. ***Obergefell v. Hodges***

Response: See above.

i. ***Bostock v. Clayton County***

Response: See above.

j. ***Masterpiece Cakeshop v. Colorado***

Response: See above.

k. ***303 Creative LLC v. Elenis***

Response: See above.

l. ***United States v. Rahimi***

Response: See above.

m. ***Loper Bright Enterprises v. Raimondo***

Response: See above.

21. With respect to constitutional interpretation, do you believe judges should rely on the "original meaning" of the Constitution?

RESPONSE: When Congress passes a statute or the people enact a constitutional amendment, that law's meaning does not change until amended with new text. Judges regularly apply a law's meaning to new circumstances, such as applying the First Amendment's protection of free speech to the internet. It would be inappropriate for judges to "update" laws out of dissatisfaction that the people or Congress have chosen not to do so.

22. How do you decide when the Constitution's "original meaning" should be controlling?

Response: See above.

23. Does the "original meaning" of the Constitution support a constitutional right to same-sex marriage?

Response: The *Obergefell* decision holds that the Constitution includes that right. As stated above, it is almost always improper for judicial nominees to give a thumbs-up or thumbs-down to Supreme Court precedent.

24. Does the "original meaning" of the Constitution support the constitutional right to marry persons of a different race?

Response: Yes. The *Loving* decision holds that the Constitution includes that right. As stated above, that is one of the two decisions where it is appropriate for nominees to state whether a case was correctly decided. *Loving* is consistent with, and compelled by, the original meaning of the Constitution.

25. What is your understanding of the Equal Protection and Due Process clauses of the Fourteenth Amendment?

Response: The relevant text states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." There are tens of thousands of cases applying these provisions in different contexts. Generally speaking, the Equal Protection Clause requires strict or intermediate scrutiny if a State tries to classify based on a protected characteristic or quasi-protected characteristic. The Due Process Clause has been interpreted to require basic procedural protections and has also been interpreted to include a substantive component that prevents States from passing certain kinds of legislation at all.

26. How do these clauses apply to individuals that the Framers of the amendment likely did not have in mind, such as women? Or LGBTQ+ individuals?

Response: The Supreme Court has decided many cases brought by plaintiffs in those demographic groups, including the *Virginia Military Institute* case and *Obergefell*. The Supreme Court has interpreted those clauses to protect those groups. As always, if the people are dissatisfied with the Constitution, they can exercise their right to amend it.

27. Do you believe that judges should be "originalist" and adhere to the original public meaning of constitutional provisions when applying those provisions today?

Response: Judges should apply the text as written by Congress or the people. It is improper for judges—rather than Congress or the people—to ever "update" or "amend" the laws.

28. If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause today?

Response: Judges should apply the text as written by Congress or the people. That includes all provisions in the Constitution. It is improper for judges—rather than Congress or the people—to ever "update" or "amend" the laws.

29. Under the U.S. Constitution, who is entitled to First Amendment protections?

Response: The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Supreme Court has on occasion determined that the First Amendment applies differently to different persons. For example, free-speech protections have been applied differently with respect to children. *E.g.*, *Ginsberg v. New York*, 390 U.S. 629 (1968).

30. 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: Generally speaking, a law regulating speech is content-based if it regulates a particular kind of speech based on substance (like political speech). The Supreme Court has instructed lower courts to look at whether the law "draws distinctions based on the message a speaker conveys" such as distinguishing based on "particular subject matter" or by "function or purpose." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

31. What is the standard for determining whether a statement is protected speech under the true threats doctrine?

Response: In *Counterman v. Colorado*, the Supreme Court explained that under the true-threats doctrine, the First Amendment does not protect "serious expressions conveying that a speaker means to commit an act of unlawful violence." 600 U.S. 66, 74 (2023) (brackets adopted, quotation marks omitted).

32. Is every individual within the United States entitled to due process?

Response: The Fifth Amendment provides, in relevant part, "No person shall … be deprived of life, liberty, or property, without due process of law." The question in most cases is less about whether the doctrine of due process applies and more about how much process is due.

33. Can U.S. citizens be transported to other countries for the purpose of being detained, incarcerated, or otherwise penalized?

Response: This question is being actively litigated. Under the canons of judicial conduct, it would be improper for a judicial nominee to promise or forecast how he or she would rule in a case that might come before him or her.

34. The Fourteenth Amendment states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

a. Is every person born in the United States a citizen under the Fourteenth Amendment?

Response: The text of the 14th Amendment excludes from citizenship persons not "subject to the jurisdiction" of the United States. For example, the Indian Citizenship Act of 1924 was enacted based on the understanding that individuals born into Indian tribes are not entitled to birthright citizenship under the Constitution, so Congress granted citizenship by statute.

b. Is the citizenship or immigration status of the parents of an individual born in the United States relevant for determining whether the individual is a citizen under the Fourteenth Amendment?

Response: This question is being actively litigated. Under the canons of judicial conduct, it would be improper for a judicial nominee to promise or forecast how he or she would rule in a case that might come before him or her.

35. Do you believe that demographic and professional diversity on the federal bench is important? Please explain your views.

Response: Judges ought to be open-minded, and it is paramount that judges consider and be exposed to a wide variety of perspectives. Nobody should ever be excluded from the opportunity to serve as a judge based on race, ethnicity, sex, religion, or any other protected characteristic.

36. The bipartisan *First Step Act of 2018*, which was signed into law by President Trump, is one of the most important pieces of criminal justice legislation to be enacted during my time in Congress. At its core, the Act was based on a few key, evidence-based principles. First, incarcerated people can and should have meaningful access to rehabilitative programming and support in order to reduce recidivism and help our communities prosper. Second, overincarceration through the use of draconian mandatory minimum sentences does not serve the purposes of sentencing and ultimately causes greater, unnecessary harm to our communities. With these rehabilitative principles in mind, one thing Congress sought to achieve through this Act was giving greater discretion to judges—both before and after sentencing—to ensure that the criminal justice system effectively and efficiently fosters public safety for the benefit of all Americans.

a. How do you view the role of federal judges in implementing the *First Step Act*?

Response: Judges are bound to follow Congress's directives in sentencing convicted defendants. That includes the First Step Act, as well as the 18 U.S.C. § 3553 factors and the Sentencing Guidelines. Section 3553(a) instructs judges to consider the need for the sentence to, among other things, "reflect the seriousness of the offense," "afford adequate deterrence," "protect the public," and provide the defendant with "correctional treatment." The First Step Act takes particular positions on these factors, and district court judges are obliged to follow those directives.

b. Will you commit to fully and fairly considering the individualized circumstances of each defendant who comes before you when imposing sentences to ensure that they are properly tailored to promote the goals of sentencing and avoid terms of imprisonment in excess of what is necessary?

Response: Yes.

37. The Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law."

a. In your Questionnaire, you state that you are currently or were previously a member of the Federalist Society. What is your understanding of "traditional values"?

Response: I am not familiar with the quoted material. I have never participated in drafting any position statement of that organization. There are tens of thousands of members of that organization.

b. President Trump wrote on Truth Social that the Federalist Society gave him "bad advice" on "numerous Judicial Nominations." He also wrote that Leonard Leo is a "sleazebag" who "probably hates America." If you are not familiar with this post, please refer to it in the footnote.[1]

i. Do you agree with President Trump that the Federalist Society provided President Trump with bad advice during his first term? Why or why not?

Response: I am not aware of what advice has or has not been proffered to the White House. To the extent the question asks to wade into political disputes, it would be inappropriate for a judicial nominee to do so.

ii. Do you agree with President Trump that Leo is a sleazebag who probably hates America? Why or why not?

[1] Donald J. Trump (@realDonaldTrump), Truth Social (May 29, 2025, 8:10 PM), https://truthsocial.com/@realDonaldTrump/posts/114593880455063168.

Response: I am not familiar with the topic this asks about, and it would be inappropriate for a judicial nominee to wade into political disputes.

iii. **If you are confirmed, do you plan to remain affiliated with the Federalist Society?**

Response: If confirmed, I will consult the canons of judicial ethics to determine generally what membership may or may not be appropriate and will make decisions in accordance with that guidance.

c. **During your selection process, have you spoken to or corresponded with any individuals associated with the Federalist Society, including Leonard Leo or Steven G. Calabresi? If so, please provide details of those discussions.**

Response: I have not spoken to Leonard Leo or Steven Calabresi. The organization has tens of thousands of members, some of whom are friends who reached out to express their congratulations on my nomination.

d. **Have you ever been asked to and/or provided services to the Federalist Society, including research, analysis, advice, speeches, or appearing at events?**

Response: I have been invited to speak to students at law schools or, on occasion, to groups of practicing lawyers.

e. **Have you ever been paid honoraria by the Federalist Society? If so, how much were you paid, and for what services?**

Response: To the best of my recollection, I have not been paid any honoraria.

38. The Teneo Network states that its purpose is to "Recruit, Connect, and Deploy talented conservatives who lead opinion and shape the industries that shape society."

a. **During your selection process, have you spoken to or corresponded with any individuals associated with the Teneo Network, including Leonard Leo? If so, please provide details of those discussions.**

Response: I have not spoken to Leonard Leo. I do not know who is a member of that organization. Nobody has reached out to me on behalf of that organization in connection with the selection process.

b. **Have you ever been asked to and/or provided services to the Teneo Network, including research, analysis, advice, speeches, or appearing at events?**

Response: No.

c. Have you ever been paid honoraria by the Teneo Network? If so, how much were you paid, and for what services?

Response: No.

39. The Heritage Foundation states that its mission is to "formulate and promote public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense." Heritage Action, which is affiliated with the Heritage Foundation, seeks to "fight for conservative policies in Washington, D.C. and in state capitals across the country."

a. During your selection process, have you spoken to or corresponded with any individuals associated with the Heritage Foundation or Heritage Action, including Kevin D. Roberts? If so, please provide details of those discussions.

Response: I have not spoken with Kevin Roberts. Nobody has reached out to me on behalf of that organization in connection with the selection process. I am aware of at least one person, who used to be a coworker and is now affiliated with that organization, who reached out to express his congratulations on my nomination.

b. Have you ever been asked to and/or provided services to the Heritage Foundation or Heritage Action, including research, analysis, advice, speeches, or appearing at events?

Response: As disclosed on the Questionnaire, I spoke at an event in 2024.

c. Were you ever involved in or asked to contribute to Project 2025 in any way?

Response: No.

d. Have you ever been paid honoraria by the Heritage Foundation or Heritage Action? If so, how much were you paid, and for what services?

Response: I do not believe I ever received any honoraria.

40. The America First Policy Institute (AFPI) states that its "guiding principles are liberty, free enterprise, national greatness, American military superiority, foreign-policy engagement in the American interest, and the primacy of American workers, families, and communities in all we do."

a. During your selection process, have you spoken to or corresponded with any individuals associated with AFPI? If so, please provide details of those discussions.

Response: I am not familiar with the members of that organization, but to my knowledge, no.

b. Have you ever been asked to and/or provided services to AFPI, including research, analysis, advice, speeches, or appearing at events?

Response: During my time in the Senate, outside organizations would routinely reach out to share or discuss ideas, particularly around tech policy. I spoke with individuals from dozens or hundreds of organizations during those years. It is possible that this organization was among them.

c. Have you ever been paid honoraria by AFPI? If so, how much were you paid, and for what services?

Response: No.

41. The America First Legal Institute (AFLI) states that it seeks to "oppose the radical left's anti-jobs, anti-freedom, anti-faith, anti-borders, anti-police, and anti-American crusade."

a. During your selection process, have you spoken to or corresponded with any individuals associated with AFLI, including Stephen Miller, Gene Hamilton, or Daniel Epstein? If so, please provide details of those discussions.

Response: I am not familiar with the members of that organization, but to my knowledge, no.

b. Have you ever been asked to and/or provided services to AFLI, including but not limited to research, analysis, advice, speeches, or appearing at events?

Response: AFLI has been cocounsel in some multistate cases that Missouri joined. Other than that, no.

c. Have you ever been paid honoraria by AFLI? If so, how much were you paid, and for what services?

Response: No.

42. The Article III Project is an organization which claims that, "The left is weaponizing the power of the judiciary against ordinary citizens."

a. During your selection process, have you spoken to or corresponded with any individuals associated with the Article III Project, including Mike Davis, Will Chamberlain, or Josh Hammer? If so, please provide details of those discussions.

Response: I am not familiar with the members of that organization, but to my knowledge, no.

b. Have you ever been asked to and/or provided services to the Article III Project, including research, analysis, advice, speeches, or appearing at events?

Response: No.

c. Have you ever been paid honoraria by the Article III Project? If so, how much were you paid, and for what services?

Response: No.

43. The Alliance Defending Freedom (ADF) states that it is "the world's largest legal organization committed to protecting religious freedom, free speech, the sanctity of life, marriage and family, and parental rights."

a. During your selection process, have you spoken to or corresponded with any individuals associated with ADF? If so, please provide details of those discussions.

Response: I am in regular discussion with members of that organization because that organization represents co-plaintiffs in a number of cases the State has brought. In addition, a number of individuals at that organization are friends or former coworkers who reached out to express their congratulations on my nomination.

b. Have you ever been asked to and/or provided services to ADF, including research, analysis, advice, speeches, or appearing at events?

Response: The State of Missouri has brought several cases joined by private plaintiffs represented by that organization. As part of that process, the State regularly shares work product and draft legal filings with that organization. I have also attended the occasional conference hosted by the organization.

c. Have you ever been paid honoraria by ADF? If so, how much were you paid, and for what services?

Response: Sometime before 2020, I coached law students who participated in a fellowship with the organization to prepare them for job interviews. I believe I was paid a few hundred dollars for a day's work.

44. The Concord Fund, also known as the Judicial Crisis Network, states that it is committed "to the Constitution and the Founders' vision of a nation of limited government;

dedicated to the rule of law; with a fair and impartial judiciary." It is affiliated with the 85 Fund, also known as the Honest Elections Project and the Judicial Education Project.

a. **During your selection process, have you spoken to or corresponded with any individuals associated with these organizations, including Leonard Leo or Carrie Severino? If so, please provide details of those discussions.**

   Response: I am not familiar with the members of that organization, but to my knowledge, no—with one exception. The only exception is that Carrie (whom I know because both of us clerked for Justice Thomas) sent me a brief message of congratulations. That is the full extent of the conversation I have had.

b. **Have you ever been asked to and/or provided services to these organizations, including research, analysis, advice, speeches, or appearing at events?**

   Response: No.

c. **Have you ever been paid honoraria by these organizations? If so, how much were you paid, and for what services?**

   Response: No.

d. **Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Concord Fund or 85 Fund in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.**

   Response: I am unaware of the allegations suggested by this question and unfamiliar with the organization described and so have not had the occasion to form an opinion. I am aware of allegations of outside donations to organizations dedicated to opposing my nomination. To the extent the question asks to wade into political disputes, it would be inappropriate for a judicial nominee to do so.

e. **If you learn of any such donations, will you commit to call for the undisclosed donors to make their donations public so that if you are confirmed you can have this information when you make decisions about recusal in cases that these donors may have an interest in?**

   Response: I am unaware of the allegations suggested by this question and unfamiliar with the organization described and so have not had the occasion to form an opinion. I am aware of allegations of outside donations to organizations dedicated to opposing my nomination. To the extent the question asks to wade into political disputes, it would be inappropriate for a judicial nominee to do so.

f. Will you condemn any attempt to make undisclosed donations to the Concord Fund or 85 Fund on behalf of your nomination?

Response: I am unaware of the allegations suggested by this question and unfamiliar with the organization described and so have not had the occasion to form an opinion. I am aware of allegations of outside donations to organizations dedicated to opposing my nomination. To the extent the question asks to wade into political disputes, it would be inappropriate for a judicial nominee to do so.

Senator Mike Lee
Questions for the Record
Joshua M. Divine, to be United States District Judge for the Eastern and Western Districts of Missouri

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

   Response: When Congress passes a statute or the people enact a constitutional amendment, that law's meaning does not change until amended with new text. Judges regularly apply a law's meaning to new circumstances, such as applying the First Amendment's protection of free speech to the internet. But that does not mean the meaning of the terms have changed, only that the laws are being applied to a new context. It would be inappropriate for judges to "update" laws out of dissatisfaction that the people or Congress have chosen not to do so.

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

   Response: As the Sixth Circuit has explained, "the Supreme Court recognizes only three" suspect classes: race, alienage, and national origin. *Ondo v. City of Cleveland*, 795 F.3d 597, 608 (6th Cir. 2015). The Supreme Court has recognized two quasi-suspect classes: gender and illegitimacy. *Id.* "The Supreme Court has not recognized any new constitutionally protected classes in over four decades, and instead has repeatedly declined to do so." *Id.* Some circuits have recognized new suspect classes that the Supreme Court has not recognized. As a district court judge, I would be bound by the classes recognized by the Supreme Court as well as any classes recognized by the Eighth Circuit.

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

   Response: M.C. Vile in his book *Constitutionalism and the Separation of Powers* traces the history of the development of separation of powers. In effect, the separation of powers operates as a brake to avoid centralization because of a concern that centralization of power will lead to greater abuse of power. Checks and balances is a related concept, referring to the ability of one branch to provide a "check" against other branches through the separation of powers. For example, the President has the power to veto bills, which is in effect a legislative power of the President that places a check on Congress.

4. **How would you evaluate a case in which one branch assumed an authority not granted it by the text of the Constitution?**

   Response: Unlike state legislatures, Congress is a body of enumerated powers, meaning there must be a specific grant of authority to justify legislation. The

President generally has powers given to him or her by Congress through legislation, but there are some cases recognizing some inherent authorities within the "executive power." Similarly, some cases discuss "inherent" authority within the "judicial power," such as authority to correct or amend defects in records or enter sanctions.

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

Response: Judicial review is the ability of courts to assess the law and adjudicate cases or controversies by applying existing law to the fact pattern of the parties before a court. Judicial supremacy occurs when a court goes beyond the law and in effect tries to amend the law by issuing an opinion that is not grounded in the text of the Constitution or the statute.

Nomination of Joshua Michael Divine
Nominee to the U.S. District Court for the Eastern and Western Districts of Missouri
Questions for the Record
Submitted June 11, 2025

QUESTIONS FROM SENATOR WHITEHOUSE

1. You said in your questionnaire that President Trump called you to tell you that you would be nominated.

   a. What else did he discuss on the phone call?

   Response: He congratulated me on the nomination.

   b. Did he ask you to make any commitments?

   Response: No.

2. **In *Missouri v. New York*, you filed a bill of complaint asking the Supreme Court to lift New York's gag order on then-candidate Donald Trump and delay Trump's sentencing for felony convictions in his hush money criminal case. Why did you file this bill of complaint?**

   Response: As Ranking Member Durbin has said many times, government attorneys have a duty to zealously advocate for their clients. The State of Missouri, through the Missouri Attorney General, decided to file the suit. The State and the Attorney General are my clients. The Attorney General instructed me to file the suit, and I complied with the legal and ethical duty to do so.

3. **In a February 2025 post on X, you disputed Politico's characterization of the unitary executive theory as "fringe," saying, "[H]ere's what SCOTUS said just a few years ago: 'the executive Power—all of it—is vested in a President.'" Do you agree with the unitary executive theory?**

   Response: I agree that the Supreme Court held in *Seila Law* that "the executive Power—all of it—is vested in a President." That is my understanding of what people typically refer to when they refer to that theory.

4. **In 2010, you wrote that people who "aren't informed about issues or platforms . . . have no business voting." Do you believe there should be any kind of test to vote?**

   Response: No. The article in question, which was written when I was a teenager, expressly condemns Jim Crow literacy tests. Jim Crow literacy tests were gerrymandered, abused, and enforced unevenly to deny Americans the right to vote. The Civil Rights Act of 1964 and Voting Rights Act of 1965 initially permitted some tests (while prohibiting others). For example, the landmark Civil Rights Act permitted tests that were written and administered to

all persons. And the Voting Rights Act permitted tests except in certain jurisdictions that had low turnout in elections. Years after those landmark pieces of litigation, in a bill much less well known, Congress passed a law banning tests nationwide. 52 U.S.C. § 10501. I learned about that legislation years after the 2010 article.

5. You said in your questionnaire that you have been a member of the Federalist Society since 2013. Recently, President Trump said he was "so disappointed" with the Federalist Society's "bad advice" on nominees, calling Leonard Leo a "sleazebag" and a "bad person who, in his own way, probably hates America."

    a. Do you agree with President Trump that Leonard Leo is a "sleazebag"? Why or why not?

    Response: I am not familiar with the topic this asks about, and it would be inappropriate for a judicial nominee to wade into political disputes.

    b. Do you agree with President Trump that Leonard Leo is a "bad person who, in his own way, probably hates America"? Why or why not?

    Response: I am not familiar with the topic this asks about, and it would be inappropriate for a judicial nominee to wade into political disputes.

1. Have you had any conversations with members of the Trump administration concerning your personal views on any policy or case law? If so, please describe those conversations with specificity.

Response: No.

2. Do you believe it is appropriate to impeach judges solely for ruling against the executive branch?

Response: Under the First Amendment, all individuals have the right to criticize judges. As the Supreme Court held in *Nixon v. United States*, 506 U.S. 224 (1993), questions of impeachment and removal fall within the exclusive prerogative of the House and the Senate. To the extent the question asks to wade into political disputes, it would be inappropriate for a judicial nominee to do so.

3. Please explain your understanding of existing case law regarding:

    a. The executive branch's obligation to comply with federal court orders.

    Response: Treatises and cases have identified circumstances where a party can raise a defense to compliance with a court, such as if the court lacked jurisdiction or if compliance was impossible. *E.g.*, 17 Corpus Juris Secundum Contempt §§ 56–65. In some circumstances, defying a court order is necessary to appeal it, as Justice

Sotomayor's majority opinion in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 111 (2009), recognizes.

b. Remedies available to a federal court to ensure executive branch compliance with a court order.

Response: Courts have a variety of methods to ensure compliance by any litigant with court orders. A common one is discovery sanctions. Courts sometimes draw adverse inferences from discovery failures or require one party to cover the costs of others. In more extreme cases, courts can dismiss a case or engage in contempt proceedings.

c. Federal government lawyers' duty of candor to federal courts before which those lawyers appear.

Response: Any lawyer representing any party has a duty of candor to the courts.

d. The president's legal obligations under the Constitution's Take Care Clause.

Response: The Constitution provides that the President "shall take Care that the Laws be faithfully executed." The Supreme Court has often discussed this clause in the context of the appointment and removal power.

e. The limits of the executive branch's power under the anti-commandeering doctrine.

Response: The Supreme Court in *Printz*, *Murphy*, and other cases has interpreted the Tenth Amendment to permit the States to decline to lend resources to the Federal Government and to forbid Congress from "commandeer[ing] the legislative process of the States."

f. The president's ability or inability to impound congressionally appropriated funds.

Response: Congress passed the Impoundment Control Act in 1974. I have not reviewed any case law or other authorities addressing or interpreting this statute, nor formed an opinion on how it might apply it to any particular facts.

g. The federal government's ability to enact laws or regulations that burden Second Amendment rights.

Response: The Supreme Court has determined in *Heller*, *McDonald*, *Bruen*, and *Rahimi* that the right to bear arms is a "fundamental right" that extends "to all instruments that constitute bearable arms." The Federal Government may enact laws so long as they are "consistent with the Nation's historical tradition of firearm regulation."

h. The federal government's ability to enact generally applicable laws that are not motivated by animus but nonetheless burden religious practices.

Response: In *Employment Division v. Smith*, the Supreme Court concluded that as a constitutional matter, government may enact neutral, generally applicable laws even if they burden religious practice. That decision proved controversial, and Congress passed the Religious Freedom Restoration Act in response, subjecting those laws to strict scrutiny. Under the *Lukumi* and *Tandon* decisions, a government regulation is not neutral or generally applicable if, though facially nondiscriminatory, it is gerrymandered to target a religion, as in *Lukumi*, or if it "treat[s] *any* comparable secular activity more favorably than religious exercise," as in *Tandon* (emphasis in original).

4. As a practicing attorney, have you ever sought a nationwide injunction or similar relief in federal court, or, as a judge, have you ever issued a nationwide injunction or similar relief? If yes, please list and describe each case.

Response: In many cases, my client has sought vacatur under the Administrative Procedure Act. That is typically considered different than a non-party injunction issued purportedly under a court's equitable authority. I cannot recall a case where the client specifically requested a non-party injunction rather than just generically injunctive relief. There have been cases where there was a dispute between the parties about what relief was obtained. In *Missouri v. Biden*, 24A173, for example, the Federal Government took the position that the States had been granted a nationwide injunction. The States disagreed, pointing to language in the Eighth Circuit stating that the court had tailored injunctive relief to provide the States full relief. The Supreme Court ultimately (and unanimously) sided with the States over the Federal Government.

a. Have you ever publicly voiced support or opposition regarding a federal court's issuance of a nationwide injunction or similar relief? If yes, please describe.

Response: I have discussed the issue of nationwide injunctions on X. To my recollection, I did not voice support or opposition but instead talked about the recent development of those injunctions as a historical matter and the discussions in the literature about whether statutory vacatur is different from a nationwide injunction.

b. Do you believe that a federal judge issuing a nationwide injunction or similar relief against the executive branch is equivalent to a coup d'etat?

Response: The Supreme Court is actively considering the issue of the permissibility of nationwide injunctions and is expected to issue a ruling this month.

c. Do you believe that a federal judge who issues a nationwide injunction or similar relief against the executive branch is equivalent to insurrection?

Response: The Supreme Court is actively considering the issue of the permissibility of nationwide injunctions and is expected to issue a ruling this month.

d. Do you believe that a federal judge who issues a nationwide injunction or similar relief against the executive branch is an activist judge?

Response: The Supreme Court is actively considering the issue of the permissibility of nationwide injunctions and is expected to issue a ruling this month.

5. Please describe your understanding of natural law.

a. What authority does natural law carry in federal case law?

Response: The Supreme Court has held that certain rights "preexist" the Constitution. For example, the First Amendment does not create a freedom of speech; it instead protects a preexisting freedom of speech. *E.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) ("the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right" (emphasis in original)). These are generally described as "natural rights" because they exist without government, and they and are expressly protected by the First Amendment and other laws.

b. When do you think it is appropriate for a federal judge to rely on natural law?

Response: See above.

c. If confirmed, do you plan to incorporate natural law into your decisions?

Response: See above.

6. Please describe your understanding of originalism.

Response: Originalism or textualism is the idea that when Congress passes a statute or the people enact a constitutional amendment, that law's meaning does not change until amended with new text and that it is inappropriate for judges to "update" laws out of dissatisfaction that the people or Congress have chosen not to do so.

a. Do you consider yourself an originalist?

Response: Different people define that term differently. My judicial philosophy is that the law should be applied as written, and not how judges wish it were written.

b. Do you believe that people who do not support or adhere to originalism do not like America?

Response: It would not be appropriate as a judicial nominee to speculate about the motives of individuals who do not consider themselves originalists.

c. Based on your understanding of originalism, was *Citizens United v. Federal Election Commission* an originalist decision? Why or why not?

Response: With the exception of *Brown* and *Loving*, it is improper for judicial nominees to give a thumbs-up or thumbs-down to Supreme Court precedent. I would follow *Citizens United* like I would follow every other binding precedent of the Supreme Court.

d. Based on your understanding of originalism, was *Trump v. United States* an originalist decision? Why or why not?

Response: See above.

7. Please describe your understanding of textualism.

Response: See above, the first response to question 6.

a. Do you consider yourself a textualist?

Response: Different people define that term differently. My judicial philosophy is that the law should be applied as written, and not how judges wish it were written.

b. How should a court analyzing a federal statute account for the "Findings" or "Purposes" sections of such statutes?

Response: It is well establishing that text in a "findings" or "purpose" clause can clarify the meaning of terms that might otherwise be ambiguous.

8. Please describe your understanding of the different roles of district and appellate courts with respect to fact-finding.

Response: In most circumstances, district courts, not appellate courts, are tasked with finding facts, and appellate courts review those findings under a deferential standard (often the clear-error standard). *E.g.*, Fed. R. Civ. Proc. 52.

a. What deference should courts grant facts found by Congress when reviewing legislation expanding or limiting individual rights?

Response: The Supreme Court has regularly deferred to facts found by Congress, especially when those facts are stated in factual-findings sections. *E.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966).

b. Separate from legal holdings, are lower courts bound to adhere to factual findings by the Supreme Court?

Response: The Supreme Court typically does not make fact findings but instead issues decisions based on the facts in the record developed by lower courts. If, in a different case, the factual record is different, a lower court must still apply any controlling Supreme Court precedent. The Supreme Court does make fact findings when it sits in original jurisdiction, and the Supreme Court (like all federal courts) sometimes takes judicial notice of facts not reasonably subject to dispute. *See* Federal Rule of Evidence 201.

c. What standard will you use to determine when it is appropriate to depart from otherwise binding appellate case law because of differences in the facts of a case?

Response: Lower courts never should fail to apply binding appellate case law. Lower courts must determine whether a precedent controls. That analysis is guided by a close assessment of the facts of each case, the reasoning of the appellate opinion, and whether the appellate opinion is based on the specific facts or instead announces a more general legal interpretation.

9. If confirmed, how will you conduct historical analyses under *New York State Rifle & Pistol Association v. Bruen*?

Response: The Supreme Court has determined in *Heller*, *McDonald*, *Bruen*, and *Rahimi* that the right to bear arms is a "fundamental right" that extends "to all instruments that constitute bearable arms." Governments may enact laws so long as they are "consistent with the Nation's historical tradition of firearm regulation." If called upon to determine whether a government restriction is valid, I would consult historical sources and binding precedent to assess whether the Supreme Court's test is satisfied.

a. As part of these historical analyses, will you solicit input from amici curiae?

Response: Yes, amici are generally free to file briefs in federal courts, including in the districts in Missouri.

b. How will you assess the veracity of historical claims made by parties?

Response: The same way a judge assesses the veracity of any contention: among other things, by consulting the original sources, assessing the credibility and thoroughness of the briefs, assessing the credibility of primary and secondary sources, and assessing whether cited sources are consistent with other available authorities.

c. How will you assess the veracity of historical claims made by amici curiae?

Response: See above.

10. The U.S. Sentencing Commission recently prioritized the "[c]ompilation and dissemination of information on court-sponsored programs relating to diversion, alternatives-to-incarceration, and reentry." Courts can tailor these programs to meet specific needs of

defendants before them. These include programs focused on mental health, substance use disorder, veterans, and juveniles.

a. Do you support the use of programs such as these?

Response: I will follow all directives of Congress. As interpreted by the *Booker* decision, Congress has directed district court judges to carefully consult the recommendations of the Sentencing Commission.

b. If confirmed, what steps will you take to participate in or support programs such as these within the jurisdiction to which you would be confirmed?

Response: I will carefully consult the recommendations of the Sentencing Commission and seek guidance from colleagues on the best way to participate in or support programs recommended by the Sentencing Commission.

11. If confirmed, will you attend, to the extent possible, any trainings provided by the Federal Judicial Center for newly appointed judges—including on abiding with federal ethics laws and the Code of Conduct for United States Judges?

Response: Yes. I have already attended one training and intend to attend future trainings should I be lucky enough to be confirmed.

12. If confirmed, you will be called upon to maintain impartiality, which requires being open to legal arguments that may lead to outcomes you dislike.

a. If confirmed, what steps will you take to ensure that you are exposed and open to a range of ideological and legal viewpoints outside of the courtroom—in particular, those that you do not agree with?

Response: Judges ought to be open-minded, and it is paramount that judges consider and be exposed to a wide variety of perspectives. In my day-to-day life, I regularly read articles and books that challenge my current thinking. In addition, I anticipate taking a generous policy to granting amici the ability to file briefs.

b. During your time as a legal professional, including as a sitting judge, if applicable, what steps have you taken to ensure that you are exposed and open to a range of ideological and legal viewpoints—in particular, those that you do not agree with?

Response: I have broadly sought to recruit from a wide variety of legal and professional backgrounds. In my day-to-day life, I regularly read articles and books that challenge my current thinking.

c. If confirmed, do you plan to hire qualified law clerks who do not share your ideological or legal viewpoints?

Response: The people I have hired in my current role hold a wide variety of views. If I am lucky enough to be confirmed, I will hire qualified people, without regard to political ideology, who share the understanding that judges ought to apply the law, not make it.

13. If confirmed, do you plan to "boycott" the hiring of law clerks from any specific schools? If so, which schools and why?

Response: I have no intention to do so.

a. Do you believe such boycotts are appropriate?

Response: The question suggests others are engaging in that conduct. I am not familiar enough with the reasons other judges may have chosen to not recruit from certain schools.

14. If confirmed, you will be responsible for managing and exercising authority over law clerks and other court personnel.

a. What professional experience do you have overseeing and managing others?

Response: As Solicitor General, I supervise the appeals of 200 attorneys. As Director of Special Litigation, I supervise the day-to-day of an entire litigation team of between 10 and 15 individuals. When I was chief counsel in the Senate, I supervised legal issues for the entire office and also supervised and managed a team much larger than the set of law clerks allotted to a judge.

b. How do you plan to recruit and hire law clerks?

Response: I intend to use the same tools for recruiting that other judges use. I will review all applications that are submitted. I intend to continue speaking at law schools, as appropriate, which tends to increase clerkship applications.

15. If confirmed, do you have plans to integrate artificial intelligence into your work as a federal judge? If so, how?

Response: I have no present plans to do so but will continually evaluate the situation as that technology develops.

16. Have you ever deleted any posts or publications originally published under your name or an account associated with you? If so, please provide those posts or publications in full.

Response: I previously had social media accounts that no longer exist. The content on those accounts is no longer available. In addition, I have on occasion deleted posts that included

errors (such as spelling mistakes). Those are not available. Unlike some previous nominees who locked down their X/Twitter accounts when they were nominated, I have kept mine public in the spirit of full transparency.

17. Have you ever asked for your name to be removed from any publication which previously bore your name? If so, please provide these publications in full.

Response: To the best of my recollection, no.

18. Have you ever been accused, in any setting, of the following? If so, please describe the accusation with specificity, the actions you took in response, and how the accusation was resolved.

a. Sexual harassment?

Response: No.

b. Sex-based discrimination?

Response: No.

c. Race-based discrimination?

Response: No.

d. Discrimination on the basis of national origin?

Response: No.

e. Discrimination on the basis of religion?

Response: No.

f. Workplace misconduct of any kind?

Response: No.

19. Have you ever spoken with the following individuals or groups about your nomination? If so, please describe your conversations with them with specificity.

a. Leonard Leo

Response: No.

b. Carrie Severino

Response: When my nomination was announced, Carrie (whom I know because both of us clerked for Justice Thomas) sent me a brief message of congratulations. That is the full extent of the conversation I have had.

c. Mike Davis

Response: No.

d. The Article III Project

Response: I am not familiar with the members of that organization, but to my knowledge, no.

20. Do the Fifth and Fourteenth Amendments protect individuals' substantive, as well as procedural, rights?

Response: The Supreme Court has interpreted those amendments to include both substantive and procedural aspects.

21. What rights does the Constitution protect that are not expressly enumerated in the Constitution?

Response: The Supreme Court has interpreted the Constitution to protect a variety of rights not expressly enumerated, and the Ninth Amendment expressly makes reference to rights not mentioned expressly by the Constitution. The Supreme Court has not exhaustively catalogued every unenumerated right but has created, among other things, the *Glucksberg* framework, which guides courts on how to determine if an unenumerated right is protected.

22. Is it ever lawful for the President to punish lawyers because of who they represent or what positions they take? If so, when?

Response: The President has authority to take care that the laws be executed. That power has generally been understood to ensure that those who work for the President carry out the President's directions. The President, like any other client, generally can fire lawyers who choose not to advocate the interests of the client.

23. Can the federal government deport immigrants with lawful status solely because of those immigrants' expression of a political view?

Response: Under the judicial code of conduct, nominees cannot comment on issues that are currently being litigated or issues that may appear before the court.

24. What protections does the Constitution offer to safeguard the freedom of the press?

Response: The press is expressly safeguarded by the First Amendment in several ways: through the Press Clause, the Speech Clause, and the Petition Clause. Other protections may

also apply. For example, a press outlet owned and run by religious individuals would also enjoy protection under the Religion Clauses.

25. Can the federal government fire its employees for the sole reason that they espouse a disfavored political opinion?

Response: Courts generally assess these kinds of questions under the *Pickering*-*Connick* test established by the Supreme Court. Courts have generally permitted governments to fire people based on speech when they are high-level employees, seek to release classified information, are not speaking on a matter of public concern, or are speaking in their official capacity, among other things. It would be improper for a judicial nominee to promise or forecast how he or she would rule in a case that might come before him or her.

26. Do you agree that campaign finance donor disclosure requirements "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking," as Justice Kennedy wrote for an 8-1 majority in *Citizens United*?

Response: With the exception of *Brown* and *Loving*, it is improper for judicial nominees to give a thumbs-up or thumbs-down to Supreme Court precedent. I would follow *Citizens United* like I would follow every other binding precedent of the Supreme Court.

27. Was *Korematsu v. United States* egregiously wrong the day it was decided?

Response: The Supreme Court in *Trump v. Hawaii* recognized what it described as "obvious"—that "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"

a. Do you agree with Chief Justice Roberts that "[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful"?

Response: I would follow *Trump v. Hawaii* like I would follow every other binding precedent of the Supreme Court, including the Supreme Court's determination that *Korematsu* "was gravely wrong." And because I have expressed that *Brown* was correctly decided, I believe any case is necessarily incorrect if it conflicts with *Brown*.

28. The Seventh Amendment ensures the right to a jury "in suits at common law."

a. What role does the civil jury play in our constitutional system?

Response: The Seventh Amendment's guarantee of the right to a jury trial in certain civil suits reflects the founding generation's belief in the importance of that institution. The right has never been incorporated under the Fourteenth Amendment, but to my knowledge most States guarantee at least some form of right to jury trials in civil cases.

b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

Response: I have not had the occasion to consider whether arbitration clauses may in some circumstances conflict with the Seventh Amendment. If a case on that issue were to arise, I would carefully consider the text of the Seventh Amendment, the history, and also the available precedent on the issue.

c. Should an individual's Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Response: I have not had the occasion to consider whether the Federal Arbitration Act may in some circumstances conflict with the Seventh Amendment. If a case on that issue were to arise, I would carefully consider the text of the Seventh Amendment, the history, and also the available precedent on the issue.

29. Did Joe Biden win the 2020 presidential election?

Response: President Biden was certified as the victor and served as the 46th President of the United States.

30. Yes or no: Was the U.S. Capitol attacked by a violent mob on January 6, 2021?

Response: The President has issued pardons to individuals involved in the events of January 6. The Supreme Court has been clear in *United States v. Klein* that the pardon power is one of the President's most plenary powers. The decision whether to extend a pardon belongs to the President in his discretion. To the extent the question asks for personal political views, the judicial code of conduct prohibits any judicial nominee from providing political or policy views.

a. Where were you on January 6, 2021?

Response: I served as a law clerk in the Supreme Court during the OT2020 term. I was in the Supreme Court building working that day.

31. Yes or no: Does the 22nd Amendment permit a president to be elected more than twice?

Response: Section 1 of the Twenty-Second Amendment states, in part, "No person shall be elected to the office of the President more than twice…." I have not reviewed any case law or other authorities addressing or interpreting this Amendment, nor formed an opinion on how it might apply to any particular facts. To the extent the question asks about political disputes, it would be improper for a judicial nominee to promise or forecast how he or she would rule in a case that might come before him or her.

Senate Judiciary Committee
Nomination Hearing
June 11, 2025
Questions for the Record
Senator Amy Klobuchar

For Joshua Michael Divine, nominee to be U.S. District Judge for the Eastern and Western Districts of Missouri

1. As Solicitor General of Missouri, you led the effort to restrict women's access to Mifepristone, a drug that has been approved in over 90 countries and safely used by millions. You sought nationwide injunctions to strip access to Mifepristone for women around the country, and among other things, tried to overturn the FDA's 2016 approval and refers to these medications as "dangerous drugs."

   - **In filing your suit, were you aware that in 2018 the GAO—an independent, non-partisan agency—evaluated 62 studies and articles that supported the FDA's decision, and that in 2023, the American Medical Association stated: "There is no evidence that people are harmed by having access to this safe and effective medication"?**

     Response: The question does not accurately characterize the lawsuit. The lawsuit seeks statutory relief under the Administrative Procedure Act, not a nationwide injunction under a court's general equitable authority. And under the lawsuit, mifepristone would still be widely accessible. The lawsuit simply seeks to reinstate safety precautions that FDA long deemed necessary, such as the safety precaution that physicians rule out ectopic pregnancies before distributing mifepristone. The lawsuit argues that it was unlawful for the previous administration to rescind those longstanding safety precautions.

     At this early stage of litigation, there remain many factual disputes between the parties. So far, six judges have ruled on the merits of the States' claims in a separate case that involved private parties, and all six judges agreed that FDA's decision to rescind longstanding safety requirements was unlawful.

2. In an article you advocated that voters should have to take a literacy test in order to vote. You wrote "there are reasons to take away somebody's vote"; and you advocated for disenfranchising anybody who could not "spit back his or her chosen candidate's platform on major issues."

   You also wrote that literacy tests get a bad reputation because they were only used against certain minority communities "but literacy tests themselves are not a bad thing."

   - **What is your current understanding of the ability of states and localities to impose literacy tests or otherwise place burdens on the right to vote?**

Response: I understand much more about voting rights law now than I did as a teenager, when the article was written. I understand that even though Congress initially permitted literacy tests under the Civil Rights Act and Voting Rights Act, those tests are no longer permitted under a less-well-known bill passed years later.

The question's characterization of the article is not correct. The article in question expressly condemns Jim Crow literacy tests. Jim Crow literacy tests were gerrymandered, abused, and enforced unevenly to deny Americans the right to vote. They were used particularly to target black Americans, but also were used to target people like my ancestors, Italian Americans. I have never advocated any form of Jim Crow literacy test.

The article, written when I was a teenager, was consistent with the Civil Rights Act of 1964 and the Voting Rights Act of 1965, which banned Jim Crow literacy tests but permitted devices that did not have the same history of abuse. After the Supreme Court unanimously held that literacy tests are constitutional so long as they are not applied in a discriminatory way, *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 53 (1959), the Civil Rights Act and Voting Rights Act temporarily prohibited literacy tests in States with a history of abuse, but not in other jurisdictions. "[T]he Civil Rights Act of 1964 allowed for the use of literacy tests as a qualification, so long as the test was administered to every individual and conducted in writing." Paulette Brown, *The Civil Rights Act of 1964*, 92 Wash. U. L. Rev. 527, 534 (2014); 52 U.S.C. § 10101(a)(2)(c). That Act restricted Jim Crow tests that had been administered arbitrarily and unevenly. The Voting Rights Act went further, banning the tests, but only in jurisdictions that had employed tests previously and where "less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964." 52 U.S.C. § 10303(a)–(b). The Voting Rights Act expressly permitted literacy tests in all other jurisdictions. The article written when I was a teenager expressed ideas consistent with those landmark pieces of legislation.

It was not until years after the Civil Rights Act and Voting Rights Act that Congress passed legislation prohibiting the use of those tests nationwide, in all jurisdictions and regardless of whether the tests were in writing. 52 U.S.C. § 10501. As a teenager in college, I was aware that the Civil Rights Act and the Voting Rights Act had banned some tests while permitting others. I was not aware of the later amendments. I learned about the more recent law in law school. Tests are illegal now, and I have never advocated any form of test (including the ones that the Civil Rights Act and Voting Rights Act permitted) since that article.

Nomination of Joshua Divine to the
United States District Court for the Eastern and Western Districts of Missouri
Questions for the Record
Submitted June 11, 2025

QUESTIONS FROM SENATOR COONS

1. **At any point during the process that led to your nomination, did you make any representations or commitments to anyone—including but not limited to individuals at the White House, at the Justice Department, or at outside groups—as to how you would handle a particular case, investigation, or matter, if confirmed? If so, explain fully.**

   Response: No.

   a. **At any point during the process that led to your nomination, were you asked about your opinion on any cases that involve President Trump or the Trump administration?**

      Response: No.

2. In your Senate Judiciary Questionnaire, you note that, on May 6, 2025, President Trump called you to tell you that you would be nominated to the federal bench.

   a. **How long did that call last?**

      Response: About two minutes.

   b. **Who else, if anyone, participated in the call other than you and President Trump?**

      Response: A secretary called my line and then patched me into the President. I do not recall speaking to anybody else.

   c. **What was discussed on the call?**

      Response: The President congratulated me on the nomination.

   d. **What questions, if any, were you asked by President Trump during the call and how did you answer them?**

      Response: None.

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

   Response: When Congress passes a statute or the people enact a constitutional amendment, that law's meaning does not change until amended with new text. It is

inappropriate for judges to "update" laws out of dissatisfaction that the people or Congress have chosen not to do so. My philosophy is that the law should be applied as written, and not how judges wish it were written.

4. **With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?**

   Response: If I were confirmed, I would faithfully apply the standards set forth in applicable Supreme Court precedent, including as appropriate the *Obergefell* and *Glucksberg* decisions.

   a. **Would you consider whether the right is expressly enumerated in the Constitution?**

      Response: Yes.

   b. **Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?**

      Response: Yes. Many cases, including *Glucksberg*, instruct courts to do that. If a case requiring that analysis were to come before me, I would consult historical resources, including historical case law. Cases applying that framework have consulted a variety of historical resources, and I would look to the kinds of sources those cases considered.

   c. **Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of another court of appeals?**

      Response: Yes, whether a right was historically recognized by a court is part of the assessment of whether the right is deeply rooted in history.

   d. **Would you consider whether a *similar* right has previously been recognized by Supreme Court or circuit precedent?**

      Response: Yes.

   e. **What other factors would you consider?**

      Response: I would consider any other factors identified in applicable precedent from the Supreme Court and the Eighth Circuit.

5. **In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a higher court? Please explain.**

   Response: To the extent "higher court" means a court with appellate authority over the district court, rather than an appellate court in a different circuit, the answer is I am not aware of a circumstance where ignoring a higher court's order would be appropriate other than if an even higher court vacated that order (such as the Supreme Court vacating an order of the Eighth Circuit).

6. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

   a. **When is it appropriate for a court to consider evidence that sheds light on our changing understanding of society?**

      Response: Courts regularly consider changing facts in assessing a case. For example, a regulation in one era may not chill speech only for the same regulation to chill speech when facts or technology change. Whether changing facts will affect resolution of a dispute will be case specific.

   b. **What is the role of sociology, scientific evidence, and data in judicial analysis?**

      Response: The role of these topics will vary depending on the case. For example, in a contract dispute between pharmaceutical companies, scientific evidence may be highly relevant. But it may be irrelevant to a run-of-the-mill contract case. The admissibility of scientific, technical, or other specialized knowledge in the determination of adjudicative facts is governed by Federal Rule of Evidence 702.

7. I have been proud to co-lead the bipartisan *Safer Supervision Act*, a bill to reform our federal supervised release system that has received substantial conservative and law enforcement support. The premise of the bill is that our federal supervision system has strayed far from how Congress designed it, as courts impose it mechanically in essentially every case, which means that probation officers do not have time to properly supervise those who most need it. The bill reinforces courts' existing obligations under 18 U.S.C. §§ 3553 and 3583 to impose supervision as warranted by the individual facts of

the case and encourages more robust use of early termination when warranted to provide positive incentives encouraging rehabilitation. At the encouragement of a bipartisan group of members of Congress, the U.S. Sentencing Commission recently finalized an amendment to supervision guidelines implementing certain parts of the bill; this amendment will go in effect in November.

a. As a sentencing judge, would you endeavor to impose supervision thoughtfully and on the basis of the individual facts of the case consistent with 18 U.S.C. § 3553 and 18 U.S.C. § 3583?

Response: Yes, I will follow all directives of Congress, which include the need to consider supervised release and the recommendations of the Sentencing Commission.

b. Would you agree that the availability of early termination under 18 U.S.C. § 3583(e)(1) can provide individuals positive incentives to rehabilitate?

Response: In enacting that section into law, Congress necessarily determined that early termination of supervised release is appropriate in some circumstances.

c. Will you commit if confirmed to reviewing the *Safer Supervision Act* and the recent Sentencing Commission amendment and considering them as you develop your approach to sentencing of supervised release?

Response: Yes.

8. What is the remedy if the President violates his constitutional duty to faithfully execute the laws?

Response: I am unfamiliar with any case that has squarely held that the President has violated the Take Care Clause. When that allegation was made against President Obama, the Department of Justice took the position that claims under that clause are not justiciable. The Supreme Court never ruled on that question because the case in which it was raised was affirmed by an evenly divided 4-4 vote without opinion. In addition, the Supreme Court has ruled that "[t]he President's unique status under the Constitution distinguishes him from other executive officials." *Nixon v. Fitzgerald*, 457 U. S. 731, 750 (1982). I am unaware of any court that has ruled on what the remedy would be in the hypothetical posed by the question, though I would review carefully any briefing if the question were ever presented to me as a judge.

9. Is President Trump eligible to be elected President for a third term?

Response: Section 1 of the Twenty-Second Amendment states, in part, "No person shall be elected to the office of the President more than twice…." I have not reviewed any case

law or other authorities addressing or interpreting this Amendment, nor formed an opinion on how it might apply to any particular facts. To the extent the question asks about current political disputes, it would be improper for a judicial nominee to promise or forecast how he or she would rule in a case that might come before him or her.

10. Who won the 2020 U.S. Presidential Election?

Response: I served as a law clerk in the Supreme Court in 2020. The Court ruled on a case on this issue when I was clerking. Ethical rules prohibit discussing those matters. President Biden was certified as the victor and served as the 46th President of the United States.

11. Would it be constitutional for the President of the United States to punish a private person for a viewpoint that person expresses in a newspaper op-ed?

Response: This barebones hypothetical provides insufficient information to assess the question. For example, a "true threat" as recognized by Supreme Court precedent would not be protected by the First Amendment, and so a person issuing a true threat in a newspaper op-ed could generally face punishment. Without knowing more, it is impossible to provide a more fulsome answer. In addition, it would be improper for a judicial nominee to promise or forecast how he or she would rule in a case that might come before him or her.

12. Would it be constitutional for the President of the United States to terminate government contracts with a private person specifically because that person donated to members of the opposite political party?

Response: The question asks about current alleged political disputes. It would be improper for a judicial nominee to promise or forecast how he or she would rule in a case that might come before him or her.

13. Would it ever be appropriate for the President of the United States to punish a law firm for taking on a client that the President did not like?

Response: The question asks about current alleged political disputes. It would be improper for a judicial nominee to promise or forecast how he or she would rule in a case that might come before him or her.

14. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives? If you do not agree, please explain whether this right is protected or not and which constitutional rights or provisions encompass it.

Response: The Supreme Court in *Griswold* held that the Constitution protects the conduct described above. As a lower court judge, I would be bound to follow all controlling precedent.

15. Do you agree that there is a constitutional right to privacy that protects the right to in vitro fertilization (IVF)? If you do not agree, please explain whether this right is protected or not and which constitutional rights or provisions encompass it.

Response: The only case I am aware of that addresses that question is *Morrissey v. United States*, 871 F.3d 1260 (11th Cir. 2017), which decided the question in the negative. Because that decision is outside the Eighth Circuit, it would not bind me. I am not aware of a court addressing that question in the Eighth Circuit. To the extent the question asks about current political disputes, it would be improper for a judicial nominee to promise or forecast how he or she would rule in a case that might come before him or her.

16. Do you believe that immigrants, regardless of legal status, are entitled to due process and fair adjudication of their claims?

RESPONSE: The Fifth Amendment provides, in relevant part, "No person shall … be deprived of life, liberty, or property, without due process of law." The question in most cases is less about whether the doctrine of due process applies and more about how much process is due. For example, Presidents of both parties have relied on expedited deportation in certain circumstances, which includes far fewer procedures than a trial.

17. What role does morality play in determining whether a challenged law or regulation is unconstitutional or otherwise illegal?

RESPONSE: Generally speaking, courts do not assess the motives of those who enact legislation. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). There have been some exceptions, such as in the *Lawrence v. Texas* decision, where the Supreme Court said that moral views were insufficient for a legislature to enact legislation.

18. What role, if any, should the practical consequences of a particular ruling play in a judge's rendering of a decision?

RESPONSE: One reason courts are given independence is so that they can rule according to what the law requires without regard to the consequences. Only in limited circumstances (such as when a court is exercising its equitable authority) should a court contemplate consequences. Those matters are typically tangential. For example, some courts have ordered injunctive relief but delayed or paused injunctive relief temporarily due to the consequences an immediate injunction would have on the parties.

19. What role, if any, should empathy play in a judge's decision-making process?

RESPONSE: It is important for judges to be respectful to all litigants. A judge should never lose sight of the fact that litigation is not an academic exercise, but has immediate

and often profound consequences in the lives of real people. At the same time, a judge takes an oath to "administer justice without respect to persons." 28 U.S.C. § 453. In all cases, a judge must rule according to the law, regardless of whether he or she empathizes with a litigant.

20. What role, if any, should a judge's personal life experience play in his or her decision-making process?

RESPONSE: A judge's life experiences will hopefully have prepared him or her to exercise the judicial office with understanding, diligence, integrity, and impartiality.

21. Under 28 U.S.C. § 455, "[a]ny justice, judge, or magistrate judge of the United States shall disqualify [themself] in any proceeding in which [their] impartiality might reasonably be questioned."

a. You filed an amicus brief in the Supreme Court on behalf of Missouri in *Alliance for Hippocratic Medicine v. Food and Drug Administration*. The case challenged the Food and Drug Administration's approval of the abortion drug mifepristone. Should you be confirmed, would you recuse yourself from future cases involving abortion drugs? Why or why not?

RESPONSE: I will recuse myself from any case in which I have been involved. More generally, not having served as a judge before, I am not an expert in the recusal standards. But in any case where recusal might even plausibly be required, I will consult the recusal statute and the code of conduct as well as any necessary additional authorities, such as ethics opinions from the judiciary and the opinions and experiences of colleagues.

22. In your Senate Judiciary Questionnaire, you disclosed that you are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

Response: I am aware that this topic has been the subject of significant scholarly attention and that many well-renowned scholars believe the decision is consistent with originalist principles. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation*

Decision, 81 Va. L. Rev. 947, 1140 (1995) ("This Article shows … that school segregation was understood during Reconstruction to violate the principles of equality of the Fourteenth Amendment."). I believe *Brown* was correctly decided.

a. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

Response: When Congress passes a statute or the people enact a constitutional amendment, that law's meaning does not change until amended with new text. Judges regularly apply a law's meaning to new circumstances, such as applying the First Amendment's protection of free speech to the internet. It would be inappropriate for judges to "update" laws out of dissatisfaction that the people or Congress have chosen not to do so. In addition, the Supreme Court on several occasions has considered the original public meaning of a constitutional provision in addressing that provision's scope. *E.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004).

b. Does the public's original understanding of the scope of a constitutional provision constrain its application decades later?

Response: See above.

c. What sources would you employ to discern the contours of a constitutional provision?

Response: Judges regularly consult text, precedent, and history to discern the contours of constitutional provisions. As to history, that includes both primary and secondary sources.

23. Should you be confirmed, would you ever inform parties before you that they do not need to comply with your orders?

Response: I cannot envision a circumstance where I would affirmatively instruct a party not to comply with an order. The Supreme Court has squarely recognized that individuals do sometimes have to violate an order so that they can appeal. As Justice Sotomayor's opinion put it, "Another long-recognized option is for a party to defy a disclosure order and incur court-imposed sanctions." *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 111 (2009). "Such sanctions allow a party to obtain postjudgment review without having to reveal its privileged information. Alternatively, when the circumstances warrant it, a district court may hold a noncomplying party in contempt. The party can then appeal directly from that ruling, at least when the contempt citation can be characterized as a criminal punishment." *Id.* It is theoretically possible that I might issue an order that discusses *Mohawk*.

a. Under what circumstances would you tell a party they could decide not to comply with your orders?

Response: See above.

b. What would you do if a party refuses to comply with one of your orders?

Response: I would assess whether allegations of noncompliance were correct and would invite briefing on the matter. I would also assess whether any recognized defenses apply. In some circumstances, sanctions might be appropriate after a finding that a party has in fact violated an order without proper cause.

24. Discuss your proposed hiring process for law clerks.

Response: I intend to use the same tools for recruiting that other judges use. I will review all applications that are submitted. I intend to continue speaking at law schools, as appropriate, which tends to increase clerkship applications.

a. Do you think law clerks should be protected by Title VII of the Civil Rights Act?

Response: As a judicial nominee, the canons of judicial ethics generally prohibit me from endorsing legislative proposals.

25. Some district court judges have issued standing orders indicating that the court will favor holding an oral argument when there is a representation that the argument would be handled by a junior lawyer. Such efforts are intended to provide more speaking opportunities in court for junior lawyers. Would you consider issuing a standing order that would encourage more junior lawyers to handle oral arguments? Why or why not?

Response: I am not generally familiar with this practice but am open to considering it. Having delivered nearly 40 oral arguments myself, I recognize that my circumstance is unusual and that oral argument opportunities for most attorneys (especially younger attorneys) are rare. I would take that into account when establishing courtroom practices.

a. How else would you support the skills development of junior lawyers appearing before you?

Response: In my current role as a supervisor, I strive to give junior attorneys the opportunity to argue cases and take other significant firsthand responsibility. I would generally encourage parties before me to do the same in appropriate circumstances and would seek additional ways to promote the development of junior lawyers.

Questions for the Record for Mr. Joshua M. Divine
Submitted by Senator Richard Blumenthal
June 11, 2025

1. You were the recipient of the Alliance Defending Freedom's Blackstone Fellowship in 2014. One of the Alliance Defending Freedom's founders, James Dobson, said that the 2012 massacre of children at Sandy Hook Elementary School happened because "we have turned our back on the Scripture and on God Almighty and I think He has allowed judgment to fall upon us. I think that's what's going on."

    a. **Do you believe the Sandy Hook school shooting happened because "we have turned our back on the Scripture and on God Almighty and I think He has allowed judgment to fall upon us."?**

    Response: I have never heard these comments and am unfamiliar with the person described in the question. The Blackstone Fellowship is one of close to a half dozen fellowships I have participated in with various organizations. Like other fellowships, it consisted of a lecture series exploring legal topics. I was one of hundreds of law students to participate. Crimes like the 2012 Sandy Hook shooting are horrifying, and as a parent, my heart goes out to all the victims.

    b. **Do you disavow these comments?**

    Response: It is not my practice to disavow or endorse comments with which I am not familiar, especially when the comments are relayed secondhand.

2. In a 2011 piece you authored, you wrote that moral opposition to homosexuality is not hateful or homophobic because it is grounded in a morality of opposition to "any form of sex that goes against the biological design of procreation and the nurturing of a family," including "homosexuality, adultery, bestiality, fornication, polygamy, and all other forms of sex that do not take place in a monogamous-marriage setting."

    a. **Bestiality is currently illegal in all but one state. Do you believe that people in same-sex relationships should, like those who commit bestiality, be criminally prosecuted?**

    Response: The question mischaracterizes the article, which argued that those things are *not* the same, the opposite of what the question suggests. The article was written in response to commentary on campus that sharply criticized Muslims, Catholics, and Mormons and asserted that members of those faiths equated those things and thus were bigoted. The article argued that it is wrong to assume people of faith are bigoted simply because one does not understand their theology. The Supreme Court in the *Obergefell* decision agreed, saying that opposition to same-sex marriage "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." I

have never advocated criminal prosecution of individuals in same-sex relationships.

b. Do you consider yourself someone who is morally opposed to "any form of sex that goes against the biological design of procreation?"

Response: As hundreds of nominees before me have noted, the judicial code of conduct prohibits nominees from discussing political or policy views. As a general matter, I can say that many of my political, policy, and even religious views have changed since college. The article in question discussed theological views of a number of religions. To the extent the question asks about religious views, the U.S. Constitution says "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

i. If so, knowing of your moral opposition to homosexuality, how can someone who is homosexual expect you to be unbiased in the courtroom?

3. You co-authored a legal complaint in *Missouri v. FDA* in which you cited two studies by James Studnicki, Tessa Longbons, and others that had been published in *Health Services Research and Managerial Epidemiology.* This complaint was electronically filed on November 3, 2023.

On February 5, 2024, Sage Journals, the publisher of *Health Services Research and Managerial Epidemiology*, issued a retraction of the studies. A post-publication peer review "identified fundamental problems with the study design and methodology, unjustified or incorrect factual assumptions, material errors in the authors' analysis of the data, and misleading presentations of the data" in the studies that, in the opinion of the reviewers, "demonstrate[d] a lack of scientific rigor and invalidate[d] the authors' conclusions in whole or in part."

a. When did you learn the studies were retracted?

Response: As the question notes, the retraction occurred after the complaint was filed and despite the publisher having agreed to publish the articles years earlier. I do not recall when or whether learning of the retraction. At the time the question says the articles were retracted, I was recovering from a near-fatal accident. Having researched this issue to respond to this question, I am aware that the authors of the study have sharply criticized the retraction as an anti-scientific retraction taken by the journal for political reasons in response to the article being cited in a legal filing. I have not had the occasion to assess who is correct in that dispute between the authors and the publisher.

b. Did you notify the Court of the retractions?

Response: The litigation in that case is still in its infancy, with the parties litigating baseline questions of venue and jurisdiction. Factual disputes have not yet been litigated, so there has not yet been occasion to discuss factual disputes implicated by the retraction of an article that is not necessary to the complaint and is mentioned only in a footnote of the current complaint.

   i. **If so, what information did you provide the Court? When did you provide this information?**

4. The House Republican-authored budget reconciliation bill currently pending in the Senate includes a provision that would limit federal judges' ability to hold government officials in contempt. The bill would prohibit federal courts from issuing contempt penalties against officials who disobey preliminary injunctions or temporary restraining orders if the party seeking the order did not provide financial security to cover potential future damages for wrongful enjoining.

   The contempt power was first codified in law in the Judiciary Act of 1789. In 1873, the Supreme Court described it as "inherent in all courts" and "essential to the preservation of order in judicial proceedings and to the enforcement of the judgements, orders, and writs of the courts, and consequently to the due administration of justice." Yet House Republicans are seeking to exempt government officials from this key enforcement tool.

   a. **Do you believe the contempt power is "essential . . . to the due administration of justice[?]"**

      Response: The question states that the Supreme Court has held this to be true. As a lower court judge, I will abide by and follow all binding Supreme Court precedent.

   b. **Do you believe that federal judges should be limited in their ability to hold government officials in contempt?**

      Response: Under Federal Rule of Civil Procedure 65, a "court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." I understand from public reporting that the bill discussed above may be a congressional response to some judges not requiring the bond contemplated by Rule 65. As a judge I would follow the law, and it is not for judicial nominees to endorse or criticize pending legislation.

5. If confirmed, you, like all other members of the federal bench, would have the ability to issue orders. On February 9, 2025, Vice President Vance posted on X that "[j]udges aren't allowed to control the executive's legitimate power." This raises an extremely concerning specter of executive defiance of court orders.

a. If confirmed, would you have the ability to issue orders?

Response: Judges operate by issuing orders. And Americans—including elected Americans—have a right to criticize judges.

i. Would you have the ability to enforce those orders?

Response: Yes.

ii. What powers would you have to enforce those orders?

Response: Courts have a variety of methods to ensure compliance by any litigant with court orders. A common one is discovery sanctions. Courts sometimes draw adverse inferences from discovery failures or require one party to cover the costs of others. In more extreme cases, courts can dismiss a case or engage in contempt proceedings.

b. Does there exist a legal basis for state executive officials to defy federal court orders? If so, what basis and in which circumstances?

Response: Treatises and cases have identified circumstances where a party can raise a defense to compliance with a court, such as if the court lacked jurisdiction or if compliance was impossible. *See, e.g*., 17 Corpus Juris Secundum Contempt §§ 56–65; *United States v. Rylander*, 460 U.S. 752, 757 (1983) (impossibility). In some circumstances, defying a court order is necessary to appeal it, as Justice Sotomayor's majority opinion in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 111 (2009), recognizes.

c. Does there exist a legal basis for federal executive officials to defy federal court orders? If so, what basis and in which circumstances?

Response: See above.

d. What would make a court order unlawful?

Response: It depends on what the question means by "unlawful," but one well-recognized rule is that an order is void ab initio if the order is issued without jurisdiction.

i. What is the process a party should follow if it believes a court order to be unlawful?

Response: Sometimes an appeal is possible. Sometimes it is not. When it is not, the Supreme Court has in fact said parties may defy an order so that they can incur sanctions that trigger a right to appeal. One example of this is when a court orders disclosure of documents that a party believes to be

privileged. Ordinarily, that kind of order is not appealable. So as Justice Sotomayor's opinion put it, a party may have to violate the order so they can appeal: "Another long-recognized option is for a party to defy a disclosure order and incur court-imposed sanctions." *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 111 (2009). "Such sanctions allow a party to obtain postjudgment review without having to reveal its privileged information. Alternatively, when the circumstances warrant it, a district court may hold a noncomplying party in contempt. The party can then appeal directly from that ruling, at least when the contempt citation can be characterized as a criminal punishment." *Id.*

ii. Is it ever acceptable to not follow this process? When and why?

Response: As the Supreme Court has said, sometimes the right process is to appeal and sometimes the right process is something else, including "defy[ing]" an order. *Id.*

6. Were you in Washington, D.C. on January 6, 2021?

Response: I served as a law clerk in the Supreme Court during the OT2020 term. I was in the Supreme Court building working that day.

a. Were you inside the U.S. Capitol or on the U.S. Capitol grounds on January 6, 2021?

Response: I understand that "U.S. Capitol grounds" is defined by the Architect of the Capitol to include the Supreme Court building. I was in the Supreme Court building on that day, working as a law clerk. I was not at or in the Capitol building.

Senator Mazie K. Hirono
Questions for the Record
Joshua M. Divine
Nominee to the U.S. District Court for the Eastern and Western Districts of Missouri

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

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

    Response: No.

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

    RESPONSE: No.

2. In a 2010 article for *The Mirror* entitled "Literacy Tests Should Be Required for Elections," you expressed support for state-administered literacy tests as a prerequisite for voting, arguing that people who "aren't informed about issues or platforms…have no business voting." Such tests were outlawed by the Voting Rights Act of 1965.

    a. Do you stand by your position that literacy tests should be required for voting?

    Response: I do not believe literacy tests should be required for voting. Those tests are illegal.

    The question's characterization of the article is not correct. The article in question expressly condemns Jim Crow literacy tests. Jim Crow literacy tests were gerrymandered, abused, and enforced unevenly to deny Americans the right to vote. They were used particularly to target black Americans, but also were used to target people like my ancestors, Italian Americans. I have never advocated any form of Jim Crow literacy test.

    The article, written when I was a teenager, was consistent with the Civil Rights Act of 1964 and the Voting Rights Act of 1965, which banned Jim Crow literacy tests but permitted devices that did not have the same history of abuse. After the Supreme Court unanimously held that literacy tests are constitutional so long as they are not applied in a discriminatory way, *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 53 (1959), the Civil Rights Act and Voting Rights Act temporarily prohibited literacy tests in States with a history of abuse, but not in other jurisdictions. "[T]he Civil Rights Act of 1964 allowed for the use of literacy tests as a qualification, so long as the test was administered to every individual

and conducted in writing." Paulette Brown, *The Civil Rights Act of 1964*, 92 Wash. U. L. Rev. 527, 534 (2014); 52 U.S.C. § 10101(a)(2)(c). That Act restricted Jim Crow tests that had been administered arbitrarily and unevenly. The Voting Rights Act went further, banning the tests, but only in jurisdictions that had employed tests previously and where "less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964." 52 U.S.C. § 10303(a)–(b). The Voting Rights Act expressly permitted literacy tests in all other jurisdictions. The article written when I was a teenager expressed ideas consistent with those landmark pieces of legislation.

It was not until years after the Civil Rights Act and Voting Rights Act that Congress passed legislation prohibiting the use of those tests nationwide, in all jurisdictions and regardless of whether the tests were in writing. 52 U.S.C. § 10501. As a teenager in college, I was aware that the Civil Rights Act and the Voting Rights Act had banned some tests while permitting others. I was not aware of the later amendments. I learned about the more recent law in law school. Tests are illegal now, and I have never advocated any form of test (including the ones that the Civil Rights Act and Voting Rights Act permitted) since that article.

i. If so, explain your position.

b. Please explain whether, and if so how, literacy tests for voting would be legally permissible under the Voting Rights Act of 1965.

Response: As originally passed, the Voting Rights Act of 1965 prohibited tests only in certain jurisdictions, but expressly permitted others so long as they were written and administered to every individual. 52 U.S.C. § 10101(a)(2)(c). Later amendments prohibited those tests nationwide. 52 U.S.C. § 10501.

3. You have previously advocated on behalf of President Trump in one of his criminal cases. You submitted a brief to the Supreme Court of the United States requesting that it lift the district court's order barring President Trump from making public statements targeting court staff, supporting personnel, and reasonably foreseeable witnesses. You also asked the Supreme Court to delay sentencing for President Trump's felony convictions.

a. Given this advocacy, how can the American people trust you to be impartial, especially in federal court cases involving the President?

Response: The question does not accurately state the nature of the legal filing. I have never been an attorney representing President Trump. The lawsuit in question was filed by the State of Missouri. I will recuse from any case that I have been part of and will consult and follow the recusal statute and all ethical requirements of the code of conduct. As a general matter, I understand that judges are not required to recuse simply because they once advocated in favor of or against one side of an issue on behalf of a client. If that were the rule, then public

defenders who become judges would never be able to hear criminal cases that come before them because of their advocacy in criminal cases against the United States.

b. Do you believe protecting witness safety in criminal proceedings is important?

Response: The question does not accurately characterize the lawsuit, which concerned whether a court could impose a gag order against President Trump, prohibiting him from speaking on issues of public importance. New York agreed that the gag order implicated constitutionally protected speech. As stated in the preliminary injunction motion, the lawsuit sought to lift a gag order that prevented President Trump from "criticiz[ing] the New York prosecution team for their close ties to and contacts with high-ranking officials in the Biden administration" and from "criticiz[ing] Judge Merchan's close relatives who are actively engaged in Democratic politics and stand to gain financially from a conviction."

c. Do you believe protecting court staff and personnel from harm by litigants and their supporters is important?

Response: See above.

4. Federal district court judges have the power to issue court orders. If confirmed for this position, you will issue many such orders.

a. As a federal district court judge, what tools would be at your disposal to ensure compliance with your court orders? Please list all such tools with which you are familiar.

Response: Courts have a variety of methods to ensure compliance by any litigant with court orders. A common one is discovery sanctions. Courts sometimes draw adverse inferences from discovery failures or require one party to cover the costs of others. In more extreme cases, courts can dismiss a case or engage in contempt proceedings.

i. When should each of these tools be used?

Response: Whether a tool should be used will depend on the specific facts of the case.

b. Is it ever permissible for a party in a case to disregard a court order?

Response: Treatises and cases have identified circumstances where a party can raise a defense to compliance with a court, such as if the court lacked jurisdiction or if compliance was impossible. *E.g.*, 17 Corpus Juris Secundum Contempt §§ 56–65. In some circumstances, defying a court order is necessary to appeal it, as

Justice Sotomayor's majority opinion in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 111 (2009), recognizes.

i. How should a federal judge respond if a party disregards an order issued by the judge?

Response: Typically, a judge will first determine whether a party has in fact failed to respond, whether there is a good reason for not responding and, if not, whether any form of response by the court is worthwhile in light of the specific facts of the case.

ii. Is the President of the United States allowed to disregard a court order?

Response: Treatises and cases have identified circumstances where a party can raise a defense to compliance with a court, such as if the court lacked jurisdiction or if compliance was impossible. *E.g.*, 17 Corpus Juris Secundum Contempt §§ 56–65. In some circumstances, defying a court order is necessary to appeal it, as Justice Sotomayor's majority opinion in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 111 (2009), recognizes.

iii. Would the response(s) outlined in response to question (i) be appropriate if the President disregarded a court order? Why or why not?

Response: Whether a tool should be used will depend on the specific facts of the case.

c. What does it mean for a judge to hold a party in contempt of court?

Response: Contempt of court encompasses a wide variety of conduct, including disorderly conduct, disobeying an order, or generally disrespectful conduct inside a courtroom.

i. Do federal judges have the authority to hold the federal government in contempt of court?

Response: The Supreme Court has described contempt authority as an "inherent" part of the judicial power, and some statutes also regulate it. *E.g.*, 18 U.S.C. § 401; Judiciary Act of 1789. I have not reviewed any case law or other authorities addressing or interpreting these authorities, nor formed an opinion on how they might apply to any particular facts.

1. If so, where does that authority come from?

Response: See above.

2. **If not, why not?**

ii. What tools does a judge possess to punish contumacious conduct?

Response: Courts have a variety of methods to respond to improper conduct, including sanctions orders, drawing adverse inferences, dismissing a case, or engaging in contempt proceedings. What tool is appropriate will depend on the specifics of the case.

1. **Do those tools apply when the federal government or individual federal officers or employees are held in contempt?**

   Response: I have not had the occasion to assess whether precedents hold that contempt proceedings are different when the party is an executive official rather than a commercial litigant, although the Supreme Court has ruled that "[t]he President's unique status under the Constitution distinguishes him from other executive officials." *Nixon v. Fitzgerald*, 457 U. S. 731, 750 (1982). If a case arose, I would invite briefing and consult the relevant authorities.

2. **If not, why not?**

   Response: See above.

Nomination of Joshua M. Divine
Nominee to be U.S. District Judge for the Eastern and Western Districts of Missouri
Questions for the Record
Submitted June 11, 2025

QUESTIONS FROM SENATOR CORY A. BOOKER

1. If you are confirmed to the federal bench, you would be one of the least experienced federal district judges in the nation. Having graduated from law school in 2016, you have about nine years of legal experience; of those nine years, you have only seven years of legal practice experience, excluding judicial clerkships.

   a. If you are confirmed, what concrete and affirmative steps do you plan to take to try to overcome the relative experience gap between you and your colleagues?

   Response: The question does not accurately characterize my experience, which includes supervising the appeals of 200 attorneys and running the special litigation team, the trial unit tasked with handling some of the State's most complex trial litigation. In those roles, I have been lucky enough to acquire more firsthand, high-level, substantive experience in a decade than most attorneys have in their entire careers. I have delivered nearly 40 oral arguments and overseen around a dozen trials, plus many more preliminary injunction hearings. In the last year alone, I obtained victories in trial courts totaling $700 billion and first-chaired a two-week trial that successfully defended complicated legislation. To this day, I am told that Missouri is the only State in the nation to successfully defend that kind of law at trial even though about half the States have that kind of law. In any event, I believe in being a lifelong learner. I will continue to study to improve and have already begun reading several books designed for new judges. I also look forward to taking advantage of the mentorship programs that the Missouri district courts have, which pair new judges with seasoned judges.

2. The American Bar Association (ABA) Standing Committee on the Federal Judiciary has conducted extensive peer evaluations of the professional qualifications of a president's nominees to become federal judges for seven decades. This practice has endured through 18 presidential administrations, under Republican and Democratic presidents.

   On May 29, 2025, Attorney General Pam Bondi ended this longstanding practice when she informed the ABA that, "[T]he Office of Legal Policy will no longer direct nominees to provide waivers allowing the ABA access to nonpublic information, including bar records. Nominees will also not respond to questionnaires prepared by the ABA and will not sit for interviews with the ABA."[1]

[1] Letter from Attorney General Pam Bondi to William R. Bay, President, American Bar Association (May 29, 2025), https://www.justice.gov/ag/media/1402156/dl?inline.

a. Do you agree with AG Bondi that "the ABA no longer functions as a fair arbiter of nominees' qualifications and its ratings invariably and demonstrably favor nominees put forth by Democratic administrations"?

Response: I am aware of the criticisms levied against the ABA. I do not know as much as the Attorney General knows about the history of ABA ratings.

b. How many years of legal experience in the practice of law does the ABA recommend a federal judicial nominee have prior to their nomination?

Response: I understand that the ABA believes individuals should "ordinarily" have 12 years of post-law school experience because few attorneys have substantial firsthand experience until that time. The ABA also waives that 12-year preference—as it did several times in the previous administration—for individuals who have already accumulated "substantial courtroom and trial experience" or other "distinguished accomplishments." I have argued nearly 40 times in court, including first-chair complicated trial experience. I supervise 200 attorneys, and I have published several academic articles—all of which are highly unusual for attorneys with a decade of experience (or even multiple decades). I am aware of another Solicitor General who was the same or fewer number of years out of law school as me who received a qualified/well-qualified rating from the ABA because he similarly was lucky enough to have high-level experiences earlier in his career.

3. In an article you wrote for your college student newspaper *The Mirror*, you referred to yourself as a "zealot" for the pro-life movement.[2]

a. What is your definition of a "zealot"?

Response: The question refers to an article that was written when I was a teenager but does not correctly characterize the article. As I explained at the hearing, the term was used in the same way that people regularly refer to lawyers providing "zealous" advocacy—energetically trying to persuade. A democracy like ours depends on the ability and willingness of its citizens to engage in debate and try to persuade.

b. Would you describe yourself today as a "zealot" for the pro-life movement?

Response: I would describe myself as a zealous advocate for my clients: the State of Missouri, its agencies, and its officials. As a government attorney, I do not engage in political activism.

c. Do you believe that a woman has the right to make decisions that affect her health?

[2] Josh Divine, *The Justification of Zealous Behavior among Pro-Lifers,* THE MIRROR (Oct. 6, 2010).

Response: To the extent the question asks generally about the right and ability of individuals to make their own medical decisions that do not affect others, yes. To the extent the question asks about situations where the Supreme Court has recognized that there are competing interests and that policymakers can pass regulations in response to those competing interests, I believe all people ought to comply with the law.

4. In response to Senator Padilla's question about your writings in your college newspaper about same-sex marriage, you stated, "What I can tell you is that I'm no longer in college. That was almost 15 years ago. I can tell you as a general matter, I've grown up, I've had a lot more experiences, a lot of my policy, political, and even my religious views have changed in that time."

   a. How have your policy, political, and religious views changed in the past 15 years?

   Response: As I explained to Senator Padilla at the hearing, and as hundreds of nominees before me have explained as well, the judicial code of conduct prohibits judicial nominees from discussing their current policy, political, and religious views. My views on many things have changed in the last 15 years. Every day, I set aside my own views and advocate the interests of my clients. And if I were to be confirmed as a judge, I would likewise set aside any views that I have now or that may develop.

   b. Are there any written statements you have published or public statements you have made in the past that you now wish to retract?

   Response: Generally speaking, there are many statements from the decades-old articles I have been questioned about that I no longer agree with. But as I explained to Senator Padilla, and as hundreds of nominees before me have explained as well, the judicial code of conduct prohibits judicial nominees from discussing their current policy, political, and religious views. My views on many things have changed in the last 15 years. Every day, I set aside my own views and advocate the interests of my clients. And if I were to be confirmed as a judge, I would likewise set aside any views that I have now or that may develop. While there are statements that I do not agree with and would not express today, I do not regret being an engaged, energetic student who was eager to grapple with issues and explore ideas in college—even if I later came to reject many ideas I had in my youth.

      i. If no, please affirm that you continue to stand by all of your previous published written statements and public statements.

5. **How would you characterize your judicial philosophy?**

Response: When Congress passes a statute or the people enact a constitutional amendment, that law's meaning does not change until amended with new text. It is inappropriate for judges to "update" laws out of dissatisfaction that the people or Congress have chosen not to do so. My philosophy is that the law should be applied as written, and not how judges wish it were written.

6. **Do you consider yourself an originalist? If so, what do you understand originalism to mean?**

   Response: Different people define that term differently. My judicial philosophy is summed up in the question above.

7. **Do you consider yourself a textualist? If so, what do you understand textualism to mean?**

   Response: Different people define that term differently. My judicial philosophy is summed up in question 6.

8. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Some federal judges consider legislative history when analyzing the meaning of a statute.

   a. **If you are confirmed to serve on the federal bench, would you consult and cite legislative history to analyze or interpret a federal statute?**

      Response: Many justices on the Supreme Court disregard legislative history because they do not believe it is reliable. Others rely on it. Under the doctrine, reliance on legislative history is unnecessary when a statute's language is unambiguous. *Mohamad v. Palestinian Authority*, 566 U.S. 449, 458 (2012). To the extent it is proper to rely on legislative history in some circumstances, it "is meant to clear up ambiguity, not create it." *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011). I would faithfully apply binding precedent.

9. According to a Brookings Institution study, Black people and white people use drugs at similar rates, yet Black people are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[3] Notably, the same study found that whites are actually *more likely* than Black people to sell drugs.[4] This disparity still persists. Even though rates of illicit drug use do not

[3] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[4] *Id.*

substantially differ by race and ethnicity,[5] a 2023 study reports that one in four people arrested for drug law violations were Black, although Black people make up only 14 percent of the U.S. population.[6]

These statistics are reflected in our nation's prisons and jails. Black people are roughly five times more likely than white people to be incarcerated in state prisons.[7] In my home state of New Jersey, "the rate of imprisonment among Black people is more than nine times" that of white people.[8]

a. To what do you attribute the statistics above?

Response: I am not familiar with the study above and so am not positioned to assess any causation.

10. According to an academic study, Black men were 65 percent more likely than similarly-situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.[9] What do you attribute this to?

Response: I am not familiar with the study above and so am not positioned to assess any causation.

11. A recent report by the United States Sentencing Commission observed demographic differences in sentences imposed during the five-year period studied, with Black men receiving federal prison sentences that were 13.4 percent longer than white men.[10] What do you attribute this to?

Response: I am not familiar with the study above and so am not positioned to assess any causation.

12. What role do you think federal judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

Response: Under 18 U.S.C. § 3553(a), judges are called on to issue sentences that "avoid unwarranted sentence disparities among defendants with similar records who have been

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[5] SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMINISTRATION, BEHAVIORAL HEALTH BY RACE AND ETHNICITY: RESULTS FROM THE 2021–2023 NATIONAL SURVEYS ON DRUG USE AND HEALTH 6 (2024).
[6] Nazgol Ghandnoosh, Ph.D. & Celeste Barry, *One in Five: Disparities in Crime and Policing*, THE SENTENCING PROJECT 18 (Nov. 2, 2023), https://www.sentencingproject.org/press-releases/new-report-on-racial-disparities-in-policing-and-crime-from-the-sentencing-project/.
[7] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (Oct. 13, 2021), https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf.
[8] *Id.* at 9.
[9] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).
[10] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING 2 (Nov. 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf.

found guilty of similar conduct." As a judge, I would apply this statute when issuing sentences.

13. Do you believe it is valuable for America to have demographic diversity in the judicial branch? If not, please explain your views.

Response: Yes, nobody should ever be excluded from the opportunity to serve as a judge based on race, ethnicity, sex, religion, or any other protected characteristic.

14. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

Response: If I am fortunate enough to be confirmed, I will treat every litigant with respect and will require that others in the courtroom do the same.

15. Under what circumstances would it be acceptable for an executive branch official to ignore or defy a federal court order?

Response: Treatises and cases have identified a number of circumstances where compliance with a court order is not required, such as if the court lacked jurisdiction or if compliance was impossible. *E.g.*, 17 Corpus Juris Secundum §§ 56–65. The Supreme Court has identified additional circumstances, such as where an order must be violated to be appealed. As Justice Sotomayor's opinion put it, "Another long-recognized option is for a party to defy a disclosure order and incur court-imposed sanctions." *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 111 (2009). "Such sanctions allow a party to obtain postjudgment review without having to reveal its privileged information. Alternatively, when the circumstances warrant it, a district court may hold a noncomplying party in contempt. The party can then appeal directly from that ruling, at least when the contempt citation can be characterized as a criminal punishment." *Id.*

a. If an executive branch official ignores or defies a federal court order, what legal analysis would you employ if confirmed to the federal bench to determine whether that official should be held in contempt?

Response: In that unlikely scenario, I would assess whether allegations of noncompliance were correct and would invite briefing on the matter. I would also assess whether any recognized defenses apply.

b. Is there any legal basis that would allow an executive branch official to ignore or defy temporary restraining orders and preliminary injunctions issued by federal district court judges?

Response: See above the first response to question 15.

16. Does the president have the power to ignore or nullify laws passed by Congress?

Response: The Supreme Court has repeatedly recognized that executive officials have substantial, but not unlimited, prosecutorial discretion in choosing how and when to enforce certain laws. To the extent the question asks about current legal disputes, it would be improper for a judicial nominee to promise or forecast how he or she would rule in a case that might come before him or her.

17. Does the president have the power to withhold funds appropriated by Congress?

Response: Congress passed the Impoundment Control Act in 1974. I have not reviewed any case law or other authorities addressing or interpreting this statute, nor formed an opinion on how it might apply it to any particular facts. To the extent the question asks about current legal disputes, it would be improper for a judicial nominee to promise or forecast how he or she would rule in a case that might come before him or her.

18. Does the Supremacy Clause of the U.S. Constitution establish that federal laws supersede conflicting state laws?

Response: Yes.

a. The Emergency Medical Treatment and Labor Act (EMTALA) is a federal law enacted in 1986 that requires hospitals to provide emergency care, including emergency abortion care. Do you agree that EMTALA, as a federal law, supersedes conflicting state laws?

Response: There is active litigation on this issue. To the extent the question asks about current legal disputes, it would be improper for a judicial nominee to promise or forecast how he or she would rule in a case that might come before him or her. As a general matter, as explained in the answer above, state laws that conflict with federal laws are preempted. But there are current disputes about whether state laws conflict with the federal law mentioned above.

19. Does the Fifth Amendment of the U.S. Constitution apply to non-citizens present in the United States?

Response: The Fifth Amendment provides, in relevant part, "No person shall … be deprived of life, liberty, or property, without due process of law." The question in most cases is less about whether the doctrine of due process applies and more about how much process is due.

20. Is it constitutional for Congress to delegate to federal agencies the power to implement statutes through rulemaking?

Response: In *Whitman v. American Trucking*, the Supreme Court held that the text of the Constitution "permits no delegation" but that no delegation has occurred when Congress

"lay[s] down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform." 531 U.S. 457, 472 (2001) (brackets omitted).

21. Was *Brown v. Board of Education*, 347 U.S. 483 (1954), correctly decided?

Response: As dozens of nominees have said before, it is almost always improper for judicial nominees to give a thumbs-up or thumbs-down to Supreme Court precedent. To my knowledge, the only two exceptions to this general rule against opining on the merits of Supreme Court cases are *Brown* and *Loving*. I agree that both those decisions were correctly decided.

22. Is *Griswold v. Connecticut*, 381 U.S. 479 (1965), binding precedent? Please describe the facts and holding of this case.

Response: *Griswold* is binding precedent. It involved an appeal by individuals who were penalized for prescribing contraceptives, and the Court held that the statute violated a "right to privacy" that the Court interpreted to be within the Constitution.

23. Is *Lawrence v. Texas*, 539 U.S. 558 (2003), binding precedent? Please describe the facts and holding of this case.

Response: *Lawrence* is binding precedent. It involved an appeal by an individual penalized for engaging in certain sexual conduct, and the Court held that the statute penalizing engaging in that conduct violated the Constitution.

24. Is *Obergefell v. Hodges*, 576 U.S. 644 (2015), binding precedent? Please describe the facts and holding of this case.

Response: *Obergefell* is binding precedent. It involved a challenge to state statutes defining marriage as a union between one man and one woman. The Court held that the Constitution requires States to license a marriage between two people of the same sex.

25. Do you believe that President Trump won the 2020 election? Please describe the facts and holding of this case.

Response: I served as a law clerk in the Supreme Court in 2020. The Court ruled on a case on this issue when I was clerking. Ethical rules prohibit discussing those matters. President Biden was certified as the victor and served as the 46th President of the United States.

26. The 22nd Amendment says that "no person shall be elected to the office of the President more than twice."[11]

a. Do you agree that President Trump was elected to the office of the President in the 2016 election?

[11] U.S. CONST. amend. XXII.

Response: Yes, that election was not disputed by the candidates.

b. Do you agree that President Trump was elected to the office of the President in the 2024 election?

Response: Yes, that election was not disputed by the candidates.

c. Do you agree that the 22nd Amendment, absent a constitutional amendment, prevents President Trump from running for a third presidential term?

Response: Section 1 of the Twenty-Second Amendment states, in part, "No person shall be elected to the office of the President more than twice…." I have not reviewed any case law or other authorities addressing or interpreting this Amendment, nor formed an opinion on how it might apply to any particular facts. To the extent the question asks about political disputes, it would be improper for a judicial nominee to promise or forecast how he or she would rule in a case that might come before him or her.

27. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

Response: As part of the process for preparing for the hearing, there was general discussion of the universe of responses the committee has previously received to various questions. I have given answers based on my understanding of what is appropriate consistent with the judicial canons of ethics and have relied on the interpretations and practices of nominees who have preceded me.

28. Have you spoken or corresponded with Elon Musk since November 2024? If yes, provide the dates, mode, and content of those discussions and communications.

Response: No.

29. Have you spoken or corresponded with any member of the Department of Government Efficiency (DOGE) since November 2024? If yes, identify the member(s) and provide the dates, mode, and content of those discussions and communications.

Response: I do not know who is a member of DOGE. To my knowledge, no.

30. Have you spoken or corresponded with Stephen Miller since November 2024? If yes, provide the dates, mode, and content of those discussions and communications.

Response: No.

31. Have you spoken or corresponded with Chad Mizelle since November 2024? If yes, provide the dates, mode, and content of those discussions and communications.

Response: Yes. Sometime in December, I interviewed for a position in the Department of Justice with Mr. Mizelle and spoke with him again by phone in mid-January when considering an offer. We discussed my qualifications and experiences as well as the parameters of the job offer.

32. Have you spoken or corresponded with Pam Bondi since November 2024? If yes, provide the dates, mode, and content of those discussions and communications.

Response: Yes. Sometime in December, I interviewed for a position in the Department of Justice with Attorney General Bondi. We discussed my qualifications and experiences.

33. Have you spoken or corresponded with Todd Blanche since November 2024? If yes, provide the dates, mode, and content of those discussions and communications.

Response: No.

34. Have you spoken or corresponded with Emil Bove since November 2024? If yes, provide the dates, mode, and content of those discussions and communications.

Response: Yes. He and I had a short phone conversation about a week after my hearing before this Committee. He is also a judicial nominee, and we discussed some logistics about Judiciary Committee hearings.

35. Have you spoken or corresponded with Leonard Leo since November 2024? If yes, provide the dates, mode, and content of those discussions and communications.

Response: No.

36. Have you—personally or through any of your affiliated companies or organizations, agents, or employees—provided financial support or other resources to any members of the Proud Boys or of the Oath Keepers for their legal fees or for other purposes? If yes, state the amount of financial support provided, dates provided, and for what purposes.

Response: No.

37. Have you ever spoken or corresponded with any of the following individuals? If yes, provide the dates, mode, and content of those discussions and communications.

Response: No.

a. Enrique Tarrio

b. Stewart Rhodes
c. Kelly Meggs
d. Kenneth Harrelson
e. Thomas Caldwell
f. Jessica Watkins
g. Roberto Minuta
h. Edward Vallejo
i. David Moerschel
j. Joseph Hackett
k. Ethan Nordean
l. Joseph Biggs
m. Zachary Rehl
n. Dominic Pezzola
o. Jeremy Bertino
p. Julian Khater

38. Have you ever spoken or corresponded with any individuals convicted and later pardoned of offenses related to the January 6, 2021 attack on the U.S. Capitol? If yes, identify the individual(s) and provide the dates, mode, and content of those discussions and communications.

Response: I do not know anybody who received a pardon. To my knowledge, I have never spoken to anybody discussed in the question.

39. Have you ever been demoted, terminated, or experienced any other adverse employment action?

Response: No.

a. If yes, please describe the events that led to the adverse employment action.

b. If no, please affirm that, since becoming a legal adult, you have left each place of employment voluntarily and not subject to the request or suggestion of any employer.

Response: I affirm that I have left each place of employment voluntarily.

40. Federal judges must file annual financial disclosure reports and periodic transaction reports. If you are confirmed to the federal bench, do you commit to filing these disclosures and to doing so on time?

Response: Yes.

41. Article III Project (A3P) "defends constitutionalist judges and the rule of law." According to Mike Davis, Founder & President of A3P, "I started the Article III Project in 2019 after I helped Trump win the Gorsuch and Kavanaugh fights. We saw then how

relentless—and evil—too many of today's Democrats have become. They're Marxists who hate America. They believe in censorship. They have politicized and weaponized our justice systems."[12]

a. Have you discussed any aspect of your nomination to the federal bench with any officials from or anyone directly associated with A3P, or did anyone do so on your behalf? If yes, identify the individual(s) and provide the dates, mode, and content of those discussions and communications.

Response: To the best of my knowledge, no. I am not familiar with the individuals who have been associated with that organization.

b. Are you currently in contact with anyone associated with A3P? If so, who?

Response: To the best of my knowledge, no. I am not familiar with the individuals who have been associated with that organization.

c. Have you ever been in contact with anyone associated with A3P? If so, who?

Response: To the best of my knowledge, no. I am not familiar with the individuals who have been associated with that organization.

42. According to its Form 990 filed in 2024,[13] the mission of The Concord Fund (formerly known as the Judicial Crisis Network and the Judicial Confirmation Network) "is to promote the vision of liberty and justice in America, fidelity to the principles of federalism and the rule of law, to educate and organize citizens in this mission, and to encourage reforms that achieve these ends."

a. Have you discussed any aspect of your nomination to the federal bench with any officials from or anyone directly associated with The Concord Fund, or did anyone do so on your behalf? If yes, identify the individual(s) and provide the dates, mode, and content of those discussions and communications.

Response: I am not familiar with the members of that organization, but to my knowledge, no—with one exception. The only exception is that Carrie Severino (whom I know because both of us clerked for Justice Thomas) sent me a brief message of congratulations. That is the full extent of the conversation I have had. I do not know if Carrie is affiliated with the organization described, but another Senator's question suggested she is.

b. Are you currently in contact with anyone associated with The Concord Fund? If so, who?

[12] *See* https://www.article3project.org/about.
[13] The Concord Fund, Form 990 (filed on May 13, 2024), *available at* https://projects.propublica.org/nonprofits/organizations/202303252/202411359349301886/full.

Response: To the best of my knowledge, no. I am not familiar with the individuals who have been associated with that organization and have not been in contact with Carrie since she sent me the brief message of congratulations.

c. Have you ever been in contact with anyone associated with The Concord Fund? If so, who?

Response: To the best of my knowledge, no, other than my association with Carrie, whom I know because both of us clerked for Justice Thomas. I am not familiar with the individuals who have been associated with that organization.

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

Response: The selection process and interviews are described in answer 26 on the Questionnaire.

44. Since you were first approached about the possibility of being nominated, did anyone associated with the Trump Administration or Senate Republicans provide you guidance or advice about which cases to list on your Senate Judiciary Questionnaire (SJQ)?

Response: I have been in contact with the Office of Legal Policy, which provided me with a general document providing guidance about how to fill out a Senate Judiciary Questionnaire. I made my own decisions about which cases to list.

a. Who?

Response: See above.

b. What advice did they give?

Response: See above.

c. Did anyone suggest that you omit or include any particular case or type of case in your SJQ?

Response: No.

45. During your selection process did you talk with any officials from or anyone directly associated with the Article III Project, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: To the best of my knowledge, no. I am not familiar with the individuals who have been associated with that organization.

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

Response: Not as part of the selection process. Friends who are among the tens of thousands of members of that organization have congratulated me on my nomination.

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

Response: The selection process and interviews are described in answer 26 on the Questionnaire. Since submitting the Questionnaire, I have been in regular contact with the Office of Legal Policy regarding logistics of the nomination.

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

Response: I reviewed a few previous nominees' responses to get an idea of the format and general length of appropriate responses. I drafted my responses to each of these questions. After receiving feedback from persons at the Office of Legal Policy at the U.S. Department of Justice, I finalized my answers and authorized them to be submitted to this Committee. My answers are my own.

Questions for the Record from Senator Alex Padilla
Senate Judiciary Committee
"Nominations"

June 11, 2025

Questions for Mr. Divine:

1. **Please identify any and all situations where it is permissible for a party, including the Executive Branch or one of its officers, departments, or agencies, to defy a court order.**

   Response: Treatises and cases have identified a number of circumstances where compliance with a court order is not required, such as if the court lacked jurisdiction or if compliance was impossible. *E.g.*, 17 Corpus Juris Secundum Contempt §§ 56–65. In some circumstances, defying a court order is necessary to appeal it, as Justice Sotomayor's majority opinion in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 111 (2009), recognizes.

2. **Please identify any and all situations in which you would advise a client to ignore or defy a court order.**

   Response: I have never advised a client to ignore or defy a court order. I would only ever advise a client consistent with what is legally permitted.

3. **Is it appropriate for the President of the United States to threaten or harass a judge when he disagrees with the outcome of a case over which that judge is presiding, or disagrees with aspects of a judge's decision or order?**

   Response: Judges, like anybody else, are subject to criticism in our democracy. Under the First Amendment, anybody is permitted to criticize rulings of judges with which they disagree. To the extent the question asks to wade into political disputes, it would be inappropriate for a judicial nominee to do so.

4. **In the process of applying to become a judge, did you have any conversations with President Trump, a member of his staff, or a member of an outside group about policy or personal positions or beliefs you would have on the bench, or decisions you would make on the bench?**

   Response: No.

Senator Peter Welch
Senate Judiciary Committee
Written Questions for Joshua Divine
Hearing on "Nominations"
Wednesday, June 11, 2025

1. **Did you author articles for *The Mirror* while a student at Northern Colorado University?**

   Response: Yes, although the name of the school was slightly different than stated in the question: University of Northern Colorado.

2. **Did you author an article entitled "Literacy tests should be required for elections?"**

   Response: As explained in the Questionnaire, I did not author article headlines. I authored an article, but the newspaper editors authored the headlines, including the headline discussed in the question.

   a. **How many years ago did you write the article?**

      Response: The article was written in 2010, fifteen years ago.

   b. **In the article, you wrote, "In the Civil Rights Act, literacy tests were banned because they were used as a form of discrimination in that they were only administered to certain groups of people, but literacy tests themselves are not a bad thing." Do you still agree that literacy tests are not a bad thing?**

      Response: The quote in isolation does not provide an accurate snapshot of the article. The article in question expressly condemns Jim Crow literacy tests. Jim Crow literacy tests were gerrymandered, abused, and enforced unevenly to deny Americans the right to vote. They were used particularly to target black Americans, but also were used to target people like my ancestors, Italian Americans. I have never advocated any form of Jim Crow literacy test.

      The article, written when I was a teenager, was consistent with the Civil Rights Act of 1964 and the Voting Rights Act of 1965, which banned Jim Crow literacy tests but permitted devices that did not have the same history of abuse. After the Supreme Court unanimously held that literacy tests are constitutional so long as they are not applied in a discriminatory way, *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 53 (1959), the Civil Rights Act and Voting Rights Act temporarily prohibited literacy tests in States with a history of abuse, but not in other jurisdictions. "[T]he Civil Rights Act of 1964 allowed for the use of literacy tests as a qualification, so long as the test was administered to every individual and conducted in writing." Paulette Brown, *The Civil Rights Act of 1964*, 92 Wash. U. L. Rev. 527, 534 (2014); 52 U.S.C. § 10101(a)(2)(c). That Act restricted Jim Crow tests that had been administered arbitrarily and unevenly. The Voting

Rights Act went further, banning the tests, but only in jurisdictions that had employed tests previously and where "less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964." 52 U.S.C. § 10303(a)–(b). The Voting Rights Act expressly permitted literacy tests in all other jurisdictions. The article written when I was a teenager expressed ideas consistent with those landmark pieces of legislation.

It was not until years after the Civil Rights Act and Voting Rights Act that Congress passed legislation prohibiting the use of those tests nationwide, in all jurisdictions and regardless of whether the tests were in writing. 52 U.S.C. § 10501. As a teenager in college, I was aware that the Civil Rights Act and the Voting Rights Act had banned some tests while permitting others. I was not aware of the later amendments. I learned about the more recent law in law school. Tests are illegal now, and I have never advocated any form of test (including the ones that the Civil Rights Act and Voting Rights Act permitted) since that article.

c. In the article, you also wrote, "there are reasons to take away somebody's vote, such as an unstable residency…." Do you still agree that an unstable residency is a valid reason to take away somebody's vote?

Response: The quote in isolation does not provide an accurate snapshot of the article, which discusses felon disenfranchisement in the same sentence. The Fourteenth Amendment has been interpreted to permit States to deny convicted felons the ability to vote. *E.g.*, *Richardson v. Ramirez*, 418 U.S. 24 (1974). As to residency, the Supreme Court has declared "that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud" and that "States have the power to require that voters be bona fide residents." *Dunn v. Blumstein*, 405 U.S. 330, 343, 348 (1972); *see also* 52 U.S.C. § 10502. The Supreme Court and Congress have permitted States to refuse to allow somebody to vote in an election if the person fails to satisfy basic requirements.

3. Did you author an article entitled "Reese issue illustrates destructive cannon of political correctness?"

Response: As explained in the Questionnaire, I did not author article headlines. I authored an article, but the newspaper editors authored the headlines, including the headline discussed in the question.

a. How many years ago did you write the article?

Response: The article was written in January 2011, more than fourteen years ago.

b. In the article, did you write, "Just as Democrats put forth everything bad they could find about President G.W. Bush, so too will a supremacist organization display mostly negative information?"

Response: The quote in isolation does not provide an accurate snapshot of the article, which contrasted a mainstream organization (Democratic Party) with a fringe organization. The article simply noted that just because a speaker is a well-known opponent of the person they are criticizing does not automatically make their assertions factually incorrect. That the criticizing organization is an institutional opponent may reflect on motive, but it does not (without more) automatically mean everything said by the criticizing organization is incorrect. The article concerned criticisms made by a supremacist organization about Dr. Martin Luther King. That kind of organization obviously lacks any credibility at all, and its motives for those criticisms were no doubt malicious. Yet CNN had verified that at least some of the organization's criticisms were factually correct. The article noted that the criticisms of Dr. Martin Luther King were a bad-faith "diatribe," but also noted that college students must become equipped to address criticisms—good faith or bad faith—no matter whether they come from a fringe organization or a mainstream one. Other articles that I wrote, and which were disclosed to the Committee, favorably compared Dr. Martin Luther King to Mother Theresa and Gandhi.

Questions for the Record
Sen. Adam Schiff (CA)

Joshua M. Divine, Nominee to the United States District Court for the Eastern District of Missouri and the Western District of Missouri

1. You have been a member of the Federalist Society since 2013. Additionally, you clerked for U.S. Supreme Court Justice Clarence Thomas, who is also a current or former member of Federalist Society. President Trump recently decried the Federalist Society for its "bad advice" on judicial nominations and called Leonard Leo, its Co-Chairman, a "real sleazebag."

    a. **Did the Federalist Society, or any current or former members of the Federalist Society, recommend you to the White House for nomination to the United States District Court for the Eastern District of Missouri and the Western District of Missouri?**

    Response: I have no knowledge of whom the White House spoke to or did not speak to. My understanding is that I was recommended by the Senators from Missouri.

    b. **Do you believe the Federalist Society provided "bad advice" to President Trump on judicial nominations?**

    Response: I am not aware of what advice has been proffered or not proffered to the White House. To the extent the question asks to wade into political disputes, it would be inappropriate for a judicial nominee to do so.

2. **The Republican-sponsored spending bill contains a provision that would impede the ability of federal judges to enforce contempt orders. The provision states: "No court of the United States may enforce a contempt citation for failure to comply with an injunction or temporary restraining order if no security was given when the injunction or order was issued." In your estimation, would this provision, if enacted, impede your ability as a future United States District Judge to enforce contempt orders against the government or government officials?**

    Response: Under Federal Rule of Civil Procedure 65, a "court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." I understand from public reporting that

the bill discussed above may be a congressional response to some judges not requiring the bond contemplated by Rule 65. As a judge I would follow the law, and it is not for judicial nominees to endorse or criticize pending legislation.

3. **Given your previous work for the Missouri Attorney General's office, do you commit to faithfully abiding by all relevant conflict of interest and judicial disqualification policies and procedures during your potential tenure as a District Judge in the Eastern and Western Districts of Missouri?**

   Response: Yes.

4. The governing statute of the United States Marshals Service requires that "the United States Marshals Service ***shall*** execute ***all lawful writs, process, and orders*** issued under the authority of the United States." Additionally, the "primary . . . mission" of the Service is to "provide for the security and to obey, execute, and enforce all orders of the United States District Courts . . . [.]" 28 U.S.C. § 566.

   a. **Based on the Service's governing statute, would it be unlawful for an executive branch official to command the Service to disregard, or otherwise not execute, any "writ[], process [or] order[]" issued by a United States District Judge?**

      Response: Not having ever served as a judge, I have not had occasion to become familiar with the statute cited. I have not reviewed any case law or other authorities addressing or interpreting this statute, nor formed an opinion on how it might apply it to any particular facts. To the extent the question asks for a promise or forecast about how I might rule in a case that might come before me, it would be improper for me to provide that forecast or promise.

   b. **If the Service were to obey an executive branch command to disregard, or otherwise not execute, one of your orders, what other mechanisms would you consider employing, as a United States District Judge, to ensure compliance?**

      Response: Not having ever served as a judge, I have not had occasion to become familiar with the statute cited. I have not reviewed any case law or other authorities addressing or interpreting this statute, nor formed an opinion on how it might apply it to any particular facts. To the extent the question asks for a promise or forecast about how I might rule in a case that might come before me, it would be improper for me to provide that forecast or promise. As a general matter, if I

am lucky enough to be confirmed, I intend to consult not just case law, but also my colleagues in the event of unusual situations.

5. In October 2010, you wrote, "People who aren't informed about issues or platforms — especially when it is so easy to become informed these days — have no business voting, which is why I propose state-administered literacy tests," in the University of Northern Colorado's student newspaper, The Mirror. Literacy tests were used by election officials throughout the Jim Crow South to prevent Black voters from registering to vote and subsequently outlawed in Section 4 of the Voting Rights Act of 1965.

   a. **Do you still believe that states should administer literacy tests before allowing citizens to vote?**

      Response: The premise of the question and the characterization of the article are not correct. The article in question expressly condemns Jim Crow literacy tests. Jim Crow literacy tests were gerrymandered, abused, and enforced unevenly to deny Americans the right to vote. They were used particularly to target black Americans, but also were used to target people like my ancestors, Italian Americans. I have never advocated any form of Jim Crow literacy test.

      The article, written when I was a teenager, was consistent with the Civil Rights Act of 1964 and the Voting Rights Act of 1965, which banned Jim Crow literacy tests but permitted devices that did not have the same history of abuse. After the Supreme Court unanimously held that literacy tests are constitutional so long as they are not applied in a discriminatory way, *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 53 (1959), the Civil Rights Act and Voting Rights Act temporarily prohibited literacy tests in States with a history of abuse, but not in other jurisdictions. "[T]he Civil Rights Act of 1964 allowed for the use of literacy tests as a qualification, so long as the test was administered to every individual and conducted in writing." Paulette Brown, *The Civil Rights Act of 1964*, 92 Wash. U. L. Rev. 527, 534 (2014); 52 U.S.C. § 10101(a)(2)(c). That Act restricted Jim Crow tests that had been administered arbitrarily and unevenly. The Voting Rights Act went further, banning the tests, but only in jurisdictions that had employed tests previously and where "less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964." 52 U.S.C. § 10303(a)–(b). The Voting Rights Act expressly permitted literacy tests in all other jurisdictions. The article written when I was a teenager expressed ideas consistent with those landmark pieces of legislation.

It was not until years after the Civil Rights Act and Voting Rights Act that Congress passed legislation prohibiting the use of those tests nationwide, in all jurisdictions and regardless of whether the tests were in writing. 52 U.S.C. § 10501. As a teenager in college, I was aware that the Civil Rights Act and the Voting Rights Act had banned some tests while permitting others. I was not aware of the later amendments. I learned about the more recent law in law school. Tests are illegal now, and I have never advocated any form of test (including the ones that the Civil Rights Act and Voting Rights Act permitted) since that article.