Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Candace Jackson-Akiwumi
Nominee to the Court of Appeals for the Seventh Circuit
May 5, 2021

1. **At your hearing, members on both sides of the aisle asked you questions about your time as a federal public defender. While there is no doubt that you have a great deal of experience working on criminal matters, you also have experience in private practice working on civil cases.**

   Can you discuss your experience working on civil matters, particularly during your time at Skadden in Chicago?

   Response: I have worked on civil matters at three different stages in my career. First, the two years I spent clerking for a federal district court judge followed by a federal court of appeals judge exposed me to a wide variety of civil matters. The majority of cases for which I conducted research and prepared memoranda, draft opinions, and draft orders as a law clerk were civil. Next, I spent three years as a civil litigator at Skadden, Arps, Slate, Meagher & Flom LLP. I engaged in complex civil litigation in both state and federal court, at the trial and appellate level. My billable matters were exclusively civil and involved areas as disparate as contracts, tax, privacy, securities, and patent infringement. My pro bono matters on the civil side involved adoption, civil rights, and tort law in federal and state courts and before administrative bodies. While at the firm, I tried one civil jury trial in state court, for which I was my client's sole counsel at trial. Last year, I returned to civil practice when I joined the litigation boutique Zuckerman Spaeder LLP. The attorneys at Zuckerman are for the most part generalists who practice both civil and criminal law. Accordingly, I continue to offer my services in criminal cases, but civil cases have predominated. My matters thus far have involved business disputes, ethics, telecommunications, and antitrust, and they are pending in the courts and before administrative agencies.

Senator Grassley, Ranking Member
Questions for the Record
Candace Jackson-Akiwumi
Nominee to be United States Circuit Judge for the Seventh Circuit

1. **You once defended a bank robber by essentially arguing that the system made him do it. *United States v. Willie Weathersby*, 16 CR 465 (N.D. Ill.). While you acknowledged the defendant's responsibility, you meant that the failure to put him in a half-way house left him no choice but to rob a bank as "the ultimate act of desperation." You said, "We did not act fast enough." I don't think anyone ever needs to rob a bank, so I disagree with you there. But beyond that, your client was a felon who had previously been convicted of aggravated robbery, burglary, and a prior bank robbery. These are violent crimes and yet he was still on the streets.**

   If we're going to blame the system for keeping him on the street and making him rob a bank, shouldn't we also blame the system for putting this violent felon on the street at all before he was ready for release?

   Response: In representing each of my clients, I took very seriously my obligation to describe for the sentencing judge the nature and circumstances of my client's offense because the federal sentencing law, 18 U.S.C. § 3553(a)(1), requires the judge to consider the nature and circumstances of the offense. In advocating on behalf of my client, I described the facts of the case so that the court could fulfill its responsibility under Section 3553(a)(1).

2. **In your hearing, in response to my question about whether district judges can take social policy into consideration in sentencing (here, the need to avoid racial disparities in sentences), you said that 18 U.S.C. § 3553(a)(6) allows a district judge to consider such disparities in passing a sentence. What caselaw supports the proposition that district courts can take racial disparities into account under § 3553(a)(6)?**

   Response: Using race to impose a different sentence on defendants with similar records and similar conduct would not be appropriate. *See United States v. Bridgewater*, 950 F.3d 928, 936 (7th Cir. 2020).

   My response was a reference to *Kimbrough v. United States*, 552 U.S. 85 (2007), in which the Supreme Court acknowledged the United States Sentencing Commission's finding that the crack/powder sentencing differential "fosters disrespect for and lack of confidence in the criminal justice system because of a widely-held perception that it promotes unwarranted disparity based on race." *Id*. at 98 (internal citations omitted). The Supreme Court's holding in *Kimbrough* permitted judges to consider the unwarranted crack/powder disparity, and the way laws impact different groups, when considering the need to avoid unwarranted disparities pursuant to 18 U.S.C. § 3553(a)(6).

3. **In your Reginald Taylor sentencing memorandum, about which I asked in your hearing, you referenced a "powerful one-plus-minute video, The Racism of the U.S. Justice System in 10 Charts," by "the media outlet Vox" to bolster your claim that Mr. Taylor's sentence should not exceed the mandatory minimum. Retired Judge Richard Posner was famous for using non-record internet research in helping him decide appeals. As a general matter, when do you think it's appropriate for federal judges to rely on non-record evidence, such as videos from Vox, as authority in rendering judicial decisions?**

   Response: If confirmed to serve as a circuit judge, I would consider only the law and the materials in the record on appeal as authority in issuing rulings. Information submitted to the district court during or in preparation for sentencing *is* a part of the record. *See* Fed. R. App. P. 10(a) (the record on appeal consists of what the parties filed in the district court, any transcripts, and the district court docket).

4. **Not long after your Reginald Taylor sentencing memorandum, the Seventh Circuit said, "imposing different sentences based on race would violate the Equal Protection Clause of the Fourteenth Amendment and the Sentencing Guidelines." *U.S. v. Grisanti*, 943 F.3d 1044 (7th Cir. 2019) (Hamilton, J.). Would your position in the Reginald Taylor case have been consistent with this precedent had it existed at the time?**

   Response: Yes, because I did not ask the court to issue a lesser sentence based on my client's race. In the sentencing memorandum that I filed on July 18, 2019, I specifically stated "Mr. Taylor is not advocating for a lower sentence based on his race. He is advocating for a sentence no higher than any mandatory minimum this Court finds applicable as one means to avoid further entrenching proven racial disparities."

5. **The Seventh Circuit explained in a case you litigated:**

   > **The district court was not required to explicitly discuss 'the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.' See 18 U.S.C. § 3553(a)(6). Subsection (a)(6) is not concerned with disparate sentences per se; its focus is on sentencing disparity that is unwarranted or unjustified."**

   ***U.S. v. Smart*, 603 Fed.Appx. 500 (7th Cir. 2015) (per curiam).**

   a. **Do you agree with the Seventh Circuit that a sentencing disparity in and of itself should not guide a district court under 18 U.S.C. § 3553(a)(6)?**
   b. **What sorts of disparities, under current law, are "unwarranted or unjustified"?**
   c. **Do you agree with current law?**

Response: Title 18, United States Code, Section 3553(a)(6) requires sentencing courts to consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." Whether any disparity among defendants with similar records who have been found guilty of similar conduct is unwarranted has typically been evaluated on a case-by-case basis. In the case you mentioned, I was representing a client as his advocate. If confirmed to serve as a judge, I would apply the sentencing statute and Supreme Court and Seventh Circuit precedent in reviewing any sentencing decision.

6. **What is the correct comparator for sentencing disparities and why do you think so:**
    a. **sentencing disparities among similarly situated defendants before a single judge;**
    b. **sentencing disparities among similarly situated defendants within a single district;**
    c. **sentencing disparities among similarly situated defendants within a single circuit;**
    d. **sentencing disparities among all similarly situated defendants;**
    e. **any other comparator.**

Response: Title 18, United States Code, Section 3553(a)(6) directs judges who are imposing a sentence to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Most courts have by now held that this sentencing factor looks to "national disparities." *See, e.g.*, *United States v. Fry*, 792 F.3d 884, 892 (8th Cir. 2015) (collecting cases). However, the Supreme Court and most circuits have also recognized that, in certain instances, judges may consider the need to avoid unwarranted co-defendant disparities when fashioning a sentence. *See, e.g.*, *Gall v. United States*, 552 U.S. 38, 55 (2007) (finding no error where district court "considered the need to avoid unwarranted disparities, but also considered the need to avoid unwarranted similarities among other co-conspirators who were not similarly situated."); *United States v. Statham*, 581 F.3d 548, 556 (7th Cir. 2009) (noting that, following *Gall*, the Seventh Circuit is "open in all cases to an argument that a defendant's sentence is unreasonable because of a disparity with the sentence of a co-defendant").

7. **In the Seventh Circuit, what is the standard of review for a motion to dismiss under Rule 12(b)(6)?**

Response: The Seventh Circuit reviews dismissal under Federal Rule of Criminal Procedure 12(b)(6) de novo. *See, e.g.*, *Nelson v. City of Chicago*, 992 F.3d 599, 603 (7th Cir. 2021).

8. **In the Seventh Circuit, what is the level of scrutiny a court must apply to a claim arising under the Second Amendment?**

Response: The Seventh Circuit has recognized that the Supreme Court, aside from ruling out rational basis review, has not identified the level of scrutiny courts must apply to

Second Amendment claims. *See Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011) (discussing the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008)). For the Seventh Circuit's most recent consideration of a Second Amendment claim, see *Wilson v. Cook County*, 937 F.3d 1028 (7th Cir. 2019), *cert. denied sub nom. Wilson v. Cook Cty., Illinois*, 141 S. Ct. 110 (2020) (affirming dismissal of complaint raising Second Amendment challenge to Cook County's ban on assault rifles and large-capacity magazines). In *Wilson*, the Seventh Circuit held that the applicable level of scrutiny to a claim under the Second Amendment depends on the nature of the conduct being regulated, specifically "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Wilson*, 937 F.3d at 1032 (internal citations omitted).

9. In the Seventh Circuit, what is the process by which a judge determines whether or not a burden is "substantial" under the Religious Freedom Restoration Act?

Response: The standard in the Seventh Circuit for inquiring whether a burden is "substantial" under the Religious Freedom Restoration Act is the same standard the Supreme Court applied most recently in *Holt v. Hobbs*, 574 U.S. 352 (2015), and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). *See Jones v. Carter*, 915 F.3d 1147, 1150 (7th Cir. 2019) (clarifying in a case brought under the Religious Land Use and Institutionalized Persons Act that, in the wake of *Hobby Lobby* and *Holt*, the Religious Freedom Restoration Act should "be construed in favor of a broad protection of religious exercise" (quoting *Hobby Lobby*, 573 U.S. at 698)).

10. In the Seventh Circuit, what is the applicable standard for a district judge to recruit counsel to represent an Eighth Amendment prisoner litigant?

Response: Prisoners do not have a right to counsel in federal civil litigation, and the demand for counsel by prisoners often exceeds the supply of volunteer lawyers. *See McCaa v. Hamilton*, 959 F.3d 842, 844-45 (7th Cir. 2020). When determining whether to recruit counsel, the district court must answer two questions: has the plaintiff made a reasonable attempt to obtain counsel and, if so, given the difficulty of the case, does the plaintiff appear competent to litigate it herself or himself? *See Pruitt v. Mote*, 503 F.3d 647, 654 (7th Cir. 2007) (en banc). The Seventh Circuit reviews the district court's answer to the second question under the deferential abuse of discretion standard, asking "not whether we would have recruited a voluntary lawyer in the circumstances, but whether the district court applied the correct legal standard and reached a reasonable decision based on facts supported by the record." *Id*. at 658.

11. In the Seventh Circuit, what is the difference, if any, between the *Rooker-Feldman* Doctrine and *res judicata*?

Response: *Rooker-Feldman* precludes a district court from adjudicating a case only when the federal suit starts after a state court has ruled against the federal plaintiff. *See Exxon*

Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005). If a federal suit began before the state court ruled against a federal plaintiff, the relevant doctrine is res judicata, also known as claim preclusion. *See Nesses v. Shepard*, 68 F.3d 1003, 1004 (7th Cir. 1995).

12. What is the relationship between the Collateral Order Doctrine and the First Amendment?

Response: A general rule of appellate review, simply stated, is that all parts of a case must be final before the case can be appealed. The collateral order doctrine permits a select category of interlocutory orders to be appealed immediately because those orders are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d 1085, 1088 (7th Cir. 2014).

The fact that First Amendment rights are involved may be relevant to this test. For example, some courts have found pretrial gag orders to be appealable under the collateral order doctrine. *See United States v. Brown*, 218 F.3d 415 (5th Cir. 2000).

13. The Supreme Court of Wisconsin has held that where a "statute's meaning is plain, there is no ambiguity to clarify, and no need to consult extrinsic sources such as legislative history." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 681 N.W.2d 110, 126 (Wis. 2004).

a. In a Wisconsin heard in diversity, is a panel of the Seventh Circuit bound by this textualist rule? Why or why not?
b. For cases involving federal law, would it make sense for the Seventh Circuit to adopt a similar rule? Why or why not?

Response: In general, when a federal court sits in diversity, federal law governs procedure and state law applies to substantive issues. *See, e.g.*, *Horne v. Elec. Eel Mfg. Co., Inc.*, 987 F.3d 704, 713 (7th Cir. 2021). The Seventh Circuit follows the Supreme Court's longstanding rule of statutory construction: when a statute is not ambiguous on its face, the court looks no further and cannot consult extrinsic sources. *See, e.g.*, *Carcieri v. Salazar*, 555 U.S. 379, 387, (2009) ("This case requires us to apply settled principles of statutory construction under which we must first determine whether the statutory text is plain and unambiguous."); *United States v. Silva*, 140 F.3d 1098, 1102 (7th Cir. 1998) ("If the language is unambiguous, we need not resort to legislative history or other sources to glean the legislative intent of the statute."). Thus, whether the Seventh Circuit is sitting in diversity and applying Wisconsin law, or sitting as a matter of federal jurisdiction, it applies the same rule of statutory construction.

14. In the Seventh Circuit, what level of religious accommodation are employers required to provide employees under Title VII?

Response: Under Title VII, an employer need not bear "more than a slight burden" and the statute also "does not place the burden of accommodation on fellow workers." *See Equal Emp. Opportunity Comm'n v. Walmart Stores E., L.P.*, 992 F.3d 656, 659 (7th Cir. 2021).

15. In the Seventh Circuit, what is the standard for a district court approving a class settlement?

Response: The Seventh Circuit's decision in *Camp Drug Store, Inc. v. Cochran Wholesale Pharmaceutical, Inc.*, 897 F.3d 825, 830-31 (7th Cir. 2018), sets forth the standard:

> The legal principles that must guide our decision today are well settled. A district court may approve the settlement of a class action only if it holds a hearing and finds that the proposed resolution "is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). One of the district court's principal responsibilities in undertaking this review is "to protect the members of a class ... from lawyers for the class who may ... place their pecuniary self-interest ahead of that of the class." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002). Indeed, we have characterized the role of "the district judge in the settlement phase of a class action suit [as] a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries." *Id*. at 280. We evaluate how the court fulfilled this role for an abuse of discretion. *See Kaufman v. Am. Express Travel Related Servs. Co*., 877 F.3d 276, 283 (7th Cir. 2017). "Under this standard, we shall affirm the judgment of the district court whenever we believe that the district court chose an option that was among those from which we might expect a district court reasonably to choose." *Salgado v. Gen. Motors Corp*., 150 F.3d 735, 739 (7th Cir. 1998).

16. In the Seventh Circuit, who bears the burden of proof in an as-applied Second Amendment case, the party challenging the gun regulation, or the government defending it?

Response: The Seventh Circuit evaluates claims under the Second Amendment as follows:

> First, the threshold inquiry in some Second Amendment cases will be a 'scope' question: Is the restricted activity protected by the Second Amendment in the first place? [I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment ... the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review. If, however, the government cannot meet this burden, then the court must inquir[e] into the strength of the government's justification for restricting or

> regulating the exercise of Second Amendment rights. The rigor of this inquiry will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right. [A] severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end. However, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.

Wilson v. Cook Cty., 937 F.3d 1028, 1032 (7th Cir. 2019), *cert. denied sub nom. Wilson v. Cook Cty., Illinois*, 141 S. Ct. 110 (2020) (internal citations and quotation marks omitted).

17. In the Seventh Circuit, what kind of employee counts as a "minister" under the First Amendment's Ministerial Exemption?

Response: The Seventh Circuit follows Supreme Court precedent, which has stated that there is not a "rigid formula" for determining whether a particular position is ministerial. The Supreme Court has concluded that some religious schoolteachers are included within the ministerial exemption, because "[e]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020).

18. Do minors have rights under the Second Amendment?

Response: Yes – for example, the Seventh Circuit struck down a regulation that banned anyone under the age of 18 from entering a firing range. *See Ezell v. City of Chicago*, 846 F.3d 888, 896 (7th Cir. 2017).

19. In the Seventh Circuit, what is the applicable standard for remanding an appeal to the Social Security Administration in a disability case? Is the standard in a case involving mental health any different from one involving physical health?

Response: An appellate court reviews a decision by an administrative law judge from the Social Security Administration deferentially to determine whether substantial evidence supports the decision and whether the administrative law judge applied the proper legal standard. *See Allord v. Astrue*, 631 F.3d 411, 415 (7th Cir. 2011). The appellate court has the statutory authority to affirm or reverse or modify the decision, with or without remanding. 42 U.S.C. § 405(g). Even where the court determines that an error has occurred, it will remand only where the court is convinced that a second proceeding would produce

a different result – that is, it will only remand if the error is not harmless. *See Deborah M. v. Saul*, No. 20-2570, 2021 WL 1399281, at *4 (7th Cir. Apr. 14, 2021) (*citing Fisher v. Bowen*, 869 F.2d 1055, 1057 (7th Cir. 1989)). The standard for evaluating whether an applicant has a disability is the same for a mental or physical impairment, therefore the standard of review for determining whether an administrative law judge correctly determined disability would be the same. *See, e.g.*, *Gedatus v. Saul*, No. 20-1753, 2021 WL 1589329, at *3 (7th Cir. Apr. 23, 2021).

20. Should you be confirmed, what specific factors will you take into consideration when deciding to overturn circuit precedent?

Response: Seventh Circuit Rule 40(e) governs. A panel of the court cannot overrule circuit precedent without first circulating a proposed opinion among active members of the court and providing an opportunity for a majority of active members to vote to hear the case en banc. The standard for hearing a case en banc, as set forth in Federal Rule of Appellate Procedure 35, contains factors a circuit judge necessarily will consider when deciding whether to revisit circuit precedent. These factors include, for example, whether a panel decision conflicts with a decision of the Supreme Court and whether the uniformity of the court's decisions is at stake.

21. Is it more important for the law to be certain or for it to be correct?

Response: This question may present two sides of same coin in that correctness drives certainty. Correctness – resulting from careful, reasoned analysis of the law – becomes the basis for certainty. When judges endeavor to say correctly "what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), certainty results for the public as to what the law is. Writing clearly is an important skill for judges in communicating the correct result and generating the certainty that follows.

22. Are there areas of the law where certainty is more important than correctness?

- **a. Is certainty more valuable than correctness in commercial law? Why or why not?**
- **b. Is certainty more valuable than correctness in criminal law? Why or why not?**

Response: See my answer to Question 21, which does not change based on the area of the law.

23. In your hearing you mentioned the process of judges meeting in conference.

- **a. Is there a tension between building consensus in the conference room and applying the law as written?**
- **b. What is more important, reaching the correct conclusion about the law or reaching a conclusion about the law all three judges agree with? Why?**
- **c. What is more important, reaching the correct conclusion about the law or reaching a conclusion that secures a majority of a panel? Why?**

d. When is it appropriate for a judge to dissent (1) from a panel opinion, (2) from an en banc opinion, and (3) from an order denying en banc rehearing? Why?

e. When is it appropriate for a judge to join a majority opinion but file a separate concurring opinion? Why?

Response: There should be no tension between building consensus and applying the law because ultimately the law must guide judicial decision-making. It is appropriate for a judge to join a unanimous or majority opinion, issue a dissent, or file a concurring opinion when a judge finds, based upon her own careful review of the facts and the law, that she has reached the correct legal conclusion.

24. Is the right to enter into a same-sex marriage provided by the Constitution's guarantee of due process?

Response: Yes, under *Obergefell v. Hodges*, 576 U.S. 644, 675-76 (2015), in which the Supreme Court held: "[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them."

25. Is the right to enter into a same-sex marriage provided by the Constitution's guarantee of equal protection?

Response: Yes, under *Obergefell v. Hodges*, 576 U.S. 644, 675-76 (2015), in which the Supreme Court held: "[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them."

26. Where in the text of the Constitution is the right to enter into a same-sex marriage found?

Response: In *Obergefell v. Hodges*, 576 U.S. 644, 675-76 (2015), the Supreme Court held: "[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them."

27. During your hearing you mentioned the example of the Fourth Circuit as a court that prizes collegiality. Recently the Fourth Circuit began using initial en banc hearings

to take cases from panels with majority Republican appointees. *See Mayor and City Council of Baltimore v. Azar*, 799 Fed. Appx. 193 (4th Cir. 2020) (Richardson, J., dissenting) ("In a sharp break with settled practice, our Court invokes the once-extraordinary mechanism of initial-en-banc review to circumvent our conventional three-judge panel process. We used to place great value in entrusting a panel of our colleagues with first adjudicating the appeal. Doing so not only fostered collegiality but reflected the value of deciding even controversial matters with adherence to a purposeful procedure. … For the past fifty years, we followed this practice through varied administrations and court compositions. Times have changed.").

a. Is that practice consistent with collegiality?

Response: I am not familiar with initial en banc review in the Fourth Circuit based on my time clerking on the court, or with any changes to the practice since that time. If I am confirmed to serve on the Seventh Circuit, the Fourth Circuit would be a sister circuit and it would not be proper for me to opine upon its operating practices.

b. Under what circumstances should a court undertake initial en banc review?

Response: Federal Rule of Appellate Procedure 35 provides the same rule for hearing en banc (initial review) as rehearing en banc. The rule states that: "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." An en banc hearing or rehearing requires the agreement of a majority of active circuit judges who are not disqualified from hearing the matter.

28. I believe Senator Booker brought up John Adams and the Boston Massacre at your hearing. As I'm sure you recall, while Samuel Adams convinced the authorities to hire fellow-patriot Robert Treat Paine as a private special prosecutor to ensure the British soldiers were punished for their actions, his cousin, John Adams, defended British Captain Preston and his soldiers accused of murder in the wake of the Boston Massacre. John Adams did this even though he was also a patriot himself. This is the foundational example in our criminal justice system of how everyone is entitled to representation. With which side of the Boston Massacre trial, Paine or Adams, would you more closely associate private litigators brought in to run a high-profile criminal prosecution because they agreed the defendant should be punished?

Response: I do not have an opinion regarding private litigators who participate in criminal prosecution. As a general matter, the representation of defendants after the Boston Massacre illustrates that even before we were a nation, the principles of due process and the right to be represented by counsel were on full display. These principles ultimately made their way into our Constitution.

29. **During your time as a federal defender, did the U.S. Government ever employ strategic communications firms in supporting their prosecutions? How would you have reacted if they did?**

    Response: I have no personal knowledge as to whether this practice was employed or not employed.

30. **An often overlooked but foundational case from the early republic is *Rutgers v. Waddington*. There Alexander Hamilton challenged the legality of New York's Trespass Act of 1783, designed to punish those who sympathized with the British during the Revolution. A New York businessman, Joshua Waddington, engaged Hamilton to defend him in litigation seeking back rents from a dispossessed brewery owner. Hamilton, a hero of the Revolution, therefore represented a notorious Tory in what turned out to be a precedent-setting case. What does this case tell you about how a client's politics should affect his ability to retain counsel?**

    Response: This case as you described it affirms the power of our nation's Sixth Amendment, which guarantees everyone a right to the assistance of counsel.

31. **Do you agree with the following statement: Not everyone deserves a lawyer, there is no civil requirement for legal defense?**

    Response: Select jurisdictions across the country provide the right to a lawyer in certain civil proceedings. *See generally*, American Bar Association, Civil Right to Counsel (containing links to state-specific appointment authority), *available at* https://www.americanbar.org/groups/legal_aid_indigent_defense/civil_right_to_counsel1/ (last accessed May 6, 2021).

32. **Do you think law firms should allow paying clients to influence which pro bono clients they take?**

    Response: These are decisions for individual law firms to make. To my knowledge, there is no ethical standard dictating a law firm's decision in either direction.

33. **Do you think law-firm clients should use their financial position to influence which pro bono clients their attorneys take?**

    Response: These are decisions for individual law firms to make. To my knowledge, there is no ethical standard dictating a law firm's decision in either direction.

34. **Absent a traditional conflict of interest, should paying clients of a law firm be able to prevent other paying clients from engaging the firm?**

    Response: These are decisions for individual law firms to make. To my knowledge, there is no ethical standard dictating a law firm's decision in either direction.

35. Do you agree with the following statement: Talk of the states as laboratories is hollow if federal courts enjoin experiments before the results are in?

Response: This appears to be a quote from Judge Easterbrook's concurrence in the denial of rehearing en banc in *Planned Parenthood of Indiana and Kentucky, Inc. v. Box*, 949 F.3d 997 (7th Cir. 2019). The Supreme Court subsequently granted certiorari, vacated the underlying decision, and remanded for further consideration in light of *June Medical Services L.L.C. v. Russo*, 140 S.Ct. 2103 (2020). On remand, the Seventh Circuit "again affirm[ed] the district court's preliminary injunction barring enforcement of the challenged law pending full review in the district court." *Planned Parenthood of Indiana and Kentucky, Inc. v. Box*, 991 F.3d 740, 742 (7th Cir. 2021). A petition for certiorari filed in April 2021 is still pending. As a pending judicial nominee, it would be inappropriate for me to opine on a pending case.

36. Do you agree with the following statement: A legitimate sting operation takes an actual criminal off the streets and thus reduces the actual crime rate?

Response: This appears to be a quote from the Seventh Circuit's en banc decision in *United States v. Mayfield*, 771 F.3d 417, 436 (7th Cir. 2014). *Mayfield* is binding Seventh Circuit precedent I would faithfully apply if confirmed.

37. Do you agree with the following statement: The absence of voter impersonation prosecutions is explained by the endemic underenforcement of minor criminal laws and by the extreme difficulty of apprehending a voter impersonator?

Response: This appears to be a quote from the Seventh Circuit's opinion in *Crawford et al. v. Marion County Election Board et al.*, 472 F.3d 949, 953 (7th Cir. 2007). The Supreme Court subsequently affirmed the Seventh Circuit's decision, which upheld an Indiana law requiring citizens to present government-issued photo ID to vote. *See* 553 U.S. 181 (2008). *Crawford* is binding Supreme Court precedent I would faithfully apply if confirmed.

38. Is *Morrison v. Olson* good law?

Response: The case remains binding Supreme Court precedent.

39. Do you agree with retired Judge Posner's critique of how the Seventh Circuit treats pro se litigants or of its management of the staff attorney program?

Response: As a general matter, in any court, cases involving pro se litigants deserve the same care and attention as cases involved represented parties. I have not studied Judge Posner's critique of the Seventh Circuit or the responses to his critique. If confirmed, I look forward to learning more about the circuit's sizeable pro se docket and its staff attorneys' office.

40. Do you agree with the Seventh Circuit's practice of not revealing panel composition until the morning of argument?

Response: While I can understand arguments on both sides of this question, this is a decision for the Seventh Circuit committee that assesses practices of the court. If I am confirmed and subsequently asked to participate in that decision-making, I would evaluate the arguments on both sides, as I would any other matter I am asked to consider as a judge, paying special attention to the question of which practice allows for the most efficient and fair process for litigants.

41. When should a court of appeals certify a question to a state supreme court?

Response: The Seventh Circuit reiterated its standard in *In re Zimmer, NexGen Knee Implant Products Liability Litigation*, 884 F.3d 746, 754 (7th Cir. 2018): "Certification is appropriate if we are 'genuinely uncertain about a question of state law that is vital to a correct disposition of the case.' *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 520 (7th Cir. 2011)."

42. Is certification necessary as a consequence of the *Erie* doctrine? Is it consistent with principles of federalism?

Response: Based on my research, the Seventh Circuit has announced its practice with regard to certification without reference to the *Erie* doctrine. *See, e.g.*, *In re Zimmer, NexGen Knee Implant Products Liability Litigation*, 884 F.3d 746, 754 (7th Cir. 2018) ("Certification is appropriate if we are genuinely uncertain about a question of state law that is vital to a correct disposition of the case" (internal quotation marks and citations omitted)); *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 520 (7th Cir. 2011) (same).

43. Do you think that there is a tension between multifactor state conflict of law standards, such as the Restatement (Second) of Conflicts and its "significant contacts" test, and the *Erie* doctrine as currently applied?

Response: My current practice has not required me to familiarize myself with the *Erie* doctrine. If I were confirmed, and a case presented these questions, I would carefully study the applicable Supreme Court and Seventh Circuit precedent and apply it to the facts of the case.

44. At your hearing I asked how many arms traffickers you have defended in court. You said it would be difficult to answer that question providing, instead, your client base in broad brushstrokes.

a. With the benefit of more time and your records, could you please tell me how many arms traffickers you have represented as clients?

b. How many felons in possession of a firearm have you represented as clients?

c. How many sex offenders have you represented as clients in conjunction with sex crimes?

Response: Among clients I represented from arrest or investigation through plea, trial, sentencing and/or appeal, according to the database at the Federal Defender Program for the Northern District of Illinois, I represented two clients charged with firearm trafficking, ten clients charged with possession of a firearm as a felon, and six clients charged with sex offenses. These numbers do not reflect the 152 clients I represented in supervised release cases because the database does not categorize supervised release clients by underlying criminal conviction type, only by the general case type category of "supervised release." Therefore, I am unable to report how many of those 152 clients had underlying convictions for firearm trafficking, possession of a firearm as a felon, or sex offenses. Also excluded from the numbers supplied above are clients who were charged with multiple offenses spanning different case types. For example, the database often categorizes clients with both a drug charge and a firearm possession charge as drug clients, and not also firearm possession clients. Accordingly, the numbers provided are estimates.

45. In the Seventh Circuit certain criminal prosecutions for illegal firearms have been prominent vehicles for asserting rights under the Second Amendment. *See, e.g.*, *U.S. v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc), *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), *U.S. v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015). During your time as a federal defender did you ever bring a Second Amendment defense on behalf of a client accused of a gun crime?

Response: No.

46. You can answer the following questions yes or no:

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

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

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

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

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

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

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

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

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

j. Was *Sturgeon v. Frost* correctly decided?

k. Was *Juliana v. United States* (9th Cir.) correctly decided?

l. Was *Rust v. Sullivan* correctly decided?

Response: The Supreme Court decisions listed above are binding precedent. If confirmed, I would apply the precedent above fully and faithfully. Prior judicial nominees have made

exceptions to the practice of avoiding comment on the merits of Supreme Court decisions to acknowledge that *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided. I agree. *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), is a Ninth Circuit case and thus not binding precedent on the Seventh Circuit, but the Canons of Judicial Conduct prohibit me from opining on current controversies.

47. Under the Supreme Court's First Amendment jurisprudence, can someone shout "fire" in a crowded theater?

Response: In *Schenck v. United States*, 249 U.S. 47, 52 (1919), Justice Holmes wrote that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Please note, however, the statement was dicta and the case did not involve someone falsely shouting fire in a crowded theatre.

48. Should the fact that a defendant carried an air gun, instead of a firearm, alter the sentencing range for the defendant?

Response: According to *Rodriguez-Contreras v. Sessions*, 873 F.3d 579, 580-81 (7th Cir. 2017), an air gun is not a firearm under federal law. Under the United States Sentencing Guidelines, an air gun is also not firearm, but a dangerous weapon. *See* U.S.S.G. § 1B1.1 Cmt. 1(H). Throughout the sentencing guidelines, a dangerous weapon usually results in different enhancements than a firearm. *See, e.g.*, U.S.S.G. § 2B3.1(b)(2).

49. You questioned the veracity of two victims in a case involving a defendant charged with coercion and enticement, accusing them of only telling "some truths" and working as prostitutes prior to their relationship with the defendant. In essence, you are accusing the victims of lying and you went so far as to describe the victims of sexual abuse as earning money "on their backs."[1] Is the concept of "believe all women" consistent with the principles of due process?

Response: The constitutional guarantees of due process are enduring, and require elements including but not limited to notice, an opportunity to be heard, an impartial tribunal, the right to be confronted with the witnesses against oneself, and the right to be heard in one's own defense.

50. In an article in your Church newspaper, The Point, you noted that "[r]ecent court decisions . . . are making it harder to maintain racially integrated schools and schools that serve all students equally, no matter the student's color or socioeconomic status."[2] Which recent court decisions did you mean?

Response: In the article I wrote for my church newsletter seven years ago, I was referring to *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014). I wrote the

[1] *United States v. Mack Adams, III*, 1:16 CR 569 (N.D. Ill.) Dkt. No. 125 at *4.
[2] SJQ 12(A) at 530.

article as a member of my church congregation who is a private citizen working as an attorney by day. If I am confirmed as a judge, *Schuette* is binding Supreme Court precedent which I will follow, and the personal views I expressed seven years ago would have no bearing on my ability to follow that precedent.

51. As discussed above, in *United States v. Reginald Taylor*, you argued that a defendant who had committed multiple, prior armed robberies and who qualified as an Armed Career Criminal should not receive the ACCA enhancement of a mandatory minimum of 15 years. In the case, the defendant tied up victims and threatened to shoot them, execution style.

a. Do you believe ACCA should be abolished?

Response: The Armed Career Criminal Act ("ACCA") is a federal statute, 18 U.S.C. § 924(e). Whether it should be abolished is a question for legislators, not judges or judicial nominees. My argument in *Taylor* that my client should not receive a mandatory minimum sentence pursuant to ACCA was based on the question of whether he had the requisite predicate criminal offenses to qualify for a sentence enhancement under ACCA – a legal question that the Supreme Court and circuit courts were considering at the time. My argument was not based on the legality or propriety of ACCA as a statute.

b. If you do not believe ACCA should be abolished, do you believe that ACCA should be altered? If so, what specifically would you like to see changed?

Response: See my response to question 51a. Whether ACCA should be abolished or altered is a question for legislators, not judges or judicial nominees.

c. Do you believe mandatory minimums should be abolished? Why or why not?

Response: This is a question for legislators, and I recognize that the role of a judge is to faithfully apply applicable precedent. If confirmed, my personal views, if any, on any topic in law or public policy, will have no bearing on my decision-making. If a case comes before me where an individual is challenging his or her sentence, I will carefully consider the applicable facts and the law.

d. If confirmed to the Seventh Circuit, will you enforce sentences of mandatory minimums for defendants who qualify for ACCA?

Response: Yes.

52. In reviewing 175 of your cases, it seems that you filed *Brady*/*Giglio* motions approximately fourteen times. These motions were not captioned as *Brady/Giglio*

motions but they sought discovery from the prosecution or law enforcement while citing *Brady* and *Giglio* as authority.

a. Why did you file these motions without including *Brady*/*Giglio* in the title or the docket caption?

Response: The motions for immediate disclosure of favorable evidence that I typically filed relied on *United States v. Bagley*, 473 U.S. 667 (1985), *United States v. Agurs*, 427 U.S. 97 (1976), *Giglio v. United States*, 405 U.S. 150 (1972), and *Brady v. Maryland*, 373 U.S. 83 (1963). In filing the motions, I was protecting my client's right to receive material because the Supreme Court in *Bagley*, in announcing the standard of review to be applied in cases of non-disclosure of favorable evidence, distinguished between cases in which specific requests for such information were made prior to trial and cases where general requests or no requests were made. The motions I filed made specific requests, thereby preserving my client's rights. These filings took place before Congress passed the Due Process Protections Act in 2020.

b. If there was a standing discovery order enforceable in the case, what was the purpose of filing this kind of motion?

To the best of my memory, I am not aware of any judges with standing criminal discovery orders in the Northern District of Illinois.

c. By filing these types of motions, were you seeking to highlight supposed prosecutorial misconduct?[3]

No.

53. In to [sic] a January 11, 2019, presentation pleas, you observe "Scholars have talked about how to handle this problem [of Brady violations and prosecutorial misconduct]: … Others have suggested list the names of the prosecutors even if no prejudice." What exactly do you mean that discipline should involve placing prosecutors "on a list"? How is this different from the doxxing of prosecutors?

Response: The speaking notes to which you are referring are from a game show event I co-hosted for the Federal Bar Association's Chicago Chapter on May 29, 2018, before an audience of prosecutors, defense attorneys, and judges (not a January 11, 2019, presentation on pleas). I do not recall if I conveyed the information in those speaking notes to the audience after the "contestants" answered the quiz question about a recent Seventh Circuit decision involving a *Brady* violation. In my speaking notes, I described five

[3] *See* SJQ attachments at 766: "Over last 5-7 years, many in the legal community have expressed concerns over lack of deterrence for brady violations and prosecutorial misconduct more generally."

suggestions by scholars on ways to reduce *Brady* violations, including listing the names of prosecutors who violate *Brady*. My speaking notes do not opine on the merits of the scholars' suggestions, nor do my notes describe the scholars' suggestions as discipline.

54. The Federalist Society is an organization of conservatives and libertarians dedicated to the rule of law and legal reform. Would you hire a member of the Federalist Society to serve in your chambers as a law clerk?

Response: My model is the judges for whom I clerked. For neither judge was membership in an organization, or failure to be a member of an organization, a reason for hiring or not hiring a law clerk. They evaluated each candidate holistically. I would do the same in hiring, if confirmed.

55. Is climate change real?

Response: This question has been the subject of extensive debate and is frequently an issue in litigation. As a pending judicial nominee, the Canons of Judicial Conduct prohibit me from opining on current controversies. If confirmed, I would approach any case presenting this issue just as I would any other case: by delving into the facts and the record, studying the arguments of the parties, carefully engaging the parties at oral argument, doing my own legal research to review applicable precedent, and conferencing with colleagues before reaching a reasoned decision.

56. Do masks prevent the transmission of COVID-19?

Response: I am not aware of any judicial pronouncement on this issue. I am aware, as a private citizen, that the U.S. Centers for Disease Control has issued guidance to wear a mask to help prevent the transmission of COVID-19.

57. Does human life begin at conception?

Response: This question has been the subject of extensive debate and is frequently an issue in litigation. As a pending judicial nominee, I will note that the Supreme Court has not resolved the question of when human life begins. Indeed, the Court has stated that it "need not resolve" the question. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

58. Please list any other state or federal judgeships to which you have applied and the results of any such applications.

Response: I was a finalist for a federal magistrate position twice in 2018. I was not selected.

59. You clerked for retired Judge Coar of the Northern District of Illinois. At your hearing, Chairman Durbin said that Judge Coar heads his judicial-selection

committee. To the extent of your knowledge, what role did Judge Coar play in your selection for this position?

Response: To my knowledge, Judge Coar played no role in my selection. Also, Judge Coar previously chaired Chairman Durbin's district court selection committee. To my knowledge, there was no selection committee for the circuit court vacancy for which I have been nominated.

60. What conversations, if any, did you have with retired circuit judge Ann Claire Williams about your interest in this position? What role, if any, did she play in your selection?

Response: I had no conversations with Judge Williams about this position until after I learned of the President's intent to nominate me. To my knowledge, Judge Williams played no role in my selection.

61. Have you had any conversations with individuals associated with the group Demand Justice, including but not limited to Brian Fallon or Chris Kang, in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.

Response: No.

62. Have you had any conversations with individuals associated with the American Constitution Society, including but not limited to Russ Feingold, in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.

Response: No.

63. Have you had any conversations with individuals associated with the Lawyers Committee for Civil and Human Rights, including but not limited to Vanita Gupta, in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.

Response: No.

64. You mention in your SJQ that you met with President Biden before being nominated. Did he ask you any questions about judicial precedent or public policy in that meeting? If so please describe those questions and your responses.

Response: No.

65. Please explain with particularity the process by which you answered these questions.

Response: I received questions for the record from members of the Senate Judiciary Committee on May 5, 2021. To answer the questions, I reviewed them, conducted research where necessary, including into my prior cases and writings, and consulted with Department of Justice attorneys. I authorized the transmission of my answers to the Senate Judiciary Committee on May 10, 2021.

66. Do these answers reflect your true and personal views?

Response: Yes.

United States Senator Marsha Blackburn
Questions for the Record
Candace Jackson-Akiwumi
Nominee to be United States Circuit Judge for the Seventh Circuit

1. **During your hearing on April 28, we spoke about a case where you represented a man accused of prostituting women. In *United States v. Mack Adams, III*, your defendant was charged with coercion and enticement, in violation of 18 U.S.C. §2422(a). In a *Brady* motion you filed against the government, you accused his victims of lying about their prior activity on Backpage.com. You continued these accusations in your sentencing memorandum, writing:**

> **"The victims, who were 19 and 27 at the time, have told some truths: they gave Mr. Adams money they earned on their backs. He supplied the marijuana and the pills, hotel rooms, and transportation. He also slept with them. It was 'f*cked up,' he candidly admits looking back. Some of the victims' testimony, however, is false, Mr. Adams steadfastly maintains, particularly the accusations that he used force and fraud in dealing with them. His position today is the very same thing he told FBI agents who interviewed him upon his arrest in 2016. The women, loathe they were to admit this to the FBI and the grand jury, willingly came to Illinois to be with Mr. Adams and to continue prostitution work they were already engaged in back home. This does not change, Mr. Adams understands, his wrongdoing in persuading them to come to Illinois and his act of prostituting them once here."**

   How do you address criticism that your actions could be called victim shaming and blaming?

   Response: In representing each of my clients, I took seriously my obligation under the Sixth Amendment and the ethics standards to zealously represent my client. In many cases, this representation included assisting my clients in contesting the evidence against them based on a thorough investigation of the facts. This obligation extends to sentencing hearings, during which a judge often makes factual findings to fashion a just sentence.

   Likewise, in representing each of my clients, I took seriously my obligation to describe for the sentencing judge the nature and circumstances of my client's offense because federal sentencing law, 18 U.S.C. § 3553(a)(1), requires the judge to consider the nature and circumstances of the offense in fashioning a just sentence.

   Thus, in advocating on behalf of my client, I described the facts of the case, including areas of agreement with the prosecution about the evidence and areas of disagreement, so that the court could fulfill its responsibility under 18 U.S.C. § 3553. In doing so, I also fulfilled my obligation under the Sixth Amendment.

As a final note, in representing my clients, I frequently worked with them in acknowledging and addressing the harm that their offense caused any victims. Federal sentencing law is also mindful of victims and the importance of ensuring defendants understand the seriousness of their offense. *See, e.g.*, 18 U.S.C. § 3553(a)(2), (7).

Nomination of Candace Jackson-Akiwumi
to be United States Circuit Judge for the Seventh Circuit
Questions for the Record
Submitted May 5, 2021

QUESTIONS FROM SENATOR COTTON

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

   Response: No.

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

   Response: No.

3. **During your confirmation hearing, you were asked whether you believe that prosecutingfirearms traffickers is the best way to stop pipelines of illegal guns. You said that you "think there are a number of tools in the tool box for combating an issue like guns and gun violence, and prosecution is one tool." You did not, however, answer the question. Do you believe that prosecuting and sentencing firearms traffickers is the best way to stop pipelines of illegal guns into crime-prone areas?**

   Response: As a private citizen, I am aware that there are a number of tools available to governments and communities in addressing gun crime. One critical tool is prosecution, and as an advocate at the Federal Defender Program, my role was to represent clients in that process. If I am confirmed as a judge, my role would be to decide cases involving federal firearm offenses on a case-by-case basis, consistent with our Constitution and federal laws, applying Supreme Court and Seventh Circuit precedent.

4. **During your confirmation hearing, you were asked whether you believe that prosecutingfirearms traffickers is the best way to stop pipelines of illegal guns. You said that you "think there are a number of tools in the tool box for combating an issue like guns and gun violence, and prosecution is one tool." What other tools do you believe are in that "tool box" for stopping the pipelines of illegal guns into crime-prone areas?**

   Response: As a private citizen, I am aware that governments and communities also employ law enforcement partnerships, education initiatives, restorative justice

initiatives, and community-based programming to address gun crime. If I am confirmed as a judge, my job would be to decide cases involving federal firearm offenses on a case-by-case basis, consistent with our Constitution and federal laws, applying Supreme Court and Seventh Circuit precedent.

5. **During your confirmation hearing, you were asked about past arguments you have made as an advocate, where you have asked courts to give reduced sentences to African American defendants solely because of their race, which you suggested was to reduce "disparities" in sentencing. In your hearing, you were asked whether white defendants should be given longer sentences "in order to correct racial disparities," and you said thatjudges are guided by the law, "which sets forth at least seven sentencing factors, including disparities. So everyone in the system, including the judge and the attorneys, are operating within that framework that Congress provided. If confirmed, that's the exact framework that I would be looking to to review any sentencing decisions by judges." You did not, however, answer the question: Should white defendants receive longer sentences than the facts of the individual case require to correct systemic "disparities" in sentencing?**

   Response: Congress has directed judges in sentencing proceedings to impose a sentence that is "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a). No defendant should receive a sentence longer than the circumstances of his or her individual case require, for any reason. Respectfully, I have never "asked courts to give reduced sentences to African American defendants solely because of their race."

6. **During your confirmation hearing, I asked you whether the Constitution allows the government to treat any person differently because of their race. You answered, "no."Does the Constitution allow a convicted criminal to ever be given a longer or shorter sentence based solely on their race or the race of other inmates?**

   Response: No defendant should ever be given a sentence of any length based solely on his or her race, or the race of other people. Sentencing in such a manner would violate our Constitution.

7. **During your confirmation hearing, I asked you whether you agreed with the view of Justice Stephen Breyer and the late Justice Ruth Bader Ginsburg that the Supreme Court should have nine justices. You responded that you were "not familiar with their particularviews," but also that the size of the Supreme Court is a "question left to the legislative branch and the executive branch." Given that members of the Supreme Court—the judicial branch—have felt it appropriate to opine on this matter, it is clearly not out of bounds for members of the judiciary to comment on the size and functioning of the judiciary itself.**

   On July 24, 2019, *National Public Radio* published an interview with Justice Ginsburg, inwhich she said, "Nine seems to be a good number. It's been that way for a long time. I think it was a bad idea when President Franklin Roosevelt tried to pack the Court.... If anything, [it] would make the Court look partisan. It would be that – one side saying, 'When we're in power, we're going to enlarge the number of judges, so we would havemore people who would vote the way we want them to.'"

   On April 7, 2021, just weeks before your confirmation hearing, Justice Breyer gave a two-hour lecture at Harvard Law School, which he described as his "own effort" to ensure that people debating court-packing proposals understood how "'court packing' [would] reflect and affect the rule of law itself." Justice Breyer argued that court-packingcould increase the perception that judges are just "politicians in robes," and that, as a result, "confidence in the courts, and in the rule of law itself, can only diminish, diminishing the Court's power, including its power to act as a 'check' on the other branches." Justice Breyer argued against risking "further eroding [the] trust" of the publicthrough politically-motivated changes to the Supreme Court.

   Do you believe that Justices Breyer and Ginsburg are wrong on this issue?

   Response: I have not formed an opinion on the size of the Supreme Court. If confirmed to

serve on the Seventh Circuit, I would be bound to follow Supreme Court precedent regardless of the number of justices.

8. During law school, you planned a conference entitled, "*The Legacy of Brown v. Board ofEducation.*" Was *Brown v. Board of Education* rightly decided?

9. Was *District of Columbia v. Heller* rightly decided?

10. Was *McDonald v. City of Chicago* rightly decided?

Response to Questions 8-10: The Supreme Court's decisions in *Brown v. Board of Education*, *District of Columbia v. Heller*, and *McDonald v. City of Chicago* are binding precedent. If confirmed, I would apply this and all precedent fully and faithfully. Prior judicial nominees have made an exception to the practice of otherwise avoiding comment on the merits of Supreme Court decisions to acknowledge that *Brown v. Board of Education* was correctly decided. I agree.

11. Are civil rights guaranteed to all Americans, or only specific sub-sets of Americans?

Response: All Americans are guaranteed civil rights.

12. Do illegal aliens have a civil right to come to the United States?

Response: No.

13. You mentioned during your confirmation hearing that you have handled immigration cases as a public defender. If a judge orders that an illegal alien be deported, can the illegal alien just ignore that order, or should there be consequences for refusing to leave?

Response: No individual or entity may ignore a court order. Further, willful failure or refusal to depart the country after a court has ordered removal is a new crime. *See* 8 U.S.C. § 1253(a)(1).

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

Response: I received questions for the record from members of the Senate Judiciary Committee on May 5, 2021. To answer the questions, I reviewed them, conducted research where necessary, and consulted with Department of Justice attorneys. I authorized the transmission of my answers to the Senate Judiciary Committee on May 10, 2021.

15. 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. Ifgovernment officials assisted with writing or drafting your answers, please also identifythe 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 Candace Jackson-Akiwumi, Nominee for the Seventh Circuit

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context 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. Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice's philosophy from Warren, Burger, Rehnquist, or Robert's Courts is most analogous with yours.

Response: My understanding from both practice as a lawyer and observation as a law clerk is that judges should fairly, diligently, and impartially apply the law to the facts of the cases before them. This is the extent of any philosophy I would bring with me to the court, if confirmed, as I have never been a judge, I have kept busy working hard every day to represent clients as a lawyer, and I have not studied the various Justices' judicial philosophies. If confirmed, I would employ in every case a method – rather than a philosophy per se – that should serve me well: (1) scrupulous review of the record with a restrained focus on the issues before the court; (2) careful review of the parties' briefs and open-minded engagement with the parties at oral argument; and (3) diligent research, thorough independent consideration of the matter, and open-minded consultation with my colleagues and law clerks. These steps should enable me to reach a reasoned result that I must then articulate in writing as cogently as possible for litigants and the public.

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

Response: The Constitution is an enduring document. If confirmed, I would follow Supreme Court and Seventh Circuit precedent about the meaning of the Constitution in applying the Constitution to the cases before me.

3. Is it appropriate for the executive under the Constitution to refuse to enforce alaw, absent constitutional concerns? Please explain.

Response: The Supreme Court's decision in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), guides courts when presented with questions about executive power. A President must act pursuant to express or implied congressional direction, an independent executive power, or a concurrent power. *Id*. at 635-37 (Jackson, J., concurring). Under these circumstances, executive authority is great. By contrast, executive authority is at its lowest point when the President acts in a manner "incompatible with the expressed or implied will of Congress." *Id*. at 637.

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

Response: I have not formed an opinion. If confirmed to serve on the Seventh Circuit, I would be bound to follow Supreme Court precedent regardless of the number of justices.

5. Do you personally own any firearms? If so, please list them.

Response: No.

6. Have you ever personally owned any firearms?

Response: No.

7. Have you ever used a firearm? If so, when and under what circumstances?

Response: Yes. When I was a summer extern at the U.S. Attorney's Office during law school, the office took externs to a shooting range for an outing.

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

Response: The Second Amendment guarantees the fundamental right of individuals to keep and bear arms. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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

Response: *Heller* and *McDonald* do not address this question, but the *Heller* Court did state that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). Should I be confirmed to the Seventh Circuit, I would follow *Heller*, *McDonald*, and any other binding Supreme Court and Seventh Circuit precedent regarding the Second Amendment.

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

Response: *Heller* and *McDonald* do not address this question, but the *Heller* Court did state that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570,

626 (2008). Should I be confirmed to the Seventh Circuit, I would follow *Heller*, *McDonald*, and any other binding Supreme Court and Seventh Circuit precedent regarding the Second Amendment.

11. **During Judge Thomas Kirsch's nomination hearing in 2020, Senator Durbin asked Judge Kirsch what he did "to prevent Indiana's gun shows from being the source of a pipeline of gun trafficking into the City of Chicago." In your time as a public defender, you defended numerous clients who were involved in unlawful firearms trafficking in Illinois. Throughout the process of your selection and nomination, did Senator Durbin ever ask you what you have done to prevent a "pipeline of gun trafficking into the City of Chicago"?**

Response: No.

12. **I understand and appreciate that you were representing clients charged with trafficking firearms, and that you sought the best outcome for them as you could. Do you believe your work contributed gun trafficking in Chicago?**

Response: No.

a. **Is trafficking illegally in firearms a serious crime?**

Response: Yes.

b. **Do you believe that judges should follow the sentencing guidelines for firearm offenses absent a convincing reason to depart from those guidelines?**

Response: Judges must follow the directives of Congress and the Supreme Court in conducting sentencing proceedings. Congress has directed judges to consider a range of sentencing factors, one of which is the sentencing guidelines, in arriving at an individualized sentence in each case. *See* 18 U.S.C. § 3553(a). The Supreme Court has held that the sentencing guidelines are advisory, not mandatory. *See United States v. Booker*, 543 U.S. 220 (2005). The Supreme Court has also held that a within-guidelines sentence is presumptively reasonable. *See Rita v. United States*, 551 U.S. 338 (2007).

c. Can you name some circumstances under which you believe it may be appropriate to downward depart from the sentencing guidelines for a firearms offense?

Response: The sentencing guidelines specify a departure for all offense types where the defendant provided substantial assistance to authorities. *See* U.S.S.G. § 5K1.1. The sentencing guidelines also specify a departure for all offense types, except child crimes and sexual offenses, if the court finds, pursuant to 18 U.S.C. § 3553(b)(1), that there is a mitigating circumstance in the case "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described." *See* U.S.S.G. § 5K2.0(a)(1).

13. Is the Religious Freedom Restoration Act a civil rights law?

Response: Congress has identified the Religious Freedom Restoration Act as a civil rights law by including it among the statutes for which attorney's fees are available under the Civil Rights Attorney's Fees Awards Act of 1976. *See* 42 U.S.C. § 1988.

14. What are the benefits of federal sentencing guidelines?

Response: The federal sentencing guidelines have an important role because Congress has directed judges to impose individualized sentences but also avoid unwarranted disparities. The Supreme Court has emphasized that the advisory guideline system should "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *See United States v. Booker*, 543 U.S. 220, 264–65 (2005).

15. As a federal defender, you argued that judges should take into account demographic disparities in sentencing when deciding on a sentence for an individual. Do you believe that judges have this discretion under the law?

Response: Congress has outlined the factors a judge should consider when imposing a sentence, which includes "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a) (6). Judges are not permitted to give defendants with similar records and similar conduct different sentences on based on their race. *See United States v. Bridgewater*, 950 F.3d 928, 936 (7th Cir. 2020). The Supreme Court has recognized that any perception of unwarranted sentencing disparities based on race undermines confidence in the criminal justice system. *See Kimbrough v. United States*, 552 U.S. 85, 98

(2007).

16. 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?

Response: The Supreme Court has held that there are limits under the Constitution to what government may impose or require of individuals in private institutions. Recent cases include *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). If I am confirmed and asked to address a First Amendment question involving religious liberty and the free exercise of religion, I would apply the binding precedent of the Supreme Court and the Seventh Circuit.

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

Response: Yes.

18. President Biden has promised to nominate judges "who look like America." What do you understand this to mean?

Response: Though I have not spoken with President Biden about this comment, I interpret the phrase as a recognition that American citizens are of every religion, race, ethnicity, national origin, gender, sexual identity, and sexual orientation; they are of all ages and abilities; and they come from varied backgrounds and live in different places.

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

Response: Political appointments of the type your question may be referring to are the province of the Executive Branch. The Constitution is the supreme law of the land: it applies to everyone and every branch of government. If I am confirmed and presented with questions about executive appointments, I would adhere to binding Supreme Court and Seventh Circuit precedent.

20. If you are to join the Seventh Circuit, and supervise along with your colleaguesthe 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;

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

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

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

Response: Because I am not currently at the Seventh Circuit, I am not aware of the court's training for employees. Nor do I know if I will have any role supervising the court's human resource programs, if confirmed. No training program should violate the Constitution or an applicable statute.

21. Will you commit that you will oppose any trainings to Seventh Circuit employees teaching that meritocracy, or related values such as work ethic andself-reliance, are racist or sexist?

Response: Because I am not currently at the Seventh Circuit, I am not aware of the court's training for employees. No training program should violate the Constitution or an applicable statute.

22. Is it appropriate for a witness to a crime to consider the race of the perpetratorwhen deciding whether to provide information to the police or federal authorities?

Response: This is an individual determination for each witness to make.

23. Is it racist for a person to call police out of concern over the threatening or unlawful conduct of a person of color?

Response: If I am confirmed as a judge, my job would be to evaluate claims of racial discrimination on a case-by-case basis, consistent with our Constitution and federal laws, applying Supreme Court and Seventh Circuit precedent.

24. Is there systemic racism in public policy across America?

Response: If I am confirmed as a judge, my job would be to evaluate claims of racial discrimination on a case-by-case basis, consistent with our Constitution and federal laws, applying Supreme Court and Seventh Circuit precedent.

25. Is the criminal justice system systemically racist?

Response: If I am confirmed as a judge, my job would be to evaluate claims of racial discrimination on a case-by-case basis, consistent with our Constitution and federal laws, applying Supreme Court and Seventh Circuit precedent.

26. In an article celebrating the sixtieth anniversary of *Brown v. Board of Education*, you wrote that "we cannot celebrate these events . . . and nothing more. . . . [W]e must continue to fight for equal opportunity with an energy that should match those who fought for civil rights fifty and sixty years ago."I have a few questions about that fight:

a. Is there a difference between "equal opportunity" and "equity"? If so, whatis the difference?

I am aware of no Supreme Court or Seventh Circuit precedent addressing this question. I am aware that a recent executive order 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." Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, E.O. No. 13985 (Jan. 20, 2021).

b. What does the Constitution's Equal Protection Clause say about equity?

Response: The Fourteenth Amendment's Equal Protection Clause does not contain the word equity.

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

a. Does the implementation of a criminal punishment prescribed by lawdepend entirely on the President's discretion?

b. Could a President lawfully declare, as a policy, that he disfavors physicalimprisonment and order all federal prosecutors to refuse to seek it?

Response: At the federal level, Congress has determined the death penalty is an appropriate penalty for certain crimes and the Supreme Court has held that the death penalty is constitutional for certain offenders and in certain circumstances. The President, acting alone, cannot change the laws enacted by

Congress, including laws related to criminal penalties, but the Constitution gives the President the authority to grant pardons, commutations, and reprieves. U.S. Const., Art. II, Sec. 2.

28. At his hearing, Attorney General Garland said that an attack on a courthouse while in operation, and trying to prevent judges from actually trying cases, "plainly is domestic extremism." And when pressed, he mentioned also that anattack "simply on government property at night or any other kind of circumstances" is a clear and serious crime. But he seemed to make a distinction between the two, describing the latter (and only the latter) as an "attack on our democratic institutions." If you are confirmed, you will be sitting on a very important court. Do you agree with these statements?

Response: Any situation where government institutions and public servants are victims of crime should be treated with seriousness. I am not aware of Attorney General Garland's statements and have no basis for commenting beyond that.

29. Do you agree that free speech is an essential and irreplaceable American value?

Response: The First Amendment's protection of free speech against government regulation is a fundamental right and a bedrock constitutional principle.

a. What are the present threats to free speech in America?

Response: If confirmed as a judge, I would adhere to Supreme Court and Seventh Circuit precedent in deciding cases alleging a violation of the First Amendment's freedom of speech.

b. What role do the courts have in addressing threats to free speech?

Response: A circuit judge's role is to decide, in a fair and impartial manner, each case that comes before the court.

c. Does the First Amendment protect speech that some may consider offensive?

Response: The Supreme Court has stated that "[w]e have said time and again that the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Matal v. Tam*, 137 S.Ct. 1744, 1763 (2017) (internal quotation marks and citations omitted).

i. If so, what are the limits to that protection?

Response: The Supreme Court has carved out exceptions to First Amendment protections for speech in a long line of cases. A specific example involving speech that some people may consider offensive is *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where the Court held that direct personal insults are not protected free speech if the insults are so offensive they are likely to provoke the listener to resort to immediate violence.

d. What is "hate speech"?

Response: The Supreme Court, to the best of my knowledge, has not defined hate speech.

i. Is "hate speech," as you have just defined it, protected by the FirstAmendment?

Response: The Supreme Court has stated that the First Amendment does not protect the following classes of speech: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *See United States v. Stevens*, 559 U.S. 460, 468 (2010). These classes are "well defined and narrowly limited," according to the Supreme Court and, to my knowledge, do not include hate speech. *Id*. at 468-69. Speech that someone describes as hate speech could fall under one of the unprotected classes above.

ii. If so, what are the limits to that protection?

Response: There is no exception for hate speech under the First Amendment's protection for freedom of expression, unless the speech is direct, personal, and either truly threatening or violently provocative. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011); *Virginia v. Black*, 538 U.S. 343 (2003); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

30. Do public educational institutions have the legal obligation to protect the speech rights of students and employees?

Response: The Supreme Court held in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

31. Do private educational institutions have the legal obligation to protect the speech rights of students and employees?

Response: The First Amendment protects free speech against government regulation. In general, private educational institutions are not government actors. There may be legal obligations at the state level: states are entitled to make their own laws governing speech so long as those laws do not violate the Constitution.

32. Are educational institutions that receive federal funding permitted to discriminate on the basis of speech?

Response: I am not aware of any federal statute that prohibits educational institutions that receive federal funding from discriminating on the basis of speech. I am aware that there was an agency rule promulgated last year potentially implicating this question and a lawsuit about the rule remains pending. I therefore will refrain from speculating on this issue as a judicial nominee.

33. In 2011, the U.S. Department of Education issued a dear Deal Colleague Letterto colleges and universities that broadened the definition of sexual harassmentand required schools to adopt a lenient "more likely than not" burden of proof when adjudicating claims, among other procedural defects. How does this compare with the standard of proof that governs in criminal prosecutions?

Response: The standard of proof for guilt or innocence in a federal criminal trial is "beyond a reasonable doubt." There is a different standard of proof for other criminal proceedings such as sentencing hearings, probation violation hearings, supervised release violation hearings.

34. Given the information in the public domain, do you believe that Brett Kavanaugh sexually assaulted Christine Blasey Ford?

Response: I have tremendous respect for the Supreme Court and I take seriously the integrity and independence of the federal judiciary. Therefore, I do not find it appropriate to opine on this question.

Senator Mike Lee
Questions for the Record
Candace Jackson-Akiwumi, Seventh Circuit

1. How would you describe your judicial philosophy?

Response: My understanding from both practice as a lawyer and observation as a law clerk is that judges should fairly, diligently, and impartially apply the law to the facts of the cases before them. This is the extent of any philosophy I would bring with me to the court, if confirmed, as I have never been a judge, I have kept busy working hard every day to represent clients as a lawyer. If confirmed, I would employ in every case a method – rather than a philosophy per se – that should serve me well: (1) scrupulous review of the record with a restrained focus on the issues before the court; (2) careful review of the parties' briefs and open-minded engagement with the parties at oral argument; and (3) diligent research, thorough independent consideration of the matter, and open-minded consultation with my colleagues and law clerks. These steps should enable me to reach a reasoned result that I must then articulate in writing as cogently as possible for litigants and the public.

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

Response: If the particular provision of the statute that is at issue had been previously interpreted by the Supreme Court or Seventh Circuit, those precedents would be binding. If it had not been previously interpreted, then I would first look at the text of the statute. The starting point for any decision involving statutory interpretation is the text of the statute. If the text is clear, the inquiry can end. If the text is ambiguous, I would next employ the various tools of statutory construction, including the broader statutory context and the canons of construction. I would also consult Supreme Court and Seventh Circuit precedent interpreting related or analogous statutory provisions, or precedent providing general guidance about the interpretive question at hand. If necessary, I would consider the legislative history of the statute or provision, and I would also consult other federal or state court decisions as persuasive, but not binding, authority.

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

Response: In most cases, I would expect to start with applicable Supreme Court and Seventh Circuit precedent interpreting the particular provision at issue. In the unusual instance that I was confronted with a question of first impression involving a constitutional provision that had not yet been interpreted by the Supreme Court or Seventh Circuit, I would first look at the text of the constitutional provision. I would interpret the text in a manner consistent with the methods of interpretation that the Supreme

Court has used. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court looked to the original public meaning of the Second Amendment.

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

Response: The Supreme Court has looked to the original meaning to interpret the Constitution in some cases, such as *Heller*, but not in all cases interpreting the Constitution. If I were confirmed to the Seventh Circuit, I would be bound by Supreme Court and Seventh Circuit precedent whether the precedent relied on original meaning or not.

5. What are the constitutional requirements for standing?

Response: The Supreme Court articulated the constitutional requirements for standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted):

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision.

6. Do you believe there is a difference between "prudential" jurisdiction andArticle III jurisdiction in the federal courts? If so, which jurisdictional requirements are prudential, and which are mandatory?

Response: Although the Supreme Court previously used the term "prudential jurisdiction," it has now called the term into question. The Seventh Circuit explained this in *Knopick v. Jayco, Inc.*, 895 F.3d 525, 529 (7th Cir. 2018):

> Though earlier cases speak in terms of "prudential standing" and permit courts to dismiss actions sua sponte, the Supreme Court has more recently called into question the bases of prudential standing. In *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), the Court explained that describing as "prudential standing" the

> legal issue of which party could sue under a statute was a "misnomer." *Id*. at 127 (citation omitted). Instead, the court defined the inquiry as "a straightforward question of statutory interpretation" to determine on the merits whether the party had a cause of action under the statute. *Id*. at 129.

The Supreme Court's footnote in *Lexmark International* illustrates that the relevant inquiry remains whether a court has Article III jurisdiction:

> We have on occasion referred to this inquiry as "statutory standing" and treated it as effectively jurisdictional. That label is an improvement over the language of "prudential standing," since it correctly places the focus on the statute. But it, too, is misleading, since "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the court's statutory or constitutional power to adjudicate the case."

Lexmark International, 572 U.S. at 128 n.4 (internal citations omitted).

7. How would you define the doctrine of administrative exhaustion?

Response: The doctrine means that an individual challenging an agency decision must first pursue the agency's available remedies before seeking judicial review.

8. Do you believe Congress has implied powers beyond those enumerated in theConstitution? If so, what are those implied powers?

Response: The "Necessary and Proper Clause" at the end of Article I, Section 8 of the Constitution grants Congress powers considered necessary to implement the powers enumerated earlier in Article I, Section 8. *McCullough v. Maryland*, 17 U.S. 316 (1819), was the first Supreme Court case to recognize and affirm that Congress has implied powers, of which there many examples ranging from the power to charter a bank in *McCullough v. Maryland* to the power to enact the military draft.

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

Response: If a case came before me where I had to evaluate whether Congress had the authority to pass a particular law that did not reference a specific enumerated power in the Constitution – and there was no binding Supreme Court or Seventh Circuit precedent that addressed the question already – my initial expectation is that I would follow methods of evaluation the Supreme Court has used. Two illustrative cases are *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). The Supreme

Court looked to the text of the Constitution and its prior precedent regarding the Commerce Clause to determine principles that guided its prior decisions. Then the Court determined that the laws at issue in its prior cases all involved economic activity in a way that the laws at issue in *Lopez* and *Morrison* did not.

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

Response: Yes. The Supreme Court has found several such rights, including, for example, a right to travel within the country, a right to privacy, and a right to the presumption of innocence in criminal cases. *See Saenz v. Roe*, 526 U.S. 489 (1999); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Coffin v. United States*, 156 U.S. 432 (1895).

11. What rights are protected under substantive due process?

Response: The Supreme Court has invoked substantive due process to protect a number of rights, as summarized in *Washington v. Glucksberg*, 521 U.S. 702, 720, (1997):

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); to use contraception, *ibid.; Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); to bodily integrity, *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), and to abortion, *Casey, supra.* We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan,* 497 U.S., at 278–279, 110 S.Ct., at 2851–2852.

12. If you believe substantive due process protects some personal rights such as aright 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: If confirmed to the Seventh Circuit, my personal beliefs about substantive due process or any other legal doctrine would have no bearing on my ability to apply binding Supreme Court and Seventh Circuit precedent. The Supreme Court has repeatedly upheld the right to an abortion pre-viability,

subject to regulations as long as those regulations do not impose "an undue burden" (if the regulations' "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability"). *See Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion). The Supreme Court has declined to protect the economic rights at issue in *Lochner v. New York* under the umbrella of substantive due process. *See West Coast Hotel Co. v. Parrish*, 57 S.Ct. 578 (1937). Both lines of cases are binding precedent to which I will faithfully adhere if confirmed.

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

Response: The Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), outlines Congress's power to regulate under the Commerce Clause. Congress may regulate the channels of interstate, the instrumentalities of interstate commerce, and activity that substantially affects interstate commerce. *Id*. at 558-59.

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

Response: The Supreme Court has designated race, alienage, national origin, and religion as suspect classes requiring strict scrutiny. *See, e.g., Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 n.4 (1976); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: The fact that the framers devoted Article I to the legislative branch, the branch that directly represents the people, reflects that the Constitution is at its heart a contract with the people. The framers illustrated in the very structure of the document that the power belonged to the people and the people ceded some power to the government – but a limited government. Articles II and III follow separately and demonstrate, at every turn, that each branch of government operates as a check on the other branches. The view from the judicial branch provides an example. Congress depends on the courts "to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), even though Congress alone has the power to make law. But the courts help Congress act as a check on the President by adjudicating when executive authority has exceeded its constitutional limitations or strayed too far from the laws passed by Congress. All this aside, the judicial branch's power is restrained. Article III limits the courts to deciding only actual cases or controversies. Additionally, the judicial branch cannot populate itself; the executive and legislative branch have that responsibility.

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

Response: After studying the text of the Constitution, I would consult the vast body of Supreme Court precedent on executive powers or the use of implied powers by Congress, depending on which branch of government the case involved. I would then follow methods of evaluation the Supreme Court has used. Two illustrative cases are *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). The Supreme Court looked to the text of the Constitution and its prior precedent regarding the Commerce Clause to determine principles that guided its prior decisions. Thereafter, the Court determined that the laws at issue in its prior cases all involved economic activity in a way that the laws at issue in *Lopez* and *Morrison* did not.

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

Response: A judge must follow the law without partiality to any party or external influence, and without the interference of her own personal views.

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

Response: A judge should do neither.

19. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantlymore 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: My law practice has not required me to study the arc of the Supreme Court's review of congressional action.

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

Response: According to my research, this topic is the subject of debate in that proponents of judicial supremacy view the Supreme Court's interpretation of the Constitution as authoritative for the executive and legislative branches, while proponents of judicial review consider each branch to have independent authority to interpret the Constitution.

21. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon

vital questions affectingthe whole people is to be irrevocably fixed by decisions of the wuo
. . . 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 independentobligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: In our system of government, elected officials are required to follow duly rendered judicial decisions. Elected officials in the United States also independently swear an oath to uphold the Constitution. U.S. Const., Art. VI, Sec. 3.

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

Response: Remembering Hamilton's observation in Federalist 78 can help tether a judge to the text and principles of Article III. Judges do not have the will of the legislators to enact laws or the force of the executive branch to execute laws. Judges merely determine "what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Relatedly, this is why courts cannot issue advisory opinions: they must adjudicate actual cases and controversies only, not opine on what the law should be.

23. How would you describe your approach to reading statutes—how much weight do you give to the plain meaning of the text? When we talk about theplain meaning of a statute, are we talking about the public understanding atthe time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: If the particular provision of the statute that is at issue had been previously interpreted by the Supreme Court or Seventh Circuit, those precedents would be binding. If it had not been previously interpreted, then I would first look at the text of the statute. The starting point for any decision involving statutory interpretation is the text of the statute. If the text is clear, the inquiry can end. If the text is ambiguous, I would next employ the various tools of statutory construction, including the broader statutory context and the canons of construction. I would also consult Supreme Court and Seventh Circuit precedent interpreting related or analogous statutory provisions, and precedent providing general guidance about the interpretive question at hand. If necessary, I would consider the legislative history of the statute or provision, and I would also consult other federal or state court decisions as persuasive, but not binding, authority.

24. As a circuit court judge, you would be bound by both Supreme Court precedent, and prior circuit court precedent. What is the duty of a lower courtjudge 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 notappear to speak directly to the issue at hand? In applying a precedent that hasquestionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: Circuit judges are at all times bound by Supreme Court precedent and the precedent of their circuit. Stare decisis is important. In the event that a precedent is not controlling, that precedent could be distinguished and therefore would allow a judge to issue a decision that is consistent with the Constitution. This necessarily limits the precedent's application to only cases where it is appropriately applied and does so in a way that honors both stare decisis and the Constitution.

25. Do you believe it is ever appropriate to look past jurisdictional issues if theyprevent the court from correcting a serious injustice?

Response: No.

26. 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: In 18 U.S.C. § 3553(a), Congress specified the factors that a sentencing court should consider when imposing a sentence. Sentencing judges can consider aspects of a defendant's identity only insofar as those aspects bear relation to one of the sentencing factors in Section 3553(a).

27. Would it ever be appropriate to sentence a defendant who belongs to a historically disadvantaged group less severely than a similarly situated defendant who belongs to a historically advantaged group to correct systemicsentencing disparities?

Response: No.

28. In January 2014, you wrote an article for "The Point" criticizing state "standyour ground" laws. In that article, you took specific aim at a Florida law which you claimed was written by "a former president of the National Rifle Association" and pushed nationally by the American Legislative Exchange Council. Your comments seemed to imply that these groups' support for the legislation was somehow nefarious. With that in mind, please answer the following questions:

a. Do you agree that citizens have the right to petition their own governmentseven if it is done through donations to advocacy organizations they agree with?

Response: Yes.

b. Do you agree that dark money groups have an outsized influence on bothstate government and the federal government, including the federal judiciary?

Response: I have not studied the issue and formed an opinion. If I were confirmed and a case came before me that presented questions involving advocacy, lobbying, and fundraising in public policy, I would carefully study the applicable laws and precedent and apply them to the facts of the case.

c. Does it concern you that dark money groups, like Demand Justice and theLeadership Conference on Civil and Human Rights, support your nomination to the U.S. Court of Appeals for the Seventh Circuit?

Response: I am aware that Demand Justice and the Leadership Conference on Civil and Human Rights have stated publicly that they support my nomination. As indicated above, I have not studied the issue of dark money groups. If I were confirmed and a case came before me that presented questions involving advocacy, lobbying, and fundraising in public policy, I would carefully study the applicable laws and precedent and apply them to the facts of the case.

d. How is support for your nomination by groups like Demand Justice or theLeadership Conference on Civil and Human Rights different from supportby the National Rifle Association and the American Legislative Exchange Council for the enactment of "stand your ground" laws?

Response: My familiarity with these groups is limited and I do not have an opinion.

29. Have you spoken with anyone affiliated with Demand Justice or the Leadership Conference on Civil Rights regarding your nomination eitherbefore or after it was announced?

Response: No.

30. In an article titled "Ferguson and the Feds: How the Federal Government Is aPart of the Problem and the Solution," you praised the Obama Department ofJustice's use of pattern or practice investigations. In regards to pattern and practice investigations, at what point does the federal government's authority

to dictate specific policies and procedures employed by local law enforcementinfringe on the general police power granted to states?

Response: As I understand it, the purpose of the pattern and practice investigations Congress has authorized the Department of Justice to undertake pursuant to 34 U.S.C. § 12601 is to ensure that local law enforcement agencies are complying with the Constitution and federal law.

31. It has been reported that you met with President Biden to discuss your potential nomination to the Seventh Circuit. Once again, for the record, willyou confirm that President Biden did not discuss or ask for a commitment from you on any of the following issues:

a. Abortion or *Roe v. Wade*?

b. The Second Amendment, *District of Columbia vs. Heller* or *MacDonald v.Chicago*?

c. Efforts to defund the police?

d. Illegal immigration?

Response: As I testified at the confirmation hearing and as reflected in my answer to Question 26b of the Senate Judicial Questionnaire, President Biden did not discuss or ask for a commitment from me on any of the above issues.

Senator Ben Sasse
Questions for the Record
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
April 28, 2021

ANSWERS BY CANDACE JACKSON-AKIWUMI

For all nominees:

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

   Response: No.

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

   Response: No.

3. **Was Marbury v. Madison correctly decided?**
4. **Was Brown v. Board of Education correctly decided?**
5. **Was Loving v. Virginia correctly decided?**
6. **Was Roe v. Wade correctly decided?**
7. **Was United States v. Virginia correctly decided?**
8. **Was District of Columbia v. Heller correctly decided?**
9. **Was Boumediene v. Bush correctly decided?**
10. **Was Citizens United v. FEC correctly decided?**
11. **Was Obergefell v. Hodges correctly decided?**

    Response to Questions 3-11: The Supreme Court decisions listed above are binding precedent. If confirmed, I would apply the precedent above fully and faithfully. Prior judicial nominees have made exceptions to the practice of avoiding comment on the merits of Supreme Court decisions to acknowledge that *Marbury v. Madison*, *Brown v. Board of Education*, and *Loving v. Virginia* were correctly decided. I agree.

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

    Response: Federal Rule of Appellate Procedure 35 contains factors a circuit judge must consider when deciding whether to hear or rehear a case en banc. En banc proceedings are "not favored." F.R.A.P. 35(a). However, en banc proceedings may be appropriate if a panel decision "conflicts with a decision of the Supreme Court or of the court to which the petition is addressed" or "the proceeding involves one or more questions of exceptional

importance." F.R.A.P. 35(b)(1)(A) & (B). In general, the principles of stare decisis apply to Seventh Circuit decisions. *See, e.g.*, *Tate v. Showboat Marina Casino P'ship*, 431 F.3d 580, (7th Cir. 2005) ("The doctrine of stare decisis imparts authority to a decision, depending on the court that rendered it, merely by virtue of the authority of the rendering court and independently of the quality of its reasoning. The essence of stare decisis is that the mere existence of certain decisions becomes a reason for adhering to their holdings in subsequent cases." (internal quotation marks and citation omitted)).

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

    Response: Please see my response to Question 12.

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

    Response: Congress has set forth the factors a judge should consider when imposing a sentence, which includes "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a) (6). Most courts have held that this sentencing factor looks to "national disparities." *See, e.g.*, *United States v. Fry*, 792 F.3d 884, 892 (8th Cir. 2015) (collecting cases). Judges are not permitted to impose different sentences on defendants with similar records and similar conduct based on their race. *See United States v. Bridgewater*, 950 F.3d 928, 936 (7th Cir. 2020). The Supreme Court has recognized that any perception of any unwarranted sentencing disparities based on race undermines confidence in the criminal justice system. *See Kimbrough v. United States*, 552 U.S. 85, 98 (2007).

<u>For Ms. Candace Jackson-Akiwumi</u>

1. **Why did you choose to become a Staff Attorney for the Federal Defender Program?**

   Response: I chose to become a Staff Attorney for the Federal Defender Program for the Northern District of Illinois because I wanted to return to public service from the private practice of law; engage in the direct representation of individual clients; help uphold our nation's constitutional principles; and work as both a trial attorney and appellate attorney.

2. **Were you ever concerned that your work for the Federal Defender Program would result in more violent criminals—including gun criminals—being put back on the streets?**

   Response: No.

Questions for the Record for
Senator Thom Tillis for
Questions for Ms. Candace Rae Jackson-Akiwumi

1. Ms. Jackson-Akiwumi, 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: The term "judicial activism" has different meanings for different people. I interpret it to mean judicial decision-making that has been injected with the judge's personal views or gone beyond the issues presented for review. Neither is appropriate. Canon 3 of the Code of Conduct for United States Judges states that judges "should not engage in behavior that is . . . biased," "should not be swayed by partisan interests, public clamor, or fear of criticism," and "should hear and decide matters assigned."

3. **Ms. Jackson-Akiwumi, do you believe impartiality is an aspiration or an expectation for a judge**?

Response: Canon 3 of the Code of Conduct for United States Judges states that "a judge should perform the duties of the office fairly, impartially, and diligently." The canon confirms that impartiality is expected of judges.

4. Ms. Jackson-Akiwumi, should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?

Response: No. A judge should be guided first and foremost by law and precedent, as applied to the facts of the case, in reaching a decision, regardless of the outcome.

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

Response: Yes. A judge should be guided first and foremost by law and precedent, as applied to the facts of the case, in reaching a decision, regardless of the outcome.

6. Ms. Jackson-Akiwumi, should a judge interject his or her own politics or policy preferences when interpreting and applying the law?

Response: No.

7. Ms. Jackson-Akiwumi, if you are confirmed, what will you do to protect Americans' right to practice their faith during this incredibly difficult time?

Response: The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." If confirmed, I can assure any litigants who would come before me that I understand a circuit judge's role is to uphold the Constitution and to decide, in a fair and impartial

manner, each case that comes before the court. This includes cases arising under the Free Exercise and Establishment Clauses of the First Amendment.

8. Ms. Jackson-Akiwumi, is there a line where a First Amendment activity or peaceful protesting becomes rioting and is no longer protected? What is that line? Do you agree that looting, burning property, and causing other destruction is not a protected First Amendment activity?

Response: The Supreme Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), governs: "The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Thus, the First Amendment does not protect speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id*.

9. Ms. Jackson- Akiwumi, 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: The Supreme Court and circuit courts are actively considering litigation arising from the COVID-19 pandemic. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). Canon 3 of the Code of Conduct for United States Judges, which applies to

judicial nominees, prevents me from commenting on pending or impending matters. In general, if I am confirmed, and subsequently presented with a case involving any constitutional question, I would look to the text of the Constitution and to the binding precedent of the Supreme Court and the Seventh Circuit in evaluating the case.

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

Response: The Second Amendment states: "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." The Second Amendment guarantees the fundamental right of individuals to keep and bear arms. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010). If confirmed, I can assure any litigants who would come before me that I understand a circuit judge's role is to uphold the Constitution and to decide, in a fair and impartial manner, each case that comes before the court. This includes cases arising under the Second Amendment.

11. 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: I have not served as judge before and thus have not considered cases regarding qualified immunity. If I am confirmed, and subsequently presented with a case involving a

qualified immunity defense, I would adhere to the binding precedent of the Supreme Court and Seventh Circuit on qualified immunity. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

12. 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: If I am confirmed, and subsequently presented with a case involving a qualified immunity defense, I would adhere to the binding precedent of the Supreme Court and Seventh Circuit on qualified immunity. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Any personal views I might have on any category of jurisprudence would be irrelevant in interpreting and applying the law.

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

Response: Cases involving qualified immunity frequently come before federal courts. Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prevents me from commenting on pending or impending matters. In general, if confirmed, I would faithfully apply Supreme Court and Seventh Circuit precedent on qualified immunity.

14. Do you agree with the current state of the *Chevron* deference doctrine? Or do you believe there should be either more or less deference given to agencies?

Response: *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is binding Supreme Court precedent. Circuit judges are bound by Supreme Court precedent and the precedent of their circuit on any subject, including administrative law. Any personal views I might have on any category of jurisprudence would be irrelevant in interpreting and applying the law.

15. How have your views on agency deference developed during your time as a district judge?

Response: I have not been a district judge.

16. Are you a bold progressive champion? If yes, please explain.

Response: I do not know what the term above refers to and I have never used those words to describe myself.

17. Have you been on the front lines advancing the law for progressive values? If yes, please explain.

Response: I do not know to what the phrase above refers. Judges, court staff, prosecutors, public defenders, probation officers, and pretrial service officers are on the front lines of our country's criminal legal system every day, and I was a part of that system for a decade as a federal public defender.

18. Some are demanding that Justice Breyer retire. Do you agree that should Justice Breyer retire this year, President

Biden would have the right to nominate someone to fill that seat on the Supreme Court?

Response: Article II, Section 2 of the Constitution states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the [S]upreme Court . . . ." It would not be appropriate for me to comment further on the matter.

19. How would you respond if a group ran ads and publicly called for you to retire as a Circuit Court Judge?

Response: I would not respond.

20. Do you agree with that Justice Breyer should retire? If not, why not?

Response: I have tremendous respect for the Supreme Court and I take seriously the integrity and independence of the federal judiciary. Therefore, I do not find it appropriate to opine on this question.