Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Jane Beckering
Nominee to be United States District Judge, Western District of Michigan

1. **Who should respond to a domestic violence call where there is an allegation that the aggressor is armed—the police or a social worker?**

   Response: As a sitting judge on the Michigan Court of Appeals, I do not involve myself in policymaking, and I do not possess enough information about the field of police enforcement and staffing strategies to have formed an opinion regarding your question.

2. **Is it appropriate for protestors to ignore social distancing mandates and gathering limitations to protest racial injustice?**

   Response: Because issues related to Covid-19 restrictions remain a matter of public debate that have been the subject of several legal proceedings, as have cases arising out of various protests, it would be improper for me to weigh in on this topic, as issues arising from these events may come before me as a sitting Michigan Court of Appeals judge.

3. **Is it appropriate for the government to use law enforcement to enforce social distancing mandates and gathering limitations for individuals attempting to practice their religion in a church, synagogue, mosque or any other place of religious worship?**

   Response: Because issues related to Covid-19 restrictions remain a matter of public debate that have been the subject of several legal proceedings, it would be improper for me to weigh in on this topic, as issues arising from these events may come before me as a sitting Michigan Court of Appeals judge. If faced with a case involving a law regarding social distancing, masks, limits on religious exercise, or vaccinations, I would be guided by relevant United States Supreme Court decisions, including *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). In that case, the Court concluded that governmental regulations are not neutral and generally applicable, and therefore, they trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise, even when the state treats some comparable secular businesses and other activities as poorly or even less favorably than the religious exercise at issue.

4. **Does the president have the power to remove senior officials at his pleasure?**
   a. **Is it possible that removing someone—as is the President's power—can be for wholly apolitical reasons?**

Response: The President's authority to remove officials is presumably governed by applicable constitutional, statutory, and perhaps regulatory provisions, as well as any applicable caselaw. If faced with a case involving the President removing a senior official from office, I would apply the applicable law to the record in the case before me. One example is *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.,* 561 U.S. 477 (2010).

5. **Is it legal for police to stop and frisk someone based on a reasonable suspicion of involvement in criminal activity?**

   Response: Yes. The 'stop and frisk' doctrine was enunciated by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968).

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

   Response: I cannot speak to what Judge Jackson said in 2013, because I do not know. As for my own opinion, I do not identify with any particular constitutional interpretive ideology, such as "originalism" or "living constitutionalism." As a Michigan Court of Appeals judge I am duty-bound to apply the applicable test or framework that has been established by the United States Supreme Court when evaluating various Constitutional provisions, just as I would be if confirmed as a federal district court judge. The Supreme Court has considered most of the constitutional provisions in depth, interpreted their meaning, identified the values the provisions were designed to promote, and, in most cases, formulated a test or framework within which to evaluate new claims associated with each provision. I follow that precedent.

7. **Is it possible for private parties—like law firms, retired prosecutors, or retired judges—to prosecute federal criminals in the absence of charges being actively pursued by federal authorities?**

   Response: Not to my knowledge.

8. **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: I do not know what you mean by "identity." In general, criminal defendants enjoy a right to counsel, but the U.S. Supreme Court has not held that there is a corresponding right to counsel in civil cases.

9. **Do you agree with the proposition that some clients don't deserve representation on account of their:**
   a. **Heinous crimes?**

Response: No, I do not agree. The Sixth Amendment provides that in criminal prosecutions, the accused shall have the assistance of counsel for his or her defense. That includes people who are accused of heinous crimes.

b. Political beliefs?

Response: A person's political beliefs are protected by the First Amendment. Those beliefs should not be used against a person to deprive them of representation.

c. Religious beliefs?

Response: A person's religious beliefs are protected by the First Amendment. Those beliefs should not be used against a person to deprive them of representation.

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

Response: Judicial decisions should be grounded in the law, and should not be influenced by outside principles unless the law calls for such consideration to be taken into account.

11. Robin DiAngelo is the author of *White Fragility*, an "anti-racist" tome published in 2018. In a 2020 *The New York Times Magazine* featured an article titled "'White Fragility' Is Everywhere. But Does Anti-Racism Training Work?," where the author describes the focus of DiAngelo's book, stating that:

> **Running slightly beneath or openly on the surface of DiAngelo's and Singleton's teaching is a set of related ideas about the essence and elements of white culture. For DiAngelo, the elements include the 'ideology of individualism,' which insists that meritocracy is mostly real, that hard work and talent will be justly rewarded. White culture, for her, is all about habits of oppressive thought that are taken for granted and rarely perceived, let alone questioned.[1]**

You have touted the benefits of hard work to high school students in speeches that you have delivered. How do you square your prior comments with DiAngelo's views about white culture?

[1] Daniel Bergner, *The New York Times Magazine*, "'White Fragility' Is Everywhere. But Does Anti-Racism Training Work?," July 15, 2020 (updated Aug. 6, 2021), available at: https://www.nytimes.com/2020/07/15/magazine/white-fragility-robin-diangelo.html

Response: I have not read the book, *White Fragility*, nor have I read the 2020 article you identify from *The New York Times Magazine*. As a general principle, I believe that hard work is a good work ethic.

12. During your investiture in October 2007, you relied on a quote from the Honorable Oliver Wendell Holmes, Jr. and stated that he was "perhaps our greatest jurist of all time."[2]

a. What do you understand his judicial philosophy to promote?

Response: My understanding is that Justice Holmes is one of the most widely cited Supreme Court justices of the 20th Century, particularly for his opinions on civil liberties and American constitutional democracy.

b. Do you agree with his judicial philosophy?

Response: I believe that Justice Holmes was an influential jurist, but I have not studied his opinions in an effort to determine whether I agree with his judicial philosophy as a general principle.

c. Do you intend to emulate his judicial philosophy if you are confirmed to the federal bench?

Response: I do not intend to emulate any judge's philosophy. I simply intend to honor my duties as a judge fully, faithfully, and impartially.

13. While campaigning for your seat on the Michigan Supreme Court, in speeches, you noted that "[c]ourts used to protect people from the arbitrary whims of the majority. Today the court has become a political tool of the majority. It has got to stop." At the time, Republicans held the majority. Now that Democrats are in the majority, do you agree with your prior statement that the courts should not be used as a "political tool of the majority"?

Response: I absolutely still believe that courts should not be used as a political tool of the majority. The judiciary is our nonpartisan branch of government. Judicial activism is inappropriate and should never be used to further a partisan agenda.

14. In 2008, you were the Keynote Speaker at an event hosted by the ABA on May 1, 2008, in celebration of the 50th Anniversary of Law Day titled "The Rule of Law: Foundation for Communities of Opportunity and Equity."[3] During your speech, you listed several examples of "stability and predictability" that are preserved by the Rule of Law and that we take for granted, including:

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[2] SJQ 12(D) at *1294.
[3] SJQ 12(D) at *1255.

When we wake up and listen to the news, we feel free to criticize the talking heads, politicians, our government as a whole, and weigh in on how it is being run, as our current presidential campaign process so ably demonstrates. We know that by doing so, no one is going to barge into our kitchen and haul us away for treason. [Freedom of Speech, first Amendment][4]

Last week, Attorney General Merrick Garland announced imminent action against parents protesting various policies being implemented at public schools across the country.

a. Do you still believe the Rule of Law exists in the United States?

Response: Yes, I still believe the Rule of Law exists in the United States.

b. Do you think it is appropriate for the DOJ to weaponize federal law enforcement agencies against concerned parent discussing changes to their children's curriculum at local school board meetings?

Response: As a sitting judge, I cannot comment on remarks made by Attorney General Merrick Garland or on the propriety of DOJ actions. It is possible that legal issues arising out of the public debate regarding various policies implemented at public schools may come before me for determination.

c. Which of the following groups of people have the right to protest government intrusion and/or overreach and why?

i. **Concerned parents about the curricula in public schools?**

Response: Yes. The First Amendment protects the rights of both free speech and assembly. Although the government may impose rules regarding demonstrations that are designed to protect the public safely, it may not discriminate against particular viewpoints.

ii. Black Lives Matter protestors?

Response: Yes. The First Amendment protects the rights of both free speech and assembly. Although the government may impose rules regarding demonstrations that are designed to protect the public safely, it may not discriminate against particular viewpoints.

iii. Climate change protestors?

Response: Yes. The First Amendment protects the rights of both free speech and assembly. Although the government may impose rules

[4] SJQ 12(D) at *1258.

regarding demonstrations that are designed to protect the public safely, it may not discriminate against particular viewpoints.

iv. **Religious groups protesting abortion?**

Response: Yes. The First Amendment protects the rights of both free speech and assembly. Although the government may impose rules regarding demonstrations that are designed to protect the public safely, it may not discriminate against particular viewpoints.

15. Is climate change real?

Response: As a sitting judge, I refrain from commenting on matters of public debate in the event laws are passed or lawsuits are filed that might require me to rule on a related issue. Climate change is the subject of public debate.

16. Is gun violence a public-health crisis?

Response: As a sitting judge, I refrain from commenting on matters of public debate in the event laws are passed or lawsuits are filed that might require me to rule on a related issue. Gun violence and whether it is a public-health crisis is the subject of public debate.

17. Is racism a public-health crisis?

Response: As a sitting judge, I refrain from commenting on matters of public debate in the event laws are passed or lawsuits are filed that might require me to rule on a related issue. Various topics related to racism are matters of public debate.

18. What is implicit bias?

Response: My understanding of implicit bias is that individuals may unconsciously attribute particular characteristics to an individual or a group of individuals based on assumptions or stereotypes. These assumptions are believed to be pervasive, even if unintentional. And while they can be positive or negative, both can be harmful when they influence decision-making. As a sitting judge, my role is to fully, faithfully, and impartially discharge my duties in the cases or controversies that come before me without any form of bias. To ensure that I do so, I approach every case the same way. I keep an open mind, carefully listen to and make sure I understand the arguments of the parties, study the record carefully, and analyze and apply the law based on the facts of record.

19. Is the federal judiciary affected by implicit bias?

Response: Ensuring that our federal judicial system operates fairly and impartially regardless of race is a worthwhile pursuit, as equal protection is a core principle in the

Constitution. But the study of racial impacts associated with our laws and legal administration, such as our sentencing guidelines, are matters reserved to policy makers. As a sitting judge, my role is to fully, faithfully, and impartially discharge my duties in the cases or controversies that come before me without regard to race. If faced with a claim of racial disparities, I would evaluate the claim based on the applicable law and the record before me.

20. Do you have any implicit biases? If so, what are they?

Response: My understanding of implicit bias, which entails unconsciously attributing particular characteristics to an individual or a group of individuals based on assumptions or stereotypes, is pervasive. And while these assumptions can be positive or negative, both can be harmful when they influence decision-making. As a sitting judge, my role is to fully, faithfully, and impartially discharge my duties in the cases or controversies that come before me without any form of bias. To ensure that I do so without being influenced by any implicit biases, I approach every case the same way. I keep an open mind, carefully listen to and make sure I understand the arguments of the parties, study the record carefully, and analyze and apply the law based on the facts of record before me.

21. Can someone change his or her biological sex?

Response: As a sitting judge, I refrain from commenting on matters of public debate in the event laws are passed or lawsuits are filed that might require me to rule on a related issue. I am aware that the extent to which the law recognizes gender transitions for purposes of legal rights or classifications tied to a person's sex is a matter of public debate. Thus, it would be inappropriate for me to comment.

22. How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?

Response: In contrast to mere criticism of an opinion, certain attacks on a sitting judge could rise to the level of imminent threats or defamation. If a case came before me regarding an attack on a sitting judge, I would consult relevant criminal statutes and First Amendment law.

23. Do you think the Supreme Court should be expanded?

Response: Because this question is the subject of ongoing political debate, it would be inappropriate for me to offer an opinion.

24. Do you believe that we should defund police departments? Please explain.

Response: I am aware of the ongoing public debate about how to best allocate public safety resources in seeking to balance the need to protect the public from criminal activity while preserving the legal rights of citizens who encounter the police in that process. As a sitting judge on the Michigan Court of Appeals, I do not involve myself in policymaking, and it is inappropriate for me to weigh in on any matters that may come before me, just as it would be were I to be confirmed as a federal district court judge.

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

Response: I am aware of the ongoing public debate about how to best allocate public safety resources in seeking to balance the need to protect the public from criminal activity while preserving the legal rights of citizens who encounter the police in that process. As a sitting judge on the Michigan Court of Appeals, I do not involve myself in policymaking, and it is inappropriate for me to weigh in on any matters that may come before me, just as it would be were I to be confirmed as a federal district court judge.

26. Do you believe legal gun purchases have caused the violent crime spike?

Response: I have not studied the correlation between legal gun purchases and violent crime rates, so I am unable to answer this question.

27. How do you understand the difference, if any, between freedom of religion and freedom of worship?

Response: The free exercise clause protects both the right to believe in whatever religion one chooses (freedom of worship) and the right to practice one's religion (freedom of religion). The latter is considered a more expansive term that includes the rights of believers to evangelize, change their religion, have schools and charitable institutions, and participate in public discourse about religion. The Supreme Court has distinguished between religious belief and actions based on those beliefs and has issued several opinions recently concerning and protecting the latter.

28. Do you believe that the federal government should decriminalize possession of all drugs?

Response: Drug law issues are matters of public policy. As a judge sitting on the Michigan Court of Appeals, I do not weigh in on policy matters, and it is possible that legal controversies regarding such matters may come before me.

29. Do you agree with Thomas Jefferson that the First Amendment erects "a wall of separation between Church & State"?

Response: I agree that the First Amendment provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." As pointed out in recent Supreme Court precedent, however, that does not mean the state and the government never intersect. In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), for example, the Court held that the if the state offers public scholarship funds for a private school, it cannot discriminate against a religious school solely because of the religious character of the school. The same principle applied in *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017), which pertained to a denial of the church's application for a grant to purchase rubber playground surfaces. Denying a generally available benefit solely on account of religious liberty imposes a penalty on the free exercise of religion that can only be justified by passing the strict scrutiny test.

30. Do you agree that the First Amendment is more often a tool of the powerful than the oppressed?

Response: The question is so broad that I do not have enough information to form an opinion.

31. What is the legal basis for a nationwide injunction?

Response: Nationwide injunctions are deemed to be an equitable remedy employed by courts to bind the federal government in its relations with nonparties. I understand that the legal basis for nationwide injunctions is a matter of ongoing dispute, as exemplified in the Supreme Court's memorandum opinion in *Department of Homeland Security v. New York,* 140 S. Ct. 599 (2020) and the dissent in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Were I to be confirmed as a federal district judge and a party were to seek a nationwide injunction, I would carefully study the issue and any existing precedent at that time.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court determined that the Second Amendment secures "an individual right to keep and bear arms" without regard to militia service. The core right recognized is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id*. at 635. But the Court did not establish the legal standard to evaluate Second Amendment claims. If confirmed as a federal district judge in the U.S. District Court for the Western District of Michigan, I would follow the legal standard adopted by the Sixth Circuit in *United States v. Greeno*, 679 F.3d 510 (2012) and *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (2016). The Sixth Circuit applies a two-step framework to resolve Second Amendment challenges. Under the first prong, "the court asks whether

the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood." *Greeno*, 679 F.3d at 518. If the government demonstrates that the challenged statute regulates activity falling outside the scope of the right, then the analysis can stop there and the law is not subject to further Second Amendment review. *Id*. But if the government cannot establish this, "then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." Id. In *Tyler*, the Sixth Circuit applied intermediate scrutiny to evaluating challenges to 18 U.S.C. § 922 and similar prohibitions. *Tyler*, 837 F.3d at 692.

33. 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: The Religious Freedom Restoration Act provides that the government may not substantially burden a person's free exercise of religion, even if that burden results from a rule of general applicability, unless the government can demonstrate that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 20000bb-1. A person whose religious exercise has been burdened in violation of the RFRA may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the government. Once the religious adherent has established a substantial burden, the action is valid only if the government shows that the burden is in furtherance of a compelling governmental interest and it is the least restrictive means of furthering that interest.

b. How is a burden deemed to be "substantial[]" under current caselaw? Do you agree with this?

Response: The Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 724 (2014), noted its repeated admonition that courts must not presume to determine the plausibility of a religious claim. The court's narrow function is to determine whether the line drawn between complying with the law and having it violate their religious beliefs reflects an "honest conviction." The Court's analysis of a substantial burden requires it to ask type of religious exercise the law burdens and what type if impact the law has on that exercise.

34. Do you agree with the Supreme Court that the free exercise clause lies at the heart of a pluralistic society (*Bostock v. Clayton County*)? If so, does that mean that the Free Exercise Clause requires that religious organizations be free to act consistently with their beliefs in the public square?

Response: As a sitting Michigan Court of Appeals judge and nominee for a federal district court position, I generally refrain from publicly addressing any personal opinion I might have regarding U.S. Supreme Court opinions and other binding precedent. I do so out of respect for the higher courts whose opinions bind my own, and out of my regard for our system of justice and the role judges play in fairly, faithfully, and impartially applying the law. Regardless of whether I agree with *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), it remains binding precedent and I would faithfully apply that precedent.

35. Does illegal immigration impose costs on border communities?

Response: I have no knowledge about the costs imposed on border communities caused by immigration issues.

36. Do Blaine Amendments violate the Constitution?

Response: In *Espinoza v. Montana Department of Revenue*, 140 S. Ct 2246 (2020), the Supreme Court determined that a "no-aid" provision in the Montana Constitution, which was a Blaine Amendment, as applied in Rule 1 of an income tax credit program, discriminated on a religious basis, and was subject to strict scrutiny. In that case, the state declined to provide scholarship funds for students to attend private schools. The Supreme Court held that Rule 1 violated the Free Exercise Clause because it barred religious schools from public benefits solely because of the religious character of the schools. The court in *Espinoza* noted that many of the no-aid provisions in various state constitutions "belong to a more checkered tradition shared with the Blaine Amendment of the 1870's, which was "born of bigotry" and "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general." *Id*. 140 S. Ct. at 2259. It further stated, "[t]he no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause." *Id*.

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

Response: Yes.

38. 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, and/or Jen Dansereau?

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, and/or Jen Dansereau?

Response: Yes. On February 1, 2021, I received an email from Christopher Kang inviting me to watch a webinar that would provide an overview of the judicial nomination process for those interested in applying. I had already submitted my application on January 30, 2021, but I registered and watched the webinar on February 2, 2021. After the President announced his intent to nominate me on June 30, 2021, I received an email from Mr. Kang congratulating me on my nomination. I replied, thanking him for his email.

39. 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: No.

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

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

Response: No.

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

Response: I have had no interactions with this organization or any of its subsidiaries.

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

Response: No.

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

Response: No.

41. **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.

42. 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.

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

Response: In July 2017, Senators Debbie Stabenow and Gary Peters issued a press release indicating that they were accepting applications from candidates interested in nomination for a federal judgeship. I submitted my application on July 27, 2017. I interviewed with the Western District Judicial Advisory Committee on November 29, 2017. On February 16, 2018, I interviewed with the White House Counsel's Office.

In January 2021, Senators Debbie Stabenow and Gary Peters issued a press release indicating that they were accepting applications from candidates interested in nomination for a federal judgeship. I submitted my application on January 30, 2021. I interviewed with the Western District Judicial Nominations Committee on March 16, 2021. I was contacted by my senators on April 17 and 19, 2021, regarding my name being forwarded to the White House Counsel's Office. I interviewed with attorneys from the White House Counsel's Office on April 21, 2021. On April 23, 2021, I was contacted by the White House Counsel's Office and advised that I had been selected for Justice Department vetting. After that, I was in contact with officials from the Office of Legal Policy at the Department of Justice. After the Justice Department and FBI vetting,

I had another interview with attorneys from the White House on June 25, 2021. On June 30, 2021, the President announced his intent to nominate me, and I was officially nominated on July 13, 2021.

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

Response: Other than as described in my answer to Question 38, I have had no other communications with anyone from Demand Justice.

a. **Did anyone do so on your behalf?**

Response: No.

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

Response: No.

a. Did anyone do so on your behalf?

Response: No.

46. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors? 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.

a. Did anyone do so on your behalf?

Response: No.

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

Response: No.

a. Did anyone do so on your behalf?

Response: No.

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

Response: No.

a. Did anyone do so on your behalf?

Response: No.

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

Response: On February 16, 2018, I interviewed with the White House staff from the prior administration when being considered for a nomination. On April 21, 2021, I interviewed with the present White House staff. On April 23, 2021, I was contacted by a White House staff member and advised that I had been selected for Justice Department vetting. The following day I spoke with a member of the Justice Department about paperwork required for the vetting process. I had a couple of conversations with the Justice Department staff member in charge of my vetting. I had another interview with attorneys from the White House on June 25, 2021, and on June 29, 2021, I received a phone call from a White House staff member advising me I would be nominated. On June 30, 2021, the President announced his intent to nominate me, and I was officially nominated on July 13, 2021. I have had several meetings since June informing me of scheduling associated with the senate hearing, turning in my financial disclosure forms, completing and submitting the Senate Judicial Questionnaire, discussing what to expect at the nomination hearing, and sending to me questions from the Senators.

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

Response: I received these questions on October 13, 2021. I prepared answers based on my own knowledge, including regarding topics I had studied in anticipation of questions that might be asked of me at my nomination hearing. I also conducted relevant legal research. I submitted my draft answers to the Office of Legal Policy for feedback, and after receiving that feedback, I finalized my answers for submission on October 18, 2021.

Nomination of Jane M. Beckering
to be United States District Judge for the Western District of Michigan Questions for the Record
Submitted October 13, 2021

QUESTIONS FROM SENATOR COTTON

1. **Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?**

   Response: No.

2. **Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?**

   Response: No.

3. **Was *D.C. v. Heller*, 554 U.S. 570 (2008) rightly decided?**

   Response: As a sitting judge on the Michigan Court of Appeals, and now a nominee for the federal district court, I generally refrain from publicly weighing in on whether I agree or disagree with binding precedent. I do so out of respect for the higher courts whose pronouncements bind my own, and out of my regard for our system of justice and the role judges play in faithfully and impartially applying the law.

4. **Is the Second Amendment right to keep and bear arms an individual right belonging to individual persons, or a collective right that only belongs to a group such as a militia?**

   Response: The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) held that it is an individual right, belonging to individual persons.

5. **Please describe what you believe to be the Supreme Court's holding in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).**

   Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that governmental regulations are not neutral and generally applicable, and therefore, they trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise, even when the state treats some comparable secular businesses and other activities as poorly or even less favorably than the religious exercise at issue.

6. **Please describe what you believe to be the Supreme Court's holding in *Terry v. United States*, 141 S. Ct. 1858 (2021).**

Response: In *Terry v. United States*, 141 S. Ct. 1858 (2021), the Supreme Court held that a sentence reduction under the First Step Act, enacted in 2018, is only available if an offender's conviction of a crack cocaine offense triggered a mandatory minimum sentence. More specifically, crack offenders sentenced under 21 U.S.C. § 841(b)(1)(C) do not have a "covered offense" under Section 404 of the First Step Act because a sentence reduction under the Act is available only if an offender's prior conviction of a crack cocaine offense triggered a mandatory minimum sentence.

7. **Please describe what you believe to be the Supreme Court's holding in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021).**

Response: In *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), the Supreme Court held that neither of Arizona's two election regulations at issue, which governed how ballots are collected and counted, violated Section 2 of the Voting Rights Act of 1965 (VRA) or had a racially discriminatory purpose. One election policy outlawed ballot collection and another banned out-of-precinct voting. The Court declined to announce a test to govern all VRA Section 2 claims involving rules like the ones at issue in the case, which specify the time, place, or manner for casting ballots. Rather, it identified certain guideposts.

8. **Please describe what you believe to be the Supreme Court's holding in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).**

Response: In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the Supreme Court held in a plurality opinion that three Immigration and Nationality Act (INA) provisions at issue, 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c), could not plausibly be interpreted as implicitly placing a six-month limit on detention or requiring periodic bond hearings. In the case, the plaintiff, a Mexican citizen and lawful United States resident was detained after a 2004 incident. He was detained pursuant to a warrant under 8 U.S.C. § 1226, which states that on a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. The plaintiff claimed that immigrants had the right to a bond hearing without a "prolonged" detention according to 8 U.S.C. § 1225.

9. **Please describe what you believe to be the Supreme Court's holding in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).**

Response: In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court concluded that President Donald Trump's Presidential Proclamation 9645, 82 Fed. Reg. 45161 (2017), did not violate the Immigration and Nationality Act or the Establishment Clause by suspending the entry of aliens from several nations. The Proclamation placed entry

restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate. The Court concluded that substantial deference must be accorded to the Executive in the conduct of foreign affairs and the exclusion of aliens, including pursuant to 8 U.S.C. § 1182(f), which provides that the President has authority to restrict the entry of aliens whenever he finds that their entry "would be detrimental to the interests of the United States."

10. What is your view of arbitration as a litigation alternative in civil cases?

Response: As a sitting judge, I have no opinion regarding the use of arbitration as a litigation alternative in civil cases. As a sitting judge, I am also called upon to evaluate the enforceability of arbitration clauses, so it would be imprudent for me to express any opinion about the benefits or disadvantages of arbitration.

11. Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.

Response: I received these questions on October 13, 2021. I prepared answers based on my own knowledge, including regarding topics I studied in anticipation of questions that might be asked of me at my nomination hearing. I also conducted relevant legal research. I submitted my draft answers to the Office of Legal Policy for feedback, and after receiving that feedback, I finalized my answers for submission on October 18, 2021.

12. Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please also identify the department or agency with which those officials are employed.

Response: No.

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

Questions for the Record for Jane M. Beckering, Nominee for the Western District of Michigan

I. Directions

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

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

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

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

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

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

II. Questions

1. **When former Governor Jennifer Granholm nominated you to the Michigan Court of Appeals, you explained why you were selected in an outline for a speech. You said, "Why me: Been complaining for years, Granholm called me off the sidelines, do something about it." You were selected because of your political viewpoints, and you were proud of the chance to serve as a Democrat on the bench. When you received your judicial commission, did you "do something about" the issues you had complained about?**

   Response: In my speech outline, I was referring to the fact that I had voiced concerns that the Michigan Supreme Court was losing its nonpartisan identity and appearing to inject political ideologies into its rulings so as to shape the law, rather than merely interpreting and applying it. Throughout my campaign, I ran on a platform of ensuring that all parties who appear before the court would be treated fairly and impartially, whether they be individuals, corporations, the government, plaintiffs, or defendants. I wanted to be a part of the process of returning the Michigan Supreme Court to a nonpartisan body. My desire to "do something about" it was to give up my successful private practice in order to serve the public and be the type of judge all lawyers wanted to see on the other side of the bench: fair and impartial. I have been on the bench for the past fourteen years, and having presided over 4,000 cases that have resulted in the issuance of written opinions, one-third of which I wrote, I believe my track record in those rulings is the record evidence that demonstrates my fidelity to the rule of law, wherever it leads.

2. **You have harshly criticized conservative jurisprudence. Specifically, you previously credited the composition of the Michigan Supreme Court for allowing "partisanship [to] invade the Halls of Justice, eroding the rights of citizens it was designed to protect." You have also lamented the influence of organizations like the Federalist Society on the Michigan judiciary. Do you believe partisanship and organizations like the Federalist society are "invading the Halls of Justice" in the federal courts?**

   Response: The remarks I made in the fall of 2006 during my campaign for the Michigan Supreme Court were in keeping with my view that politics does not belong in the judiciary, and that there should not be a litmus test, such as membership in any particular organization, when selecting highly qualified people for the bench who can be fair and impartial. Talented judges can come from a wide variety of different backgrounds. Since becoming a judge in 2007, I have not engaged in similar campaign-style speech. I highly respect judges who honor their oath of office.

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

Response: Yes. When evaluating claims regarding matters of religion and government, the U.S. Supreme Court has looked to the establishment and free exercise clauses of the First Amendment. the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 20000bb with respect to federal laws (in *City of Boerne v. Flores*, 521 U.S. 507 (1997) the RFRA was declared unconstitutional as applied to the states; it was later amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to clarify that it is only applicable to federal laws); and the RLUIPA, 42 U.S.C. § 2000cc-1(a). These laws guarantee that religious individuals and organizations will have substantial autonomy to act consistently with their religious beliefs.

The RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Under the RFRA, the federal government "shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability," except when the government demonstrates that the application of that burden furthers a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. §§ 2000bb-1(a), (b). In *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014), the Supreme Court recognized that a for-profit corporation falls within the definition of the Religious Freedom Restoration Act's protection of a "person's" exercise of religion.

Regarding limits upon what the government can require of institutions, in both *Burwell v. Hobby Lobby* and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennyslvania*, 140 S. Ct. 2367 (2020), the Supreme Court applied the RFRA and concluded that the Affordable Care Act (ACA) substantially burdened the plaintiff employers' free exercise of closely held religious obligations by requiring them to provide their employees with certain methods of contraception.

For constitutional free-exercise challenges, where a challenged law is neutral and of general applicability and has merely an "incidental effect" on a plaintiff's religious beliefs, defendants need not show a compelling governmental interest. *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 (1993); see also *Emp., Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990). Where the challenged law does not meet these requirements, defendants must show that the policy is narrowly tailored to serve a compelling state interest. *Church of the Lukumi Babalu v. Aye*, 508 U.S. at 531-32. Facial neutrality is not necessarily determinative of the question whether a law is neutral. For example, if the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral. *Id*. at 533. Regulations are not deemed neutral and of general applicability whenever they treat nonsecular activities more favorably than religious exercise; the court must evaluate the risk various activities pose, not the reason why people gather. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). If a law authorizes the government to grant unrestricted discretionary exemptions and the government declines to grant them to those invoking religious liberty, it is not of general applicability. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). If the

governmental body adjudicating a free exercise defense to the application of a neutral law of general applicability exhibits hostility toward a person's religious beliefs, the religious neutrality protected by the Constitution is defeated. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

If I am confirmed as a federal district court judge in the United States District Court for the Western District of Michigan, I would be bound by Sixth Circuit precedent. That would include *Roberts v. Neace*, 958 F.3d 409, 413 (6th Circ. 2020) (a law may not be motivated by animus toward people of faith in general or one faith in particular); *Cavin v. Michigan Department of Corrections*, 927 F.3d 455 (6th Circ. 2019) (the right of inmates to exercise their religion, as protected by RLUIPA, is evaluated under a test that is like a "three-act play. In Act One, the inmate must demonstrate that he seeks to exercise religion out of a 'sincerely held religious belief. . . . In Act Two, he must show that the government substantially burdened that religious exercise. . . . In Act three, the government must meet the daunting compelling-interest and least-restrictive means test."); and *Hartmann v. Stone*, 68 F. 3d 973 (1995) (a law is not neutral and of general applicability if it discriminates on its face).

4. 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 granted injunctive relief to the diocese plaintiff with respect to the governor's executive order, enjoining the governor from enforcing its 10- to 25- person occupancy limits on attendance at religious services in areas classified as "red" or "orange" zones, finding that it violated the Free Exercise Clause of the First Amendment because the regulations treated houses of worship much more harshly than comparable secular facilities.

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

Response: Yes.

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

Response: As set forth in Article II of the Constitution, the executive power is vested in the President. Before taking office, the President shall solemnly swear or affirm that "he

will faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect, and defend the Constitution of the United States." Generally speaking, the executive branch is responsible for enforcing federal laws. However, in our tripartite system of government, the executive branch also has broad discretion with respect to enforcement decisions. See *Wayte v. U.S.*, 470 U.S. 1524, 607 (1985). "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis courts are competent to undertake." *Id*.

7. Describe how you would characterize your judicial philosophy on the bench in Michigan thus far, and identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.

Response: I believe that as the nonpartisan branch of government, it is crucial for courts to be a level playing field for all litigants, be they individuals, corporations, plaintiffs or defendants. Judges must faithfully, fairly, and impartially apply the law to the facts of the case before them, wherever that leads. I do not identify with any judicial philosophy other than to uphold my oath of office. To ensure quality and consistency, I approach each case with the same framework. First, I listen to the parties' arguments with an open mind and make sure that I fully understand each parties' position. I then carefully review the record evidence in the case. Finally, I study the law and apply it to the facts of the case or controversy before me. I also believe it is important for judges to clearly and concisely explain their rulings, such that even if a party disagrees with the outcome, they can be reassured that their cause was given careful consideration. Because I do not identify with a particular ideology or philosophy of judging, I could not identify a specific U.S. Supreme Court Justice whose philosophy is closest to my own.

8. In your own words, please briefly describe your understanding of the interpretative method known as originalism.

Response: My understanding of the interpretative method known as originalism comports with the *Black's Law Dictionary* (Tenth Edition) definition, which describes it as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted."

9. In your own words, please briefly describe your understanding of the interpretive method often referred to as living constitutionalism.

Response: My understanding of the interpretative method known as living constitutionalism comports with the *Black's Law Dictionary* (Tenth Edition) definition, which describes it as "[t]he doctrine that the Constitution should be interpreted and

applied in accordance with changing circumstances and, in particular, with changes in social values."

10. 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 my experience presiding in over 4,000 cases that have resulted in the issuance of written opinions and thousands more that have been resolved by orders on motions in the Michigan Court of Appeals, constitutional questions arise on a regular basis in criminal matters and on a periodic basis in civil matters. I have found that the U.S. Supreme Court has considered most constitutional provisions in depth, identifying the meaning of the provision, the interests it is designed to promote or protect, and in most cases, the applicable test or framework for evaluating new claims implicating that provision. Even when new factual contexts or categories of cases arise, these frameworks apply to my analysis. If confirmed as a federal district court judge, I would follow all binding Supreme Court and Sixth Circuit precedent. Were I to be presented with a constitutional issue of first impression whose resolution is not controlled by binding precedent, I would study and apply Supreme Court or Sixth Circuit rulings that are either directly or analogously applicable to the provision or provisions at issue so as to protect the consistent development of the rule of law.

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

Response: The U.S. Supreme Court has recognized in some circumstances that, although the core principles embodied in the Constitution do not change, their application may be impacted by contemporary values and understandings. See *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.,* 347 U.S. 483, 492-93(1954) ("In approaching this problem [of segregation in schooling], we cannot turn the clock back to 1868 when the [14th] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout this Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protections of the laws."). If confirmed as a federal district court judge, I would follow all binding Supreme Court and Sixth Circuit precedent.

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

Response: The Constitution is our nation's fundamental, foundational law, and it codifies the core values of the people. It is deemed to be the intention of the people to the

intention of their agents. It can be changed through the Article V amendment process. Designed to be an enduring foundational document, the U.S. Supreme Court has been called upon to interpret and apply it in new factual contexts, such as with respect to the people's rights under the Fourth Amendment when it comes to searches of a cell phone in *Riley v. California*, 573 U.S. 373 (2014). While the Supreme Court has applied the protections of the Constitution to circumstances that were not envisioned by the framers, in doing so it has endeavored to be faithful to the principles reflected in the Constitution as enacted. See *Carpenter v. U.S.*, 138 S. Ct. 2206, 2213-2214, 2223 (2018).

13. 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: Because this is a topic of ongoing political debate, and I am a sitting judge and nominee for the federal district court, it would be imprudent for me to express any opinion. If confirmed, I will continue to abide by the precedent issued by the Supreme Court, regardless of its size or composition.

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

Response: Yes, as declared by the Supreme Court in *District of Columbia v. Heller,* 554 U.S. 570 (2008) and applied to the states in *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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

Response: Each right under the Constitution must be evaluated and applied on its own terms, using the applicable level of scrutiny associated with its protection set forth in U.S. Supreme Court rulings or other binding circuit court precedent. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court did not establish the level of protection provided to Second Amendment claims. If confirmed as a federal district judge in the U.S. District Court for the Western District of Michigan, I would follow the legal standard adopted by the Sixth Circuit in *United States v. Greeno*, 679 F.3d 510 (2012) and *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (2016). The Sixth Circuit applies a two-step framework to resolve Second Amendment challenges. Under the first prong, "the court asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood." *Greeno*, 679 F.3d at 518. If the government demonstrates that the challenged statute regulates activity falling outside the scope of the right, then the analysis can stop there and the law is not subject to further Second Amendment review. *Id*. But if the government cannot establish this, "then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second

Amendment rights." *Id*. In *Tyler*, the Sixth Circuit applied intermediate scrutiny to evaluating challenges to 18 U.S.C. § 922 and similar prohibitions. *Id*. at 692.

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

Response: Please see my answer to Question 18. In that answer, I describe the level of protection provided for gun rights. With regard to the right to vote, it receives its own level of protection, as articulated in *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008). To satisfy the equal protection standard, a government's burden on voting rights must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation. Evenhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious and satisfy the equal protection standard set forth in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). But, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. *Id*. at 1616.

17. If you are to join the federal bench, and supervise along with your colleagues the court's human resources programs, will it be appropriate for the court to provide its employees trainings which include the following:

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

Response: I do not know what training programs are provided at the United States District Court for the Western District of Michigan, or for whom such trainings may be provided. And I am not aware whether judges have any role in providing trainings. To the extent this answers your question, I would expect that any trainings must be consistent with the law and thoughtfully designed to promote the sound and impartial administration of justice.

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

Response: I do not know what training programs are provided at the United States District Court for the Western District of Michigan, or for whom such trainings may be provided. And I am not aware whether judges have any role in providing trainings. To the extent this answers your question, I would expect that any trainings must be consistent with the law and thoughtfully designed to promote the sound and impartial administration of justice.

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

Response: I do not know what training programs are provided at the United States District Court for the Western District of Michigan, or for whom such trainings may be provided. And I am not aware whether judges have any role in providing trainings. To the extent this answers your question, I would expect that any trainings must be consistent with the law and thoughtfully designed to promote the sound and impartial administration of justice.

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

Response: I do not know what training programs are provided at the United States District Court for the Western District of Michigan, or for whom such trainings may be provided. And I am not aware whether judges have any role in providing trainings. To the extent this answers your question, I would expect that any trainings must be consistent with the law and thoughtfully designed to promote the sound and impartial administration of justice.

18. 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: I do not know what training programs are provided at the United States District Court for the Western District of Michigan, or for whom such trainings may be provided. And I am not aware whether judges have any role in providing trainings. To the extent this answers your question, I would expect that any trainings must be consistent with the law and thoughtfully designed to promote the sound and impartial administration of justice.

19. Is the criminal justice system systemically racist?

Response: While I am generally aware of studies about your question, including a United States Sentencing Commission study that shows increased incarceration rates for black males similarly situated to while males in terms of their crime class and history, as a judge, I am not called upon to evaluate larger issues of race and the law. I am called upon to evaluate individual cases and controversies fairly and impartially, without regard to race, and I would continue to do so if confirmed as a federal district court judge.

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

Response: If faced with a case or controversy alleging that a political appointment was made by considering skin color or sex, I would review and apply U.S. Supreme Court precedent applicable to the type of appointment at issue, if any.

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

Response: The federal death penalty is codified in 18 U.S.C. § 3591. For that to be changed, Congress has the authority to repeal or amend the statute. Generally speaking, the executive branch is responsible for enforcing federal laws. However, in our tripartite system of government, the executive branch also has broad discretion with respect to enforcement decisions. See *Wayte v. U.S.*, 470 U.S. 1524, 607 (1985). "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis courts are competent to undertake." *Id*.

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

Response: In *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021), the Supreme Court nullified a nationwide residential eviction moratorium that had been place for nearly a year, concluding that it strained credibility to believe that the statute at issue, 42 U.S.C. § 264(a), granted the CDC the sweeping authority it asserted it had, as such interpretation could permit dramatic administrative overreach.

23. Do you believe that unlawfully setting a building on fire, amidst general rioting, is a violent act?

Response: From your question I gather you may be referring to conduct that has occurred during protest rallies over the past couple of years. As a sitting judge, I regularly preside over criminal appeals. I would be improper for me to answer your hypothetical question as it could cause future litigants to fear that I will prejudge their case.

24. In *Carpenter v. United States*, what criteria did the U.S. Supreme Court use to distinguish between phenomena that are covered by the 4th Amendment 3rd Party Doctrine and those that are not?

Response: In *Carpenter v. U.S.*, 138 S. Ct. 2206 (2018), the Supreme Court considered the privacy expectations of a person whose information is in the hands of third parties. Under the third-party doctrine, a person has no legitimate expectation of privacy, for Fourth Amendment purposes, information he voluntarily turns over to third parties, even though he may have turned it over expecting only that it would be used for a limited purpose. As such, the government is typically free to obtain such information without triggering Fourth Amendment protections. But, an individual maintains a legitimate expectation of privacy in the record of his physical movements, as captured through cell-site location information. In light of a slightly reduced level of privacy expectation, the Supreme Court held that for police to access cell site location information from a cell phone company, the government can compel production of the content of stored communications or related non-content information when specific and articulable facts show that there are reasonable grounds to believe that the contents of a wire or electronic information sought are relevant and material to an ongoing criminal investigation. *Id*. at 2221. This standard of suspicion

is lower than the probable cause requirement for a typical warrant. *Id*. at 2222. And exceptions may exist, such as exigent circumstances. *Id*. at 2223.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the City of Philadelphia stopped referring children to Catholic Social Services (CCS), a foster care agency, upon discovering that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage. The city did so because it concluded that CCS's refusal to certify same-sex couples violated a non-discrimination provision in its contract with the city as well as the non-discrimination requirements of a city ordinance. At issue before the Supreme Court was whether the Third Circuit properly determined that the city's actions were permissible under *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), which addressed the concept of neutral and generally applicable laws that incidentally burden religion. Tasked with deciding whether the burden the city had placed on the religious exercise of CSS was constitutionally permissible, the Court concluded that, under the rubric of general applicability, the inclusion of a formal system of entirely discretionary exceptions to the anti-discrimination law rendered the contractual non-discrimination requirement not generally applicable. It held that "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless of whether any exceptions have been given, because it "invite[s] the government to decide which reasons for not complying with the policy are worthy of solicitude . . . here, at the Commissioner's 'sole discretion.' " *Fulton*, 141 S. Ct. at 1879.

26. In *Americans for Prosperity Foundation v. Bonta*, the Court majority ruled that California's disclosure requirement was facially invalid because it burdens donors' First Amendment rights to freedom of association. However, the majority was evenly split as to which standard of scrutiny should apply to such cases. Please explain your understanding of the two major arguments, and which of the two standards an appellate judge is bound to apply?

Response: Chief Justice John Roberts' opinion calls for an "exacting scrutiny" standard when evaluating governmental disclosure requirements. "Exacting scrutiny" requires a "substantial relation between the disclosure requirement and a sufficiently important government interest" and that the regime be narrowly tailored to the government's asserted interest, even if it is not the least restrictive means of achieving that end. *Americans for Prosperity Foundation v. Bonta,* 141 S. Ct. 2373, 2383-84 (2021). Justice Thomas would apply a strict scrutiny standard, upholding the law only if it is the least restrictive means to serve a compelling state interest. *Id*. 141 S. Ct. at 2390. Justices Gorsuch and Alito declined to conclude that a single standard applies to all disclosure

requirements. *Id*. 141 S. Ct. at 2391. The U.S. Supreme Court has explained that when a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court is the narrowest grounds taken by members who concurred in the judgment. *Marks v. U.S.*, 430 U.S. 188, 193 (1977). In absence of binding precedent as to the applicable standard, I would first determine whether Sixth Circuit precedent establishes a standard. After conducting brief research on the matter, it does not appear that the Sixth Circuit has weighed in on the matter following the *Bonta* decision. If I am confirmed to the federal district court and I encounter a case involving a governmental disclosure requirement, assuming there is still no Sixth Circuit precedent at the time, I would analyze the Supreme Court's decisions in connection with past membership-disclosure cases, as well as freedom of association cases more broadly, in an effort to determine the constitutionally required standard.

27. Explain the Michigan Supreme Court's holdings in its October 2, 2021 opinion issued in *Midwest Institute of Health v. Whitmer*.

Response: In *Midwest Institute of Health, PLLC v. Whitmer*, 506 Mich 332 (2020), the plaintiffs challenged the state's executive orders related to the Covid-19 pandemic and sought injunctive relief. On March 11, 2020, the Governor had proclaimed a state of emergency under both the Emergency Management Act and the Emergency Powers of the Governor Act of 1945. The Governor's orders included various stay-at-home and other restrictions, including the prohibition on bariatric and joint replacement surgeries except for emergencies. The plaintiffs challenged the Governor's statutory authority to issue Executive Orders 2020-17 and 2020-77 beyond 28 days after her announcement of the state of emergency without obtaining legislative approval, and that the orders were void for vagueness. The plaintiffs also raised challenges under the 14th Amendment and Commerce Clause of the U.S. Constitution. The Supreme Court ruled that the Governor lacked authority under the Emergency Manager Act to issue or renew any executive orders related to Covid-19 after her first order expired on April 30, 2020, and that the Emergency Powers Act violated the Michigan Constitution's nondelegation clause.

Senator Josh Hawley
Questions for the Record

Jane Beckering
Nominee, U.S. District Judge for the Western District of Michigan

1. **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?**

    Response: No.

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

    Response: I believe that judges are duty bound to faithfully and impartially apply the law, regardless of whether they like the outcome.

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

Response: The Rooker-Feldman doctrine holds that lower federal courts should not sit in direct review of state court decisions unless Congress has specifically authorized such relief, such as it did in 28 U.S.C. § 2254 when it authorized federal courts to grant a writ of habeas corpus. The doctrine is gleaned as a negative inference from 28 U.S.C. § 1257, which states that "Final judgements or decrees rendered by the highest court of State in which a decision could be had, may be reviewed by the Supreme Court . . . ."

The Younger abstention doctrine requires federal courts to abstain from hearing cases involving federal issues already being litigated in state forums. The doctrine applies when three factors are present: (1) there is an ongoing state proceeding; (2) the claim raises important state interests; and (3) the state proceedings provide an adequate opportunity to raise the federal constitutional claims.

The Pullman abstention doctrine is a doctrine in which federal courts may choose not to hear a case, even if all the formal jurisdictional requirements are met, until the state law question can be resolved in a state court.

The Burford abstention doctrine allows federal courts to abstain from reviewing certain decisions of state administrative agencies or from otherwise assuming the

functions of state courts in the development and implementation of a state' pubic policies.

Thibodaux abstention entails a federal court's act of declining to exercise its jurisdiction to allow a state court to decide difficult issues of importance in order to avoid unnecessary friction between federal and state authorities.

The adequate and independent state ground doctrine provides that when a litigant petitions the United States Supreme Court to review the judgment of a state court which rests upon both federal and state law, the Supreme Court does not have jurisdiction over the case if the state ground is adequate to support the judgment and is independent of federal law.

The Erie doctrine mandates that a federal court called upon to resolve a dispute not directly implicating a federal question, such as when sitting in diversity jurisdiction, must apply state substantive law, but federal procedural law.

3. **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.**

      Response: Not applicable.

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

   Response: The United States Supreme Court has considered most of the constitutional provisions in depth, and in doing so, it has already interpreted their meaning, determined the values each provision is designed to promote, and in many instances, formulated a test or framework within which to evaluate new or novel claims under the provision. I do not have a position about the role the original public meaning should play, as I follow Supreme Court precedent's position on the matter when a constitutional provision is at issue in a case before me.

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

   Response: I always start with the text. The purpose of statutory interpretation is to understand and give effect to the intent of the legislature. I consider the meaning of a

term or phrase and its statutory context. If the language of a statute is clear and unambiguous, I presume the legislature intended the meaning expressed in the statute, and further judicial construction is neither required nor permitted. If and only if a statute is ambiguous, meaning it is equally susceptible to more than one interpretation, do I apply the canons of construction, which can include linguistic canons based on grammatical rules and presumptions about usage, and also substantive canons. I may also look to judicial interpretations of analogous statutory language, and possibly legislative history, but only in an effort to shed light on the meaning of the statutory language. Legislative history is not a substitute for the language chosen by the legislature.

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: Not all legislative history is the same. Some is clearer and more straightforward than others. But ultimately, I am acutely aware that many changes can be made to legislation after it is introduced, so the focus must be on the statutory text itself.

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

Response: I do not believe laws of foreign nations is relevant when interpreting the provisions of the U.S. Constitution.

6. 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: In *Bucklew v. Precythe*, 139 S. Ct. 112 (2019), the Supreme Court clarified that "anyone bringing a method of execution claim alleging the infliction of unconstitutionally cruel pain must meet the *Baze-Glossip* test." In *Baze*, the Court held that 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 it without a legitimate penological reason. *Baze v. Rees*, 553 U.S. 35, 52 (2008). *Glossip* indicated that this standard governs all Eighth Amendment method of execution claims. *Glossip v. Gross*, 576 U.S. 863, 876-77 (2015). In *Bucklew*, the Court noted that *Baze* and *Glossip* should not be read to suggest that traditionally acceptable methods of execution—such as hanging, the firing squad, electrocution, and lethal injection—are necessarily rendered unconstitutional as soon as

an arguably more humane method like lethal injection becomes available. I have not found Sixth Circuit precedent addressing this issue.

7. **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.

8. **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: Not to my knowledge. The Supreme Court weighed in on the issue in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), holding that the availability of DNA testing technologies does not mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt. The Supreme Court concluded that the task of establishing rules associated with the ordering of DNA testing post-conviction belonged primarily to the legislature.

9. **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: It means that a judge who is true to his or her oath must make decisions required by the law, even if he or she does not personally agree with the outcome. As Justice Kennedy eloquently stated in his concurrence in *Texas v. Johnson*, 491 U.S. 397, 420-21 (1989), "the hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." In other words, a judge must faithfully interpret and apply the law wherever it leads.

10. **U.S. Courts of Appeals sometimes issue "unpublished" decisions and suggest that these decisions are not precedential. *Cf.* Rule 32.1 for the U.S. Court of Appeals for the Tenth Circuit.**

a. Do you believe it is appropriate for courts to issue "unpublished" decisions?

Response: Courts, such as mine on the Michigan Court of Appeals, have established protocols for when an opinion should be published. I follow that protocol.

b. If yes, please explain if and how you believe this practice is consistent with the rule of law.

Response: My understanding is that the significant increase in caseloads over the past century due to the rising amount of litigation, and the concomitant number of published decisions, prompted the development of criteria calling for publication of only those opinions that are of general precedential value. *Annual Report of the Director of the Administrative Office of the United States Courts* (1964), in *Reports of Proceedings of the Judicial Conference of the United States* (1964).

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. I firmly believe that a judge must honor his or her oath of office and faithfully apply the law, fairly and objectively.

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: When evaluating claims regarding matters of religion and government, the Supreme Court has looked to the establishment and free exercise clauses of the First Amendment; the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb for federal laws (in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the RFRA was declared unconstitutional as applied to state laws; it was later amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to clarify that it is only applicable to federal laws); and the RLUIPA, 42 U.S.C. § 2000cc-1(a). These laws guarantee that religious individuals and organizations will have substantial autonomy to act consistently with their religious beliefs.

The RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Under the RFRA, the government "shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability," except when the government demonstrates that the application of that burden furthers a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. §§ 2000bb-1(a), (b).

For constitutional free-exercise challenges, where a challenged law is neutral and of general applicability and has merely an "incidental effect" on a plaintiff's religious beliefs, defendants need not show a compelling governmental interest. *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 (1993); see also *Emp., Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990). Where the challenged law does not meet these requirements, defendants must show that the policy is narrowly tailored to serve a compelling state interest. *Church of the Lukumi Babalu v Aye*, 508 U.S. at 531-32. Facial neutrality is not necessarily determinative of the question whether a law is neutral. For example, if the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral. *Id*. at 533. Regulations are not deemed neutral and of general applicability whenever they treat nonsecular activities more favorably than religious exercise; the court must evaluate the risk various activities pose, not the reason why people gather. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). If a law authorizes the government to grant unrestricted discretionary exemptions and the government declines to grant them to those invoking religious liberty, it is not of general applicability. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). If the governmental body adjudicating a free exercise defense to the application of a neutral law of general applicability exhibits hostility toward a person's religious beliefs, the religious neutrality protected by the Constitution is defeated. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

If I am confirmed as a federal district court judge in the United States District Court for the Western District of Michigan, I would be bound by Sixth Circuit precedent. That would include *Roberts v. Neace*, 958 F.3d 409, 413 (6th Circ. 2020) (a law may not be motivated by animus toward people of faith in general or one faith in particular); *Cavin v. Michigan Department of Corrections*, 927 F.3d 455 (6th Circ. 2019) (the right of inmates to exercise their religion, as protected by RLUIPA, is evaluated under a test that is like a "three-act play. In Act One, the inmate must demonstrate that he seeks to exercise religion out of a 'sincerely held religious belief. . . . In Act Two, he must show that the government substantially burdened that religious exercise. . . . In Act three, the government must meet the daunting compelling-interest and least-restrictive means

test."); and *Hartmann v. Stone*, 68 F.3d 973 (1995) (a law is not neutral and of general applicability if it discriminates on its face).

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: See my response to Question No. 13, above.

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 United States Supreme Court has made it clear that people with sincere religious beliefs that their religion prevents or requires certain action are entitled to invoke the Free Exercise Clause without a judicial evaluation of the validity of their interpretations. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 833-34 (1989). See also *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018).

In *Fox v. Washington*, 949 F.3d 270, 277 (2020), the Sixth Circuit held that courts are to determine whether the line drawn by the plaintiff between conduct consistent and inconsistent with his or her religious beliefs reflects an "honest conviction." The court noted that sincerity is distinct from reasonableness, and that once a plaintiff alleges that certain conduct violates their sincerely held religious beliefs as they understand them, it is "not within the court's purview to question the reasonableness of those allegations" or to say that the plaintiff's religious beliefs are "mistaken or unsubstantial." *Id*. A properly developed record on the sincerity issue can include testimonial evidence and reference to religious texts. *Id*.

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*, 554 U.S. 570, 595 (2008), the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms without regard to militia service. The core right recognized

is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id*. at 635. *Heller* concluded that the inherent right of self-defense is central to the Second Amendment right, *id*. at 628, and the handgun is the "quintessential self-defense weapon", *id*. at 629. The Court noted that, just as there are limits on the First Amendment's right of free speech, the right protected by the Second Amendment is not unlimited. *Id*. at 570. For example, the Court stated that nothing in its opinion should be read to "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id*. at 626-27. The Court declined in *Heller* to establish a level of scrutiny for evaluating Second Amendment restrictions. *Id*. at 634-635.

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: The cases I have presided over that entailed gun rights and regulations are as follows:

1. *Capital Area Dist. Library v. Michigan Open Carry, Inc*., 289 Mich. App. 220 (2012).

2. *People v. Minch*, 295 Mich. App. 92 (2011), reversed and remanded, 493 Mich. 87 (2012).

3. *People v. Schwartz*, 2010 WL 4137453 (Mich. Ct. App. Oct. 21, 2010)

16. In *Trump v. Hawaii*, the Supreme Court overruled *Korematsu v. United States*, 323 U.S. 214 (1944), saying that the decision—which had not been followed in over 50 years—had "been overruled in the court of history." 138 S. Ct. 2392, 2423 (2018). What is your understanding of that phrase?

Response: In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court concluded that President Donald Trump's Presidential Proclamation 9645, 82 Fed. Reg. 45161 (2017), did not violate the Immigration and Nationality Act or the Establishment Clause by suspending the entry of aliens from several nations. The Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate. The Court concluded that substantial deference must be accorded to the Executive in the conduct of foreign affairs and the exclusion of aliens, including pursuant to 8 U.S.C. § 1182(f),

which provides that the President has authority to restrict the entry of aliens whenever he finds that their entry "would be detrimental to the interests of the United States." The majority opinion referred to *Korematsu v. United States*, 323 U.S. 214 (1944) (which entailed the forcible relocation of U.S. citizens to internment camps, solely and explicitly on the basis of race), because the dissent had relied upon it. The majority found it wholly distinguishable and took the opportunity to make clear that it had long ago been abrogated by subsequent precedent. The Court stated that "it is wholly inapt to liken that morally repugnant [executive] order to a facially neutral policy denying certain foreign nationals the privilege of admission." *Id*. at 2423.

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?

Response: It is up to the Supreme Court to determine whether its own opinions are no longer good law. As a sitting judge, I am obligated to follow all precedential opinions, regardless of whether I think they may have been abrogated by implication, unless and until the superior court declares it so.

a. If so, what are they?

Response: None.

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

Response: I do.

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: I have formed no opinion regarding Judge Learned Hand's statement, but I would faithfully follow all precedent if I were assigned to preside over a monopoly claim, including the Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act. My understanding is that the two elements of monopolization are (1) the power to fix prices and exclude competitors within the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.

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

Response: See my answer Question 18a.

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: Please see my answer to 18a.

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

Response: "Federal common law" is a phrase used to describe common law (i.e. law derived from judicial decisions instead of statutes) that is developed by federal courts. It is my understanding that while common law development is frequent in state courts, it is rare in federal courts.

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: Given the principle of dual sovereignty, state courts are free to interpret their constitutional provisions independently of provisions in the federal constitution. That said, states are also free to consider as persuasive authority judicial interpretations as to the scope of identical constitutional rights. A state constitution may provide greater civil rights and liberties, but it may not be interpreted so as to curtail rights that are provided by the federal constitution.

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

Response: Please see my answer to Question 20a.

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

Response: Yes, state constitutions are free to provide greater protections.

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

Response: As a sitting judge on the Michigan Court of Appeals, and now a nominee for the federal district court, I generally refrain from publicly weighing in on whether I agree or disagree with binding precedent. I do so out of respect for the higher courts whose pronouncements bind my own, and out of my regard for our system of justice and the role

judges play in faithfully and impartially applying the law. I also believe such restraint contributes to the actual and perceived integrity of the judicial process, as the public benefits from the reassurance that a judge will follow the law and not prejudge cases or controversies that may come before them. Regardless of whether I agree with a Supreme Court decision, it remains binding precedent and I would faithfully apply that precedent.

With that said, the holding in *Brown v. Board of Ed. of Topeka*, 347 U.S. 483 (1954), that de jure segregation is inconsistent with our understanding of equal protection in today's society, is so well-established and widely accepted that the issue is unlikely to ever come before me or another court. For that reason, I can safely make an exception to my general rule and share my opinion that the case was rightly decided.

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

Response: Nationwide injunctions are deemed to be an equitable remedy employed by courts to bind the federal government in its relations with nonparties. I understand that the legal basis for nationwide injunctions is a matter of ongoing dispute, as exemplified in the Supreme Court's memorandum opinion in *Department of Homeland Security v. New York,* 140 S. Ct. 599 (2020) and the dissent in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Were I to be confirmed as a federal district judge and a party were to seek a nationwide injunction, I would carefully study the issue and any existing precedent at that time.

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

Response: Please see my answer to 22a.

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

Response: Please see my answer to 22a.

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 answer to 22a.

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

Response: The United States was the first nation to adopt federalism as its governing framework. Federalism is a system of government in which power is divided, by a constitution, between a central government and regional governments. Throughout the generations, there have been shifts in differing directions as to whether power should be concentrated at the local or the federal level, often as pursued by the president in power at the time.

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 answer to Question 2.

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

Response: In addition to the substantive due process rights expressly set forth in the Constitution, the Supreme Court has held that the due process clauses of the Fifth and Fourteenth Amendments also protect those fundamental rights and liberties that are objectively, deeply rooted in this Nation's history and tradition. *Washington v. Glucksberg*, 521 U.S. 702 (1997). The Court has found that the Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. *Id*. at 719. Those rights include the right to direct the education and upbringing of one's children (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); to bodily integrity (*Rochin v. California*, 342 U.S. 165 (1952)); to marital privacy (*Griswold v. Connecticut*, 381 US. 479 (1965)); to marry (*Loving v. Virginia*, 388 U.S. 1 (1967)); to use contraception (*Griswold*; and *Eisenstadt v. Baird*, 405 U.S. 438 (1972)); and to abortion (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)). The Court has also "strongly suggested" that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Glucksberg*, 521 U.S. at 720.

The Court's established method of substantive-due-process analysis has two primary features. First it has deemed the Constitution to protect "those 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." *Id*. at 721 (citations and internal quotation marks omitted). Second, it has required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. *Id*.

27. 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: The Free Exercise Clause of the First Amendment to the United States Constitution reflects a critical protection for religious liberty. As a sitting Michigan Court of Appeals judge, I follow Supreme Court's precedent concerning the scope of this liberty.

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 clause protects both the right to believe in whatever religion one chooses (freedom of worship) and the right to practice one's religion (free exercise of religion). The latter is considered a more expansive term that includes the rights of believers to evangelize, change their religion, have schools and charitable institutions, and participate in public discourse about religion. The Supreme Court has distinguished between religious belief and actions based on those beliefs and has issued several opinions recently concerning and protecting the latter.

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: The Religious Freedom Restoration Act provides that the federal government may not substantially burden a person's free exercise of religion, even if that burden results from a rule of general applicability, unless the government can demonstrate that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 20000bb-1. A person whose religious exercise has been burdened in violation of the RFRA may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the government. Once the religious adherent has established a substantial burden, the action is valid only if the government shows that the burden is in furtherance of a compelling governmental interest and it is the least restrictive means of furthering that interest.

The Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 724 (2014) noted its repeated admonition that courts must not presume to determine the plausibility of a religious claim. The court's narrow function is to determine whether the line drawn between complying with the law and having it violate their religious beliefs reflects an "honest conviction." The Court's analysis of a substantial burden requires it to ask what type of religious exercise the law burdens and what type of impact the law has on that exercise. I would apply this legal precedent as well as others on point when applying a standard for determining whether a governmental action is a substantial burden on the free exercise of religion.

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: The United States Supreme Court has made it clear that people who hold sincere religious beliefs that their religion prevents or requires certain action are entitled to invoke the Free Exercise Clause without a judicial evaluation of the validity of their interpretations. *Frazee v. Illinios Dept. of Employment Sec.*, 489 U.S. 829, 833-34 (1989). See also *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018).

In *Fox v. Washington*, 949 F.3d 270, 277 (2020), the Sixth Circuit held that courts are to determine whether the line drawn by the plaintiff between conduct consistent and inconsistent with his or her religious beliefs reflects an "honest conviction." The court noted that sincerity is distinct from reasonableness, and that once a plaintiff alleges that certain conduct violates their sincerely held religious beliefs as they understand them, it is "not within the court's purview to question the reasonableness of those allegations" or to say that the plaintiff's religious beliefs are "mistaken or unsubstantial." *Id*. A properly developed record on the sincerity issue can include testimonial evidence and reference to religious texts. *Id*.

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 *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014), the Supreme Court recognized that a for-profit corporation falls within the definition of the

Religious Freedom Restoration Act's protection of a "person's" exercise of religion.

With respect to education, in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012), the Supreme Court concluded that the ministerial exception applied to a "called" teacher, regarded as one who has been called to their vocation by God, and thus, constituted an affirmative defense to a claim that the school retaliated against her by firing her after she indicated she had spoken with an attorney and intended to assert her legal rights under the Americans with Disabilities Act (ADA) with respect to her development of narcolepsy. The teacher had completed certain academic training requirements, including a course of theological study, and in addition to teaching secular subjects, she taught religion class, led her students in daily prayer and devotional exercises, and took her students on a weekly school-wide chapel service. Likewise, in *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court held that religious institutions are exempt from anti-discrimination laws, such as the Age Discrimination in Employment Act (ADEA) and the ADA, when hiring and firing employees who are deemed ministers. It concluded that the First Amendment protects the right of churches and other religious organizations to decide matters of faith and doctrine without governmental intrusion, including who should hold certain important positions.

With regard to education and funding, in *Espinoza v. Montana Department of Revenue*, 140 S. Ct 2246 (2020), the Supreme Court determined that a "no-aid" provision in the Montana Constitution, which was a Blaine Amendment, as applied in Rule 1 of an income tax credit program, discriminated on a religious basis, and was subject to strict scrutiny. In that case, the state declined to provide scholarship funds for students to attend private schools. The Supreme Court held that Rule 1 violated the Free Exercise Clause because it barred religious schools from public benefits solely because of the religious character of the schools. The court in *Espinoza* noted that many of the no-aid provisions in various state constitutions "belong to a more checkered tradition shared with the Blaine Amendment of the 1870's, which was "born of bigotry" and "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general." *Id*. 140 S. Ct. at 2259. It further stated, "[t]he no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause." *Id*. The same principle applied in *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017), which pertained to a denial of the church's application for a grant to purchase rubber playground surfaces. Denying a

generally available benefit solely on account of religious liberty imposes a penalty on the free exercise of religion that can only be justified by passing the strict scrutiny test.

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: Yes. I have presided over the following cases responsive to this question:

1. *Ferrel v. Isrealite House of David*, 2020 WL 1649748 (Mich. Ct. App. Apr. 2, 2020);
2. *Flakes v. New Mt. Vernon Missionary Baptist Church*, 2019 WL 5419633 (Mich. Ct. App. Oct. 22, 2019);
3. *Braverman v. Granger*, 303 Mich. App. 587 (2014);
4. *Hannewald v. Schwertferger*, 2011 WL295589 (Mich. Ct. App. Mar. 1, 2011);
5. *Weishuhn v. Catholic Diocese of Lansing*, 279 Mich. App. 150 (2008).

28. Under American law, a criminal defendant cannot be convicted unless found to be guilty "beyond a reasonable doubt." On a scale of 0% to 100%, what is your understanding of the confidence threshold necessary for you to say that you believe something "beyond a reasonable doubt." Please provide a numerical answer.

Response: The "beyond a reasonable doubt" standard has been the burden of proof in criminal cases as early as 1880. *Miles v. United States*, 103 U.S. 304, 312 (1880). It is the law of the land and I abide by that precedent.

29. 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: In a series of later decisions, the United States Supreme Court effectively overturned its ruling in *Lochner v. New York*, 198 U.S. 45 (1905), which had held that New York's limitations on bakers' working hours were

unconstitutional. In *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955), for example, the Supreme Court unanimously declared, "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." Since the end of the *Lochner* era, the Supreme Court has applied a lower standard of review when evaluating restrictions on economic liberty. Because *Lochner* is no longer deemed good law, I do not follow it. I believe that Justice Holmes made the quoted statement in furtherance of his position that the Constitution is not intended to embody a particular economic theory.

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

Response: Because *Lochner v. New York* was abrogated, I do not follow it as a sitting judge. Instead, I follow the subsequent precedent and do not deem it prudent to address any personal opinion I might have regarding Supreme Court precedent out of respect for the higher courts whose opinions bind my own, and out of my regard for our system of justice and the role judges play in fairly, faithfully, and impartially applying the law.

30. The Supreme Court has held that a state prisoner may only show that a state decision applied federal law erroneously for the purposes of obtaining a writ of habeas corpus under 28 U.S.C. § 2254(d) if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

a. Do you agree that if there is a circuit split on the underlying issue of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents"?

Response: Criminal defendants regularly file habeas corpus petitions in the federal district courts of Michigan after failing to prevail in their conviction appeals, including in cases over which I preside. It would be imprudent for me to provide an opinion on state of the law in this area.

b. In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?

Response: Please see my answer to Question 30a.

c. If you disagree with either of these statements, please explain why and provide examples.

Response: Please see my answer to Question 30a.

d. If confirmed, would you treat unpublished decisions as precedential?
Response: No. Unpublished opinions, by design, are not precedential. If there is no binding precedent on point and an unpublished opinion is on all fours with the facts of a case before me, I may consider it for its persuasive authority, and I have done so as a judge on the Michigan Court of Appeals.

e. If not, how is this consistent with the rule of law?

Response: Please see my answer to Question 10b.

f. If confirmed, would you consider unpublished decisions cited by litigants when hearing cases?

Response: Please see my answer to Question 30d.

g. Would you take steps to discourage any litigants from citing unpublished opinions? *Cf.* Rule 32.1A for the U.S. Court of Appeals for the Eighth Circuit.

Response: As a sitting judge on the Michigan Court of Appeals, our Michigan Court Rules guide litigants with respect to when it is or is not appropriate to cite to unpublished opinions. If I am fortunate enough to be confirmed as a federal district judge, I would study the applicable court rules and confer with colleagues about common practices and protocols and why they exist.

h. Would you prohibit litigants from citing unpublished opinions? *Cf.* Rule 32.1 for the U.S. Court of Appeals for the District of Columbia.

Response: Please see my answer to Question 30g.

31. In your legal career:

a. How many cases have you tried as first chair?

Response: Two, one of which lasted at least a week and the other lasted two weeks. I was the sole counsel for my client in both cases.

b. How many have you tried as second chair?

Response: Two, one of which settled during trial, and the other lasted several weeks. I was co-counsel in both cases, and I shared responsibilities with the lead lawyer.

c. How many depositions have you taken?

Response: Several hundred, including at least 100 expert witness depositions.

d. How many depositions have you defended?

Response: Several hundred, including at least 100 expert witness depositions.

e. How many cases have you argued before a federal appellate court?

Response: None.

f. How many cases have you argued before a state appellate court?

Response: None, but I have been a sitting state appellate court judge for 14 years and have presided on over 4,000 cases that have resulted in the issuance of written opinions, one-third of which I wrote, and thousands more cases resolved by order on a motion.

g. How many times have you appeared before a federal agency, and in what capacity?

Response: None that I can recall.

h. How many dispositive motions have you argued before trial courts?

Response: Dozens.

i. How many evidentiary motions have you argued before trial courts?

Response: Dozens.

32. If any of your previous jobs required you to track billable hours:

a. What is the maximum number of hours that you billed in a single year?

Response: My best estimate is around 2,100 hours, maybe more.

b. What portion of these were dedicated to pro bono work?

Response: A very small percentage. I handled a handful of pro bono cases while in private practice.

33. Chief Justice Roberts said, "Judges are like umpires. Umpires don't make the rules, they apply them."

a. What do you understand this statement to mean?

Response: I understand this to mean that the role of a judge is to call the shots by interpreting and applying the law as written, not making it.

b. Do you agree or disagree with this statement?

Response: I wholeheartedly agree with it. I also agree with Chief Justice Roberts' comment that the same strike zone should apply for all parties.

34. When encouraged to "do justice," Justice Holmes is said to have replied, "That is not my job. It is my job to apply the law."

a. What do you think Justice Holmes meant by this?

Response: I believe he meant that a judge must faithfully apply the law even if he does not like the resulting outcome.

b. Do you agree or disagree with Justice Holmes? Please explain.

Response: I fully agree with Justice Holmes. As Justice Kennedy eloquently stated in his concurrence in *Texas v. Johnson*, 491 U.S. 397, 420-21 (1989), "the hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." In other words, a judge must faithfully interpret and apply the law wherever it leads, as that is the proper role of the judiciary.

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

Response: I am unable to answer this question without a factual context. If called upon to evaluate whether to award damages or injunctive relief in a case or controversy before me, I would review the applicable law and facts of the case.

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

Response: Other than in an opinion as a sitting appellate court judge, no, I have not.

a. If yes, please provide appropriate citations.

Response: Please see my answer to Question 36.

37. 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: I never deleted or attempted to delete any content from my social media since I was first contacted about being under consideration for this nomination. After reading the Judicial Conference of the United States Committee on Codes of Conduct Advisory Opinion No. 112 of the Guide to Judiciary Policy, Vol 2B, Ch. 2, which is available at uscourts.gov, I determined that I would no longer maintain a personal Facebook account.

38. What were the last three books you read?

Response: *Greenlights*, by Matthew McConaughey, *Eleanor Oliphant is Completely Fine*, by Gail Honeyman, and *A Gentleman in Moscow*, by Amor Towles.

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

Response: I am unable to answer the question, as I am not a social scientist and I do not possess the data or statistics necessary to draw such a broad conclusion, if it is even possible to do so. Ensuring that our federal judicial system operates fairly and impartially regardless of race is a worthwhile pursuit, as equal protection is a core principle in the Constitution. But the study of racial impacts associated with our laws and legal administration, such as our sentencing guidelines, are matters reserved to policy makers. As a sitting judge, my role is to fully, faithfully, and impartially discharge my duties in the cases or controversies that come before me without regard to race. If faced with a claim of racial disparities, I would evaluate the claim based on the applicable law and the record before me.

40. What case or legal representation are you most proud of?

Response: I am not proud of only one case in particular. I very much enjoyed private practice, and I often developed personal friendships with my clients, several of whom remain my friends today.

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

Response: Not that I can recall. For the last 15 years of my private practice before taking the bench, I focused heavily on contingency work, so I had the luxury of choosing my clients and did so on the basis of whether I believed in their case.

a. How did you handle the situation?

Response: Please see my answer to Question 41a.

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

Response: Absolutely.

42. What three law professors' works do you read most often?

Response: There are no particular law professors whose works I read regularly. As a Judge on the Michigan Court of Appeals, one of the busiest intermediate appellate courts in the country, I focus my time on reading the law itself, rather than law review articles about the law.

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

Response: My view of the law has not been shaped by a particular Federalist Paper.

44. What is a judicial opinion, law review article, or other legal opinion that made you change your mind?

Response: As a judge on the Michigan Court of Appeals, when I am attempting to interpret and apply the law in a given case, I read all applicable precedent, persuasive authority if there is no precedent, and discuss the law and the case with my panel members. Other than reading and following precedent, there is no particular judicial opinion or law review article that has changed my view about the law.

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

Response: The issue of balancing a mother's right of privacy and the government's interest in protecting potential human life is a source of emotional and impassioned debate that is currently very actively being litigated in our courts. For example, the Supreme Court is scheduled to hear oral argument in *Dobbs v. Jackson Women's Health Org.* on December 1, 2021. As a sitting judge and a nominee for the federal

district court, it would be imprudent for me to comment on matters that are currently being debated in our courts, as well as in the political arena.

46. 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: Not that I recall.

47. 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)?

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: While it is possible that I wrote or edited a brief for a superior while I was a young associate at McDermott, Will & Emery from 1990 to 1992, I believe my name would still have been listed under the name of my superior. From that point on, I'm quite sure my name was on all briefs that I was involved in writing or editing.

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

Response: I can think of no such cases.

50. Have you ever confessed error to a court?

Response: Not that I recall.

a. If so, please describe the circumstances.

51. 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: Nominees must tell the truth when testifying under oath before the Senate Judiciary Committee, including when asked to state their views on their judicial philosophy.

Questions for the Record for Judge Jane Beckering
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 Mike Lee
Questions for the Record
Jane M. Beckering, Nominee to United States District Judge for the Western District of Michigan

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

Response: My judicial philosophy is that judges must honor their oath of office and fully, faithfully, and impartially apply the law to the facts of the case or controversy before them, wherever that leads. To ensure quality and consistency, I approach each case with the same procedural framework. First, I listen to the parties' arguments with an open mind and make sure I fully understand each party's position. Second, I carefully review the record evidence. Third, I study the applicable law. And finally, I apply the law to the facts of the case and clearly and concisely explain my analysis so the parties understand my ruling.

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

Response: If the language of the federal statute in question is clear and unambiguous, I would interpret and apply the statute as written without referring to outside sources, except to discern whether existing precedent has already interpreted the statute. In that instance, I would follow binding precedent. If the statute is ambiguous, meaning equally susceptible to more than one interpretation, I would consult U.S. Supreme Court and Sixth Circuit precedent that has either interpreted the statute in question, set forth rules of statutory construction applicable to interpreting the statute in question, or interpreted analogous statutory language. Absent those sources, I may also look at legislative history, but only in an effort to shed light on the meaning of the statutory language. Legislative history is not a substitute for the language chosen by the legislature.

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

Response: I would first examine all relevant precedent that dictates how the constitutional provision at issue is to be interpreted. The U.S. Supreme Court has considered most of the constitutional provisions in depth, interpreted their meaning, and, in most cases, formulated a test or framework within which to evaluate new claims associated with each provision. I would follow that precedent. In the truly exceptional circumstance where this is no existing precedent or guidance, I would follow the fabric of prior rulings to develop the law consistently and predictably in harmony with the existing rulings of the Supreme Court or 6th Circuit.

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

Response: The U.S. Supreme Court has considered most of the constitutional provisions in depth, and in doing so, it has already interpreted their meaning, and in many instances, formulated a test or framework within which to evaluate new or novel claims under the provision. I do not have a position about the role the original public meaning should play, as I follow Supreme Court precedent's position on the matter when a constitutional provision is at issue in a case before me.

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

Response: I always start with the text of the statute itself. The purpose of statutory interpretation is to understand and give effect to the intent of the legislature. I consider the meaning of a term or phrase and its statutory context. If the language of a statute is clear and unambiguous, I presume the legislature intended the meaning expressed in the statute, and further judicial construction is neither required nor permitted. If and only if a statute is ambiguous, meaning equally susceptible to more than one interpretation, do I apply the canons of construction, which can include linguistic canons based on grammatical rules and presumptions about usage, and also substantive canons. I may also look to judicial interpretations of analogous statutory language, and possibly legislative history, but only in an effort to shed light on the meaning of the statutory language. Legislative history is not a substitute for the language chosen by the legislature.

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: With respect to statutory provisions the "plain meaning" refers to the public understanding of the relevant language at the time of enactment. With respect to constitutional provisions, the U.S. Supreme Court has considered most of the constitutional provisions in depth, and in doing so, it has already interpreted their meaning, and in many instances, formulated a test or framework within which to evaluate new or novel claims under the provision. I follow Supreme Court precedent's position on the matter when a constitutional provision is at issue in a case before me.

6. What are the constitutional requirements for standing?

Response: The U.S. Supreme Court addressed this issue in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). It held that the irreducible constitutional minimum of standing consists of three elements: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that

is likely to be redressed by a favorable judicial decision." *Id*. at 1547. The plaintiff, as the party invoking federal jurisdiction, bears the burden of proving these elements, and at the pleading stage the plaintiff must clearly allege facts demonstrating each element. *Id*. To establish an injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical. *Id*. at 1548. For an injury to be particularized, it must affect the plaintiff in a personal and individual way. *Id*.

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

Response: Congress's powers are derived from Article I of the Constitution. In *McCulluch v. Maryland*, 17 U.S. 316 (1819), the U.S. Supreme Court held that the powers of the government are limited and are "not to be transcended", but that a sound construction of the Constitution "must allow the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it." *Id*. at 39. Congress's powers must be within the scope of the Constitution and consist "within the letter and spirit of the Constitution." *Id*. One example of Congress being provided with implied powers in the Constitution is the "necessary and proper" clause in Article I, sec. 8, paragraph 18.

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 look to existing U.S. Supreme Court and 6th Circuit precedent, assuming the constitutionality of a law has been raised in a case or controversy before me. Congress's powers are derived from Article I of the Constitution. In *McCulluch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that the powers of the government are limited, and that those limits are "not to be transcended", but that a sound construction of the Constitution "must allow the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it." *Id*. at 39. Congress's powers must be within the scope of the Constitution and consist "within the letter and spirit of the Constitution." *Id*. One example of Congress being provided with implied powers in the Constitution is the "necessary and proper" clause in Article I, sec. 8, paragraph 18.

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

Response: According to U.S. Supreme Court precedent, yes. The Supreme Court has held that, in addition to the rights expressly set forth in the Constitution, the due process clauses of the Fifth and Fourteenth Amendments also protect those fundamental rights and liberties that are objectively, deeply

rooted in this Nation's history and tradition. *Washington v. Glucksberg*, 521 U.S. 702 (1997). The Court has found that the Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. *Id*. at 719. Those rights include the right to direct the education and upbringing of one's children (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); to bodily integrity (*Rochin v. California*, 342 U.S. 165 (1952)); to marital privacy (*Griswold v. Connecticut*, 381 US. 479 (1965)); to marry (*Loving v. Virginia*, 388 U.S. 1 (1967)); to use contraception (*Griswold*; and *Eisenstadt v. Baird*, 405 U.S. 438 (1972)); and to abortion (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)). The Court has also "strongly suggested" that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Glucksberg*, 521 U.S. at 720.

The Court's established method of substantive-due-process analysis has two primary features. First it has deemed the Constitution to protect "those 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." *Id*. at 721 (citations and internal quotation marks omitted). Second, it has required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. *Id*.

10. What rights are protected under substantive due process?

Response: Please see my answer 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: I derive my understanding of what substantive due process rights exist based on the findings of the Supreme Court. With respect to *Lochner v. New York*, 198 U.S. 45 (1905), in a series of later decisions the Court effectively abrogated its ruling, which had held that New York's limitations on bakers' working hours were unconstitutional in violation of the right to contract under the 14th Amendment. In *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955), for example, the Supreme Court unanimously declared, "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." Since the end of the *Lochner* era, the Supreme Court has applied a lower standard of review when evaluating restrictions on economic liberty. Because *Lochner* is no longer deemed good law, I would not follow it.

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

Response: As the Supreme Court noted in *U.S. v. Lopez*, 514 U.S. 549, 552-53 (1995), the Constitution delegates to Congress the power "to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." The Court identified three broad categories of activity that Congress may regulate under its Commerce Clause power. "First, Congress may regulate the use of the channels of interstate commerce." *Id*. at 558. "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id*. "Finally, Congress' commerce authority includes the power to regulate those activities, having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." *Id*.

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

Response: The four generally agreed-upon suspect classifications for purposes of strict scrutiny evaluation are race, religion, national origin, and alienage. See *Graham v. Richardson,* 403 U.S. 365, 371-72; *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Alienage is a unique category because strict scrutiny is applied for purposes of state law for lawful immigrants, intermediate scrutiny is applied when it comes to the education of unlawfully present immigrant children, and rational basis scrutiny is applied for purposes of federal scrutiny because Congress has the power to regulate immigration. In determining whether someone is entitled to be considered within a suspect classification, a court will look to whether the person is a "discrete and insular minority." See *United States v. Carolene Products Col*, 304 U.S. 144, 152-53, n. 4 (1938). To do so, courts may examine a variety of factors, including whether the person has an inherent trait, whether that trait is highly visible, whether the person is part of a class that has been disadvantaged historically, and whether the person is part of a group that has historically lacked effective representation in the political process. See *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

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

Response: Foundational. We have a tripartite form of government, with a bicameral Congress, which was specifically designed to make sure no one branch would be able to control too much power.

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 review and apply U.S. Supreme Court and Sixth Circuit precedent regarding the powers granted to that branch in the Constitution, as well as the

principle of separation of powers and what powers are properly delegated to another branch and within the scope of that delegation.

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

Response: None. A judge's duty is to faithfully and impartially apply the law.

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

Response: Both are bad. A constitutional law should not be invalidly struck down, and an unconstitutional law should not be upheld.

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: While I am generally aware of the evolution and timing of various Supreme Court rulings, I have not studied what accounts for any trends. Rather, as a sitting judge, my responsibility is to apply precedent faithfully and impartially, which I would do if confirmed as a federal district court judge.

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

Response: Judicial review refers to the power of each branch of government to interpret the Constitution in matters that pertain to it. Judicial supremacy refers to the fact that the Supreme Court is the ultimate authoritative interpreter of the Constitution. Its decisions are binding on the other branches and levels of government. *Marbury v. Madison*, 5 U.S. 137 (1803),

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: Elected officials have an independent obligation to follow the Constitution, and an obligation to respect judicial decisions. Both are important for the rule of law.

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: I have no opinion as to whether Hamilton's principle is important to keep in mind while judging. But I agree that the judicial branch has the power to interpret the law, not make it.

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

Response: I am unable to answer the question given such a broad hypothetical format. As a sitting state court judge and nominee for the federal district court, I would not want to give any party the impression that I have prejudged the law in a given area or situation.

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

Response: I would apply the specific sentencing factors set forth in 18 U.S.C. § 3553, which do not allow judges to take into account a defendant's group identity. However, judges are obligated to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

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

Response: I am not familiar with President Biden's statement, and I am not familiar with any federal statutes that define equity as set forth above. To the extent the term is used outside the legal context, I have no opinion about its proper definition.

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

Response: I understand that the difference between "equity" and "equality" is a topic of public debate in the political, social, and academic realm. As a sitting judge on the Michigan Court of Appeals and nominee for the federal district court bench, I generally refrain from publicly commenting on matters that may lead to legislation or lawsuits that will come before the courts for resolution.

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

Response: Please see my answer to Question 25.

27. How do you define "systemic racism?"

Response: I understand that "systemic racism" refers to procedures and processes in place in our organized society of culture, policy, and institutions that perpetuate racial group inequity.

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

Response: I do not use the term "critical race theory," as I believe it means different things to different people.

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

Response: Please see my answer to Question No. 28, as I do not use the term "critical race theory" due to its varying meanings to different people.

30. Over the course of your career, how many times have you spoken at events sponsored or hosted by the following liberal, "dark money" groups?

a. American Constitution Society

Response: None.

b. Arabella Advisors

Response: None.

c. Demand Justice

Response: None.

d. Fix the Court

Response: None.

e. Open Society Foundation

Response: None.

31. Have you spoken with anyone affiliated with the groups listed in Question #30 since you expressed interest in the open seat on the Western District of Michigan?

Response: On February 1, 2021, I received an email from Christopher Kang, of Demand Justice, inviting me to watch a webinar that would provide an overview of the judicial nomination process for those interested in applying. I had already submitted my application on January 30, 2021, but I registered and watched the webinar on February 2, 2021. After the President announced his intent to nominate me on June 30, 2021, I received an email from Mr. Kang congratulating me on my nomination. I replied, thanking him for his email.

32. When you were nominated to the Michigan Supreme Court, you gave several speeches on the conservative composition of the Michigan Supreme Court. You have been quoted saying that "[c]ourts used to protect people from the arbitrary whims of the majority. Today the court has become a political tool of the majority. It has got to stop." What did you mean by that? Is it the courts' role to protect the minority?

Response: I meant that the judiciary is our nonpartisan branch of government. Its sole function is to interpret the law, not make it, and a judge should not engage in judicial activism so as to favor a partisan interest regardless of who appointed that judge to the bench. Judges are duty-bound to faithfully and impartially apply the law without fear or favor. As for the court's role in protecting the minority from the majority, that is a fundamental principle of our constitutional democracy, which allows for majority rule, but coupled with the protection of minority rights (meaning individuals whose partisan representative is not in power) against constitutional overreach by the majority. This principle is embedded into the fabric of our Constitution and its system of checks and balances.

Questions from Senator Thom Tillis
for Jane Beckering
Nominee to be United States District Judge for the Western District of Michigan

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: "Judicial activism" occurs when a judge is unwilling or unable to rule as the law requires and instead resolves cases consistent with his or her personal views or how the judge thinks the law should have been written. I consider it inappropriate, as it is antithetical to the role of the judiciary, which is to interpret the law, not make it.

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

   Response: It is an expectation.

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

   Response: No.

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

   Response: Yes. As Justice Kennedy eloquently stated in his concurrence in *Texas v. Johnson*, 491 U.S. 397, 420-21 (1989), "the hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." In other words, a judge must faithfully interpret and apply the law wherever it leads, as that is the proper role of the judiciary, and I believe in America's tripartite system of government.

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 would faithfully apply the Supreme Court's rulings in District of *Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), as well as applicable Sixth Circuit precedent, which includes *United States v.*

Greeno, 679 F.3d 510 (2010) and *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (2016).

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: If I were called upon as a judge to preside over a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits, I would look to the precedent cited in answer to Question 7, applicable statutes pertaining to the duties of sheriffs with respect to the processing of handgun purchase permits, and any applicable precedent regarding the impact of crises such as the Covid-19 pandemic on an individual's constitutional and statutory gun rights.

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: As a judge on the Michigan Court of Appeals, I currently follow applicable Michigan law. If I were to be confirmed as a federal district judge, I would follow the process set forth in applicable precedent, including *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), which generally shields government officials from liability for civil damages arising out of their performance of discretionary functions as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

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: The standard for qualified immunity, as set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), is binding precedent, and my role as a judge is to follow binding precedent. I would apply that standard unless the law changes, such as if Congress enacts a statute on the issue or if the United States Supreme court enacts a different standard.

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

Response: The standard for qualified immunity, as set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), is binding precedent, and my role as a judge is to follow binding precedent. I would apply that standard unless the law changes, such as if Congress enacts a statute on the issue or if the United States Supreme court enacts a different standard.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the

standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: I have no opinion. If confirmed as a federal district judge and I am called upon to preside over a case involving patent eligibility, I would follow the Supreme Court precedent and any applicable laws passed by Congress on the issue of patent eligibility.

13. **How would you apply current patent eligibility jurisprudence to the following hypotheticals. Please avoid giving non-answers and actually analyze these hypotheticals.**

    a. ***ABC Pharmaceutical Company*** **develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?**

    Response: With all due respect, I agree with other judicial nominees who have declined to analyze hypothetical scenarios so as not to suggest how I might decide a matter if it were to come before me. If confirmed as a federal judge and I am called upon to preside over a case similar to your hypothetical question, I would apply federal law and applicable Supreme Court precedent, which currently includes *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014); and *Mayo Collaborative Services v. Prometheous Laboratories, Inc.*, 566 U.S. 66 (2012).

    b. ***FinServCo*** **develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should *FinServCo's* business method standing alone be eligible? What about the business method as practically applied on a computer?**

    Response: With all due respect, I agree with other judicial nominees who have declined to analyze hypothetical scenarios so as not to suggest how I might decide a matter if it were to come before me. If confirmed as a federal judge and I am called upon to preside over a case similar to your hypothetical question, I would apply federal law and applicable Supreme Court precedent, which currently includes *Alice Corp. Pty. Ltd. v CLS Bank Int'l*, 573 U.S. 208 (2014); *Mayo Collaborative Services v. Prometheous Laboratories, Inc.*, 566 U.S. 66 (2012); and *Bilski v. Kappos*, 561 U.S. 593 (2010).

    c. ***HumanGenetics*** **Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics* Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by**

humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?

Response: With all due respect, I agree with other judicial nominees who have declined to analyze hypothetical scenarios so as not to suggest how I might decide a matter if it were to come before me. If confirmed as a federal judge and I am called upon to preside over a case similar to your hypothetical question, I would apply federal law and applicable Supreme Court precedent, which currently includes *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Association for Molecular Pathology v. Myriad Genetics, Inc.,* 569 U.S. 576 (2013); and *Mayo Collaborative Services v. Prometheous Laboratories, Inc.*, 566 U.S. 66 (2012).

d. *BetterThanTesla ElectricCo* develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla's* billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?

Response: With all due respect, I agree with other judicial nominees who have declined to analyze hypothetical scenarios so as not to suggest how I might decide a matter if it were to come before me. If confirmed as a federal judge and I am called upon to preside over a case similar to your hypothetical question, I would apply federal law and applicable Supreme Court precedent, which currently includes *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Mayo Collaborative Services v. Prometheous Laboratories, Inc.*, 566 U.S. 66 (2012); *Bilski v. Kappos*, 561 U.S. 593 (2010); and *KSR International Co. v. Teflex*, Inc., 550 U.S. 398 (2007).

e. *Natural Laws and Substances, Inc.* specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?

Response: With all due respect, I agree with other judicial nominees who have declined to analyze hypothetical scenarios so as not to suggest how I might decide a matter if it were to come before me. If confirmed as a federal judge and I am called upon to preside over a case similar to your hypothetical question, I would apply federal law and applicable Supreme Court precedent, which currently includes *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Association for Molecular Pathology v. Myriad Genetics, Inc.,* 569 U.S. 576 (2013); and *Mayo Collaborative Services v. Prometheous Laboratories, Inc.*, 566 U.S. 66 (2012).

f. A business methods company, *FinancialServices Troll,* specializes in taking conventional legal transaction methods or systems and implementing them through a computer process or artificial intelligence. Should such implementations be patent eligible? What if the implemented method actually improves the expected result by, for example, making the methods faster, but doesn't improve the functioning of the computer itself? If the computer or artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?

Response: With all due respect, I agree with other judicial nominees who have declined to analyze hypothetical scenarios so as not to suggest how I might decide a matter if it were to come before me. If confirmed as a federal judge and I am called upon to preside over a case similar to your hypothetical question, I would apply federal law and applicable Supreme Court precedent, which currently includes *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Mayo Collaborative Services v. Prometheous Laboratories, Inc.*, 566 U.S. 66 (2012); and *Bilski v. Kappos*, 561 U.S. 593 (2010).

g. *BioTechCo* discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTech Co* invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?

Response: With all due respect, I agree with other judicial nominees who have declined to analyze hypothetical scenarios so as not to suggest how I might decide a matter if it were to come before me. If confirmed as a federal judge and I am called upon to preside over a case similar to your hypothetical question, I would apply federal law and applicable Supreme Court precedent, which currently includes *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Association for Molecular Pathology v. Myriad Genetics, Inc.,* 569 U.S. 576 (2013); *Mayo Collaborative Services v. Prometheous Laboratories, Inc.*, 566 U.S. 66 (2012); and *KSR International Co. v. Teleflex, Inc*., 550 U.S. 398 (2007).

h. Assuming *BioTechCo's* diagnostic test is patent eligible, should there exist provisions in law that prohibit an assertion of infringement against patients receiving the diagnostic test? In other words, should there be a testing exemption for the patient health and benefit? If there is such an exemption, what are its limits?

Response: As a sitting judge and nominee for the federal district court, it would be imprudent for me to weigh in on whether there should exist certain provisions in patent law such as your hypothetical question describes, as that deals with policy matters.

i. *Hantson Pharmaceuticals* develops a new chemical entity as a composition of matter that proves effective in treating TrulyTerribleDisease. Should this new chemical entity be patent eligible?

Response: With all due respect, I agree with other judicial nominees who have declined to analyze hypothetical scenarios so as not to suggest how I might decide a matter if it were to come before me. If confirmed as a federal judge and I am called upon to preside over a case similar to your hypothetical question, I would apply federal law and applicable Supreme Court precedent, which currently includes *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014); and *Mayo Collaborative Services v. Prometheous Laboratories, Inc.*, 566 U.S. 66 (2012).

j. *Stoll Laboratories* discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should *Stoll Labs* be able to patent the natural law that superconductive materials in space have higher superconductive temperatures? What about the space applications of superconductivity that benefit from this effect?

Response: With all due respect, I agree with other judicial nominees who have declined to analyze hypothetical scenarios so as not to suggest how I might decide a matter if it were to come before me. If confirmed as a federal judge and I am called upon to preside over a case similar to your hypothetical question, I would apply federal law and applicable Supreme Court precedent, which currently includes *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014); and *Mayo Collaborative Services v. Prometheous Laboratories, Inc.*, 566 U.S. 66 (2012).

14. Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: Please see my response to Question No. 12.

15. 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: As a judge on the Michigan Court of appeals, I presided over an abuse-of-process and malicious prosecution case arising out of series of lawsuits claiming copyright infringement, distribution of false copyright information, and the wrongful filing of copyright renewals. The case did not analyze copyright law.

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

Response: None.

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

Response: None.

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: As a judge on the Michigan Court of Appeals the past fourteen years, I have handled a number of cases involving the First Amendment and the right to free speech. None of them have dealt directly with free speech and intellectual property issues.

16. 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: If the language of a statute is clear and unambiguous, it is presumed that the legislature intended the meaning expressed, and a court must apply the statute as written. If there is debate about the meaning of legislative text because it is equally susceptible to more than one interpretation, then courts must resort to the canons of construction, which can include linguistic canons based on grammatical rules and presumptions about usage, and also substantive canons. Assuming those measures are unhelpful, I might look to judicial interpretations of analogous statutory language, and possibly legislative history in an effort to discern the meaning of the text.

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: In *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), the Supreme Court held that when a court is confronted with an interpretation contained in an agency opinion letter, policy statement, agency manual, or enforcement guideline, it does not warrant *Chevron-style* deference. Instead, interpretations contained in such formats are entitled to respect, but only to the extent they have the power to persuade. This is known as *Skidmore* deference, as set forth in *Skidmore v. Swift*, 323 U.S. 134, 140 (1944).

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 as a federal district judge and I am assigned to preside over a case involving the obligation of an online service provider associated with a possible copyright infringement, I would look to applicable law, including the Digital Millennium Copyright Act (DMCA) of 1998 and any other precedent in existence at that time.

17. 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: Until new laws are passed that may better address the constantly evolving issues raised due to advances in the digital environment, courts must apply existing law.

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 as a federal district court judge and I am assigned to preside over a copyright infringement case stemming from an internet situation, I would be bound to follow existing Supreme Court precedent and any laws enacted by Congress at that time. As for the Supreme Court, it has the ability to overturn its own precedent, should it conclude that factual circumstances have changed. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096-97 (2018); and *Janus v. AFSCME*, 138 S. Ct. 2448, 2482-83 (2018).