

**Senator Chuck Grassley, Ranking Member**  
**Questions for the Record**  
**Mr. Charles Esque Fleming**  
**Nominee to be United States District Judge, Northern District of Ohio**

- 1. What is the legal standard for determining whether a picture depicts “lascivious” conduct in the Sixth Circuit and in the Supreme Court?**

Response: The Sixth Circuit uses a six-factor test to determine whether a depiction is lascivious. It has stated that the list is not exhaustive and all of the factors do not have to be satisfied. *United States v. Brown*, 579 F.3d 672, 680 (6<sup>th</sup> Cir. 2009).

The Court also held that a sentencing judge may go beyond the four corners of the depiction to a limited extent to determine whether they are lascivious. It developed a three-factor test: (1) where, when, and under what circumstances the photographs were taken, (2) the presence of other images of the same victim(s) taken at or around the same time, and (3) any statements a defendant made about the images. *Id.* at 683-684

It does not appear that the Supreme Court has issued an opinion on the standard for determining whether a depiction is lascivious.

- 2. You previously argued that 18 U.S.C. 2251(b) “is unconstitutional as it regulates more conduct than Congress intended,” and you also wrote that “Congress did not intend to use the Commerce Clause power to regulate all visual depictions of minors engaged in sexually explicit conduct.”**

- a. Please explain how a federal statute written by Congress is purportedly unconstitutional because the statute “regulates more conduct than Congress intended.”**

Response: Fifteen years ago in *United States v. Brown*, 2006 WL 3203747 (6<sup>th</sup> Cir. November 6, 2006), we raised a legal question as to whether conduct my client engaged in was properly within the statute at issue. At the time we made this argument on behalf of our client, this was an open question under Sixth Circuit caselaw. The trial court and the Sixth Circuit rejected this challenge; the Supreme Court denied certiorari. As a federal defender, I have been ethically obligated to zealously advocate for my clients. However, I understand that the role of the judge is very different from the role of an advocate. Any prior work I engaged in as an advocate would play no role in my work as a judge. If I am so fortunate to be confirmed, I will follow Supreme Court and Sixth Circuit precedent.

- b. **What sources should courts look to beyond the text of the statute in determining whether a statute is unconstitutional because it went beyond what “Congress intended”?**

Response: If I am so fortunate to be confirmed and a case before me raises this issue, I would first look to Supreme Court and Sixth Circuit precedent on the issue. If a case of first impression were to come before me, I would first look to the text to determine congressional intent. The text of a statute is always the best evidence of what Congress intended. If it is clear from the text, my analysis would stop there. If the text was ambiguous, I would look to canons of statutory construction and persuasive authority from other circuits and my district on the topic. In the absence of that, I would consult the legislative history of the statute.

3. **Do you believe that “[g]enuine partnership with nonprofit organizations and advocacy groups must be at the center of efforts to create a network of supports that function effectively, equitably, and without funneling people into the criminal legal system”? Please explain why or why not.**

Response: In my 30-plus years as a litigator in federal court I have not had occasion to address, nor have I been approached with, this issue. I have no position as to its accuracy. If I am so fortunate to be confirmed, my personal beliefs regarding this statement would be irrelevant. I would decide the cases before me fairly and impartially without regard to my personal beliefs.

4. **What is more important during the COVID-19 pandemic—protecting the community from violent, repeat firearm offenders or releasing violent firearm reoffenders to the community to protect the defendant from COVID-19?**

Response: If matters come before me concerning the release or detention of a person who is alleged to be a repeat, violent, firearm offender, I will follow any applicable Supreme Court and Sixth Circuit precedent; I will also consider the appropriate factors including danger to the community in rendering a fair and impartial decision.

5. **Is a defendant continuing a sexual relationship with the victim after being convicted of corruption of a minor (sometimes referred to as statutory rape) a reason for a downward departure due to a defendant’s criminal history if the defendant is convicted of other crimes in the future? Please explain why or why not.**

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on what may be a potential basis for downward departure as to the defendant’s criminal history, as this issue may come before me as a judge. If confirmed, all of my sentencing decisions would be guided by the factors Congress

has set out in 18 U.S.C. §3553(a), noting for example “the need for the sentence imposed...to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.” 18 U.S.C. §3553(a)(2)(A).

- 6. Is the fact that a defendant had been previously convicted of a crime of violence several years before a sufficient reason to justify not counting a conviction toward a defendant’s career offender status, or to justify a downward departure from the guidelines? Please explain why or why not.**

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on what may be potential bases for downward departure as to the defendant’s criminal history or what prior convictions may not count, as this issue may come before me as a judge. If confirmed, all of my sentencing decisions would be guided by the factors Congress has set out in 18 U.S.C. §3553(a), noting for example, “the need for the sentence imposed...to reflect the seriousness of the offense to promote respect for the law, and to provide just punishment for the offense.” 18 U.S.C. §3553(a)(2)(A).

- 7. Then-Senator Joe Biden co-sponsored the 1986 Anti-Drug Abuse Law that provided the foundation for the disparity between crack and cocaine. You authored an editorial decrying the impact of the law.**

- a. How have you attempted to shield your clients from the fall-out of the law?**

Response: I have zealously advocated through plea negotiation, trial, and sentencing in an effort mitigate the effects of the statute as to my clients.

- b. Will you allow your prior advocacy efforts to influence your decisions on the bench, if confirmed?**

Response: If I am so fortunate to be confirmed, my efforts as an advocate will play no part in my decision making as a judge.

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

Response: This issue is better left to policymakers to decide.

**9. Several weeks ago, Attorney General Merrick Garland announced imminent action against parents protesting various policies being implemented at public schools across the country.**

- a. Do you think it is appropriate for the DOJ to weaponize federal law enforcement agencies against concerned parents discussing changes to their children’s curriculum at local school board meetings?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on the propriety of DOJ actions. Cases may come before me which raise issues related to this. If so, I will apply Supreme Court and Sixth Circuit precedent to the facts and circumstances of the case in rendering a fair and impartial decision.

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

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

Response: Under the First Amendment, all people have the right to freedom of speech. Any group may engage in peaceful protests subject generally to reasonable time, place, and manner restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

- ii. Black Lives Matter protestors?**

Response: See answer to 9.b.i.

- iii. Climate change protestors?**

Response: See answer to 9.b.i.

- iv. Religious groups protesting abortion?**

Response: See answer to 9.b.i.

**10. Should judicial decisions take into consideration principles of social “equity”?**

Response: I have never heard the term social equity and have not formulated an opinion as to its meaning. Equity is defined as “fairness; impartiality; justice”. *Equity*, Webster’s New World Dictionary (3d College ed. 1994). If I am so fortunate to be confirmed, the principles of fairness, impartiality, and justice will be at the core of every decision I make.

**11. Do you believe that legal gun purchases have caused the violent crime spike in Cleveland?**

Response: I have no data upon which to base a conclusion as to this question.

**12. What is implicit bias?**

Response: The dictionary defines implicit bias as “a [bias](#) or prejudice that is present but not consciously held or recognized”. *Implicit bias*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/implicit%20bias>.

**13. Is the federal judiciary affected by implicit bias?**

Response: I have no data upon which to base a conclusion as to this question. If I am so fortunate to be confirmed, I will fairly and impartially decide the matters before me without bias or prejudice.

**14. What is the legal standard for “threats” in the Sixth Circuit?**

Response: The Sixth Circuit defines threat as follows: “The word ‘threat’ means a statement that is a serious expression of intent to inflict bodily harm on a particular person [or group] that a reasonable observer would perceive to be an authentic threat.” Sixth Circuit Pattern Jury Instructions §18.01 (2021).

**15. Please state the governing law for self-defense in Ohio and the Sixth Circuit.**

Response: In Ohio, “a person is allowed to act in self-defense, defense of another, or defense of that person's residence. If, at the trial of a person who is accused of an offense that involved the person's use of force against another, there is evidence presented that tends to support that the accused person used the force in self-defense, defense of another, or defense of that person's residence, the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense, defense of another, or defense of that person's residence, as the case may be”. Ohio Rev. Code §2901.05(B)(1) (2021).

In the Sixth Circuit, a person is entitled to defend himself against the immediate use of unlawful force. But the right to use force in self-defense is limited to using only as much force as reasonably appears to be necessary under the circumstances. The government has the burden of proving that the defendant did not act in self-defense. Sixth Circuit Pattern Jury Instruction §6.06 (2021).

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on policy matters. This is better left to a legislative body.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on policy matters. This is better left to a legislative body.

**18. Do you believe that the federal government should reallocate funds away from the Department of Justice, specifically, U.S. Attorney's Offices, to provide greater support to the Federal Public Defenders?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on policy matters. This is better left to a legislative body.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on policy matters. This is better left to a legislative body. I would also note that if I am so fortunate to be confirmed, I would faithfully apply all federal laws, including laws related to illegal drugs.

**20. Do you believe the federal government should expand the use of the safety valve? What alterations do you believe should be adopted?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on policy matters. These issues are better left to Congress and the U.S. Sentencing Commission.

**21. How will Cleveland's recently passed Amendment 24 impact the relationship between police, social workers and victims?**

Response: Issue 24 was voted into law in early November, 2021. It will create a civilian commission to, among other things, oversee police training and discipline.

It has not yet been implemented. In addition, as a judicial nominee and if I am so fortunate to be confirmed, I would not comment on policy matters involving legislation or ballot initiatives.

**22. In what situation(s) does qualified immunity not apply to a law enforcement officer in Ohio?**

Response: Under Ohio law, a law enforcement officer is not entitled to qualified immunity when: 1) the officer's acts or omissions fall outside the scope of their employment or responsibilities, 2) the officer's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner, or 3) Ohio law otherwise expressly imposes civil liability upon the officer. Ohio Rev. Code §2744.03(A)(6) (2003). The Supreme Court decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) would also apply to officers in Ohio charged with violations of federal law.

**23. What is the legal basis for a nationwide injunction?**

Response: In general, all injunctions are governed by Rule 65 of the Federal Rules of Civil Procedure. While the Supreme Court has considered matters regarding nationwide injunctions, there is ongoing debate as to the power of Article III district court judges to issue injunctions that go beyond the parties to the case or controversy before them. I would carefully adhere to Supreme Court and Sixth Circuit precedent, and the text of Rule 65, if a matter came before me where a party sought any injunction, much less a nationwide injunction.

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

Response: Yes. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)

**25. In a False Claims Act case, what is the standard used by the Sixth Circuit for determining whether a false claim is material?**

Response: The Sixth Circuit looks at several factors in determining materiality including: "1) the government's decision to expressly identify a provision as a condition of payment, 2) whether the government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, contractual requirement or if, with actual knowledge of the noncompliance, it consistently pays such claims and there is no indication that its practice will change, and 3) whether the noncompliance is minor or insubstantial or if it goes to the very essence of the bargain." *United States ex rel. Prather v. Brookdale Senior Living Communities*, 892 F.3d 822, 831 (6<sup>th</sup> Cir. 2018) (citations and quotations omitted). The Court has held that none of the factors is dispositive and the list is not exclusive. *Id.*

**26. What legal standard and circuit precedents would you apply in evaluating whether a regulation or statute infringes on Second Amendment rights?**

Response: I would apply the Sixth Circuit's decision in *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678, 685-686 (6<sup>th</sup> Cir. 2016). In it, the Court used a two-step inquiry: "The first step asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood. If the government establishes that the challenged law regulates activity outside the scope of the Second Amendment as understood at the time of the framing of the Bill of Rights, the activity is unprotected and the law is not subjected to further constitutional scrutiny. If, however, the historical evidence is inconclusive or suggests that the regulated activities—or in our case the regulated individuals—are not categorically unprotected, then we must ascertain the appropriate level of scrutiny and examine the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." (Citations and quotations omitted). "[U]nless the conduct at issue is categorically unprotected, the government bears the burden of justifying the constitutionality of the law under a heightened form of scrutiny." *Id.*

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

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

Response: Yes. As a judicial nominee and if I am so fortunate to be confirmed, I would normally not comment on the correctness of a Supreme Court decision. However, I make an exception in this case because the issue decided is not likely to come before me.

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

Response: Yes. As a judicial nominee and if I am so fortunate to be confirmed, I would normally not comment on the correctness of a Supreme Court decision. However, I make an exception in this case because the issue decided is not likely to come before me.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on the correctness of a Supreme Court decision. I would follow applicable Supreme Court precedent in fairly and impartially deciding cases which come before me.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on the correctness of a Supreme Court decision. I would follow

applicable Supreme Court precedent in fairly and impartially deciding cases which come before me.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on the correctness of a Supreme Court decision. I would follow applicable Supreme Court precedent in fairly and impartially deciding cases which come before me.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on the correctness of a Supreme Court decision. I would follow applicable Supreme Court precedent in fairly and impartially deciding cases which come before me.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on the correctness of a Supreme Court decision. I would follow applicable Supreme Court precedent in fairly and impartially deciding cases which come before me.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on the correctness of a Supreme Court decision. I would follow applicable Supreme Court precedent in fairly and impartially deciding cases which come before me.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on the correctness of a Supreme Court decision. I would follow applicable Supreme Court precedent in fairly and impartially deciding cases which come before me.

**28. Demand Justice is a progressive organization dedicated to “restor[ing] ideological balance and legitimacy to our nation’s courts.”**

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: Not applicable.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: In March, 2021, I submitted my application for a judicial position in the Northern District of Ohio. On May 22, 2021, I was interviewed by a bipartisan commission appointed by Senators Brown and Portman. I was subsequently notified that my name was one of nine being given to the senators for consideration. On June 4, 2021, I interviewed with members of Senator Brown’s staff. On June 11, 2021, I was interviewed by Senator Portman. On June 24, 2021, I interviewed with Senator Brown and his staff. On July 2, 2021, I was notified by Senator Brown that my name was being recommended to President Biden for nomination for a judgeship in the Northern District of Ohio.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: To the best of my recollection, I have been in communication with White House and Justice Department staff since July 14, 2021.

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

Response: No.

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

Response: I received these questions on November 24, 2021. I reviewed each question, conducted any necessary research, reviewed my cases or records as necessary, and answered each question to the best of my ability. I also received feedback from the Justice Department's Office of Legal Policy before finalizing my answers to the committee.

**Senator Marsha Blackburn**  
**Questions for the Record to Charles Esque Fleming**  
**Nominee for the Northern District of Ohio**

- 1. Both the Violence Against Women Act and the Civil Rights Act of 1964 derived their authority from the Commerce Clause. But in *United States v. Brown*, you argued that a client who was convicted of using his granddaughters to produce child sexual exploitation material could not be convicted under 18 U.S.C. § 2251. That statute relies on the Commerce Clause, yet in your view, “Congress did not intend to use the Commerce Clause power to regulate all visual depictions of minors engaged in sexually explicit conduct.” Do you believe Congress and the federal government lack the authority to prohibit all forms of child sexual exploitation material under the Commerce Clause?**

Response: Fifteen years ago in *United States v. Brown*, 2006 WL 3203747 (6<sup>th</sup> Cir. November 6, 2006), we raised a legal question as to whether conduct my client engaged in was properly within the statute at issue. At the time we made this argument on behalf of our client, this was an open question under Sixth Circuit caselaw. The trial court and the Sixth Circuit rejected this challenge; the Supreme Court denied certiorari. As a federal defender, I have been ethically obligated to zealously advocate for my clients. However, I understand that the role of the judge is very different from the role of an advocate. Any prior work I engaged in as an advocate would play no role in my work as a judge. If I am so fortunate to be confirmed, I will follow Supreme Court and Sixth Circuit precedent.

- 2. If you answered yes to question 1, do you also oppose the Violence Against Women Act and the Civil Rights Act of 1964?**

Response: Not applicable.

**Senator Mike Lee**  
**Questions for the Record**  
**Charles Fleming, District Judge Nominee for the Northern District of Ohio**

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

Response: If I am so fortunate to be confirmed, my duty would be to uphold the Constitution and the laws of the United States. I would apply the law to only the facts and circumstances before me in a manner that is fair, impartial, and respectful to the parties.

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

Response: If there is binding precedent interpreting the provision at issue, that precedent would control my interpretation. If there is no binding precedent, I would first look to the text of the statute. If it is clear, I would stop there. If the text is ambiguous, I would consider the text while looking to the canons of statutory construction and consider persuasive authority from other circuits or in my district. If there is none of the mentioned precedent, I would consult the legislative history for guidance.

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

Response: If there is binding precedent interpreting the provision at issue, that precedent would control my interpretation. If there is no binding precedent, I would first look to the text of the provision. If it is clear, I would stop there. If the text is ambiguous, I would consider the text while looking to persuasive authority from other circuits or in my district.

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

Response: In interpreting a provision of the Constitution, I would first look to the text to determine the plain meaning. I also would follow Supreme Court and Sixth Circuit precedent as to the role of text and original meaning.

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

Response: The plain meaning controls if the text is clear and unambiguous. If it is ambiguous, I would follow the procedure in my answer to question 2.

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

Response: The plain meaning refers to the ordinary meaning of the text of the statute. If it is clear and unambiguous, the text controls. If it is ambiguous, I would follow the procedure in my answers to questions 2 and 3.

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

Response: To have standing, a plaintiff must establish three elements: 1) the plaintiff must have suffered an actual injury, 2) there must be a causal connection between the injury and the conduct complained of, and 3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

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

Response: In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that under the Necessary and Proper Clause, Congress has implied powers necessary to carry out its enumerated powers.

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

Response: If I am so fortunate to be confirmed, I would look to precedent to determine whether the Supreme Court and/or the Sixth Circuit have upheld the constitutionality of the statute, or have addressed the constitutionality of similar federal or state laws. If there are no cases from either court on these topics, I would look to persuasive authority from other circuits or my district.

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

Response: The Supreme Court has stated that rights enumerated in the Bill of Rights have penumbras, or implied rights which are not enumerated. It has stated that the First, Third, Fourth, Fifth, and Fourteenth Amendments have penumbral rights, such as the right to privacy. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (citations omitted); *Loving v. Virginia*, 388 U.S. 1 (1967) (the right to marry); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (the right to have children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (the right to direct the education and upbringing of one's child); *Rochin v. California*, 342 U.S. 165 (1952) (the right to bodily integrity).

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

Response: The Supreme Court has held that the Due Process clauses of the Fifth and Fourteenth Amendments protect “those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation's history and tradition’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they

were sacrificed””. *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (citations omitted). Please see response to question 9.

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

Response: See response to questions 9 and 10 above.

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

Response: The Supreme Court has stated that Congress may regulate: 1) the use of channels of interstate commerce, 2) instrumentalities of interstate commerce (or persons/items in interstate commerce, or 3) activities having a substantial relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-559 (1995).

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

Response: The Supreme Court has identified race, national origin, religion, and alienage as suspect classes. *Johnson v. Robison*, 415 U.S. 361 (1974); *Graham v. Richardson*, 403 U.S. 365 (1971).

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

Response: Our tripartite form of government (Executive, Legislative, and Judicial branches), as established in the Constitution, gives each branch limited powers and responsibilities. Yet each branch acts as a check/balance as to the others to ensure that no branch has absolute and undisputed power.

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

Response: I would look to the text of the Constitution to determine what authority was expressly granted to the particular branch, and I would follow Supreme Court and Sixth Circuit precedent on the issue.

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

Response: Empathy should play no role in a judge’s decision making. If I am so fortunate to be confirmed, I would follow Supreme Court and Sixth Circuit precedent relevant to the issues in the case, and would fairly and impartially decide the matter without regard to empathy.

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

Response: Both situations are equally unfavorable.

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

Response: I do not have a position on any change in the Supreme Court's decision making. I would follow all precedent of the Supreme Court and the Sixth Circuit in deciding cases regarding the constitutionality of statutes.

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

Response: Judicial review relates to the Supreme Court's review of the constitutionality of the actions of the legislative and executive branches. Judicial supremacy relates to the Supreme Court being the final interpreter of the Constitution.

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

Response: I have no position on the obligations of elected officials. If a case or controversy comes before me raising as an issue the duties of elected officials, I will apply relevant Supreme Court and Sixth Circuit precedent to fairly and impartially decide the matter before me.

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

Response: Courts of law have a singular purpose: to fairly and impartially interpret and apply the law to the cases/controversies which come before them and render a just decision.

22. **As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when**

**confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand?**

Response: If I am so fortunate to be confirmed and if there is no mandatory precedent from the Supreme Court or the Sixth Circuit which applies to the issues before me, I would look to persuasive authority from other circuits and my district that has addressed the issue. If that is unavailing, I would look to cases in the Supreme Court and the Sixth Circuit that addressed similar issues for guidance.

- 23. In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?**

Response: If I am so fortunate to be confirmed, I would apply Supreme Court and Sixth Circuit precedent fairly and impartially to the facts and circumstances of the case or controversy before me.

- 24. 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: If I am so fortunate to be confirmed, the defendant's group identity would not factor into my sentencing decision. However, 18 U.S.C. §3553(a) does instruct sentencing judges to consider, among other factors, the need to avoid unwarranted sentence disparities between similarly situated defendants. I would consider that provision, and the remaining factors in the statute, in every sentencing.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I have no position as to President Biden's definition of equity. Equity is defined as "fairness; impartiality; justice". *Equity*, Webster's New World Dictionary (3d College ed. 1994). If confirmed, I will decide every matter which comes before me with fairness, impartiality, and justice.

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

Response: Equality is defined as “the state or instance of being equal”. *Equality*, Webster’s New World Dictionary (3d College ed. 1994). (Please see definition of equity in the response to question 25).

**27. Should equity be taken into consideration in determining the outcome of a case?**

Response: Based on the dictionary definition which defines equity in terms of fairness, impartiality, and justice (please see response to question 25), equity should be considered in every case.

**28. Does the 14<sup>th</sup> Amendment’s equal protection clause guarantee “equity” as defined by the Biden Administration (listed above in question 24)?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, I have no position regarding the President’s definition of equity. The 14<sup>th</sup> Amendment’s Equal Protection Clause, as well as its Due Process Clause, are intended to ensure equal protection under the law and fundamental fairness. Based on the dictionary definition of equity (please see response to question 25), this indicates that equity is a consideration.

**29. How do you define “systemic racism?”**

Response: This is a term that is defined differently by different sources, and I do not have a position as to what constitutes systemic racism. If I am so fortunate to be confirmed, race would play no part in my decision making.

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

Response: This is a term that is defined differently by different sources, and I do not have a position as to what constitutes critical race theory. If I am so fortunate to be confirmed, race would play no part in my decision making.

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

Response: These are terms that are defined differently by different sources, and I do not have a position as to what constitutes critical race theory or systemic racism. I also do not have a position as to what, if any, distinction there is between them.

**Senator Ben Sasse**  
**Questions for the Record for Nominee Charles Fleming**  
**U.S. Senate Committee on the Judiciary**  
**Hearing: “Nominations”**  
**November 17, 2021**

Questions 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, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

Response: No.

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

Response: If I am so fortunate to be confirmed, my duty would be to uphold the Constitution and the laws of the United States. I would apply the law to only the facts and circumstances before me in a manner that is fair, impartial, and respectful to the parties.

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

Response: I do not define myself by any labels or terms. For my judicial philosophy, please see my response to question 3.

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

Response: Please see my response to question 4.

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

Response: I have not referred to the Constitution as a living document, and have no opinion as to that. I believe the Constitution is an enduring document.

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

Response: I admire, among others, Justice Thurgood Marshall. As the first African American on the Supreme Court, he was a trailblazer.

**8. Was *Marbury v. Madison* correctly decided?**

Response: Yes. As a judicial nominee and if I am so fortunate to be confirmed, I would normally not comment on the correctness of a Supreme Court decision. However, I make an exception in this case because the issue decided is not likely to come before me.

**9. Was *Lochner v. New York* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

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

Response: Yes. As a judicial nominee and if I am so fortunate to be confirmed, I would normally not comment on the correctness of a Supreme Court decision. However, I make an exception in this case because the issue decided is not likely to come before me.

**11. Was *Bolling v. Sharpe* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

**12. Was *Cooper v. Aaron* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

**13. Was *Mapp v. Ohio* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

**14. Was *Gideon v. Wainwright* correctly decided?**

Response: Yes. As a judicial nominee and if I am so fortunate to be confirmed, I would normally not comment on the correctness of a Supreme Court decision. However, I make an exception in this case because the issue decided is not likely to come before me.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

**16. Was *South Carolina v. Katzenbach* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

**17. Was *Miranda v. Arizona* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

**18. Was *Katzenbach v. Morgan* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

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

Response: Yes. As a judicial nominee and if I am so fortunate to be confirmed, I would normally not comment on the correctness of a Supreme Court decision. However, I make an exception in this case because the issue decided is not likely to come before me.

**20. Was *Katz v. United States* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

**22. Was *Romer v. Evans* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

**23. Was *United States v. Virginia* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

**24. Was *Bush v. Gore* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

**26. Was *Crawford v. Marion County Election Board* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

**27. Was *Boumediene v. Bush* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

**28. Was *Citizens United v. Federal Election Commission* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

**29. Was *Shelby County v. Holder* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

**30. Was *United States v. Windsor* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

**31. Was *Obergefell v. Hodges* correctly decided?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, it would not be appropriate to comment on Supreme Court precedent. I would follow all Sixth Circuit and Supreme Court precedent in deciding the cases and controversies before me.

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

Response: In the Sixth Circuit, only the court *en banc* can overturn the reported decision of a panel of the court. Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, *en banc* hearings should only be ordered when “necessary to secure or maintain uniformity of the court’s decisions” or “the proceeding involves a question of exceptional importance.” If I am so fortunate to be confirmed, I would play no role in deciding whether any appellate court chose to reaffirm its own precedent.

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

Response: In the Sixth Circuit, only the court *en banc* can overturn the reported decision of a panel of the court. Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, *en banc* hearings should only be ordered when “necessary to secure or maintain uniformity of the court’s decisions” or “the proceeding involves a question of exceptional

importance.” If I am so fortunate to be confirmed, I would play no role in deciding whether any appellate court chose to reaffirm its own precedent.

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

Response: This depends on the clarity of the statute itself and the extent to which it has been interpreted by the Sixth Circuit and/or the Supreme Court. If there is binding precedent interpreting the provision at issue, that precedent would control my interpretation. If there is not binding precedent but the text of the statute is clear, there is no need to go further. If the statute is ambiguous and neither court has interpreted it, persuasive precedent from other circuits or my district may be helpful. If there is no precedent of any kind interpreting the statute, the legislative history may be of some assistance. If I am so fortunate to be confirmed, my personal opinion regarding general principles of justice would play no part in interpreting a statute.

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

Response: If I am so fortunate to be confirmed, race would not factor into my sentencing decisions. The United States Code at 18 U.S.C. §3553(a) instructs sentencing judges to consider a list of factors, including the need to avoid unwarranted sentence disparities between similarly situated defendants. I would consider that provision, and the other factors listed in the statute, in every sentencing.

**Questions from Senator Thom Tillis for Charles Esque Fleming**  
**Nominee to be United States District Judge for the Northern District of Ohio**

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

Response: Yes.

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

Response: This is a term that is defined differently by different sources and I have no position as to what constitutes judicial activism. If I am so fortunate to be confirmed, I will follow Supreme Court and Sixth Circuit precedent and apply the same fairly and impartially to the cases and controversies before me.

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

Response: It is an expectation.

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

Response: No.

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

Response: If I am so fortunate to be confirmed, I recognize that the outcome of a case is often undesirable to some party. When a matter goes to trial, generally, someone will lose. The outcome will usually be undesirable to that party no matter how fair and impartial the judge is in applying the law. There is no way to reconcile this. It is part and parcel of our justice system.

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

Response: No.

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

Response: If I am so fortunate to be confirmed, I would apply the Second Amendment jurisprudence of the Supreme Court and the Sixth Circuit fairly and impartially to the matter

before me. This would include the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010).

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

Response: As a judicial nominee and if am so fortunate to be confirmed, I would not comment on hypothetical scenarios which raise issues that may come before me as judge. If as judge any of these issues were raised in a case before me, I would fairly and impartially decide the matter applying Supreme Court and Sixth Circuit precedent to the facts and issues before me.

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

Response: The Supreme Court has stated that the qualified immunity defense does not apply when the government official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). It is an affirmative defense that must be pleaded by the defendant. *Id.* The Sixth Circuit has stated that a defendant official is not entitled to qualified immunity if "(1) the defendant violated a constitutional right; and (2) the right was clearly established." *Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 680-681 (6<sup>th</sup> Cir. 2013) (citations omitted). If the defendant raises the defense of qualified immunity, the plaintiff bears the burden of establishing that the defendant is not entitled to qualified immunity. *Id.* If I am so fortunate to be confirmed, I will fairly and impartially decide any matter involving qualified immunity issues by applying Supreme Court and Sixth Circuit precedent to the facts and circumstances before me.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment as to the sufficiency of qualified immunity jurisprudence. I will fairly and impartially decide any matter involving qualified immunity issues by applying Supreme Court and Sixth Circuit precedent to the facts and circumstances before me.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment as to the appropriate scope of qualified immunity protections. This is a policy matter better decided by the legislature.

**12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?**

Response: In my 30-plus years of experience as a litigator in federal court, including trial and appellate practice, I have not practiced patent law. If a case or controversy before me should present a patent eligibility issue, I will apply Supreme Court precedent in fairly and impartially rendering a decision.

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

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

Response: In my 30-plus years of experience as a litigator in federal court, including trial and appellate practice, I have not practiced patent law. If a case or controversy before me should present a patent eligibility issue, I will apply Supreme Court precedent in fairly and impartially rendering a decision.

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

Response: Please see my answer to 13a.

- c. ***HumanGenetics* Company** wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if ***HumanGenetics* Company** wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?

Response: Please see my answer to 13a.

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

Response: Please see my answer to 13a.

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

Response: Please see my answer to 13a.

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

Response: Please see my answer to 13a.

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

Response: Please see my answer to 13a.

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

Response: Please see my answer to 13a.

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

Response: Please see my answer to 13a.

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

Response: Please see my answer to 13a.

14. Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the

**Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on the clarity and consistency of current jurisprudence. If a case came before me regarding the mentioned issues, I would apply Supreme Court and Sixth Circuit precedent to the facts and issues before me in rendering a fair and impartial decision. As to the ineligibility tests, I would follow Supreme Court and Sixth Circuit precedent as to how the tests are to be applied in a particular case.

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

**a. What experience do you have with copyright law?**

Response: In my 30-plus years of experience as a litigator in federal court, including trial and appellate practice, I have not practiced copyright law. When I made the transition from civil practice to federal criminal practice, I had to familiarize myself with very complex areas of federal criminal law and sentencing in a very short period of time. If I am so fortunate to be confirmed and preside over a case involving copyright law, I will quickly familiarize myself with applicable statutory law, and Supreme Court and Sixth Circuit precedent. I will do this to ensure that I render a fair and impartial decision that comports with the law and precedent.

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

Response: Please see my answer to 15a.

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

Response: Please see my answer to 15a.

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

Response: Please see my answer to 15a.

16. **The legislative history of the Digital Millennium**

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

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

Response: If I am so fortunate to be confirmed and assuming the text is ambiguous, I would closely examine the text of the statute and any Supreme Court and Sixth Circuit precedent on analogous issues. In the absence of such precedent, I would look to canons of statutory construction and persuasive authority from other circuits and my district on the issue. If that is unavailing, I would then consider the legislative history.

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

Response: In *Christiansen v. Harris County*, 529 U.S. 576 (2000), the Supreme Court addressed the issue of the deference to be given to a federal agency’s interpretation of a law or regulation. As a judicial nominee and if I am so fortunate to be confirmed, I would follow Supreme Court and Sixth Circuit precedent if a matter raising this issue comes before me. I would not comment on what the agency’s role should be. That is a policy matter, better left to Congress to decide.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on hypothetical factual/legal scenarios regarding issues which may come before me as judge. In all cases which come before me, I will apply relevant Supreme Court and Sixth Circuit precedent to the facts and issues before me in rendering a fair and impartial decision.

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

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

Response: If I am so fortunate to be confirmed and a case requiring interpretation of the DMCA came before me, I would look to the text of the statute as well as Supreme Court and Sixth Circuit precedent interpreting the statute. If there is no such precedent, I would look to persuasive authority in other circuits and in my district.

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

Response: Please see response to 17a.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on whether I would support a hypothetical local rule. The Northern district of Ohio does not have any single-judge divisions. This issue would not likely come before me.

19. **In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants.**

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

Response: In my 30-plus years of experience as a litigator in federal court, including trial and appellate practice, I have not encountered this issue and I have no position as to its propriety.

**b. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?**

Response: In my 30-plus years of experience as a litigator in federal court, including trial and appellate practice, I have not encountered this issue and I have no position as to its propriety.

**20. I have expressed concerns about the fact that nearly one quarter of all the patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.**

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

Response: While I understand generally that judge shopping/forum shopping can affect the appearance of fairness in the judicial process and in court proceedings, I have not encountered this issue in my 30-plus years of federal litigation experience—so it has not been a problem in the cases I have litigated.

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

Response: If I am so fortunate to be confirmed, I will do everything within my power to ensure that the process applicable to the cases before me is fair and impartial.

**21. In just three years, the Court of Appeals for the Federal Circuit has granted no fewer than 19 mandamus petitions ordering a particular sitting district court judge to transfer cases to a different judicial district. The need for the Federal Circuit to intervene using this extraordinary remedy so many times in such a short period of time gives me grave concerns.**

**a. What should be done if a judge continues to flaunt binding case law despite numerous mandamus orders?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on what action should be taken in that hypothetical situation. I would follow all binding precedent of the Supreme Court and the Sixth Circuit, as it pertains to the cases and controversies before me.

- b. **Do you believe that some corrective measure beyond intervention by an appellate court is appropriate in such a circumstance?**

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on what action should be taken in that hypothetical situation. I would follow all binding precedent of the Supreme Court and the Sixth Circuit, as it pertains to the cases and controversies before me.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on whether the mentioned situation undermines the perception of fairness and the judiciary's evenhanded administration of justice. I would do everything within my power to ensure that the process and proceedings in the cases before me are handled fairly and impartially.

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on what, if any, inquiry should be made.

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

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

Response: As a judicial nominee and if I am so fortunate to be confirmed, I would not comment on a matter of policy. This is better left to a judicial administrative body.

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

Response: Please see response to 23a.