Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Arianna Freeman
Nominee to be United States Circuit Judge for the Third Circuit
March 9, 2022

1. **In 2009, you joined the Federal Community Defender Office in the Eastern District of Pennsylvania. Since then—as a court-appointed attorney—your practice has focused on representing indigent individuals seeking habeas relief in federal courts.**

    a. **Please explain the importance of habeas work.**

    b. **How does habeas work help vindicate constitutional rights and protections, including the right to due process and the Sixth Amendment right to effective assistance of counsel.**

    Response: Many of the rights enshrined in the Constitution pertain to the fairness and accuracy of criminal prosecutions. The Fifth and Sixth Amendments guarantee that any person charged with a crime will have numerous rights, including the rights to due process, to the assistance of counsel, to an impartial jury, and to be confronted with the witnesses against him. The Supreme Court has held that each of those rights is fundamental and protected against deprivation by the states.

    The writ of habeas corpus permits the judicial system to correct deprivations of these fundamental rights. As the Supreme Court stated in *Harris v. Nelson*,

    > The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: "The Privilege of the Writ of Habeas Corpus shall not be suspended * * *." U.S. Const., Art. I, s 9, cl. 2. The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

    394 U.S. 286, 290–91 (1969).

    For over 12 years, I have served as a federal public defender representing indigent individuals in matters arising from these principles. This work helps our nation realize its constitutional ideal of the fair administration of justice.

2. **The Judiciary Committee has received a number of letters of support for your nomination from former prosecutors in the Third Circuit. One letter—from 17 former**

Assistant United States Attorneys (AUSAs)—stressed that you are "exceptionally well-qualified and well-suited to serve on the Third Circuit." Another—from four former prosecutors—highlights the writers' confidence that you "will provide sound and measured opinions, while approaching each case without bias and with respect for the rule of law."

a. **As a federal public defender, how have you approached your working relationship with state and federal prosecutors?**

   Response: Over the course of my career as a federal public defender, I have litigated cases in which prosecutors from several different jurisdictions have represented the opposing party. I have always prioritized respectful interactions with opposing counsel. I believe it is important for attorneys to treat each other ethically and respectfully as we fulfill our roles to zealously advocate for our clients.

b. **If confirmed to the Third Circuit, what importance will you place on collegiality and consensus-building?**

   Response: The ability of appellate courts to adjudicate matters collectively provides a unique opportunity for judges to benefit from the considered viewpoints of their colleagues who have reviewed the same record and studied the same legal authorities. If confirmed, I would welcome the opportunity to exchange ideas with the judges on the Third Circuit. I believe the open-minded and collegial exchange of ideas is a vital component of judging, as it helps achieve the shared goal of fairly administering the law in all cases. I also believe that open-minded and respectful collaboration increases the likelihood of reaching consensus, which is important to achieve whenever possible.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Arianna Freeman
Judicial Nominee to the United States Court of Appeals for the Third Circuit

1. **In your Senate Judiciary Questionnaire, you indicated that you were a recording secretary for Region 7, Inc., between 2017 and 2021. You also wrote that you have been a member of the Social Change Network since 2007. These groups do not appear to have much online presence. I would appreciate your explanation of (a) what each organization does, (b) the nature of your involvement as a member, and (c) whether membership in each organization is open to the public or by invitation.**

   Response: Region 7, Inc. is an organization that provides assistance to persons with eating disorders. As Recording Secretary, I was responsible for taking meeting minutes and maintaining and distributing documents. Membership is limited to persons with particular service roles.

   The Social Change Network is an informal network of attorneys in the Philadelphia area that, until 2019, gathered from time to time to discuss issues that any member wished to discuss. I coordinated and attended some of the gatherings. This informal group has no membership requirements.

2. **In the context of federal case law, what is the academic or scholarly definition of super precedent? Which cases, if any, count as super precedent?**

   Response: In my legal career, I have never encountered the term "super precedent." It appears that neither the Supreme Court nor the Third Circuit has used that term. If confirmed, I will faithfully apply all Supreme Court and Third Circuit precedents.

3. **You can answer the following questions yes or no:**
   a. **Was *Brown v. Board of Education* correctly decided?**
   b. **Was *Loving v. Virginia* correctly decided?**
   c. **Was *Griswold v. Connecticut* correctly decided?**
   d. **Was *Roe v. Wade* correctly decided?**
   e. **Was *Planned Parenthood v. Casey* correctly decided?**
   f. **Was *Gonzales v. Carhart* correctly decided?**
   g. **Was *District of Columbia v. Heller* correctly decided?**
   h. **Was *McDonald v. City of Chicago* correctly decided?**
   i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
   j. **Was *Sturgeon v. Frost* correctly decided?**
   k. **Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided?**

Response: If confirmed, I will faithfully apply all Supreme Court precedents. It is generally inappropriate for judicial nominees to comment on the merits of any particular precedent. As per the practice of prior judicial nominees, I make an exception to that general rule to acknowledge that a small number of cases whose holdings are highly unlikely to be challenged in future litigation were correctly decided. *Brown v. Board of Education* and *Loving v. Virginia* are two such cases, and I agree that they were correctly decided.

4. **Do you agree with Judge Ketanji Brown Jackson when she said in 2013 that she did not believe in a "living constitution"?**

   Response: I am not familiar with Judge Jackson's statement or its context. The Constitution is an enduring document. It does not change unless amended pursuant to Article V.

5. **Should judicial decisions take into consideration principles of social "equity"?**

   Response: Judicial decisions should be based on the governing law and the record before the court.

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

   Response: I am not familiar with this quote or its context. Judges should apply governing law to the facts before them.

7. **Is climate change real?**

   Response: If confirmed, I will approach any case involving questions about climate change by reviewing the facts in the record and applying the governing law.

8. **Do parents have a constitutional right to direct the education of their children?**

   Response: The Supreme Court has held that parents have the right to direct the education of their children. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("[Plaintiff's] right thus to teach, and the right of parents to engage [Plaintiff] so to instruct their children, we think, are within the liberty" of the Fourteenth Amendment.); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("[The 'liberty' specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one's children") (citation omitted).

9. **Is whether a specific substance causes cancer in humans a scientific question?**

Response: The Supreme Court and the Third Circuit have recognized that testimony from scientific experts is relevant to whether a specific substance causes cancer in humans. *See*, *e.g.*, *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *McMunn v. Babcock & Wilcox Power Generation Grp., Inc.*, 869 F.3d 246 (3d Cir. 2017).

10. **Is when a "fetus is viable" a scientific question?**

Response: In *Planned Parenthood v. Casey*, the Supreme Court observed that "advances in neonatal care have advanced [fetal] viability to a point somewhat earlier" than in 1973. 505 U.S. 833, 860 (1992).

11. **Is when a human life begins a scientific question?**

Response: The Supreme Court has not stated whether this is a scientific question. In *Planned Parenthood v. Casey*, the Supreme Court stated, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." 505 U.S. 833, 851 (1992).

12. **Can someone change his or her biological sex?**

Response: I understand that there are medical procedures available to change one's biological sex.

13. **Is threatening Supreme Court justices right or wrong?**

Response: There are a number of federal statutes which criminalize threats against persons. Those statutes include 18 U.S.C. §§ 875 and 876. Additionally, under 18 U.S.C. §§ 111 and 1114 it is unlawful to impede, intimidate, or interfere with any officer or employee of the United States on account of the performance of official duties.

14. **Does the president have the power to remove senior officials at his pleasure?**

Response: In *Seila Law LLC v. Consumer Fin. Prot. Bureau*, the Supreme Court stated that the President generally has unrestricted authority to remove officials who wield executive power on his behalf. 140 S. Ct. 2183, 2191-92 (2020). The Supreme Court noted that its precedents have recognized only two exceptions to the President's unrestricted removal power: (1) Congress can "create expert agencies led by a *group* of principal officers removable by the President only for good cause," and (2) Congress can "provide tenure protections to certain *inferior* officers with narrowly defined duties. *Id.* at 2192 (citations omitted) (emphasis in original)**.**

15. **Do you believe that we should defund or decrease funding for police departments and law enforcement, including the law enforcement entities responsible for protecting the federal courthouses in Portland from violent rioters? Please explain.**

    Response: Questions about funding for police departments and law enforcement are important issues for policymakers to consider.

16. **Do you believe that local governments should reallocate funds away from police departments to other support services? Please explain.**

    Response: Questions about funding for police departments and other support services are important issues for policymakers to consider.

17. **What is more important during the COVID-19 pandemic: ensuring the safety of the community by keeping violent, gun re-offenders incarcerated or releasing violent, gun re-offenders to the community?**

    Response: Judges faced with sentencing questions must consider the factors set forth in 18 U.S.C. § 3553(a). Those factors include the need to protect the public from further crimes of the defendant. 18 U.S.C. § 3553(a)(2).

18. **What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?**

    Response: If confirmed, I will apply all Supreme Court and Third Circuit precedent governing Second Amendment challenges. In *District of Columbia v. Heller*, the Supreme Court did not set forth a level of scrutiny for evaluating Second Amendment challenges, but it rejected a "freestanding 'interest-balancing'" approach. 554 U.S. 570, 634-35 (2008). Applying *Heller*, the Third Circuit has adopted a two-pronged approach to Second Amendment challenges. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). "*Marzzarella* requires a court to ask first whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee of the right to bear arms. If it does, the second step is to evaluate that law under some form of heightened scrutiny. The level of scrutiny to be applied is determined by whether the law burdens the core of the Second Amendment guarantee . . . [which] protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home." *Ass'n of New Jersey Rifle & Pistol Clubs Inc. v. Att'y Gen. New Jersey*, 974 F.3d 237, 241-42 (3d Cir. 2020) (internal citations omitted). "Laws that do burden that core receive strict scrutiny, whereas those that do not burden it receive intermediate scrutiny." *Id.* at 242 (internal citations omitted).

19. **Do state school-choice programs make private schools state actors for the purposes of the Americans with Disabilities Act?**

Response: I am not aware of any Supreme Court or Third Circuit precedent resolving this question. If confirmed to the Third Circuit and if this issue comes before me, I will thoroughly research the law and apply it to the facts in the record.

20. **Does a law restrict abortion access if it requires doctors to provide medical care to children born alive following failed abortions?**

    Response: I am not aware of any Supreme Court or Third Circuit precedent resolving this question. If confirmed to the Third Circuit, I will thoroughly research the law and apply it to the facts in the record of any case that came before me raising this question.

21. **Under the Religious Freedom Restoration Act the federal government cannot "substantially burden a person's exercise of religion."**
    a. **Who decides whether a burden exists on the exercise of religion, the government or the religious adherent?**

       Response: Courts decide whether a law burdens the exercise of religion under the Religious Freedom Restoration Act of 1993 (RFRA). *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014) ("Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate 'substantially burden[s]' the exercise of religion.").

    b. **How is a burden deemed to be "substantial[]" under current caselaw?**

       Response: In *Hobby Lobby*, the Supreme Court relied on two factors to find that the plaintiffs' religious exercise was substantially burdened by the contraceptive mandate at issue: (1) non-compliance with the mandate would cause "severe" economic consequences for the plaintiffs; and (2) compliance with the mandate would require the plaintiffs to violate their sincerely held religious beliefs. 573 U.S. at 719-726. Applying *Hobby Lobby* to a RFRA challenge, the Third Circuit has held that "[r]eligious exercise is impermissibly burdened when government action compels individuals 'to perform acts undeniably at odds with fundamental tenets of their religious beliefs.'" *Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 355 (3d Cir. 2017).

22. **Judge Stephen Reinhardt once explained that, because the Supreme Court hears a limited number of cases each year, part of his judicial mantra was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

    Response: All federal judges must fulfill their duty to faithfully and impartially apply the law to the facts in the record. That duty includes applying all governing precedent.

23. **As a matter of legal ethics do you agree with the proposition that some civil clients don't deserve representation on account of their identity?**

    Response: In civil cases, where there is no constitutional right to counsel, a lawyer may represent a client regardless of that client's identity if the lawyer can represent the client's interests consistent with all ethical obligations.

24. **Do Blaine Amendments violate the Constitution?**

    Response: I understand the term "Blaine Amendments" to refer to state constitutional or statutory provisions that prohibit governments from funding schools with religious affiliations. If confirmed, I will apply all Supreme Court and Third Circuit precedents regarding any such provisions. In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020) and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the Supreme Court invalidated restrictions on funding schools with religious affiliations as violative of the First Amendment Free Exercise Clause.

25. **Is the right to petition the government a constitutionally protected right?**

    Response: The right to petition the government for redress of grievances is protected by the First Amendment.

26. **What is the operative standard for determining whether a statement is not protected speech under the "fighting words" doctrine?**

    Response: "States are free to ban the simple use . . . of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). The Supreme Court has held that courts must apply "careful consideration of the actual circumstances surrounding" the expression at issue, and they must ask "whether the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (citation omitted). Applying *Texas v. Johnson*, the Third Circuit has stated, "To be punishable, words must do more than bother the listener; they must be nothing less than 'an invitation to exchange fisticuffs.'" *Johnson v. Campbell*, 332 F.3d 199, 212 (3d Cir. 2003) (citation omitted).

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

    Response: The Supreme Court has held that States can prohibit "true threats," which "encompass those statements where the speaker means to communicate a serious

expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

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

       Response: No.

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

       Response: No.

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

       Response: I have spoken to Christopher Kang, who provided me with background information about the judicial nomination process.

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

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

       Response: No.

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

       Response: No.

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

       Response: Please see my answer to Question 28(c).

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

    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.**

    Response: No.

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

    Response: No.

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

    Response: No.

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

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

    Response: No.

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

    Response: No.

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

Response: No.

32. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: On February 8, 2021, I submitted an application to the judicial nomination advisory panel established by Senators Bob Casey and Pat Toomey to be considered for a position on the United States District Court for the Eastern District of Pennsylvania. On May 19, 2021, I interviewed with the advisory panel. On September 15, 2021, I interviewed with Senator Casey's staff regarding a district court position. On September 17, 2021, I interviewed with Senator Casey and his staff regarding a position on the United States Court of Appeals for the Third Circuit. On September 21, 2021, I interviewed with attorneys from White House Counsel's Office about a Third Circuit position. Since November 2, 2021, I have been in contact with attorneys from the Office of Legal Policy at the United States Department of Justice. On November 16, 2021, I interviewed with Senator Toomey's staff. On November 23, 2021, I interviewed with Senator Toomey. On January 19, 2022, my nomination was submitted to the Senate.

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

    Response: Please see my answer to Question 28(c).

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: On September 21, 2021, I interviewed with attorneys from White House Counsel's Office regarding a potential nomination to the United States Court of Appeals for the Third Circuit. Since that date, I have been in contact with attorneys from that office regarding my nomination. Since November 2, 2021, I have been in contact with attorneys from the Office of Legal Policy at the United States Department of Justice regarding my nomination.

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

    Response: I received these questions on March 9, 2022. I reviewed the questions and answered them to the best of my ability, conducting research where necessary. I provided my draft responses to the Justice Department's Office of Legal Policy before finalizing my answers.

Senator Marsha Blackburn
Questions for the Record to Ms. Arianna Freeman
Nominee to be United States Circuit Judge for the Third Circuit

1. **You were interviewed for a 2018 episode of the Doing Time podcast. In regards to inmates who are serving long sentences for certain offences—you referenced homicide in Pennsylvania, for example—you said, "I think we can take a fresh look and we can see that they're different from the person who committed the offence earlier, and I wish that we could take a second look at these individuals." Rehabilitation of prisoners is obviously a noble goal, but so are punishment, incapacitation, and deterrence. These offenders are given long sentences to penalize them for the horrific crimes they've committed and to protect our communities. Is it your view that our prison system should focus more on rehabilitation and that we should release convicted murderers simply because they have undergone some reform during their time in prison?**

   Response: The extent to which our prison system should focus on rehabilitation is an important question for policymakers. Whether convicted murderers or any other convicted persons should be released is a question that implicates the laws and policies of the relevant jurisdiction. For instance, a defendant who has been convicted of a federal crime may file a motion for a reduction of a prison sentence pursuant to 18 U.S.C. § 3582(c)(1)(A), and district court may grant such motions only if "extraordinary and compelling reasons warrant such a reduction" or if "the defendant is at least 70 years of age, has served at least 30 years in prison, . . . and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community. . . ." 18 U.S.C. § 3582(c)(1)(A)(i)-(ii). Additionally, even if one of these prerequisites is satisfied, a judge must consider the sentencing factors set forth in 18 U.S.C. § 3553(a) to the extent that they are applicable. Those sentencing factors include the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant. 18 U.S.C. § 3553(a)(2).

2. **In that same podcast interview, you stated, "I wonder if there are conditions that we are incarcerating people for that are really health conditions. For instance, we're looking at the opioid epidemic as a health crisis. But for many years we fought a war on drugs that involved incarcerating people who were addicts." Is it your view that judges should consider whether or not a defendant is an addict when deciding what sentence to impose for a federal drug crime?**

   Response: When deciding what sentence to impose for a federal drug crime, judges must consider all of the sentencing factors set forth in 18 U.S.C. § 3553(a). Among several other factors, judges must consider "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), and the need "to

provide the defendant with needed educational or vocational training, medical care, or other correctional treatment," 18 U.S.C. § 3553(a)(2)(D). The Supreme Court and the Third Circuit have recognized that addition is relevant to a sentencing court's analysis of the § 3553(a) factors. *See, e.g.*, *United States v. M. M.*, 23 F.4th 216, 218 (3d Cir. 2021).

Additionally, the United States Sentencing Guidelines Manual provides courts with guidance about how addiction should be treated during sentencing:

> Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (*see* § 5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the probation office to judge the success of the program.
>
> In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* § 5C1.1, Application Note 7.
>
> In a case in which a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (*see* § 5B1.3(d)(4)).

U.S.S.G. § 5H1.4.

3. How should these health conditions you referenced factor into incarceration decisions?

Response: Please see my answer to Question 2.

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

Questions for the Record for Arianna Freeman, Nominee for the Third Circuit

I. Directions

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

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

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

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

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

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

II. Questions

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

   Response: From my experience as an advocate and a judicial law clerk, I have developed a belief that the fair administration of justice is best served when judges give open-minded and careful consideration to the arguments raised by the parties, conduct diligent research into the law, and fairly and impartially apply the law to the facts in the record while treating the persons before them with respect. I could not identify a particular Supreme Court Justice whose philosophy is most analogous with mine.

2. **Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an 'originalist'?**

   Response: Black's Law Dictionary defines "originalism" as follows: "1. The doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect. — Also termed doctrine of original public meaning; original-meaning doctrine; original public meaning. 2. The doctrine that a legal instrument should be interpreted to effectuate the intent of those who prepared it or made it legally binding." Black's Law Dictionary (11th ed. 2019).

   I have not characterized myself by reference to originalism or any other particular doctrine. If confirmed, I will follow Supreme Court and Third Circuit precedent with regard to interpretive methods.

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

   Response: Black's Law Dictionary defines "living constitutionalism" as follows: "The doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019).

   I have not characterized myself by referring to living constitutionalism or any other particular doctrine. If confirmed, I will follow Supreme Court and Third Circuit precedent with regard to interpretive methods.

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

   Response: In the unusual circumstance involving a true issue of first impression regarding the interpretation of a constitutional provision, I would consider the text of the provision and apply the method of interpretation that the Supreme Court used in the most analogous circumstance. I would then look to any analogous Third Circuit precedent or persuasive

authority from other jurisdictions.

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

   Response: If confirmed, I will follow Supreme Court and Third Circuit precedent with regard to interpretive methods. In *District of Columbia v. Heller*, the Supreme Court stated that it was "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" 554 U.S. 570, 576 (2008) (citation omitted). Similarly, in *Bostock v. Clayton Cty., Georgia*, the Supreme Court stated that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President." 140 S. Ct. 1731, 1738 (2020).

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

   Response: The text of the Constitution does not change absent amendment through the Article V process. If confirmed, I will follow all Supreme Court and Third Circuit precedent about the meaning of the Constitution.

7. **Four years ago, you said in an interview that:**

   > **There is really very little in the law that is clean cut, andparticularly constitutional law and federal statutes. There is vigorous debate over many of these issues. Often times I am 100% convinced that I am right about how the law should be interpreted, and the prosecutors on the other side have the same level of confidence in their view. And we rely on the courts to resolve these disputes. And often times, we file appeals, and wetry to go up to the U.S. Supreme Court, and even then, there's vigorous debate, even among the justices, so it is never simple.**

   a. **How does the role of a judge vary from that of an advocate when it comesto constitutional law and questions of statutory interpretation?**

      Response: In matters involving constitutional law and questions of statutory interpretation, the role of an advocate is to zealously and ethically represent the interests of her clients. The role of a judge is entirely different; judges must consider the parties' arguments and interpret the law impartially. I am mindful that, if confirmed, I will be duty-bound to impartially apply the law to the facts of each case.

   b. **What guiding principles would you use as a judge to resolve disagreements on statutory interpretation?**

      Response: In matters involving statutory interpretation, I would first look to whether the particular statutory provision at issue had been interpreted by the Supreme Court or the Third Circuit; if so, that precedent would be binding. If the particular statutory provision had not been previously interpreted by the Supreme Court or the Third Circuit, I would look first look at the text of the statute. If the text were clear and

unambiguous, the inquiry would end there; I would interpret the provision according to its text. If the text were ambiguous, I would next employ the tools of statutory construction including the statutory context, the canons of construction, and Supreme Court or Third Circuit precedent interpreting analogous statutory provisions. If necessary, I would also consider any persuasive authority from other jurisdictions and legislative history.

c. **You spoke in this interview about vigorous debate, even among justices and judges. Do you believe it is appropriate for judges to disagree over what the best outcome of a case is in terms of policy outcomes?**

Response: Judges should determine the outcome of a case based on the law and the facts; they should not consider their personal views about policy outcomes.

d. **When, if ever, should judges allow policy outcomes and preferences to weigh more heavily than the text of the law at issue and facts of a case?**

Response: Judges should never allow policy outcomes and preferences to factor into their consideration of cases.

e. **If you believe judges should consider policy outcomes in resolving cases, what guiding principles do you believe apply to that decisionmaking process?**

Response: Judges should not consider their personal preferences regarding policy outcomes in resolving cases.

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

Response: The First Amendment and certain statutes, such as the Religious Freedom Restoration Act (RFRA), limit what government may impose or require of private institutions. The Supreme Court has held that RFRA applies to religious organizations, *see Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), and to small businesses operated by observant owners, *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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

Response: The Supreme Court has "made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citation omitted). "Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court concluded that the religious entity-applicants had satisfied the requirements for a preliminary injunction of the government regulations they challenged. The Court found that the applicants were likely to prevail on the merits of their First Amendment claims where they had made a strong showing that the challenged regulations were not neutral to religion and "single out houses of worship for especially harsh treatment." *Id.* at 66. Applying strict scrutiny, the Court stated the challenged regulations were not narrowly tailored to achieve the compelling interest of stemming the spread of COVID-19. *Id.* at 67. The Court stated that the applicants would be irreparably harmed without the injunction, as "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* (citation omitted). Finally, the Court stated that there was no showing that granting the injunction would harm the public. *Id.* at 68.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court provided a summary of its holdings governing Free Exercise claims. First, it stated that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296 (emphasis in original). Second, the Court stated that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* It explained that "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather." *Id.* Third, it stated that to satisfy strict scrutiny, the government must "show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Id.* at 1296-97. Fourth, it stated that a case is not necessary moot when the government withdraws or modifies a COVID restriction in the course of litigation. *Id.* at 1297. "So long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Id.* (citation omitted). Applying these principles to the case before it, the Supreme Court concluded that the applicants were entitled to a preliminary injunction of the State's COVID restrictions that treat some comparable secular activities more favorably than at-home religious exercise. *Id.* It reasoned that the lower court did not conclude that the comparable secular activities pose a lesser risk of COVID transmission than the applicants' proposed religious exercise at home. *Id.* It stated, "The State cannot 'assume the worst when people go to worship but assume the best when people go to work.'" *Id.* (citation omitted). It also

concluded that the case was not rendered moot by a change in State policy where the previous restrictions remained in place for a period of time and where State officials had the authority to reinstate those the previous restrictions at any time. *Id.*

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court held that the government's application of a facially neutral public accommodations law violated the Free Exercise Clause where government officials showed hostility toward the sincere religious beliefs motivating an objection to the law. 138 S. Ct. 1719, 1729-32 (2018).

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

Response: An individual's religious beliefs are protected if they are sincerely held. Sincere religious need not be consistent with any particular faith tradition. *See, e.g.*, *Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 834 ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."). Courts do not determine whether religious beliefs are mistaken or insubstantial; they simply determine whether they are honest convictions. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

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

Response: Please see my answer to Question 14.

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

Response: The Supreme Court has "warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 887 (1990).

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

Response: I do not believe this is the official position of the Catholic Church.

15. **In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Courtreversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose**

the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.

Response: Under the "ministerial exception," "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). In *Our Lady of Guadalupe School*, the Supreme Court held that employment matters related to two teachers at Catholic schools were subject to the ministerial exception. *Id.* at 2066. After reviewing the First Amendment origins of the ministerial exception and the role of religious education to many faiths practiced in this country, *id.* at 2060-66, the Court reached its decision based on "abundant record evidence that [the teachers] performed vital religious duties" including providing instruction in religion, *id.* at 2066. It reasoned that the teachers' "titles did not include the term 'minister,' and they had less formal religious training, but their core responsibilities as teachers of religion were essentially the same." *Id.*

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that a restriction that burdens religious liberty is not generally applicable, and therefore is subject to strict scrutiny, when it permits the government to provide individual exemptions.

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

Response: In his concurrence in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), Justice Gorsuch addressed some issues that the lower courts and administrative authorities might consider on remand in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). He stated that *Fulton* makes clear that the Religious Land Use and Institutionalized Persons Act requires strict scrutiny—that is, the government must demonstrate that its land use regulation is narrowly tailored to serve a compelling governmental interest. *Mast*, 141 S. Ct. at 2432. He stated that courts "cannot rely on broadly formulated governmental interests, but must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Id.* (internal quotation marks, alterations, and citations omitted). He also stated that governments and courts must give due weight to exemptions given to other groups and to regulations used in other jurisdictions. *Id.* at 2432-33. Lastly, he stated that the government cannot reject alternatives based on assumptions or supposition. *Id.* at 2433.

18. **Would it be appropriate for the court to provide its employees trainings whichinclude the following:**

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

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

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

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

Response: I am not familiar with any court's employee training programs. If called upon to evaluate a court employee training program, I would assess whether the program was consistent with the Constitution and any applicable laws.

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

Response: Please see my response to Question 18.

20. **Is the criminal justice system systemically racist?**

Response: This is an important question for policymakers to consider. If I am confirmed as a judge, my job will be to evaluate claims of racial discrimination under the governing law and based on the record before me.

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

Response: If I am confirmed as a judge, I would evaluate any challenges to Executive Branch appointments under the governing law, and I would apply any applicable Supreme Court and Third Circuit precedents.

22. **President Biden has created a commission to advise him on reforming the Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.**

Response: If confirmed, I will apply Supreme Court precedent regardless of the size of the Court. As a judicial nominee, it would be inappropriate for me to comment on whether Congress should increase or decrease the number of justices on the Supreme Court.

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

Response: The Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742 (2010) (holding that the Second Amendment right to keep and bear arms is a fundamental right that the Fourteenth Amendment makes applicable to the states).

24. **Does the right to own a firearm receive less protection than the other individualrights specifically enumerated in the Constitution?**

Response: The Second Amendment right to keep and bear arms is a fundamental right. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). If confirmed as a judge, I would apply all Supreme Court and Third Circuit precedents regarding the protection of the Second Amendment rights.

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

Response: The Supreme Court stated that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). If I am confirmed as a judge, I will follow *Heller*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and any other Supreme Court and Third Circuit precedents regarding the protection of the Second Amendment rights.

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

Response: If confirmed as a Third Circuit judge, I would evaluate any claims challenging the propriety of the executive to refuse to enforce a law by evaluating the arguments of the parties and applying all governing law to the facts in the record.

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

Response: Black's Law Dictionary defines prosecutorial discretion as "A prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." Administrative rules changes are subject to the requirements of the Administrative Procedure Act.

28. **Does the President have the authority to abolish the death penalty?**

Response: The federal death penalty is permitted by 18 U.S.C. § 3591. The President does not have the authority to unilaterally repeal an act of Congress.

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

Response: In *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021), the Supreme Court vacated the stay of a district court's order vacating a nationwide moratorium on evictions imposed by the Centers for Disease Control and Prevention (CDC) during the COVID-19 pandemic. The Supreme Court agreed with the district court's conclusion that the CDC lacked authority to impose the moratorium, and it concluded that the parties challenging the stay ("the applicants") "not only have a substantial likelihood of success on the merits—it is difficult to imagine them losing." *Id.* at 2488. It concluded that the applicants "are at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery," and that the Government's interests had decreased as the harm to the applicants increased. *Id.* at 2489. Finally, it recognized the strong public interest in combating the spread of COVID–19, but it held that "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Id.* at 2490.

Senator Josh Hawley
Questions for the Record

Arianna Freeman
Nominee, U.S. Court of Appeals for the Third Circuit

1. **In a 2018 interview for a podcast, you said, "There is really very little in the law that is clean cut, and particularly constitutional law and federal statutes." How would you approach a case of first impression where you think the law is not "clean cut"?**

   Response: In matters involving statutory interpretation, if the particular statutory provision at issue had not been previously interpreted by the Supreme Court or the Third Circuit, I would look first look at the text of the statute. If the text were clear and unambiguous, the inquiry would end there; I would interpret the provision according to its text. If the text were ambiguous, I would next employ the tools of statutory construction including the statutory context, the canons of construction, and Supreme Court or Third Circuit precedent interpreting analogous statutory provisions. If necessary, I would also consider any persuasive authority from other jurisdictions and legislative history. In the unusual circumstance involving a true issue of first impression regarding the interpretation of a constitutional provision, I would consider the text of the provision and apply the method of interpretation that the Supreme Court used in the most analogous circumstance. I would then look to any analogous Third Circuit precedent or persuasive authority from other jurisdictions.

2. **Do you agree with the Supreme Court's statement that "[t]he Constitution allows capital punishment. In fact, death was the standard penalty for all serious crimes at the time of the founding"?**

   Response: I agree that the Supreme Court has held that the Constitution allows capital punishment. I have not read the source that the Supreme Court quoted in *Bucklew v. Precythe* when it stated that death was "'the standard penalty for all serious crimes' at the time of the founding." 139 S. Ct. 1112, 1122 (2019) (quoting S. Banner, The Death Penalty: An American History 23 (2002) (Banner)).

3. **Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."**

   a. **Do you agree with that philosophy?**

b. **If not, do you think it is a violation of the judicial oath to hold that philosophy?**

Response: I am not familiar with this quote or its context. Judges must faithfully and impartially apply the law to the facts of each case before them.

4. **What is the standard for each kind of abstention in the court to which you have been nominated?**

Response: The *Younger* abstention doctrine requires federal courts to abstain from hearing cases when certain state proceedings are ongoing at the time the federal case is commenced. *PDX N., Inc. v. Comm'r New Jersey Dep't of Lab. & Workforce Dev.*, 978 F.3d 871, 882 (3d Cir. 2020). The case that gave rise to the doctrine, *Younger v. Harris*, 401 U.S. 37 (1971), involved a pending state criminal prosecution, but the Supreme Court subsequently extended the doctrine to some state civil proceedings. *See Huffman v. Pursue*, Ltd., 420 U.S. 592, 607 (1975). *Younger* abstention is only appropriate when the underlying state case falls in one of three categories: "(1) criminal prosecutions, (2) civil enforcement proceedings, and (3) civil proceedings involving orders in furtherance of the state courts' judicial function." *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 138 (3d Cir. 2014) (internal quotation marks and citation omitted).

Pullman abstention is proper "when a state court determination of a question of state law might moot or change a federal constitutional issue presented in a federal court case." *Nat'l City Mortg. Co. v. Stephen*, 647 F.3d 78, 83 (3d Cir. 2011) (citing *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941)). "The first step in the *Pullman* analysis is to determine whether three special circumstances exist: (1) Uncertain issues of state law underlying the federal constitutional claims brought in federal court; (2) State law issues amenable to a state court interpretation that would obviate the need for, or substantially narrow, the scope of adjudication of the constitutional claims; (3) A federal court's erroneous construction of state law would be disruptive of important state policies." *Chez Sez III Corp. v. Twp. of Union*, 945 F.2d 628, 631 (3d Cir. 1991) (citations omitted). If all three special circumstances are present, a district court must "make a discretionary determination as to whether abstention is in fact appropriate under the circumstances of the particular case, based on the weight of these criteria and other relevant factors." *Id.*

Under the *Burford* abstention doctrine, "a federal court should refuse to exercise its jurisdiction in a manner that would interfere with a state's efforts to regulate an area of law in which state interests predominate and in which adequate and timely state review of the regulatory scheme is available." *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 303 (3d Cir. 2004). *Burford* abstention requires a two-step analysis.

First, the court asks "whether timely and adequate state law review is available." *Id.* If the court determines that state review is available, it then must examine three issues: "(1) whether the particular regulatory scheme involves a matter of substantial public concern; (2) whether it is the sort of complex technical regulatory scheme to which the *Burford* abstention doctrine usually is applied; and (3) whether federal review of a party's claims would interfere with the state's efforts to establish and maintain a coherent regulatory policy." *Id.* (citations omitted).

Colorado River abstention applies "where the presence of concurrent state proceedings may indicate that a district court should abstain from the contemporaneous exercise of concurrent jurisdiction due to principles of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Nat'l City Mortg. Co.*, 647 F.3d at 83 (internal quotation marks, alterations, and citation omitted); *see also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976))

The *Rooker-Feldman* doctrine prohibits courts from exercising jurisdiction in certain circumstances where a federal suit follows a state suit. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The Supreme Court has held that the doctrine "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). The Third Circuit has interpreted *Exxon Mobil* to hold that four requirements must be met for the *Rooker-Feldman* doctrine to apply: "(1) the federal plaintiff lost in state court; (2) the plaintiff complains of injuries caused by the state-court judgments; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments." *Great W. Mining & Min. Co. v. Fox Rothschild LLP*, 615 F.3d 159, 166 (3d Cir. 2010) (internal quotation marks, alterations, and citation omitted)

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

   Response: No.

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

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

   Response: If confirmed, I will follow Supreme Court and Third Circuit precedent regarding constitutional interpretation. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court looked to the original public meaning to interpret the Second Amendment.

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

   Response: The Supreme Court has "explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1749 (2020). When the meaning of a statute's terms is not clear, courts turn to other methods of interpretation, including analogous language in provisions within the same statutory scheme and analogous language in other statutes. The Supreme Court has instructed that "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (citations omitted).

   a. **If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?**

      Response: The Supreme Court also has explained that some types of legislative history are more probative of congressional intent than others. *See, e.g., NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history."); *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. We have eschewed reliance on the passing comments of one Member and casual statements from the floor debates. . . .") (internal quotations marks, alterations, and citations omitted)).

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

Response: It would only be appropriate to do so if the Supreme Court determined that it was appropriate.

8. **Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?**

   Response: To prevail on a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment, "a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019) (citations omitted).

9. **Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?**

   Response: Yes.

10. **Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?**

    Response: No.

11. **Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?**

    Response: No.

12. **Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.**

    Response: The Supreme Court has held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as

they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). The Court has clarified that "the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citation omitted). "Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). In *Masterpiece Cakeshop*, the Supreme Court held that the government's application of a facially neutral public accommodations law violated the Free Exercise Clause where government officials showed hostility toward the sincere religious beliefs motivating an objection to the law. 138 S. Ct. at 1729-32. In *Tandon v. Newsom*, the Court clarified that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S. Ct. 1294, 1296 (2021) (emphasis in original). It stated that, to satisfy strict scrutiny, the government must "show that measures less restrictive of the First Amendment activity could not address its interest." *Id.* at 1296-97.

13. **Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.**

    Response: Please see my answer to Question 12.

14. **What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?**

    Response: The Third Circuit has recognized that "[f]ew tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion," *Africa v. Com. of Pa.*, 662 F.2d 1025, 1031 (3d Cir. 1981), and the task is particularly difficult when courts must consider nontraditional faiths, *Fallon v. Mercy Cath. Med. Ctr. of Se. Pa.*, 877 F.3d 487, 490 (3d Cir. 2017). The Third Circuit applies the Supreme Court's standard for determining whether a belief is religious, as distinguished from political, sociological, or philosophical; it asks, "Does the claimed belief occupy the same place in the life of the objector as an

orthodox belief in God holds in the life of one clearly qualified for exemption?" *Fallon*, 877 F.3d at 490 (quoting *United States v. Seeger*, 380 U.S. 163, 184 (1965)). Additionally, the Third Circuit applies Supreme Court precedent that "no court should inquire into the validity or plausibility of the beliefs; instead, the task of a court is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in the believer's own scheme of things, religious." *Id.* at 490-91 (internal quotation marks, alteration, and citations omitted). The Third Circuit has adopted the following definition of religion: "First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs." *Id.* at 491 (citation omitted).

15. **The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."**

    a. **What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?**

       Response: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. 570, 635 (2008).

    b. **Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.**

       Response: No.

16. **Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).**

    a. **What do you believe Justice Holmes meant by that statement, and do you agree with it?**

       Response: I believe the statement quoted above is meant to express what Justice Holmes stated elsewhere in his dissenting opinion: that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J. dissenting).

The Supreme Court largely abrogated *Lochner* in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). If confirmed, I will follow all governing Supreme Court and Third Circuit precedent.

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

Response: *Lochner v. New York* was largely abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). If confirmed, I will follow all Supreme Court precedent. It is generally inappropriate for judicial nominees to comment on the merits of any particular precedent.

17. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

a. If so, what are they?

Response: I believe there are Supreme Court opinions that have been abrogated by statute or constitutional amendment but that have not been formally overruled. One example is *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which was abrogated by the Reconstruction Amendments.

b. With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?

Response: Yes.

18. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

Response: If confirmed, I will follow all Supreme Court and Third Circuit precedent about what constitutes a monopoly.

b. If not, please explain why you disagree with Judge Learned Hand.

Response: Please see my answer to Question 18(a).

c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

Response: In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992), the Supreme Court held that evidence showing that Eastman Kodak controlled at least 80% of the relevant markets, "with no readily available alternatives," was sufficient to survive the company's motion for summary judgment under the standard for a finding of monopoly power. The Court also cited two previous cases in which the Supreme Court held that company holdings of 87% of the market and "over two-thirds of the market," respectively, constituted monopolies. *Id.* (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)).

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

Response: I understand federal common law to refer to law derived from the decisions of federal courts rather than enacted by statute. In *Erie Railroad Co. v. Tompkins*, the Supreme Court stated that "[t]here is no federal general common law." 304 U.S. 64, 78 (1938),

20. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

Response: Federal courts must interpret state constitutional provisions in accordance with state law.

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

Response: Please see my response to Question 20.

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

Response: State constitutional or statutory provisions can provide greater protections than the federal Constitution provides.

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

Response: If confirmed, I will faithfully apply all Supreme Court precedents. It is generally inappropriate for judicial nominees to comment on the merits of any particular precedent. As per the practice of prior judicial nominees, I make an exception to that general rule to acknowledge that certain cases whose holdings are

highly unlikely to be challenged in future litigate were correctly decided. *Brown v. Board of Education* is one such case, and I agree that it was correctly decided.

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

Response: The Supreme Court has stated that "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Injunctions "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The Supreme Court has upheld nationwide injunctions granted by federal courts when those injunctions are necessary to grant complete relief to the parties. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017).

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

Response: Injunctions are governed by Rule 65 of the Federal Rules of Civil Procedure. There is ongoing debate as to the power of federal judges to issue nationwide injunctions. If confirmed, I will follow all Supreme Court and Third Circuit precedent regarding injunctions.

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

Response: Please see my response to Question 22.

23. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

Response: Please see my response to Question 22.

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

Response: In *Bond v. United States*, the Supreme Court stated that "allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." 564 U.S. 211, 221 (2011).

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

Response: Please see my response to Question 4.

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

Response: If confirmed to the Third Circuit, I will review appeals in cases in which the parties sought damages, injunctive relief, or both, depending on the circumstances of each case. My role would be to consider whether the award of damages or injunctive relief was supported by the law and the facts in the record.

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

Response: The Supreme Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendments protect certain unenumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). This concept is known as substantive due process. *See id.*

28. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. What is your view of the scope of the First Amendment's right to free exercise of religion?

Response: Please see my response to Question 12.

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

Response: The free exercise of religion is not limited to freedom of worship. The Supreme Court has held that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990).

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

Response: In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court found that the challenged contraceptive mandate substantially burdened the plaintiffs' free exercise of religion where compliance with the mandate would require the plaintiffs to engage in conduct that seriously violates their religious beliefs and where non-compliance would cause severe economic consequences. 573 U.S. 682, 720 (2014). If confirmed, I will apply *Hobby Lobby* and all other applicable Supreme Court and Third Circuit precedent.

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

Response: Please see my response to Question 14.

e. **Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?**

Response: In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, the Supreme Court held that the Religious Freedom Restoration Act (RFRA) "applies to all Federal law, and the implementation of that law, whether statutory or otherwise. RFRA also permits Congress to exclude statutes from RFRA's protections." 140 S. Ct. 2367, 2383 (2020). The Supreme Court has stated that RFRA operates as a kind of super statute, displacing the normal operation of other federal laws. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1754 (2020). If confirmed, I will follow all precedent of the Supreme Court and the Third Circuit regarding the relationship between RFRA and other federal laws.

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

Response: I have not issued any judicial opinions, orders, or other decisions, as I have not served as a judge or other adjudicator.

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that judges must faithfully apply the law even when the results conflict with their personal views.

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

Response: Yes.

a. If yes, please provide appropriate citations.

Response: After the Supreme Court's held in *Johnson v. United States*, 576 U.S. 591 (2015), that the so-called "residual clause" of the Armed Career Criminal Act was unconstitutionally vague, I took the position in numerous cases that the analogous residual clause of 18 U.S.C. § 924(c) was unconstitutionally vague. Many of those cases were consolidated by the Third Circuit and addressed in *In re Matthews*, 934 F.3d 296 (3d Cir. 2019)—a case that I argued in October 2018. After the oral argument but before the Third Circuit issued its opinion, the Supreme Court issued its ruling in *United States v. Davis*, 139 S. Ct. 2319 (2019), and held § 924(c)'s residual clause was unconstitutionally vague.

31. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

Response: No.

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

Response: If I am confirmed as a judge, my job would be to evaluate any claims of racial discrimination based on the facts of the case before me and consistent with the Constitution and laws.

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

Response: Yes.

34. How did you handle the situation?

Response: Per my ethical duty, I presented colorable legal arguments that advanced my client's interests.

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

    Response: Yes.

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

    Response: No particular Federalist Paper(s) have most shaped my views of the law.

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

    Response: To the best of my knowledge, there is no law governing this question. As a judicial nominee, it would be inappropriate for me to offer any personal views about this question because, if I am confirmed, cases involving this question may come before me.

38. **Other than at your hearing before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is available online or as a record, please include the reference below or as an attachment.**

    Response: I once gave testimony at a deposition involving damage to my home. I am unable to locate a copy of this transcript.

39. **In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:**

    a. ***Roe v. Wade,* 410 U.S. 113 (1973)?**

    b. **The Supreme Court's substantive due process precedents?**

    c. **Systemic racism?**

    d. **Critical race theory?**

       Response: No.

40. **Do you currently hold any shares in the following companies:**

    a. **Apple?**

    b. **Amazon?**

c. **Google?**

d. **Facebook?**

e. **Twitter?**

Response: No.

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

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

    Response: In over 12 years at the Federal Community Defender Office, I have edited several briefs that have been filed by my colleagues. Where I have had a substantial role in authoring or editing a brief, my name has appeared on the brief. Where I have contributed minor editorial comments, my name has not appeared on the brief. I have no way of identifying the cases in which I contributed only minor editorial comments.

42. **Have you ever confessed error to a court?**

    a. **If so, please describe the circumstances.**

    Response: To the best of my recollection, there have been one or two occasions on which I filed errata or corrective statements upon discovering errors in previous filings.

43. **Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.**

    Response: Judicial nominees swear an oath to provide truthful information when testifying before the Senate Judiciary Committee. Pursuant to that oath, and guided by their ethical responsibilities as attorneys and judicial nominees, nominees must be candid and forthcoming when they respond to the Committee's questions.

Questions for the Record for Arianna Julia Freeman
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

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

      Response: No.

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

      Response: No.

Senator Kennedy
Questions for the Record
Arianna Freeman

1. **Please describe your judicial philosophy.**

   Response: From my experience as an advocate and a judicial law clerk, I have developed a belief that the fair administration of justice is best served when judges give open-minded and careful consideration to the arguments raised by the parties, conduct diligent research into the law, and fairly and impartially apply the law to the facts in the record while treating the persons before them with respect.

2. **Do you believe in the concept of a "living Constitution"?**

   Response: I have not characterized myself by referring to "living constitutionalism" or any other particular doctrine. If confirmed, I will follow Supreme Court and Third Circuit precedent with regard to the meaning of the Constitution and interpretive methods.

3. **Of the three, would you describe your judicial philosophy more as originalist, textualist, or living Constitutionalist?**

   Response: As discussed in my responses to Questions 1 and 2, , I do not ascribe to any particular doctrine. If confirmed, I will follow Supreme Court and Third Circuit precedent with regard to the meaning of the Constitution and interpretive methods.

4. **Please explain how you would reason through a case involving matters of statutory or constitutional interpretation if strict textualism would compel reaching an absurd result.**

   Response: If confronted with a matter of statutory or constitutional interpretation in which the plain language of the text would compel an absurd result, I would look to Supreme Court and Third Circuit precedent for guidance in interpreting analogous statutory or constitutional provisions. For example, in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, the Supreme Court addressed a circumstance in which the literal meaning of a constitutional provision would lead to "absurd results that the provision cannot have been meant to produce." 139 S. Ct. 2449, 2462 (2019). The Court then examined the history of how the constitutional provision functioned within the larger constitutional scheme. *Id.* at 2462-70.

5. **What weight, if any, would you give to legislative history when interpreting a statute?**

Response: The Supreme Court has "explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1749 (2020). When the meaning of a statute's terms is not clear, courts turn to other methods of interpretation, including analogous language in provisions within the same statutory scheme and analogous language in other statutes. The Supreme Court has instructed that "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (citations omitted). The Supreme Court also has explained that some types of legislative history are more probative of congressional intent than others. *See, e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history.").; *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. We have eschewed reliance on the passing comments of one Member and casual statements from the floor debates. . . .") (internal quotations marks, alterations, and citations omitted)).

6. **Is it appropriate for an appellate court to criticize, sidestep, or otherwise undermine Supreme Court precedent?**

   Response: A circuit court of appeals is always bound by Supreme Court precedent. It is not appropriate for a court of appeals to sidestep or otherwise undermine Supreme Court precedent. Even on the rare occasion when a circuit court judge may encourage the Supreme Court to reconsider its holdings, that does not obviate the judge's duty to apply Supreme Court precedent.

7. **What is your interpretation of the Ninth Amendment, and what role does it play in the constitutional "right to privacy"?**

   Response: The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. In *Griswold v. Connecticut*, the Supreme Court stated that various guarantees of the Bill of Rights "create zones of privacy." 381 U.S. 479, 484 (1965). In the context of that statement, the Court referred to the First, Third, Fourth, Fifth, and Ninth Amendments. *Id.* I am not aware of any controlling opinions from the Supreme Court that further discuss the relationship between the Ninth Amendment and the right to privacy that the Court recognized in *Griswold*.

Senator Mike Lee Questions
for the Record
Arianna Freeman, Nominee to be United States Circuit Judge for the ThirdCircuit

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

   Response: From my experience as an advocate and a judicial law clerk, I have developed a belief that the fair administration of justice is best served when judges give open-minded and careful consideration to the arguments raised by the parties, conduct diligent research into the law, and fairly and impartially apply the law to the facts in the record while treating the persons before them with respect.

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

   Response: In matters involving statutory interpretation, I would first look to whether the particular statutory provision had been interpreted by the Supreme Court or the Third Circuit; if so, that precedent would be binding. If the particular statutory provision had not been previously interpreted by the Supreme Court or the Third Circuit, I would look first look at the text of the statute. If the text were clear and unambiguous, the inquiry would end there, and I would interpret the provision according to its text. If the text were ambiguous, I would next employ the tools of statutory construction including the statutory context, the canons of construction, and Supreme Court or Third Circuit precedent interpreting analogous statutory provisions. If necessary, I would also consider any persuasive authority from other jurisdictions and legislative history.

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

   Response: I would apply all Supreme Court and Third Circuit precedent interpreting the particular constitutional provision. If I were confronted with the unusual circumstance involving a true issue of first impression regarding the interpretation of a constitutional provision, I would consider the text of the provision and apply the method of interpretation that the Supreme Court used in the most analogous circumstance. I would then look to any analogous Third Circuit precedent or persuasive authority from other jurisdictions.

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

   Response: Please see my response to Question 3.

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

   Response: Please see my response to Question 2.

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

Response: If confirmed, I will follow Supreme Court and Third Circuit precedent with regard to interpretive methods. In *District of Columbia v. Heller*, the Supreme Court stated that it was "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" 554 U.S. 570, 576 (2008) (citation omitted). Similarly, in *Bostock v. Clayton Cty., Georgia*, the Supreme Court stated that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." 140 S. Ct. 1731, 1738 (2020).

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

Response: The Supreme Court articulated the constitutional requirements for standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). It stated that standing requires three elements: (1) the plaintiff must have suffered an "injury in fact" that is concrete and particularized and actual or imminent; (2) the injury must be traceable to the challenged action of the defendant; and (3) it must be likely, not merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 560-61.

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

Response: In *McCullough v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that the Necessary and Proper Clause grants Congress powers considered necessary to implement its enumerated powers.

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

Response: I would apply Supreme Court and Third Circuit precedent to evaluate whether the law is within the scope of Congress's powers. For example, if called upon to evaluate whether Congress had the power to enact a law under the Commerce Clause, I would look to *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995).

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

Response: The Supreme Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendments protect certain unenumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would

exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). This concept is known as substantive due process. *See id.* In *Glucksberg*, the Supreme Court provided several examples of rights protected by substantive due process:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, [*Planned Parenthood of Pa. v.*] *Casey*, [505 U.S. 833 (1992)].

521 U.S. at 720.

10. **What rights are protected under substantive due process?**

Response: Please see my response to Question 9.

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

Response: The Supreme Court itself has distinguished these types of rights. The Court has held that the economic rights at issue in *Lochner v. New York* are not protected under substantive due process. *See, e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). By contrast, the Supreme Court has held that various personal rights are protected under substantive due process, as discussed in my response to Question 9. If confirmed, I will apply all Supreme Court precedent.

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

Response: The Supreme Court has held that the Commerce Clause empowers Congress to regulate three categories of activity: the channels of interstate commerce, the instrumentalities of interstate commerce, and activity that substantially affects interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

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

Response: In discussing whether a particular group qualifies as a suspect class, the Supreme Court has described the "traditional indicia of suspectedness" to include an

"immutable characteristic determined solely by the accident of birth" and groups that are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (citations omitted). The Supreme Court has held that groups classified by race, religion, national origin, or alienage are suspect classes. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 n.4 (1976); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

    Response: The Supreme Court has stated that "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (internal quotation marks and citation omitted).

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

    Response: I would apply Supreme Court and Third Circuit precedent. If there were no precedent governing about the particular constitutional question, I would examine Supreme Court and Third Circuit cases addressing the scope of the powers granted to the branch of government in question and I would apply those principles to the case before me.

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

    Response: A judge must impartially consider every case without regard to any personal views.

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

    Response: Both outcomes are equally bad.

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

    Response: I have not studied changes in Supreme Court's rate of invalidating federal statutes as unconstitutional, and I do not have a basis upon which to opine on this topic.

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

Response: I understand judicial review to refer to the power of the judicial branch to evaluate the legality of actions taken by the legislative or executive branch. *See Marbury v. Madison*, 5 U.S. 137 (1803). The term "judicial supremacy" appears to have several different meanings. Black's Law Dictionary defines judicial supremacy as follows: "The doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019).

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

Response: Officials in all branches of government should abide by their oath to support the Constitution. State legislators and executive and judicial officers are bound to follow decisions of the United States Supreme Court interpreting the Constitution. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

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

Response: The above-quoted statement from Federalist 78 underscores that judges have a limited role and should only decide actual controversies brought by parties.

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

Response: The United States Sentencing Guidelines Manual states that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S.S.G. § 5H1.10.

23. **The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color;**

members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in ruralareas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?

Response: There are multiple definitions of the term "equity." If confirmed and if a case came before me involving the definition of the term "equity," I would look first to Supreme Court and Third Circuit precedent and, as needed, I then would follow the normal methods of interpretation to define the term.

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

Response: There are multiple definitions of the terms "equity" and "equality." Black's Law Dictionary provides nine definitions of "equity":

> 1. Fairness; impartiality; evenhanded dealing. 2. The body of principles constituting what is fair and right; natural law. 3. The recourse to principles of justice to correct or supplement the law as applied to particular circumstances; specif., the judicial prevention of hardship that would otherwise ensue from the literal interpretation of a legal instrument as applied to an extreme case or from the literal exclusion of a case that seems to fall within what the drafters of the instrument probably intended. 4. The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called "law" in the narrower sense) when the two conflict. 5. A right, interest, or remedy recognizable by a court of equity. 6. The right to decide matters in equity; equity jurisdiction. 7. The amount by which the value of or an interest in property exceeds secured claims or liens; the difference between the value of the property and all encumbrances on it. 8. An ownership interest in property, esp. in a business. 9. A share in a publicly traded company.

Black's Law Dictionary (11th ed. 2019). The same dictionary defines "equality" as "[t] he state of being equal; esp., likeness in power or political status." *Id.*

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

Response: To the best of my knowledge, neither the Supreme Court nor the Third Circuit has addressed whether the Fourteenth Amendment's Equal Protection Clause guarantees equity as defined above in Question 23.

26. **How do you define "systemic racism?"**

Response: I believe the term "systemic racism" has multiple meanings. I generally understand the term "systemic racism" to apply to the widespread and longstanding

effects of differential treatment based on race.

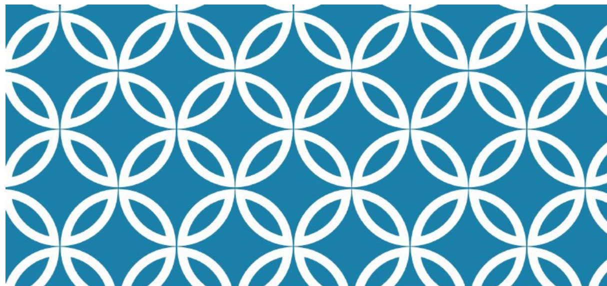
27. **How do you define “critical race theory?”**

Response: To the best of my understanding, “critical race theory” is a field of academic study that centers on the history of race relations.

28. **Do you distinguish “critical race theory” from “systemic racism,” and if so, how?**

Response: To the best of my understanding, “critical race theory” is a field of academic study while “systemic racism” is not.

29. **During your confirmation hearing, I asked you a question about a statement made as part of a presentation you gave in 2018 for the Defender Services Office Training Division’s Non-Capital Habeas Conference. You answered thatyou did not recall the presentation or the statement. Below are relevant slides from the presentation that you submitted as part of your Senate questionnaire. Please clarify what you meant when you told attendees to “argue anything and everything you can think of to get your client tolling,because if his claims are untimely, they are dead before they even begin.”**



TOLLING AND RELATION BACK
ARIANNA FREEMAN & MEGAN HOFFMAN
SEPTEMBER 27, 2018

APPEAL TO THE EQUITIES

“Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.” Lonchar v. Thomas, 517 U.S. 314, 324 (1996).

Argue anything and everything you can think of to get your client tolling, because if his claims are untimely, they are dead before they even begin.

Response: This was a joint presentation. I did not prepare or present from the “Appeal to the Equities” slide pictured above. I understand the sentence quoted in this question to mean that attorneys should make all available arguments supported by the law and the record.

Senator Ben Sasse
Questions for the Record for Arianna J. Freeman
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
March 2, 2022

1. **Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

   Response: No.

2. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No.

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

   Response: From my experience as an advocate and a judicial law clerk, I have developed a belief that the fair administration of justice is best served when judges give open-minded and careful consideration to the arguments raised by the parties, conduct diligent research into the law, and fairly and impartially apply the law to the facts in the record while treating the persons before them with respect.

4. **Would you describe yourself as an originalist?**

   Response: I have not characterized myself by reference to originalism or any other particular doctrine. If confirmed, I will follow Supreme Court and Third Circuit precedent with regard to interpretive methods.

5. **Would you describe yourself as a textualist?**

   Response: I have not characterized myself by reference to textualism or any other particular doctrine. If confirmed, I will follow Supreme Court and Third Circuit precedent with regard to interpretive methods.

6. **Do you believe the Constitution is a "living" document whose precise meaning can change over time? Why or why not?**

   Response: The Constitution is an enduring document. It does not change unless amended pursuant to Article V.

7. **Please name the Supreme Court Justice or Justices appointed since January 20, 1953 whose jurisprudence you admire the most and explain why.**

   Response: There are no particular Supreme Court Justices whose jurisprudence I most admire.

8. **In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for appellate court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?**

   Response: In the Third Circuit, precedential decisions of a panel are binding on subsequent panels. In the absence of controlling Supreme Court precedent*, en banc* consideration is necessary to overturn Third Circuit precedent. Rule 35 of the Federal Rules of Appellate Procedure governs *en banc* consideration, and it states that *en banc* consideration is not favored and ordinarily will not be ordered unless "(1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(1)-(2).

9. **In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for an appellate court to reaffirm its own precedent that conflicts with the original public meaning of the text of a statute?**

   Response: Please see my response to Question 8.

10. **What role should extrinsic factors not included within the text of a statute, especially legislative history and general principles of justice, play in statutory interpretation?**

    Response: In matters involving statutory interpretation, I would first look to whether the particular statutory provision had been interpreted by the Supreme Court or the Third Circuit; if so, that precedent would be binding. If the particular statutory provision had not been previously interpreted by the Supreme Court or the Third Circuit, I would look first look at the text of the statute. If the text were clear and unambiguous, the inquiry would end there, and I would interpret the provision according to its text. If the text were ambiguous, I would next employ the tools of statutory construction including the statutory context, the canons of construction, and Supreme Court or Third Circuit precedent interpreting analogous statutory provisions. If necessary, I would also consider any persuasive authority from other jurisdictions and legislative history. The Supreme Court has instructed that "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (citations omitted). The Supreme Court also has explained that some types of legislative history are more probative of congressional intent than others. *See, e.g., NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least

illuminating forms of legislative history.”); *Garcia v. United States*, 469 U.S. 70, 76 (1984) (“In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. We have eschewed reliance on the passing comments of one Member and casual statements from the floor debates. . . .”) (internal quotations marks, alterations, and citations omitted)). I do not believe “general principles of justice” are an accepted method of statutory interpretation.

11. **If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?**

    Response: Sentencing judges must consider the statutory sentencing factors set forth in 18 U.S.C. § 3553(a). Once such factor is “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6). The United States Sentencing Guidelines Manual states that race, sex, national origin, creed, religion, and socio-economic status “are not relevant in the determination of a sentence.” U.S.S.G. § 5H1.10.

Questions from Senator Thom Tillis
for Arianna Freeman
Nominee to be United States Circuit Judge for the Third Circuit

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

   Response: Yes.

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

   Response: I understand "judicial activism" to refer to judges deciding cases based on their personal views instead of the governing law; that is inappropriate.

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

   Response: Impartiality is an expectation that a judge must fulfill.

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

   Response: No.

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

   Response: The desirability of an outcome is a subjective factor that is beyond the province of judges, who take an oath to impartially interpret the law and objectively apply it to the facts of each case regardless of any personal views.

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

   Response: No.

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

   Response: If confirmed, I will faithfully apply all Second Amendment precedent, including the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

8. **How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone's constitutional rights? In other words, does a pandemic limit someone's constitutional rights?**

Response: As with any case that may come before me, if I am confirmed I will review the arguments of the parties, research the governing law, and apply any Supreme Court and Third Circuit precedent to the facts in the record. Constitutional rights are not diminished in times of crisis.

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

Response: If confirmed, I will follow the process set forth in all applicable Supreme Court and Third Circuit precedent, including *District of Columbia v. Wesby*, which holds that "officers are entitled to qualified immunity under [42 U.S.C.] §1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time. Clearly established means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." 138 S. Ct. 577, 589 (2018) (internal quotation marks and citations omitted).

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

Response: Whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers is a question for policy makers. If confirmed, I will follow all Supreme Court and Third Circuit precedent regarding qualified immunity.

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

Response: The proper scope of qualified immunity protections for law enforcement is a question for policy makers. If confirmed, I will follow all Supreme Court and Third Circuit precedent regarding qualified immunity.

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

a. What experience do you have with copyright law?

Response: In over 12 years as a federal public defender, I have not practiced copyright law. I recall working on at least one copyright law case that was in active litigation while I was a United States District Court judicial law clerk.

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

Response: I have not had experience with this statute.

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

Response: I have not had experience addressing this issue.

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

Response: In over 12 years as a federal public defender, I have not litigated any matters implicating First Amendment or free speech issues. I may have worked on First Amendment and free speech issues during my two years as a United States District Court judicial law clerk. I do not recall working on free speech and intellectual property issues.

13. **The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office recently reported courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.**

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

Response: The Supreme Court has "explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1749 (2020). When the meaning of a statute's terms is not clear, courts turn to other methods of interpretation, including analogous language in provisions within the same statutory scheme and analogous language in other statutes. The Supreme Court has instructed that "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (citations omitted). The Supreme Court also has explained that some types of legislative history are more probative of congressional intent than others. *See, e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history."); *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the

Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. We have eschewed reliance on the passing comments of one Member and casual statements from the floor debates. . . .") (internal quotations marks, alterations, and citations omitted)).

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

Response: The role of an administrative agency's interpretation of a law is governed by the doctrines of *Chevron* and *Skidmore* deference. *Chevron* deference is a doctrine governing when and how courts should defer to an agency's interpretation of a statute that it administers when that interpretation has the force of law. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). *Skidmore* deference is a doctrine governing when and how a court should defer to an agency's policy statements, agency manuals, and enforcement guidelines containing the agency's interpretation of a statute that it administers. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Opinion letters from agencies, such as the United States Copyright Office, warrant *Skidmore* deference "only to the extent that those interpretations have the 'power to persuade.'" *Id.* (citations omitted).

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

Response: If I am confirmed and an issue involving this question came before me, I would research the governing law and review the facts in the record to determine the effect on the online service provider.

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

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

Response: Judges must interpret statutes as written. Congress can amend a statute as needed to account for changes in circumstances since the original enaction of the statute.

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

Response: If confirmed to the Third Circuit, I will be bound to follow Supreme Court and Third Circuit precedent. Each of those courts has standards governing whether to overturn its own precedent. For instance, in the Third Circuit, *en banc* consideration is necessary to overturn Third Circuit precedent in the absence of controlling Supreme Court precedent.

15. **In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.**

a. **Do you see "judge shopping" and "forum shopping" as a problem in litigation?**

Response: I have not studied "judge shopping" or "forum shopping" within a judicial district, and I do not have a basis upon which to opine on this topic.

b. **If so, do you believe that district court judges have a responsibility not to encourage such conduct?**

Response: Please see my response to Question 15(a).

c. **Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?**

Response: Judges should fairly and impartially apply the law to the facts of the cases before them.

16. **When a particular type of litigation is overwhelmingly concentrated in just one or two of the nation's 94 judicial districts, does this undermine the perception of fairness and of the judiciary's evenhanded administration of justice?**

a. **If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?**

b. **To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to**

judges across the district, regardless of which division the judge sits in? Should such a rule apply only where a single judge sits in a division?

Response: I have not studied the topic addressed in this question, and I do not have a basis upon which to opine on this topic.

17. **Mandamus is an extraordinary remedy that the court of appeals invokes against a district court only when the petitioner has a clear and indisputable right to relief and the district judge has clearly abused his or her discretion. Nearly every issuance of mandamus may be viewed as a rebuke to the district judge, and repeated issuances of mandamus relief against the same judge on the same issue suggest that the judge is ignoring the law and flouting the court's orders.**

    a. **If a single judge is repeatedly reversed on mandamus by a court of appeals on the same issue within a few years' time, how many such reversals do you believe must occur before an inference arises that the judge is behaving in a lawless manner?**

    b. **Would five mandamus reversals be sufficient? Ten? Twenty?**

    Response: I have not studied the frequency of mandamus reversals by the courts of appeals, and I do not have a basis upon which to opine on this topic.

18. **You once included the following line in a presentation slide for an event for the Defender Services Office: "Argue anything and everything you can think of to get your client tolling, because if his claims are untimely, they are dead before they even begin." Can you please provide additional context to this statement? What is your justification for using these kinds of delay tactics in the administration of justice?**

    Response: The presentation to which this question refers was a joint presentation. I did not prepare or present from the slide quoted in this question. I understand the sentence quoted in this question to mean that attorneys should make all available arguments supported by the law and the record.

19. **You have represented several clients in habeas cases where the prisoner had been convicted of heinous crimes, including murder. In those cases, how did you balance the protection of public safety against representing convicted murderers? How would you view this balance if confirmed to the Third Circuit?**

    Response: As a federal public defender, I have fulfilled my duty as an advocate to zealously advocate for my clients' interests regardless of any personal views that I may or may not have about the clients or their conduct. The habeas cases that I have litigated have involved claims that the clients were deprived of their Sixth Amendment right to the assistance of counsel or to their Fifth Amendment or Fourteenth Amendment right to due process. Those rights are guaranteed to all criminal defendants, including those accused of heinous crimes. If confirmed to the Third Circuit, I will no longer be in the role of an

advocate, and I will fulfill my duty as a judge to fairly and impartially apply the law to the facts of each case.

20. What criteria did you use before determining which clients to represent as a defense attorney in habeas cases involving convicted murderers? What factors weighed in favor or against you taking on a client?

Response: As an attorney employed by the Federal Community Defender Office, I represented every client whose case was assigned to me without regard to any personal views that I may or may not have had about the clients or their conduct.